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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 Unpublished cases appear in *Italics*.

2. No opinion associated with this universal parallel citation number will appear in the N.C. App. Reports.

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3. This opinion was moved from its original filing date and is published in Volume 286 of the N.C. App. Reports.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF H.B.

No. COA21-760

Filed 16 August 2022

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—minimally sufficient findings

The trial court's order contained minimally sufficient findings to support its conclusion that a mother's parental rights to her daughter were subject to termination due to the mother's failure to make reasonable progress in correcting the conditions that led to the child's removal from the home. The trial court's finding that the mother willfully left her daughter for a specified period of time in the custody of the department of social services (DSS) without making reasonable progress was based on competent evidence regarding the inadequacy of the mother's efforts, including the underlying juvenile file, of which the court took judicial notice, and corroborating documentary evidence submitted by DSS and testimony from social workers and the GAL district administrator.

2. Termination of Parental Rights—best interests of the child—dispositional factors—bond between parent and child

The trial court did not abuse its discretion in terminating a mother's parental rights to her daughter after considering the statutory factors regarding the best interests of the child contained in N.C.G.S. § 7B-1110, where its finding that there was no bond between the mother and her daughter was supported by competent evidence

and was not the sole factor supporting the conclusion that termination was in the child's best interests.

Judge WOOD dissenting.

Appeal by respondent-mother from order entered 19 August 2021 by Judge Vanessa E. Burton in Robeson County District Court. Heard in the Court of Appeals 10 May 2022.

J. Edward Yeager, Jr., for the petitioner-appellee Robeson County Department of Social Services.

Benjamin J. Kull for the respondent-appellant mother.

North Carolina Administrative Office of the Courts, by Matthew D. Wunsche, for the Guardian ad Litem.

ARROWOOD, Judge.

¶ 1 Respondent-mother ("mother") appeals from the trial court's order terminating her parental rights with respect to the minor child, "H.B."[1] For the following reasons, we affirm the trial court.

I. Background

¶ 2 H.B. was born on 13 March 2015. On the same day, the Robeson County Department of Social Services ("DSS") received a Child Protective Services report ("CPS report") "alleging neglect due to substance abuse." On 30 April 2015, "a staffing decision was made for services not recommended and the case was closed." Two other CPS reports followed throughout the years regarding mother's care for H.B., both of which were swiftly closed via staffing decisions.

¶ 3 On 1 May 2019, DSS received a CPS report "alleging substance abuse" when mother gave birth to H.B.'s younger brother, "A.L.,"[2] who was born premature at 27 weeks and whose "meconium tested positive for cocaine and marijuana." DSS also learned that A.L. was transferred "from Scotland Memorial Hospital to North East Hospital in Concord, North Carolina"; that mother did not have her own residence, but lived with her grandmother; that mother "did not have any supplies for" A.L.;

1. Initials are used throughout to protect the identity of the minor child.

2. *See* footnote 1, *supra*.

that mother had not visited A.L. while he was hospitalized; that, according to mother, "a home assessment could not be completed at her residence because other people living in the residence had issues"; that H.B.'s father was deceased; and that H.B. lived with her paternal grandmother ("Ms. Bullard"). Mother admitted to DSS that "she smoked marijuana, but denied cocaine use." However, mother then admitted to using "cocaine once 'due to [A.L.'s father] beating and knocking on her[.]' " Mother agreed to complete a substance abuse assessment.

¶ 4 On 14 May 2019, an employee with "Premier Behavioral" informed DSS that mother "was receiving services through Premier" and "would be attending substance abuse classes"; however, mother "had not completed a substance abuse assessment at this time due to not having active Medicaid in Robeson County."

¶ 5 On 16 May 2019, DSS made a home visit at Ms. Bullard's home. There, DSS observed H.B.'s paternal great-grandmother, who was also present, "yell for [H.B.] to come from behind the home to meet with [DSS,]" as well as "several children in the yard cussing, playing with cross bows, and throwing bricks."

¶ 6 On 23 May 2019, DSS "attempted to transport [mother] to the child and family team meeting, but [mother] did not make herself available." "While in [mother]'s neighborhood," the DSS social worker assigned to mother's case "saw [mother] walking down a trail and called out to her multiple times, but [mother] ignored worker's attempts and got out of worker's sight."

¶ 7 On 6 June 2019, DSS made another home visit to Ms. Bullard's home. "Ms. Bullard had to yell for [H.B.] outside the residence in order to locate her so [H.B.] could come in the home to visit with [DSS]." DSS learned that H.B. had lived with Ms. Bullard "for much of her life[,]" and that mother "gives Ms. Bullard a little money and sometimes buys [H.B.] some clothes, but not on a consistent basis."

¶ 8 On the same day, mother informed DSS that she had last used cocaine the previous week. Mother was living "in a mobile home with no electricity" at the time. Mother also admitted "to being diagnosed with bi-polar disorder and is not currently receiving services for her mental health."

¶ 9 On 8 June 2019, DSS had "a discussion" with Ms. Bullard regarding her "supervision of her grandchildren." Specifically, the DSS social worker assigned to mother's case informed Ms. Bullard that she had "observed the children playing in the road[,]" that there was no adult supervising the children, and that the social worker had once "had to

completely stop her car to avoid hitting a small female child," whom she later learned was H.B. herself. On 10 June 2019, DSS learned that mother had "only attended two classes . . . at Premier Behavioral and that [she] was not compliant."

¶ 10 DSS filed a juvenile petition on 11 June 2019, alleging that H.B. was neglected, due to her living "in an environment injurious to [her] welfare[,]" and dependent, due to her need of "assistance or placement because [she] has no parent, guardian, or custodian responsible for [her] care or supervision." The trial court returned an order for nonsecure custody for H.B., as well as A.L., on the same day, scheduling a hearing for continued nonsecure custody for the following day. The trial court rendered orders for the continued placement of H.B. and A.L. in the nonsecure custody of DSS on 12 June 2019 and then again on 26 June 2019, both of which were filed on 15 August 2019.

¶ 11 On 24 July 2019, mother entered into a "Family Services Agreement[,]" in which she "agreed to address housing, employment, parenting, to complete a Mental Health assessment, and a Substance Abuse assessment."

¶ 12 The matters came on for adjudication and disposition on 12 September 2019. On adjudication, after making findings of fact consistent with the above facts, the trial court concluded that H.B. and A.L. were neglected pursuant to N.C. Gen. Stat. § 7B-101(15) and ordered for both children to remain in the legal custody of DSS pending disposition. On disposition, the trial court found that both H.B. and A.L. had been placed in a licensed foster home. The trial court also found that mother had not made herself available to DSS to develop "a Family Services Case Plan" and that DSS had been unable to contact mother since 20 August 2019. The trial court then stated it relied on and accepted into evidence DSS's "Court Report" and "Family Reunification Assessment," "the North Carolina Permanency Planning Review & Family Services Agreement," and the Guardian ad Litem's "Court Report[.]"

¶ 13 The trial court concluded that it was "in the best interest of the children that their custody remain[ ] with [DSS]" and that DSS "continue to work on efforts of reunification in this matter." Accordingly, the trial court ordered for the legal and physical custody of H.B. and A.L. to remain with DSS, for DSS to continue to work on reunification efforts, and for DSS to "develop a plan" with Ms. Bullard. Both orders on adjudication and disposition were filed on 23 October 2019.

¶ 14 On 25 March 2020, the trial court filed a review hearing order, ordering for H.B. and A.L. to remain in the custody of DSS. Following a hearing held on 14 May 2020, the trial court entered a permanency

planning order, providing for the continued custody of H.B. and A.L. with DSS, and setting the primary plan for reunification with a concurrent plan for adoption. The trial court also noted that there was an open investigation at the time involving Ms. Bullard, "due to another child in her care testing positive for cocaine." Pending the results from this investigation, H.B. was to be placed back into Ms. Bullard's home.

¶ 15 Following a 10 June 2020 hearing, the trial court entered another permanency planning order on 1 July 2020, in which it found that H.B. had been adjudicated neglected in 2019, that mother had failed to make herself available to DSS, follow through on her Family Services Case Plan, or visit H.B. and A.L. consistently, that DSS was investigating Ms. Bullard, and that the child in Ms. Bullard's care who had tested positive for cocaine no longer resided with her. Then the trial court ordered, among other things, that H.B. remain in DSS's custody, that H.B. be placed back into Ms. Bullard's home, that mother's visitation with her children be "reduced to once a month" with a 48-hour notice requirement, and that DSS pursue termination of mother's parental rights with respect to A.L.

¶ 16 H.B. was once again removed from Ms. Bullard's home on 8 July 2020, where she was found "outside unsupervised with a black eye, and was also dirty." "A CPS referral was called on Ms. Bullard and Scotland County DSS substantiated injurious environment on Ms. Bullard." On 11 March 2021, mother's parental rights with respect to A.L. were officially terminated.

¶ 17 DSS filed a petition for termination of parental rights with respect to H.B. on 5 April 2021. DSS alleged, in pertinent part, the following:

> 3. The child, [H.B.,] is currently residing in a licensed foster home, under the supervision, direction and custody of [DSS].
>
> 4. The child, [H.B.], is currently in the custody of [DSS], pursuant to a Non-Secure Custody Order entered on June 11, 2019.
>
> 5. That on [September 12, 2019],[3] the Court adjudicated the child, [H.B.,] as a neglected juvenile in accordance with N.C.G.S. 7B-101 (15).
>
> . . . .

3. As illustrated in paragraph 22 of this opinion, DSS's petition was amended during the termination hearing because it had erroneously listed "September 18, 2019" as the date of the adjudication hearing.

> 11. The parental rights of the Respondent mother . . . is [sic] subject to termination by the Court pursuant to N.C.G.S[.] 7B-111 in that:
>
> a. The mother has willfully left the minor child in placement outside of the home for more than twelve (12) months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal in that the mother failed to comply with her family services case plan; and
>
> b. The mother has neglected the child within the meaning of N.C.G.S[.] 7B-101, pursuant to the prior adjudication of neglect in the underlying juvenile court file; and
>
> c. The mother has willfully failed to pay a reasonable portion of the costs of the child's care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so.
>
> . . . .
>
> 13. The Respondent Mother . . . is subject to termination of her parental rights pursuant to N.C.G.S. 7B-1111.
>
> . . . .
>
> 15. Termination of Respondent's parental rights is in the best interest and welfare of the minor child.

¶ 18 DSS included as exhibits H.B.'s birth certificate, the permanency planning order filed 1 July 2020, an affidavit of status as to H.B., and an additional, extensive affidavit detailing DSS's dealings with mother since H.B.'s birth. The second affidavit, particularly, consisted of a 14-page, 156-paragraph, detailed timeline of events beginning on 13 March 2015, when DSS made its first contact with mother, through 11 March 2021, when, among other things, the trial court ordered for H.B.'s primary plan to be shifted to adoption with a concurrent plan of reunification. This timeline captures, in addition to the forementioned facts, mother's

repeated failure to present herself to visitations conducted at DSS and DSS's multiple, failed attempts to reach mother either in-person or over the phone.

¶ 19 The matter came on for termination hearing on 28 July 2021, following a pre-trial order entered 1 July 2021. The trial court heard testimony from DSS foster care social worker Lataysha Carmichael ("Ms. Carmichael") during the adjudication phase, and then from adoption social worker Chandra McKoy ("Ms. McKoy") and Guardian ad Litem District Administrator Amy Hall ("Ms. Hall") during disposition.

¶ 20 Ms. Carmichael testified that DSS "initially got involved with [H.B.]" due to a "referral" following A.L.'s diagnosis as "substance affected" at birth, and that H.B. had been "in care since June of 2019." Ms. Carmichael testified that mother had not "done anything to complete a plan that would reunite the family" nor "paid any reasonable portion of the costs associated with the care for the child in the period of the six months prior to filing this petition[.]"

¶ 21 Ms. Carmichael stated that, between June 2019 and March 2021, mother never provided DSS proof of having submitted herself to a substance abuse assessment, of having acquired suitable housing of her own, or of being employed. Ms. Carmichael also stated that mother had made "a verbal communication to [her] that she was attending Positive Progress" for mental health and parenting services; however, when Ms. Carmichael spoke with "Positive Progress," she learned that it "had no record of [mother]." Ms. Carmichael stated that mother had not consistently presented herself to visitations at DSS.

¶ 22 Following Ms. Carmichael's testimony, counsel for DSS moved to amend its petition to reflect that the date of the adjudication hearing was 12 September 2019, and not 18 September 2019, as was originally provided in the petition. The trial court granted DSS's motion without objection.

¶ 23 The trial court made its oral rendition on adjudication, stating, in pertinent part:

> The Court further finds that this matter came before the Court on a petition for neglect; that the minor was found and adjudicated a neglected juvenile on September 12, 2019, as a result of improper care and substance abuse issues as determined by the Court on said date; that the minor has been in custody of [DSS].

> The Court further finds that the mother had a care plan, failed to complete the care plan, failed to make any payments for the costs of the care of the minor child, failed to make any efforts to improve her status so that the child could be removed from the custody of [DSS].
>
> . . . .
>
> Court further finds that this juvenile has been in at least on three occasions in the care of at least two separate parties: July 8, 2020, until now in the care of [foster parents] Arthur and Jessie Kelly; June 10, 2020, until July 7, 2020, the care of [Ms.] Bullard; and June the 11th, 2019, through June 9, 2020, in the care again of Arthur and Jessie Kelly.
>
> The Court has taken judicial notice of the file, reviewed the exhibits admitted today, A, B, C and D, adopts the efforts made by [DSS] not to proceed in a motion for termination of parental rights.

Specifically, DSS's Exhibits A, B, C, and D were the same four exhibits DSS had included in its petition for termination of parental rights: H.B.'s birth certificate, the permanency planning order filed 1 July 2020, an affidavit of status as to H.B., and the 14-page affidavit.

¶ 24 The trial court continued:

> Further finding that the juvenile has been outside of the mother's home for more than 12 months without any showing of any reasonable efforts of the mother to change those circumstances, again, based upon the inaction of the mother, that the juvenile was a neglected child.
>
> Court finds that there is sufficient evidence to proceed and find that it's in the best interest and welfare of the minor child that the parental rights be terminated and we proceed to disposition at this point.

¶ 25 At disposition, Ms. McKoy testified that she had been assigned to mother's case in March 2021, "once . . . the focus was shifted to adoption[.]" Ms. McKoy stated that mother had "initiated services at several providers[,]" but "hasn't followed through." According to Ms. McKoy, mother "was supposed to be getting a job at Waffle House," which "f[e]ll through[,]"

and was "currently living with her boyfriend." Ms. McKoy testified that H.B. was doing "very well" in her "prospective adoptive placement."

¶ 26 Lastly, Ms. Hall asked the trial court to find that grounds existed by which to terminate mother's parental rights, that said grounds were "proven by clear, cogent[,] and convincing evidence," that termination of mother's parental rights was in the best interest of H.B., that H.B. should remain in the "legal physical custody" of DSS, that visitation should be terminated, and that DSS should "continue with the plan of adoption . . . ."

¶ 27 The trial court made its oral rendition on disposition, stating, in pertinent part:

> That the mother was assigned a case plan requiring her to work several services, that she failed to do so and complete any service;
>
> That the mother did not follow through with providers and that mother specifically admits that the most recent providers . . . indicated they couldn't work with her because she had failed to continue previously with their services when she signed up.
>
> The Court finds that there is not a significant relationship with the child and parent because the parent has not cared for the child, has failed to visit consistently with the child during the time that the child was in the care and legal custody of [DSS].
>
> The Court finds that the child has a bond and a relationship with the prospective adoptive parents, has been living with them for essentially two years;
>
> That the mother . . . has previously been before [DSS] on an additional . . . petition for termination of parental rights which was granted; that the minor child [A.L.] resides in the home that . . . [H.B.] currently lives in and so they are biological siblings living together.
>
> . . . .
>
> The Court further finds that the period of time that [H.B.] has been separated from her mother and unknown father, based upon the past neglect and the likelihood of repetition of that neglect, based upon the history of the mother and her care or lack of care for her children, as well as the fact that the mother

> was willing to allow her child to remain in the custody of [DSS] without working her plan or making any progress, reasonable progress, to correct her situation so that the child could be returned back to her;
>
> The Court finds that today there has not been any change in the circumstances except for the mother continues with the pattern at the last minute during a hearing suggesting that there is an alternative but her history of failing to follow through, the Court finds that any efforts at this point would not be in the best interest of the minor child [H.B.].
>
> The Court finds that the lack of progress by [mother] was willful and that she had the ability at a minimum to participate in the counseling services set up by [DSS] and to work her plan but she failed to do so, and it was by her own inaction that the child remained in the custody of [DSS].
>
> As a result, the Court finds that it is in the best interest of the minor child [H.B.] that the petition for the termination of parental rights be granted; that the legal and physical custody of [H.B.] will remain with [DSS] continuing with the plan of adoption; terminate any visitation with the biological mother . . . .

¶ 28 The trial court entered a signed, written order on 19 August 2021. The trial court made the following findings of fact with respect to H.B. and mother:

> *Based on the evidence* presented by the parties, as well as *review of the Court record*, the Court makes the following findings, *based on clear, cogent and convincing evidence*:
>
> 1. The name of the juvenile is [H.B.], as evidenced by the child's Birth Certificate attached to the filed Petition, which is to be made part of this paragraph as if fully set forth herein.
>
> 2. The child, [H.B.], currently resides in a licensed foster home, under the supervision, direction and custody of [DSS].

3. . . . . [Mother] was served with a copy of the Petition to Terminate Parental Rights on April 8, 2021. [Mother] had notice of this proceeding today.

. . . .

5. That a Juvenile Petition and Non-Secure Custody Order were filed regarding the minor child, on June 11, 2019.

6. On September 12, 2019, the Court adjudicated the child, [H.B.], as a neglected juvenile pursuant to N.C.G.S. 7B-101 (15).

7. *That the Court takes judicial notice of the underlying Juvenile File 19JA173* and [DSS]'s efforts to work with the Respondent mother . . . .

8. The mother . . . has willfully left the child 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. There is a high likelihood that the neglect would continue.

10.[4] The mother . . . has neglected the juvenile in that the juvenile lives in an environment injurious to the juveniles' [sic] welfare.

11. The mother . . . failed to pay a reasonable portion of the costs of the children's [sic] care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so.

12. The parental rights with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

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4. The trial court's order skips number 9 in its list of findings of fact.

. . . .

14. As such, and *based on clear, cogent and convincing evidence*, grounds exist to terminate the parental rights of the Respondent mother . . . .

15. The Court *relies on and accepts into evidence the Timeline*, marked DSS Exhibit '__" [sic], in making these findings and finds the said report to both [sic] credible and reliable.

(Emphasis added.)

¶ 29 DSS's "Timeline" noted in paragraph 15 of the trial court's findings consisted of a two-page, 18-paragraph timeline of events beginning 1 March 2021, when mother's case was assigned to Ms. McKoy, through 19 July 2021, nine days before the termination of parental rights hearing. This timeline illustrated, among other things, the following: that mother had completed a mental health assessment in January 2021, but, as of 2 March 2021, had failed to present herself to a follow-up appointment "to begin services"; that mother had repeatedly failed to present herself for scheduled visits in April 2021; that during a "PPR meeting" held on 3 June 2021, for which mother was absent, the "[t]eam recommended to continue with plan of adoption, continue to monitor placement and continue to pursue" termination of parental rights; that on 9 June 2021 mother had reported being "clean for 8 days"; that mother failed to show up on 15 June 2021 for a substance and mental health assessment; that mother had failed to show up for family visits on 7 and 19 July 2021; and that on 19 July 2021 mother informed Ms. McKoy over the phone that she had yet to secure employment.

¶ 30 The trial court concluded that grounds existed to terminate mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111, stating:

a. The juvenile has been placed in the custody of [DSS] for a continuous period of six months next preceding the filing of the Petition, and

b. *The Respondent mother . . . has willfully left the child in the legal and physical custody of [DSS] from June 11, 2019 until the present, for over 12 months* without making reasonable progress to correct the conditions that led to the removal of the child; and

> c. The Respondent mother . . . has neglected the juvenile in that the juvenile live[s] in an environment injurious to the juveniles' [sic] welfare; and
>
> d. The Respondent mother . . . has willfully failed to pay a reasonable portion of the costs of the child's care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so; and
>
> e. The parental rights of the parnet [sic] with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home . . . .

(Emphasis added.)

¶ 31 On disposition, the trial court made the following findings of fact by clear, cogent, and convincing evidence:

> 1. That grounds for termination of parental rights exist under N.C.G.S. 7B-1111, et seq. and it is in the best interest of the minor child that the parental rights of the child's mother . . . should be terminated.
>
> . . . .
>
> 3. The minor child has been in the care of [DSS] since June 11, 2019.
>
> 4. At the time the child . . . came into care, [she was] four years old. Today, the child . . . is six years old.
>
> 5. The minor child, [H.B.], is currently residing in a licensed foster home of Arthur and Jessie Kelly and said placement is appropriate. The child . . . is doing well in the home of Arthur and Jessie Kelly and the child is thriving in their home. The child . . . is very well bonded to Arthur and Jessie Kelly and she calls them "mama and daddy".
>
> 6. The permanent plan for this child is adoption.

7. Based on the foregoing, the likelihood of adoption is extremely high.

8. That there is no bond between the minor child and the Respondent mother . . . .

9. That Termination of Parental Rights of the Respondent mother . . . and the Respondent unknown father will help achieve the permanent plan for the minor child . . . .

10. The Court relies on and accepts into evidence the GAL Report, marked Exhibit "A", in making these findings and finds the said report to be both credible and reliable.

¶ 32 The trial court ordered for the termination of mother's parental rights and all visitation with respect to H.B. Mother filed notice of appeal on 15 September 2021.

II. Discussion

¶ 33 On appeal, mother argues that: the trial court erred by allowing "a mid-hearing motion to amend the termination petition to add a claim under N.C. Gen. Stat. § 7B-1111(a)(9)"; the trial court erred by making "no substantive findings of fact to support any of the termination grounds"; and the trial court abused its discretion "by basing its best interest determination on an unsupported finding of fact regarding the parent-child bond." We first address whether the trial court's findings of fact were sufficient to support its conclusions of law.

A. Adjudication

¶ 34 **[1]** "We review a trial court's adjudication to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re J.S.*, 377 N.C. 73, 2021-NCSC-28, ¶ 16 (citation and quotation marks omitted). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *Id.* (citation and quotation marks omitted). "The trial court's findings of fact that are supported by clear, cogent, and convincing evidence are deemed conclusive even when some evidence supports contrary findings." *In re D.D.M.*, 2022-NCSC-34, ¶ 9 (citation omitted).

¶ 35 "In termination of parental rights proceedings, the trial court's finding of *any* one of the . . . enumerated grounds is sufficient to support a termination." *In re N.T.U.*, 234 N.C. App. 722, 733, 760 S.E.2d 49,

57 (2014) (citation and quotation marks omitted) (emphasis added). "Thus, on appeal, if we determine that any one of the statutory grounds enumerated in § 7B-1111(a) is supported by findings of fact based on competent evidence, we need not address the remaining grounds." *Id.* (citation omitted). Accordingly, we limit our review to N.C. Gen. Stat. § 7B-1111(a)(2) ("subsection (a)(2)").

¶ 36 Under subsection (a)(2), a trial court "may terminate the parental rights upon a finding" that:

> [t]he 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.

N.C. Gen. Stat. § 7B-1111(a)(2) (2021).

¶ 37 "[A] trial court may take judicial notice of findings of fact made in prior orders . . . because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence." *In re A.C.*, 2021-NCSC-91, ¶ 17 (citation omitted). "On the other hand, however, the trial court may not rely solely on prior court orders and reports and must, instead, receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *Id.* (citation and quotation marks omitted).

¶ 38 Mother does not dispute any of the trial court's findings of fact—including, namely, the finding that H.B. spent more than twelve months outside of mother's home and care. Although the trial court's findings are bare-boned and disordered, the trial court clearly identifies the grounds upon which to terminate mother's parental rights pursuant to subsection (a)(2): that mother "has willfully left [H.B.] 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 [H.B.]."

¶ 39 The trial court also makes a purported conclusion of law, which is better characterized as a finding of fact, in paragraph 3, subsection b, that reads: "The Respondent mother . . . has *willfully left the child in the legal and physical custody of [DSS] from June 11, 2019 until the present*, for over 12 months without making reasonable progress to

correct the conditions that led to the removal of the child[.]" (Emphasis added.) *See Dunevant v. Dunevant*, 142 N.C. App. 169, 173, 542 S.E.2d 242, 245 (2001) ("Findings of fact are statements of what happened in space and time. . . . [A] pronouncement by the trial court which does not require the employment of legal principles will be treated as a finding of fact, regardless of how it is denominated in the court's order." (citations and quotation marks omitted)).

¶ 40 The trial court took judicial notice "of the underlying Juvenile File 19JA173 and [DSS]'s efforts to work with Respondent mother," "relie[d] and accept[ed] into evidence the Timeline" submitted by DSS, and heard testimony from DSS social worker Ms. Carmichael, foster care social worker Ms. McKoy, and Guardian ad Litem District Administrator Ms. Hall. *See In re A.C.*, ¶ 18 ("Although the trial court did take judicial notice of the record in the underlying neglect and dependency proceeding and incorporated 'that file and any findings of fact therefrom within the [adjudication] order,' it did not rely solely upon these materials in determining that respondent-mother's parental rights in Arty were subject to termination. Instead, the trial court also received oral testimony during the termination hearing . . . ." (alteration in original)).

¶ 41 As we observed above, the underlying Juvenile File 19JA173, by its very nature, provides a thorough illustration of DSS's dealings with mother from H.B.'s birth, culminating in the permanency planning order on 12 May 2021, by which the trial court allowed DSS to "focus its efforts on the plan of adoption" for H.B. DSS's "Timeline" depicted DSS's dealings from March through mid-July 2019, detailing mother's repeated failure to follow through on her appointments and scheduled visits, all the while H.B. continued to live outside of mother's care. Witness testimony at the termination hearing corroborated the evidence provided by "the underlying Juvenile File" and DSS's "Timeline[.]"

¶ 42 All of this evidence taken together showed exactly what the trial court found, and more: that mother had willfully left [H.B.,] who was six years old by the time of the termination hearing, "in the legal and physical custody of [DSS] from June 11, 2019 until the present[ ] for over 12 months"; that H.B. had already spent most of her life living outside of mother's care, either in the precarious home of Ms. Bullard or in foster placement, by the time DSS became involved with the family; that H.B.'s living arrangements had been "injurious" to her welfare; that mother had "willfully failed to pay a reasonable portion of the costs of the child's care for a continuous period of six months immediately preceding the filing of the petition"; that H.B. had been adjudicated neglected; that mother's "parental rights with respect to another child[,]" A.L., "ha[d]

been terminated involuntarily"; that mother "lacks the ability or willingness to establish a safe home"; that mother had repeatedly failed to follow through on her case plan; that DSS had repeatedly attempted to make contact with mother; and that mother had not made any progress toward bringing H.B. back into her care.

¶ 43 Though the trial court's findings of fact are unartfully drafted, this is not a close case. Furthermore, the fact that the trial court's oral rendition and written order do not precisely mirror each other is of no moment. *See Oltmanns v. Oltmanns*, 241 N.C. App. 326, 330, 773 S.E.2d 347, 351 (2015) ("Although the written entry of judgment is the controlling event for purposes of appellate review, rendition is not irrelevant. . . . A trial court has an affirmative duty to enter a written order reflecting any judgment which has been orally rendered; failure to enter a written order deprives the parties of the ability to have appellate review." (citation omitted)). The order sufficiently, albeit minimally, supports the trial court's conclusion that mother's parental rights with respect to H.B. should be terminated pursuant to subsection (a)(2).

B. Disposition

¶ 44 **[2]** "The [trial] court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion." *In re C.S.*, 380 N.C. 709, 2022-NCSC-33, ¶ 13 (citation and quotation marks omitted) (alteration in original). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation and quotation marks omitted) (alteration in original).

¶ 45 Per N.C. Gen. Stat. § 7B-1110,

> [a]fter 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. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. 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.

N.C. Gen. Stat. § 7B-1110(a) (2021).

¶ 46 "Although the statute requires the trial court to consider each of the statutory factors, the trial court is only required to make written findings regarding those factors that are relevant." *In re C.S.*, ¶ 19 (citation omitted). "A factor is relevant if there is conflicting evidence concerning that factor." *Id.* (citation omitted). "If supported by the evidence received during the termination hearing or not specifically challenged on appeal, the trial court's dispositional findings are binding on appeal." *Id.* (citation omitted).

¶ 47 Mother argues the trial court abused its discretion because it "found that 'there is no bond between' " H.B. and herself. Specifically, mother states that the trial court "based its ultimate best interest determination on the flawed belief that there was 'no bond' of any kind between [mother] and [H.B.]" and that, "[b]y basing such a critical determination on such a clearly flawed belief, the [trial] court necessarily abused its discretion." Because mother only challenges the trial court's finding of a lack of bond, all other findings are binding. *See id.*

¶ 48 First, as is apparent from N.C. Gen. Stat. § 7B-1110, mother's argument that the finding of the presence of a parental bond is a dispositive factor on disposition is unsupported by law. *See In re A.H.F.S.*, 375 N.C. 503, 514, 850 S.E.2d 308, 317-18 (2020) ("[A]lthough the trial court found that Charley was strongly bonded to respondents, this Court has recognized that the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." (citation and quotation marks omitted)).

¶ 49 Indeed, the Guardian ad Litem's court report ("GAL report") stated: "Even though [H.B.] has been in foster care for over two years, she still has a bond with her mother. She loves and misses her." The GAL report also provided that H.B. was doing very well in her foster placement, that

she was bonded to her foster parents, that likelihood for adoption was excellent, that she was living with her sibling A.L. in the same foster placement, that A.L. also had a plan for adoption, that mother's parental rights as to A.L. had been terminated by the same trial court on 11 March 2021, and that mother had "signed a case plan on 7/24/19 agreeing to address substance use, mental health, parenting, housing and employment[,]" on which she had "failed to make any progress" for about two years. Accordingly, the GAL report recommended that the trial court find that it was in H.B.'s best interests to terminate mother's parental rights.

¶ 50 The trial court's written findings of fact stated that there was no bond between H.B. and mother. The trial court provided more context to this finding during its oral rendition, stating: "The Court finds that there is not a significant relationship with the child and parent because the parent has not cared for the child, has failed to visit consistently with the child during the time that the child was in the care and legal custody of [DSS]." Not only is this reasoning supported by the record, the GAL report, and other evidence, but it is also not inconsistent with how our appellate courts have accepted a finding of a lack of bond between respondent-parent and child. *See*, *e.g.*, *In re K.A.M.A.*, 379 N.C. 424, 2021-NCSC-152, ¶ 16 ("Due to respondent's failure to visit, Kenneth had no bond with respondent."); *In re C.J.C.*, 374 N.C. 42, 47, 839 S.E.2d 742, 746 (2020) ("[T]he Respondent/father has been minimally involved even prior to the filing of this Petition. Therefore, he essentially has no bond at all with the child.").

¶ 51 The record shows that the trial court sufficiently considered and made findings of fact, bolstered by the GAL report, regarding the multiple, required factors set out by N.C. Gen. Stat. § 7B-1110, namely: H.B.'s age, her high likelihood of adoption, her lack of bond with mother, that termination of mother's parental rights should aid in the accomplishment of H.B.'s adoption, and the good relationship between H.B. and her prospective adoptive parents. *See* N.C. Gen. Stat. § 7B-1110(a). Accordingly, we hold the trial court did not abuse its discretion.[5]

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5. Mother's additional contention, that the trial court erred by allowing DSS to amend its petition mid-hearing, is of no moment. The amendment at issue did not deprive mother of notice of possible ground for termination, but rather allowed the petition to correct a minor error and reflect the evidence. *See In re B.L.H.*, 190 N.C. App. 142, 147, 660 S.E.2d 255, 258, ("[W]here a respondent lacks notice of a possible ground for termination, it is error for the trial court to conclude such a ground exists." (citations omitted)), *aff'd*, 362 N.C. 674, 669 S.E.2d 320 (2008). Furthermore, mother did not object to DSS's motion. Accordingly, we find that this was not reversible error.

III. Conclusion

¶ 52 For the foregoing reasons, we affirm the trial court's termination of mother's parental rights.

AFFIRMED.

Judge INMAN concurs.

Judge WOOD dissents by separate opinion.

WOOD, Judge, dissenting.

¶ 53 The trial court failed to make the necessary, substantive findings of fact to support its conclusions of law that grounds existed under N.C. Gen. Stat. § 7B-1111 to terminate Mother's parental rights to H.B. The order of the trial court should be vacated and remanded for the trial court to make further findings of fact to support its conclusions of law that grounds existed to terminate Mother's parental rights. I respectfully dissent.

I. Factual and Procedural Background

¶ 54 On August 19, 2021, the trial court entered an order terminating Mother's parental rights to H.B. In the adjudication, the trial court made 14 findings of fact:

> 1. The name of the juvenile is . . . [H.B.], as evidenced by the child's Birth Certificate attached to the filed Petition, which is to be made part of this paragraph as if fully set forth herein.
>
> 2. The child, . . . [H.B.], currently resides in a licensed foster home, under the supervision, direction and custody of the Robeson County Department of Social Services.
>
> 3. The mother of the child is . . . [Mother]. . . . [Mother] was served with a copy of the Petition to Terminate Parental Rights on April 8, 2021. . . . [Mother] had notice of this proceeding today.
>
> 4. That there is no father listed on the child's birth certificate. That an unknown father was served by process of publication.

5. That a Juvenile Petition and Non-Secure Custody Order were filed regarding the minor child, on June 11, 2019.

6. On September 12, 2019, the Court adjudicated the child, . . . [H.B.], as a neglected juvenile pursuant to N.C.G.S. 7B-101 (15).

7. That the Court takes judicial notice of the underlying Juvenile File 19JA173 and the Department's efforts to work with the Respondent mother[] . . . the Respondent Unknown father of the child, . . . [A.L.].

8. The mother, . . . [Mother] has willfully left the child 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. There is a high likelihood that the neglect would continue.

10. [sic] The mother, . . . [Mother] has neglected the juvenile in that the juvenile lives in an environment injurious to the juveniles' welfare.

11. The mother, . . . [Mother, failed to pay a reasonable portion of the costs of the children's care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so.

12. The parental rights with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

13. That the unknown father, has willfully left the child in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal; has failed to file an affidavit of paternity in a central registry maintained by the Department of Health and Humans Services; legitimated the juvenile pursuant to provisions of G.S.

> 49-10, G.S. 49-12.1, or filed a petition for this specific purpose; legitimated the juvenile by marriage to the mother of the juvenile; has not provided substantial financial support or consistent care with respect to the juvenile and mother; has not established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.
>
> 14. As such, and based on clear, cogent and convincing evidence, grounds exist to terminate the parental rights of the Respondent mother[] . . . and the Respondent unknown father.
>
> 15. The Court relies on and accepts into evidence the Timeline, marked DSS Exhibit '__", [sic] in making these findings and finds the said report to [sic] both credible and reliable.

¶ 55 Additionally, the trial court made 10 findings of fact in the dispositional portion of its order. One of these findings, finding of fact number 8, stated, "[t]hat there is no bond between the minor child and the Respondent mother." The trial court then terminated Mother's parental rights to H.B. Mother filed a timely notice of appeal.

II. Standard of Review

¶ 56 A proceeding to terminate parental rights consists of two stages, an adjudicatory stage followed by a dispositional stage. *In re A.A.M.*, 379 N.C. 167, 2021-NCSC-129, ¶ 14; *Bolick v. Brizendine* (*In re D.R.B.*), 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). At the adjudicatory stage, the petitioner must show by "clear, cogent, and convincing evidence" "any ground for termination alleged under N.C.G.S. § 7B-1111(a)" exists. *In re A.A.M.*, at ¶ 14 (citing N.C. Gen. Stat. § 7B-1109(e)-(f) (2019)). During this stage, "the trial court must 'take evidence, find the facts, and . . . adjudicate the existence or nonexistence of any of the circumstances set forth in [N.C.G.S. §] 7B-1111 which authorize the termination of parental rights of the respondent.' " *In re B.O.A.*, 372 N.C. 372, 379-80, 831 S.E.2d 305, 310 (2019) (quoting N.C. Gen. Stat. § 7B-1109(e)). If a petitioner successfully shows the existence of any of the enumerated grounds under N.C. Gen. Stat. § 7B-1111, the trial court then proceeds to the dispositional stage. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 5 (2004). At the dispositional stage, the trial court must determine "whether it is in the best interests of the child to terminate the parental rights." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 615 (1997) (citation omitted); *see In re N.C.E.*, 379 N.C. 283, 2021-NCSC-141, ¶ 12.

¶ 57 On appeal, our appellate courts must determine whether the trial court's findings of fact are supported by "clear and convincing evidence," *In re W.K.*, 376 N.C. 269, 277, 852 S.E.2d 83, 89-90 (2020), and "whether those findings support the trial court's conclusions of law." *In re B.O.A.*, 372 N.C. at 379, 831 S.E.2d at 310 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)); *see In re Shepard*, 162 N.C. App. at 221, 591 S.E.2d at 6. "The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo." *In re J.S.*, 374 N.C. 811, 814, 845 S.E.2d 66, 71 (2020). We review the trial court's determination at the dispositional stage as to the child's best interest for abuse of discretion. *In re N.C.E.*, 379 N.C. 283, 2021-NCSC-141 ¶ 13. "Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.* (internal quotation marks omitted) (quoting *In re J.J.B.*, 374 N.C. 787, 791, 845 S.E.2d 1, 4 (2020)).

III. Discussion

A. Substantive Findings of Fact

¶ 58 Mother asserts the trial court made no substantive finding of fact to support its ultimate conclusions of law that four separate grounds existed under N.C. Gen. Stat. § 7B-1111 to terminate her parental rights to H.B. I agree.

¶ 59 In an adjudicatory hearing for termination of parental rights, the trial court must "take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2021). As the majority opinion above explains, "[i]n termination of parental rights proceedings, the trial court's 'finding of any one of the . . . enumerated grounds is sufficient to support a termination.' " *In re N.T.U.*, 234 N.C. App. 722, 733, 760 S.E.2d 49, 57 (2014) (quoting *In re J.M.W.*, 179 N.C. App. 788, 791, 635 S.E.2d 916, 918-19 (2006)). Notwithstanding this, when entering its judgment to terminate parental rights, the trial court must 1) "find the facts *specifically*," 2) "state separately its conclusions of law thereon," and 3) "direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, R. 52(a)(1) (emphasis added); *see In re Anderson*, 151 N.C. App. 94, 96, 564 S.E.2d 599, 601-02 (2002); *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982), *superseded by statute on other grounds*, N.C. Gen. Stat. § 50-13.4(f)(9) (2021).

¶ 60 In other words, "the trial court's factual findings must be more than a recitation of allegations. They must be the '*specific* ultimate facts . . .

sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.' " *In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 (emphasis added) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977)); *see In the Matter of: B.F.N. and C.L.N.*, 2022-NCSC-68, ¶ 15 ("The trial court is under a duty to find the facts specially and state separately its conclusions of law thereon, regardless of whether the court is granting or denying a petition to terminate parental rights."). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *Id.* (quotation omitted); *see Quick*, 305 N.C. at 451, 290 S.E.2d at 657 ("[A] proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.").

¶ 61 In *In re Anderson*, we addressed the interplay between an adjudication order, N.C. Gen. Stat. § 7B-1109, and Rule 52. There, the respondent contended the trial court erred by concluding grounds existed under N.C. Gen. Stat. § 7B-1111 to terminate his parental rights. *In re Anderson*, 151 N.C. App. at 96, 564 S.E.2d at 601. On appeal, we reviewed the trial court's order on adjudication and found it only possessed three findings of fact. *Id.* at 97, 564 S.E.2d at 602. We concluded these findings of fact were insufficient because "[t]wo merely recite[d] that DSS filed a petition and that service was proper on [the parties]" and the third finding of fact was a "mere recitation[] of allegations." *Id.* We further held "[e]ven if the factual findings here did not merely recite allegations, they remain insufficient to support the conclusions of law that grounds exist for termination." *Id.*

¶ 62 Notably, the majority's opinion discusses the trial court's oral adjudication of H.B.; however, a trial court's oral adjudication at trial does not constitute a judgment. *See Dabbondanza v. Hansley*, 249 N.C. App. 18, 21, 791 S.E.2d 116, 119 (2016); *Spears v. Spears*, 245 N.C. App. 260, 286, 784 S.E.2d 485, 502 (2016) ("The announcement of an order in court merely constitutes rendition of the order, not its entry."). In its oral adjudication, the trial court included DSS's exhibits A, B, C, and D which was comprised of H.B.'s birth certificate, the July 1, 2020 permanency planning order, an affidavit status of H.B., and an affidavit prepared by DSS. Notwithstanding, this oral rendition is not a final order as it was not "reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, R. 58. Even if a trial court enters an oral ruling, "a trial court's oral findings are subject to change before the final written order is entered." *In re E.D.H.*, 2022-NCSC-70, ¶ 19 (quoting *In*

re A.U.D., 373 N.C. 3, 9-10 (2019); *see In re L.G.A.*, 277 N.C. App. 46, 54, 2021-NCCOA-137, ¶ 22 ("[T]he written, signed, and filed order may not have exactly the same provisions as announced at the conclusion of the hearing."). While the trial court is "not required to make detailed findings of fact in open court," *In re T.M.*, 180 N.C. App. 539, 549, 638 S.E.2d 236, 242 (2006), the same is not true for written orders. After the trial court enters an oral rendition, it is the responsibility of the trial court to ensure that the written order comports to the findings and rulings of the trial court, regardless of whom drafts the written order.

¶ 63 Here, the court made numerous oral findings that were not contained in the written order; however, since the trial court retains the authority to change its ruling prior to entry of the written order, we cannot presume that the trial court was still confident in its finding made during its oral rendition at the time the written order was signed and filed. Upon review, then, we cannot mend the trial court's shortcomings in drafting the order with our own investigation of that court's previous statements. Because the trial court's oral adjudication is not a judgment, this Court's review must be limited to the trial court's written order for the purpose of this appeal. *See id.*; *Spears*, 245 N.C. App. at 286, 784 S.E.2d at 502; *Oltmanns v. Oltmanns*, 241 N.C. App. 326, 330, 773 S.E.2d 347, 351 (2015).

¶ 64 Here, the majority's opinion concludes,

> [T]he trial court clearly identifies the grounds upon which to terminate mother's parental rights pursuant to subsection (a)(2): that mother "has willfully left [H.B.] 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 [H.B.]."

By so concluding, the majority disregards the trial court's failure to "find the facts" specifically, and thus has failed to fulfil its fact-finding duty. The first six findings of fact merely recite the juvenile's name, location of the child's current residence, that service was proper upon Mother and father, that DSS filed a petition and non-secure custody order, and that H.B. was adjudicated neglected. *See In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602. These first six findings are not "ultimate facts required by Rule 52(a) to support the trial court's conclusions of law, but rather are mere recitations of" the jurisdictional posture of the trial court and procedure of this case. *Id.* (internal quotation marks omitted). Although finding of fact number 7 found by the trial court took judicial notice of

the underlying case file, it fails to make a specific ultimate finding of fact. *See id.*; *Quick*, 305 N.C. at 451, 290 S.E.2d at 657.

¶ 65 Moreover, findings of fact numbers 8, 10, 11, and 12 are mere recitations of the statutory language of N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (9). N.C. Gen. Stat. § 7B-1111 provides,

> [t]he court may terminate the parental rights upon a finding of one or more of the following:
>
> (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 . . . a neglected juvenile within the meaning of G.S. 7B-101. [*See* N.C. Gen. Stat. § 7B-101(15)(e) (2021) (stating a juvenile is neglected when the caretaker "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare").]
>
> (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.
>
> (3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.
>
> . . .
>
> (9) The parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (9) (2021).

¶ 66 Finding of fact number 8 mirrors the language of N.C. Gen. Stat. § 7B-1111(a)(2), stating

> [t]he mother, . . . [Mother], has willfully left the child 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. There is a high likelihood that the neglect would continue.

Likewise, finding of fact number 10 copies the language of N.C. Gen. Stat. §§ 7B-1111 and 7B-101(15)(e), providing, "[t]he mother, . . . [Mother] has neglected the juvenile and the juvenile lives in an environment injurious to the juveniles' welfare." Finding of fact number 11 also copies the language of N.C. Gen. Stat. § 7B-1111(a)(3), stating, "[t]he mother, . . . [Mother] failed to pay a reasonable portion of the costs of the children's care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so." Finally, finding of fact number 12 is a recitation of N.C. Gen. Stat. § 7B-1111(a)(9): "The parental rights with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home."

¶ 67 Because findings of fact numbers 8, 10, 11, and 12 are merely recitations of the statutory language of N.C. Gen. Stat. § 7B-1111, the trial court failed to "find the facts specifically." N.C. Gen. Stat. § 1A-1, R. 52(a)(1). In other words, by copying the statutory language of N.C. Gen. Stat. § 7B-1111, these findings of facts are not ultimate findings of fact because they are not "the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 (quotation omitted). Therefore, findings of fact numbers 8, 10, 11, and 12 are insufficient to support the trial court's judgment.

¶ 68 Finally, findings of fact numbers 13, 14, and 15 are also insufficient to support the termination of Mother's rights to H.B. Finding of fact number 13 concerns the unknown father and thus is not applicable to Mother. Finding of fact number 14 is more properly categorized as a conclusion of law than a finding of fact. A conclusion of law is "any determination requiring the exercise of judgment, or the application of legal principles." *China Grove 152, LLC v. Town of China Grove*, 242 N.C. App. 1, 6, 773 S.E.2d 566, 569 (2015) (*In re Helms*, 127 N.C. App.

505, 510, 491 S.E.2d 672, 675 (1997)). Finding of fact number 14 provides, "[a]s such, and based on clear, cogent and convincing evidence, grounds exist to terminate the parental rights of the Respondent mother[] . . . and the Respondent unknown father." This determination requires the trial court judge to exercise her judgment and determine "clear, cogent and convincing" evidence existed so as to terminate Mother's rights to H.B. Accordingly, although finding of fact number 14 is labeled as a finding of fact, it is "more properly classified [as] a conclusion of law." *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675. Lastly, finding of fact number 15 states "[t]he Court relies on and accepts into evidence the Timeline, marked DSS Exhibit '__', [sic] in making these findings and finds the said report to be [sic] both credible and reliable." This finding does not state what information in the Timeline the trial court relied on and fails to identify for this court what the DSS Exhibit's identification number is.

¶ 69 Based on the foregoing, the trial court's findings of fact were wholly insufficient for an appellate court to determine "whether the trial court correctly exercised its function to find facts and apply the law thereto." *In the Matter of: B.F.N. and C.L.N.*, at ¶ 15 (quotation omitted). Although the majority notes "the trial court's findings are bare-boned and disordered," their subsequent affirmation of the trial court's judgment disregards the trial court's duty to make specific findings of facts. This duty is not to be taken lightly, especially in a case such as the one *sub judice* where a parent's constitutional right to his or her child is involved. The trial court erred by failing to make specific findings of fact in this case to support its termination of Mother's parental rights to H.B. Thus, I would vacate and remand the judgment of the trial court for further findings of fact.

B. Best Interests at Disposition

¶ 70 Mother contends the disposition's finding of fact number 8 is not supported by competent evidence, and thus the trial court abused its discretion by basing its best interest determination on this fact. This finding provides, "there is no bond between the minor child and the Respondent mother." After a careful review of the record, there is no evidence in the record to support this finding of fact. Rather, DSS' witness at the hearing, Chandra McKoy, testified H.B. recognized Mother and appeared happy to see her when visits did occur. Furthermore, the guardian ad litem's report to the court reported "[e]ven though . . . [H.B.] has been in foster care for over two years, she still has a bond with her mother. She loves and misses her."

¶ 71 Despite this testimony and guardian ad litem report, the majority concludes the trial court nonetheless scraped together additional considerations to support the trial court's inability to find a sufficient bond between mother and child. The trial court could have inferred a lack of bond, the majority argues, from other passages within the guardian ad litem's report. These passages show that H.B. was adapting well to foster care, that Mother's parental rights as to another child had already been terminated, and that Mother was not progressing well with drug rehabilitation. While these observations may have been true and useful for other factual findings, none support the finding at issue. The lack of a mother's bond with her child cannot reasonably be determined from evidence that merely shows the child is doing well in foster care, the mother's rights as to another child have already been adjudicated, or the mother struggles with substance abuse.

¶ 72 The majority cites to other cases where we have upheld orders finding a lack of bond between parent and child. In all of these cases, though, the trial court relied upon evidence related to the parent-child relationship to arrive at its finding. In *In re K.A.M.A.*, the trial court based its finding upon "the lack of visits" from the parent. 379 N.C. 424, 2021-NCSC-152, ¶ 16. In *In re C.J.C.*, the trial court based its finding upon the parent being "minimally involved." 374 N.C. 42, 47, 839 S.E.2d 742, 746 (2020). In this case, no such evidence of the lack of parent-child relationship is present. These cases are thus distinguishable.

¶ 73 Instead, we should look to cases like *In re R.G.L.* where our Supreme Court held that

> although there is no testimony specifically concerning the bond between respondent and Robert, contrary to finding of fact 55 that there was "absolutely no bond at all between [Robert] and his parents," the social worker testified a bond existed "between the child and mom." We hold the evidence does not support the challenged portions of findings of fact 32 and 55.

¶ 74 379 N.C. 452, 2021-NCSC-155, ¶ 28. Similarly, the social worker in this case testified that Mother's visitations went well and the guardian ad litem's report explicitly states that there existed a bond between Mother and H.B. As such, the trial court here erred by making finding of fact number 8 as the evidence does not support the challenged finding of fact.

C. Additional Ground for Termination

¶ 75 Mother next argues the trial court committed reversible error by allowing DSS to amend the petition and add a claim under N.C. Gen. Stat. § 7B-1111(a)(9) during the termination hearing. *See* N.C. Gen. Stat. § 7B-1111(a)(9) (2021) ("The parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home."). This court has repeatedly held a trial court may not grant a motion to amend a petition to terminate a parent's parental rights during a termination hearing. *In re G.B.R.*, 220 N.C. App. 309, 314, 725 S.E.2d 387, 390 (2012); *In re B.L.H.*, 190 N.C. App. 142, 146, 660 S.E.2d 255, 257 (2008), *aff'd per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008). As such, the trial court erred by allowing such amendment.

IV. Conclusion

¶ 76 Our appellate case law and Rule 52 of North Carolina Civil Procedure requires a trial court to make specific findings of fact. The trial court made no substantive findings of fact in this case. Without specific findings of fact to support the trial court's conclusions of law that grounds existed to terminate Mother's parental right to H.B. under N.C. Gen. Stat. § 7B-1111, we are left with insufficient facts from which to determine whether the trial court's judgment is adequately supported by competent evidence. As such, the trial court failed to fulfill its fact-finding duty. Thus, the judgment of the trial court should be vacated and remanded for further findings of fact, and I respectfully dissent.

BEAVERS v. McMICAN

[285 N.C. App. 31, 2022-NCCOA-547]

DAVID BEAVERS, PLAINTIFF
v.
JOHN MCMICAN, DEFENDANT

No. COA21-85

Filed 16 August 2022

1. Appeal and Error—Rule 11(c) supplement—depositions—neither proffered to nor considered by trial court

When reviewing plaintiff's appeal from an order granting summary judgment for defendant in an alienation of affection and criminal conversation case, the Court of Appeals declined to consider two depositions (of the parties' respective ex-wives) that plaintiff had filed as an Appellate Rule 11(c) supplement to the record on appeal. Although both parties referenced the depositions during the summary judgment hearing, neither deposition had been certified at that time, and the trial court later confirmed in an amended summary judgment order that it did not consider either deposition when reaching its ruling; therefore, the depositions were never "before the trial court" for purposes of Rule 11(c) and could not be considered on appeal.

2. Alienation of Affections—criminal conversation—unidentified lover—summary judgment—evidence of post-separation conduct—corroborative of pre-separation conduct

After plaintiff's wife admitted to having sexual intercourse with an unidentified coworker while still married to plaintiff, the trial court erred in granting summary judgment for defendant on plaintiff's alienation of affection and criminal conversation claims where the circumstantial evidence—viewed in the light most favorable to plaintiff—was sufficient for a jury to infer that defendant was the coworker at issue, including evidence that defendant and plaintiff's wife were coworkers, maintained a friendship and communicated frequently during plaintiff's marriage, and began openly dating less than four months after plaintiff and his wife separated. Importantly, it was permissible for plaintiff to meet his burden of production at the summary judgment phase by using evidence of defendant's post-separation conduct (his dating relationship with plaintiff's wife) to corroborate evidence of any pre-separation acts (the extramarital affair between plaintiff's wife and the unidentified coworker).

Judge DILLON concurring with a separate opinion.

Judge JACKSON dissenting.

Appeal by Plaintiff from an order entered 14 October 2020 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 5 October 2021.

Matheson and Associates, PLLC, by John R. Szymankiewicz, for plaintiff-appellant.

Shannon Poore for defendant-appellee.

MURPHY, Judge.

¶ 1 We will not consider documents on appeal that were not before the trial court for its consideration of summary judgment. Here, although both parties at a hearing verbally referenced the contents of two depositions, the certifications of which were pending, we do not consider the depositions in determining whether the trial court erred because they were not proffered to or considered by the trial court.

¶ 2 A trial court errs in granting a movant's motion for summary judgment where there exists evidence on the record that, when viewed in the light most favorable to the nonmoving party, could support each element of the alleged offense. With respect to alienation of affection and criminal conversation claims, acts by a defendant occurring after a plaintiff and former spouse have permanently separated may only be used to satisfy that plaintiff's burden of production for purposes of summary judgment insofar as they corroborate acts that occurred prior to separation. Here, where acts by an unknown party satisfied Plaintiff's burden of production with respect to the final elements of alienation of affection and criminal conversation and other evidence—including, in part, post-separation conduct—tended to show the unknown party was Defendant, Plaintiff satisfied his burden of production. Accordingly, the trial court erred in granting Defendant's motion for summary judgment.

BACKGROUND

¶ 3 This action was initiated on 13 December 2018 when Plaintiff David Beavers filed a civil complaint in Wake County Superior Court asserting claims for alienation of affection and criminal conversation against his ex-wife's alleged paramour, Defendant John McMican. The relevant facts of this case, detailed below, are not in dispute.

¶ 4 Plaintiff and his ex-wife, Alison Beavers, married on 23 October 2004. On 18 January 2016, Plaintiff discovered texts on Alison's phone

in which she had sent nude pictures to a person identified as "Bestie." Alongside the pictures, Alison and "Bestie" had exchanged messages appearing to reference an instance of sexual intercourse that had occurred prior to the exchange of messages and pictures. At the time, Plaintiff did not look at the number associated with the contact information or otherwise take steps to discover the identity of "Bestie."

¶ 5 Upon discovering the exchange, Plaintiff briefly confronted Alison, then left his and Alison's home to stay with his parents. Upon Plaintiff's return several days later, he and Alison had a conversation about the affair. Alison explained to Plaintiff that she had engaged in sexual acts with the person identified as "Bestie" but that the two did not have sexual intercourse. Alison further professed that her paramour's name was "Dustin," one of her co-workers.

¶ 6 Several more weeks passed, and Plaintiff, skeptical of Alison's story during the first conversation, accused Alison of engaging in sexual intercourse with another man. Alison, in response, told Plaintiff she *had* engaged in sexual intercourse with someone from her workplace; however, she did not specify it was the person she had previously identified as "Dustin." Plaintiff never discovered Dustin's identity, and he suspected that, based on the absence of any "Dustin" in Alison's contacts, "Dustin" was a pseudonym. Plaintiff and Alison permanently separated on 16 December 2016.

¶ 7 Three and one-half months later, on 1 April 2017, Alison openly began dating Defendant, one of her co-workers. The two had known one another through work since the Summer of 2011. The Record indicates they had a close relationship, exchanging ninety-eight texts and calls in October of 2016 alone, as well as interacting via phone and Facebook numerous times outside of that month. While the two admittedly became both romantically and sexually involved upon beginning their relationship, no direct evidence of romantic involvement between Alison and Defendant exists before the start of their relationship in April 2017, and both have expressly disavowed being romantically involved prior to that time.

¶ 8 On 13 December 2018, Plaintiff sued Defendant on theories of alienation of affection and criminal conversation. Defendant, in turn, filed a *Motion for Summary Judgment*, arguing Plaintiff presented insufficient evidence of at least one element of both offenses.[1] The trial court conducted a hearing on Defendant's motion on 17 August 2020, during

1. The primarily disputed elements of both offenses are discussed in the analysis section of this opinion. *See infra* at ¶¶ 18-20, 25.

which both parties referenced, without objection, recent depositions of Alison and Defendant's ex-wife, Jessica McMican. However, neither deposition was certified until 20 August 2020, three days later. The trial court entered an order on 12 October 2020 granting Defendant's *Motion for Summary Judgment*, and Plaintiff timely appealed.

¶ 9 On appeal, Plaintiff submitted a supplement pursuant to Rule 11(c) of the Rules of Appellate Procedure containing, *inter alia*, the depositions of Alison and Jessica discussed by counsel during the hearing. We entered an order to the trial court on 23 November 2021 inquiring which, if either, of the depositions the trial court considered in granting Defendant's *Motion for Summary Judgment*; and, in response, the trial court filed an *Amended Order Granting Defendant's Motion for Summary Judgment* on 3 March 2022 confirming it considered neither of the two depositions.

ANALYSIS

¶ 10 On appeal, Plaintiff contends the trial court erred in granting Defendant's *Motion for Summary Judgment* with respect to his criminal conversation and alienation of affection claims. First, however, Defendant argues that the documents in Plaintiff's Rule 11(c) supplement are not properly before us. Accordingly, we first address whether Plaintiff's proffered supplement is properly before us under Rule 11(c), then we address whether the trial court erred in granting Defendant's *Motion for Summary Judgment*.

A. Rule 11(c) Supplement

¶ 11 **[1]** Defendant contends that, under Rule 11(c) of our Rules of Appellate Procedure, "[t]he purported evidence contained in the Rule 11(c) supplement should not be considered on appeal as some evidence was not presented to the trial court for consideration . . . and other evidence contained in the supplement is irrelevant."

¶ 12 Rule 11(c) states, in relevant part, as follows:

> Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate.
>
> . . . .

> If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules; *provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included.*

N.C. R. App. P. 11 (2021) (emphasis added); *see also Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 490, 516 S.E.2d 176, 180 (1999) (remarking that, when reviewing a trial court's decision to grant or deny summary judgment, "[w]e may only consider the pleadings and other filings that were before the trial court"), *appeal dismissed*, 351 N.C. 342, 525 S.E.2d 173 (2000).

¶ 13 Here, the trial court conducted its hearing on Defendant's *Motion for Summary Judgment* on 17 August 2020. The Rule 11(c) supplement contains two depositions that were not certified until 20 August 2020, three days later. The trial court confirmed in its *Amended Order Granting Defendant's Motion for Summary Judgment* that it considered neither of these depositions when evaluating whether to grant Defendant's *Motion for Summary Judgment*. Accordingly, neither deposition informs our review on appeal.

¶ 14 As to the remaining arguments concerning the Rule 11(c) supplement's role in our review, Defendant's contentions concern the *persuasive* relevance of the evidence to our determination, not whether the evidence is properly before us on appeal. As there exist no other indications in the Record or in the parties' arguments that our considering the remainder of the evidence in Plaintiff's Rule 11(c) supplement is improper, it will inform our review insofar as it is relevant.

B. Defendant's *Motion for Summary Judgment*

¶ 15 **[2]** Rule 56(c) of our Rules of Civil Procedure provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1,

Rule 56 (2021). "Summary judgment is appropriate when the moving party establishes the lack of any triable issue of fact"; and, in determining whether any such triable issue exists, "[a]ll facts asserted by the nonmoving party are taken as true and viewed in the light most favorable to that party." *Wells Fargo Bank, N.A. v. Stocks*, 378 N.C. 342, 2021-NCSC-90, ¶ 13 (marks and citations omitted).

¶ 16 Despite its frequent invocation, "[s]ummary judgment 'is an extreme remedy and should be awarded only where the truth is quite clear.' " *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603 (quoting *Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E.2d 101, 103 (1970)), *disc. rev. denied*, 354 N.C. 371, 555 S.E.2d 280 (2001). It should only be granted in cases where a court is confident that "no person shall be deprived of a trial on a genuine disputed factual issue." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 682, 565 S.E.2d 140, 146 (2002) (citations omitted). "[T]he fundamental purpose of a summary judgment motion . . . is to allow a litigant to 'test' the extent to which the allegations in which a particular claim has been couched have adequate evidentiary support." *Prouse v. Bituminous Cas. Corp.*, 222 N.C. App. 111, 116, 730 S.E.2d 239, 242-43 (2012). Accordingly, courts may grant a motion for summary judgment only in those instances where a party

> meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted). "Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

¶ 17 Here, Plaintiff's complaint alleged both alienation of affection and criminal conversation. We address both in turn.

¶ 18 In order to establish a claim for alienation of affection, a plaintiff must show that "(1) there was a marriage with love and affection existing between the [plaintiff] and [his or her spouse]; (2) that love and affection was alienated; and (3) the malicious acts of the defendant produced the loss of that love and affection." *Nunn v. Allen*, 154 N.C. App. 523, 533, 574 S.E.2d 35, 41-42 (2002) (marks and citations omitted), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 630 (2003). As there is no meaningful contention that evidence sufficient to survive a motion for summary

judgment did not exist with respect to the first two elements,[2] we devote the bulk of our analysis to whether "the malicious acts of [] [D]efendant produced the loss of that love and affection." *Id.* at 533, 574 S.E.2d at 42.

¶ 19 As to the third element of alienation of affection, "[a] malicious act has been loosely defined to include any intentional conduct that would probably affect the marital relationship." *Rodriguez v. Lemus*, 257 N.C. App. 493, 495, 810 S.E.2d 1, 3 (citations omitted), *disc. rev. denied*, 371 N.C. 447, 817 S.E.2d 201 (2018). However, the exact definitional contours of a "malicious act" are irrelevant for purposes of this appeal[3] because "[m]alice is conclusively presumed by a showing that the defendant engaged in sexual intercourse with the plaintiff's spouse." *Id.* at 495-96, 810 S.E.2d at 3. As the evidence supporting the first element of alienation of affection in this case consists, in primary part, of a series of text messages indicating Alison engaged in sexual intercourse with "Bestie," an admission by Alison that she engaged in sexual acts with "Bestie" and that "Bestie" was a man named "Dustin," and a separate admission by Alison indicating she had engaged in sexual intercourse with an unnamed person, whether the behavior at issue qualified as a "malicious act" would be conclusively presumed in the affirmative, provided sufficient evidence exists that any paramour referenced was actually Defendant.

¶ 20 As Plaintiff testified during his deposition, he relied primarily on "put[ting] two and two together" in support of his contention that one

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2. At minimum, Plaintiff met his burden of production with respect to the first two elements through his verified complaint:

> 4. Prior to [18 January 2016], Plaintiff and [Alison] had a good and loving marriage. Plaintiff was a dutiful spouse and provided a comfortable home and environment for his wife.
>
> . . . .
>
> 14. . . . [T]he genuine love and affection that existed between [] Plaintiff and [Alison] was lost and destroyed . . . .

This verified complaint qualifies as an affidavit for production purposes. *See Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (citations omitted) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.").

3. Setting aside evidence concerning extramarital sex acts, Plaintiff's proffered evidence of Defendant's pre-separation acts consisted entirely of phone and Facebook contact, the specifics of which are unknown. Whatever subjective insecurity this behavior may have induced in Plaintiff, we do not believe evidence of this type of contact, without more, "would probably affect the marital relationship" so as to be relevant to our alienation of affection analysis. *Id.*

or more of the parties sexually involved with Alison prior to their separation was actually Defendant. Evidence supporting this identification includes phone and Facebook contact between Alison and Defendant during her and Plaintiff's marriage, the existence of their friendship at work, and the fact that they openly had a romantic and sexual relationship less than four months from the separation date of Alison and Plaintiff's more than decade-long marriage. Plaintiff argues this evidence is sufficient to have survived Defendant's *Motion to Dismiss*; however, Defendant argues this evidence is insufficient for a jury to find that he engaged in sexual intercourse with Alison prior to their separation.

¶ 21 At the heart of the parties' arguments lies a disagreement about the proper role of evidence concerning post-separation conduct with respect to alienation of affection claims; and, more specifically, the scope of our recent holding in *Rodriguez v. Lemus*. In *Rodriguez*, we held that, in cases involving alienation of affection, "evidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct and can support claims for alienation of affection and criminal conversation, so long as the evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture." *Id.* at 498, 810 S.E.2d at 5. In that case, which involved a challenge to the sufficiency of the evidence to support a trial court's findings of fact during a bench trial,[4] *id.* at 495, 810 S.E.2d at 3, we held the evidence was sufficient to support the trial court's findings where

> [the] [p]laintiff's evidence of pre-separation conduct included[] (1) phone records showing 120 contacts between [the] [d]efendant and [the] [p]laintiff's spouse in a one-month period, all at times when

4. While we are mindful of the discrepancy in scrutiny between our review of a trial court's grant or denial of summary judgment—which is subject to de novo review—and our review of a trial court's findings of fact on appeal from a bench trial—which we review for competent evidence on the record—the two are, for purposes of our analysis, functionally interchangeable in this case. *See id.* at 495, 810 S.E.2d at 3 (citations omitted) ("[W]e are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence . . . ."); *Jones*, 362 N.C. at 573, 669 S.E.2d at 576 ("Our standard of review of an appeal from summary judgment is de novo[.]"). The nature of our review of a trial court's grant or denial of summary judgment, though de novo, requires us to view the nonmovant's evidence "in the light most favorable to that party," examining only whether they have support on the record. *Stocks*, 378 N.C. 342, 2021-NCSC-90, ¶ 13 (marks and citations omitted). Where, as in *Rodriguez*, the trial court finds a plaintiff's evidence persuasive during a bench trial, our review for competent evidence on the record is nearly identical to our review of whether a plaintiff met her burden of production for purposes of summary judgment. Accordingly, our analysis in *Rodriguez* directly informs our analysis in this case despite the nominal differences in procedural posture.

> [the plaintiff's spouse] was away from home; (2) two hotel charges on [the spouse's] credit card bill; (3) a third hotel receipt dated 21 March 2012 and information from the third hotel that [the spouse] was there with a woman; and (4) social media postings by [the] [d]efendant and [the plaintiff's spouse] which [the] [p]laintiff interpreted as their initials used as a code between them.

Id. at 498, 810 S.E.2d at 5. Plaintiff argues that, under *Rodriguez*, Defendant's established, post-separation sexual relationship with Alison properly demonstrates Defendant was involved in the sexual encounters referenced in Alison's messages and confessions. Meanwhile, Defendant argues that the pre-separation conduct amounts to "mere conjecture," rendering Defendant's post-separation conduct irrelevant for purposes of whether Plaintiff's evidence was sufficient to withstand a motion for summary judgment. *Id.*

¶ 22 Defendant's argument implicitly—and incorrectly—narrows the scope of our holding in *Rodriguez*. The *Rodriguez* principle was articulated in response to the question of whether factfinders could consider evidence of post-separation *at all* after our General Assembly enacted N.C.G.S. § 52-13, which provides that "[n]o act of [a] defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent." N.C.G.S. § 52-13(a) (2021); *see also id.* at 497, 810 S.E.2d at 4 ("[C]laims of alienation of affection and criminal conversation arising after the effective date of [N.C.G.S. §] 52-13 cannot be sustained without evidence of pre-separation acts satisfying the elements of these respective torts. What is less clear is whether evidence of post-separation acts is admissible to support an inference of pre-separation acts constituting alienation of affection or criminal conversation."). In other words, N.C.G.S. § 52-13 prevents defendants in cases involving criminal conversation and alienation of affection from being held liable for acts taking place after two spouses have separated, and *Rodriguez* effectuates that policy by ensuring that, if a factfinder considers evidence of post-separation conduct, it does so only insofar as it contextualizes pre-separation conduct.

¶ 23 Defendant, in arguing post-separation conduct cannot inform whether Plaintiff's evidence was sufficient to withstand his *Motion for Summary Judgment*, implies that, under *Rodriguez*, corroborating evidence is only available when Defendant has already been identified

as the actor in one or more independently sufficient instances of pre-separation conduct. No such limitation exists. Plaintiff presented evidence that his ex-wife engaged in sexual intercourse with at least one third party. To hold that Defendant's post-separation conduct with Plaintiff's ex-wife cannot inform the sufficiency of Plaintiff's evidence insofar as it indicates Defendant may have been "Bestie"—or, if a different person, the man she referenced in the second conversation—would ignore the reality that direct, contemporaneous evidence of adultery is almost never available. *See In re Est. of Trogdon*, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991) ("Adultery is nearly always proved by circumstantial evidence."). Accordingly, to the extent Plaintiff's evidence of Defendant's post-separation conduct informs our understanding of the identities of "Bestie," "Dustin," or another professed paramour, it properly informs our review of the trial court's *Amended Order Granting Defendant's Motion for Summary Judgment*.

¶ 24 Having clarified the scope of *Rodriguez*, we must now determine whether Plaintiff presented evidence which, when taken as true and viewed in the light most favorable to him, could demonstrate that "the malicious acts of [] [D]efendant produced [a] loss of [] love and affection." *Nunn*, 154 N.C. App. at 533, 574 S.E.2d at 42; *Stocks*, 378 N.C. 342, 2021-NCSC-90, ¶ 13. We hold that he did. The evidence of a friendship and frequent contact between Alison and Defendant that existed prior to the relationship, as well as their romantic and sexual relationship after separation, while not sufficient for a jury to conclude the final element of alienation of affection had been met on its own, could convince a jury that Defendant was "Bestie"—or, if different, the person with whom she admitted she had engaged in sexual intercourse. Accordingly, the trial court erred in granting Defendant's *Motion for Summary Judgment* with respect to Plaintiff's claim for alienation of affection.

¶ 25 Likewise, Plaintiff's evidence, when taken as true and viewed in the light most favorable to him, *Stocks*, 378 N.C. 342, 2021-NCSC-90, ¶ 13, demonstrates that Defendant was liable for criminal conversation. "To withstand [a] defendant's motion for summary judgment on [a] claim of criminal conversation, [a] plaintiff must present evidence demonstrating: '(1) marriage between the spouses and (2) sexual intercourse between [the] defendant and [the] plaintiff's spouse during the marriage.' " *Coachman v. Gould*, 122 N.C. App. 443, 446, 470 S.E.2d 560, 563 (1996) (quoting *Chappell v. Redding*, 67 N.C. App. 397, 401, 313 S.E.2d 239, 241, *disc. rev. denied*, 311 N.C. 399, 319 S.E.2d 268 (1984)). Here, as in the alienation of affection claim, there is no meaningful dispute as to whether Plaintiff and Alison were married; and, also as in the alienation

of affection claim, Alison's admission that she had engaged in sexual intercourse with a third party, together with her friendship, contacts, and future romantic and sexual relationship with Defendant, would allow a jury to find Defendant had engaged in sexual intercourse with Alison prior to her and Plaintiff's separation.[5]

¶ 26 Accordingly, the trial court also erred in granting Defendant's *Motion for Summary Judgment* with respect to Plaintiff's claim for criminal conversation.

CONCLUSION

¶ 27 In alienation of affection and criminal conversation cases, a plaintiff's evidence of a defendant's conduct occurring after a plaintiff and his or her ex-spouse separate constitutes viable corroborative evidence for purposes of satisfying the burden of production where the identity of a pre-separation extramarital sexual partner is unknown. Accordingly, here, the trial court erred in granting Defendant's *Motion for Summary Judgment*.

REVERSED AND REMANDED.

Judge DILLON concurs with a separate opinion.

Judge JACKSON dissents with a separate opinion.

DILLON, Judge, concurring.

¶ 28 I fully concur in the majority opinion. Plaintiff David Beavers forecasted sufficient evidence to survive summary judgment on his claims against Defendant for alienation of affection and criminal conversation, so called "heartbalm" torts. Admittedly, there was no *direct* evidence before the trial court that David's wife, Alison, and Defendant were engaging in an affair involving sexual intercourse prior to David and Alison's separation. However, there was evidence that, shortly before their separation, Alison admitted to her husband having an affair with a married co-worker, though she would not identify who the co-worker was. And the *circumstantial* evidence forecasted by David, when viewed in the

5. We note that the separation restriction in N.C.G.S. § 52-13 also applies to criminal conversation. *See* N.C.G.S. § 52-13(a) (2021) (emphasis added) ("No act of [a] defendant shall give rise to a cause of action for alienation of affection *or criminal conversation* that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent.").

light most favorable to him, was sufficient for a jury to infer that Alison's affair was with Defendant. This circumstantial evidence showed the following occurred during the year leading up to David and Alison's separation:

¶ 29 As of January 2016, eleven months before they separated, David and Alison had been happily married for much of their eleven years together. Three children were born to the marriage. But that month, David discovered that Alison had sent sexually charged messages and seductive selfies to a married co-worker she refused to identify. Defendant and Alison were co-workers. During 2016, Alison spent some nights and weekends away from David, often being cryptic about where she was going or whom she was with. Defendant admitted going on overnight business trips in 2016. Defendant met with Alison multiple times outside of work prior to Alison and David's separation. In July 2016, David found a receipt from a hotel where Alison had stayed. Defendant and Alison spoke on the phone on one occasion in July 2016 late at night, just prior to midnight. During a week in October 2016, a few months before David and Alison separated, Defendant and Alison exchanged 98 text messages. David and Alison separated in December 2016; Defendant and his wife separated shortly thereafter. By April 2017, Defendant and Alison were openly dating and had sexual intercourse before David and Alison's divorce became final.

¶ 30 As judges, we should not allow our general opinions about heartbalm torts to interfere with our duty to fairly evaluate evidence when determining whether a plaintiff is entitled to have her claims involving these torts heard by a jury.

¶ 31 I write separately to address our dissenting colleague's concern (and the concern in some circles identified in his dissenting opinion) that North Carolina still recognizes claims for alienation of affection and criminal conversation.

¶ 32 Many argue that North Carolina should abolish heartbalm torts because of its misogynistic origins. Indeed, the right to seek damages from a third party who interferes with a marital relationship was originally only available to married men. This right was not available to married women, as a wife was considered in a way the property of her husband. But most rights we all enjoy today used to be enjoyed only by some. Throughout history, we have responded to these injustices by *extending* these rights to be enjoyed by more groups, not by eliminating them.

¶ 33 For instance, under the common law, a married woman lacked the capacity to enter contracts. *Sanderlin v. Sanderlin*, 122 N.C. 1, 2, 29 S.E. 55, 55 (1898) ("At common law the contract of a married woman was

void."). However, recognizing the right to contract is a good thing, rather than doing away with this right altogether, the right to contract has been extended to almost all, including married women.

¶ 34 Also, under the common law, married women had very limited property rights. *See Bass v. Paquin*, 140 N.C. 83, 87, 52 S.E. 410, 412 (1905) ("Prior to 1848, we find no [North Carolina] statute interfering with or limiting the common law right and power of the husband over his wife's property."). However, recognizing the right to own/control property to be a good thing, rather than eliminating this right altogether, property rights have been extended to married women.

¶ 35 "The right to vote is one of the most cherished rights in our system of government[.]" *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759,762 (2009). It used to be that most people, including married women, could not vote. Again, recognizing the right to vote is a good thing, rather than further restricting voting rights, the right to vote has been extended to most citizens, including married women.

¶ 36 Our Supreme Court recognizes the "tangible and intangible benefits resulting from the loving bond of the marital relationship." *Nicholson v. Hugh Chatham*, 300 N.C. 295, 302, 266 S.E.2d 818, 822 (1980). Indeed, the United States Supreme Court recognizes that "marriage is 'one of the vital personal rights essential to the orderly pursuit of happiness by free [people].' " *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

¶ 37 Recognizing the benefits one receives from a good marriage relationship, our Supreme Court has stated that the basis of an alienation of affection action "is the [plaintiff's] loss of the society, affection, and assistance of [the plaintiff's spouse]." *Ross v. Dean*, 192 N.C. 556, 135 S.E. 348, 349 (1926) (suit by husband). As was done in other jurisdictions, North Carolina extended the right to sue for this loss to married women. *See Brown v. Brown*, 121 N.C. 8, 27 S.E. 998 (1897) (extending this right to wives to sue for this loss). More recently, some jurisdictions have done an about-face and have abolished the right of individuals to sue for this loss altogether. But there is a strong argument why we should not follow suit, considering the other injuries for which we allow people to seek redress, many involving less harmful conduct and harm to less significant relationships.

¶ 38 For instance, we already allow a plaintiff to recover for the loss of "society, affection, and companionship" of his/her spouse when that loss is caused by the mere *negligence* of a third party, whose negligence act results in the death or severe injury to the plaintiff's spouse. *Nicholson*,

300 N.C. at 302, 266 S,E,2d at 822 (recognizing claim for "loss of consortium"). Interestingly, under our common law, only a husband could sue for loss of consortium, as his wife "was regarded as little more than a chattel in the eyes of the law." *Id.*, at 298, 266 S.E.2d at 820. But rather than eliminating the right to seek a loss of consortium claim based on this history, we now recognize the loss suffered by a married woman when she loses the benefits of her marriage due to the negligence of a third party is equally compensable. *Id.* at 297, 266 S.E.2d at 819 ("[T]he essence of consortium today has become a mutual right of a husband and wife to the society, companionship, comfort and affection of one another.").

¶ 39 I am not aware of any move to abolish loss of consortium claims. How much more should a married person be able to recover for this same loss (society, affection, companionship) when caused by the wrongful/malicious acts of a third party?

¶ 40 Further, I note that we recognize torts against third parties who wrongfully/maliciously interfere relationships which most would consider less significant than a marriage relationship.

¶ 41 For instance, if I enter a *contractual* relationship with someone to buy her car and if a third party convinces the seller to breach her contract with me, our law recognizes my right to recover any resulting damage. I have the right to sue that third party for interfering with my contractual relationship. *See Beverage Sys. v. Associated Bev.*, 368 N.C. 693, 784 S.E.2d 457 (2016) (recognizing "tortious interference with contract" claim).

¶ 42 Even if I only have a *potential* contractual relationship to buy the car, our law recognizes that I have suffered compensable damages when a third party acts out of malice in talking the seller out of entering a contract with me. *See Owens v. Pepsi Cola*, 330 N.C. 666, 412 S.E.2d 636 (1992) (recognizing claim for "tortious interference with prospective economic advantage").

¶ 43 In a non-commercial setting, our law allows me to sue a third party who acts out of malice to prevent another from creating a valid will which would have included me as a beneficiary. *See Bohannon v. Wachovia*, 210 N.C. 679, 188 S.E. 390 (1936) (recognizing claim for "tortious interference with an expected inheritance").

¶ 44 These torts have long been recognized, and I am not aware of any movement to take away the right to seek damages for these civil wrongs. How much more should we continue to recognize the right of individuals

to seek damages from those who out of malice interfere with one of the most important relationships in society?

¶ 45 I acknowledge that there is a concern in retaining heartbalm torts based on the occasional large jury verdict. But we value the role of juries in our society to use their judgment to evaluate the value of compensable harm, within legal parameters. If the size of jury awards is perceived as a problem, the better answer may be a type of tort reform to hold down "runaway" verdicts, rather than abolishing the right for married persons to seek damages at all for the tremendous harm done to them and their families by third parties acting wrongfully/maliciously.

¶ 46 The harm caused by criminal conversation – which merely requires a showing that a third party committed adultery with the plaintiff's spouse, without any requirement to show that the adultery caused the affections of the cheating spouse to be alienated – causes a different harm. Unlike with alienation of affection, a third party can be held liable for criminal conversation even where the cheating spouse instigated the contact.

¶ 47 However, most married persons have an expectation of fidelity within the marriage. *Malecek v. Williams*, 255 N.C. App. 300, 304, 804 S.E.2d 592, 596 (2017) (analyzing the constitutionality of North Carolina's heartbalm torts). And a plaintiff suffers harm when this expectation is not realized. It may be that a cheating spouse and third party should not be held *criminally* liable for adultery. Indeed, such prosecutions are essentially non-existent, and many courts have held such criminal laws to be unconstitutional. However, just because one should not be held criminally responsible does not necessarily mean that *civil* liability cannot be imposed, as with other torts that do not involve criminal conduct. Cheating spouses already suffer from a civil standpoint for their adulterous behavior: a cheating spouse who is a supporting spouse is liable for alimony; and a cheating spouse who is a dependent spouse loses any right to receive alimony. N.C. Gen. Stat. § 50-16.3(a).

¶ 48 "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were." *Obergefell*, 576 U.S. at 681. Under our common law, the right to seek redress from a jury of his peers for the loss of the benefits of this most profound of relationships used to reside solely with men. But, as with other rights, our State has progressed by extending this right to women. I see no reason why we should regress.

JACKSON, Judge, dissenting.

¶ 49 I would hold summary judgment for Defendant was proper in that Plaintiff had utterly failed to produce one single genuine issue of material fact as to the identity of his wife's paramour and would therefore affirm the order of the trial court. Additionally, on a more fundamental level, the torts of alienation of affection and criminal conversation have been outdated for over a hundred years and it is past time that these torts be abolished. I wish to take this opportunity to explain in detail why.

¶ 50 For all the reasons below, I respectfully dissent.

I. The Torts of Alienation of Affection and Criminal Conversation Should be Abolished

¶ 51 In the latter half of the 19th century, every state in the nation, apart from Louisiana, recognized a husband's right of action to bring alienation of affection and criminal conversation claims. William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for A New Career*, 33 Ariz. St. L.J. 985, 1005 (2001) ("Corbett"). By the 1980s, even with the ability of wives to bring the same causes of action due to the passage of Married Women's Property Acts, most states had limited the torts significantly or abolished them entirely. *Id*. at 1009-10. Today, alienation of affection remains a viable tort claim in only four states besides North Carolina—Hawaii, Mississippi, South Dakota, and Utah—and criminal conversation in only three other states—Hawaii, Kansas, and Maine.[1] *See* H. Hunter Bruton, Note, *The Questionable Constitutionality of Curtailing Cuckolding: Alienation-of-Affection and Criminal-Conversation Torts*, 65 Duke L.J. 755, 760-61 (2016).

¶ 52 Despite the overwhelming disfavor of these claims nationally, these torts are alive and well in North Carolina, regrettably in my view. Practitioners estimate approximately 200 alienation of affection lawsuits are filed each year. Meghann Mollerus, *Alienation of Affection: Yes, You Can Sue Your Marriage's Homewrecker*, WFMY News 2 (Feb. 12, 2019, 9:28 AM) https://www.wfmynews2.com/article/home/ alienation-of-affection-yes-you-can-sue-your-marriage-homewrecker/83-1b416ffc-4665-4763-82d6-bb73c40c32d4. Furthermore, over the past two decades the damages awards have become enormous. Amongst the notable

1. Although it has not been expressly abolished in New Mexico, the New Mexico Supreme Court disfavors claims for alienation of affection and even stated as long ago as 1978 that the tort goes against the best interest of the people and should be abolished. *Thompson v. Chapman*, 93 N.M. 356, 358, 600 P.2d 302, 304 (1978).

verdicts between 1998 and 2018 were seven jury awards of $1 million or more, including a $9 million award in 2010, four jury awards between $100,000 and $750,000, and three bench awards between $5 million and $30 million. G. Edgar Parker, *Tort Claims for Alienation of Affections and Criminal Conversation are Alive and Well in North Carolina*, N.C. State Bar J., Summer 2019, at 20-21. These torts continue to be used despite repeated legislative attempts to abolish them. Jean M. Cary & Sharon Scudder, *Breaking Up Is Hard To Do: North Carolina Refuses to End Its Relationship with Heart Balm Torts*, 4 Elon L. Rev. 1, 16-19 (2012) ("Cary & Scudder").

¶ 53 Additionally, prominent stakeholders in the North Carolina legal community have long called for the end of the so-called heart balm torts. In 1998—almost twenty-five years ago—the North Carolina Association of Women Attorneys adopted a resolution calling for the elimination of the torts. The resolution's recitals typify the reasons the torts should be abolished:

> WHEREAS the origin of the torts, alienation of affection and criminal conversation is the anachronistic philosophy that women were property; and
>
> WHEREAS this philosophy is inconsistent with the sound principle that women are full and equal partners in marriage; and
>
> WHEREAS these torts are inconsistent with North Carolina's public policy embodied in its laws of no fault divorce; and
>
> WHEREAS, the litigation of these torts contributes to the conflict between marital partners and has a detrimental impact on the family.

Annual Meeting Resolutions, North Carolina Association of Women Attorneys, https://www.ncawa.org/assets/docs/ncawa-annual-meeting-resolutions-through-2018.pdf (last accessed 20 July 2022). In the early 2000s, the Family Law Section of the North Carolina Bar Association began actively advocating for the legislative repeal of the torts. Cary & Scudder, *supra* at 16.

¶ 54 Our Court even judicially abolished the torts in 1984, *Cannon v. Miller*, 71 N.C. App. 460, 497, 322 S.E.2d 780, 804 (1984), only to have the decision vacated just two months later by our Supreme Court in a four-sentence order, 313 N.C. 324, 327 S.E.2d 888 (1985). There was no analysis in the Supreme Court's order. All the reasons for abolishing the

torts articulated by our Court in *Cannon* remain true today and *many* of these reasons have only become *more* compelling over the last 36 years. Our Supreme Court deserves another opportunity to correct this wrong.

A. The Concept of Women as Property Inherent in the Claims of Alienation of Affection and Criminal Conversation Is Wrong, and Inconsistent with Modern Law

¶ 55 Alienation of affection and criminal conversation are common law torts rooted in the antiquated idea that women, when married, are the personal property of their husbands. Legal recognition and validation of these rights gave husbands "an action against a third party when that person abducted her, seduced her, beat her, or 'stole' her affections"—in other words, a lawsuit for stealing a woman from a man that through marriage the law regarded the man to own, as though the woman were livestock or worse. 1 Suzanne Reynolds, *Reynolds on North Carolina Family Law* § 3.12 (6th ed. 2020) ("Reynolds"); *see also Barbee v. Armstead*, 32 N.C. (10 Ired.) 530 (1849). This action, in its early incarnation known as a suit for enticement, allowed a husband to recover for the loss of his wife's services from a third person who had enticed or separated the wife away from the husband, regardless of whether the wife had herself *consented* to leave. *See* Reynolds, *supra* § 3.12; *Cannon v. Miller*, 71 N.C. App. at 471, 322 S.E.2d at 789. While enticement as such is no longer recognized in North Carolina, or any other state, the iniquitous spirit of the tort is alive and flourishing in the claims of alienation of affection and criminal conversation still recognized today in North Carolina. Reynolds, *supra*, § 3.12; *see also* Jennifer E. McDougal, Comment, *Legislating Morality: The Actions for Alienation of Affections and Criminal Conversation in North Carolina*, 33 Wake Forest L. Rev. 163, 164 (1998) ("McDougal").

¶ 56 It has been said that "[t]he gravamen of the . . . cause of action [for alienation of affection] is the deprivation of the husband of his conjugal right to the society, affection, and assistance of his wife[.]" *Cottle v. Johnson*, 179 N.C. 426, 428, 102 S.E 769, 770 (1920). In other words, "the action seeks recompense for the loss of consortium[.]" Reynolds, *supra*, § 3.13. Between spouses, "consortium" is a legal euphemism for sex. *Consortium*, Black's Law Dictionary (11th ed. 2019). The right of a husband to recover for the loss of consortium from his wife was based on the shameful legal recognition and validation of the wife as chattel owned by the husband. *Cannon*, 71 N.C. App. at 473, 322 S.E.2d at 790. If a third party interfered with the service of a man's chattel, such as a servant or a slave, that man had an action for trespass. *Id.* Applying this concept to the marital relationship, if a third party interfered with

a wife providing her services—her society, companionship, and sexual relations—to her husband, then the husband had a cause of action. *Id.* In terms that unfortunately were characteristically common at the time, the North Carolina Supreme Court described this reality in a 1921 opinion, explaining:

> At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an account for injuries to his horse, his slave, or any other property; that is to say, by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that "by reason of the unity of marriage" such actions could be maintained by the husband.

Hipp v. E.I. Dupont De Nemours & Co., 182 N.C. 9, 12, 108 S.E. 318, 319 (1921), *overruled by Hinnant v. Tide Water Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925).

¶ 57 Prior to the enactment of Married Women's Property Acts, only husbands had a property interest in their wives and therefore only a husband could recover for the loss of consortium. McDougal, *supra*, at 165. In *Hipp*, our Supreme Court frankly noted the reason that a woman had no corresponding property interest in a man to whom she was married by referencing Blackstone's Commentaries:

> We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties (husband) injured by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior (the wife) by such injuries is totally unregarded. One reason for this may be this: *That the inferior hath no kind of property in the company, care or assistance of the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury.*

182 N.C. at 13, 108 S.E. at 319 (quoting 3 Blackstone's Commentaries, 143) (emphasis added).

¶ 58 By the end of the 1800s, every state had enacted laws known as Married Women's Property Acts that removed some of the legal disabilities of married women and granted them most of the same de jure rights as their husbands—primarily, rights to "acquire, own, and transfer

property, make contracts, be employed and keep their earnings, sue, and be sued." McDougal, *supra*, at 165 n.13. As the inferior party was now at least nominally on somewhat more equal footing with the so-called superior party, the North Carolina Supreme Court decided in 1897 that women could also bring an action for alienation of affection against their husbands, *see Brown v. Brown*, 121 N.C. 8, 27 S.E. 998 (1897), and by 1925 went as far as to hold that the same was true for the tort of criminal conversation, *see Hinnant*, 189 N.C. at 126, 126 S.E. at 309-10.

¶ 59 Today, proponents of the torts often argue that the archaic origins of the torts do not matter and the fact that women today enjoy the right to assert claims on an equal basis with men, along with other rationales—such as disincentivizing adultery and promoting the stability of the nuclear family for the purpose of childrearing—justify the continued existence of the torts. *See* Lance McMillan, *Adultery as Tort*, 90 N.C. L. Rev. 1987, 1999 (2012) ("McMillan"); Corbett, *supra* at 1015. Yet the ability of both husbands and wives to bring an action for alienation of affection and criminal conversation does not resolve, abrogate, or otherwise eliminate the offensive and outdated concept underpinning the torts—that through marriage, a spouse becomes the property of the other spouse.

¶ 60 A person cannot be the property of another person. A wife is not property, and a husband is not property. For the most part, the law stopped recognizing and validating this concept over 100 years ago. That it has not stopped doing so in North Carolina in 2022 through the continued recognition of the validity of the torts of alienation of affection and criminal conversation is shameful and a wrong that we should right today. If spouses are not property of one another, they cannot be stolen—nor can their love or affection be stolen. *See* McDougal, *supra* at 181-83. The law must not validate the idea that sex is something a person can owe another person—and by extension, something that a third person could possibly steal—regardless of whether the two people have been joined in the legal union we know as marriage. "[T]he promise of sexual fidelity is simply not a possession that can be taken away by a third party without the permission of the participating spouse." Cary & Scudder, *supra* at 14. As the Washington Court of Appeals summarized when abolishing criminal conversation: "The love and affection of a human being who is devoted to another human being is not susceptible to theft. There are simply too many intangibles which defy the concept that love is property." *Irwin v. Coluccio*, 32 Wash. App. 510, 515, 648 P.2d 458, 461 (1982). Love is not property.

¶ 61 By extension, if a person is not the property of another person—nor is their love or their affection—then that person cannot be compensated

for the loss of this property because it was not property in the first place. In abolishing alienation of affection in 1981, the Supreme Court of Iowa explained: "We certainly do not do so because of any changing views on promiscuous sexual conduct. It is merely and simply because the plaintiffs in such suits do not deserve to recover for the loss of or injury to 'property' which they do not, and cannot, own." *Fundermann v. Mickelson*, 304 N.W.2d 790, 794 (Iowa 1981). The same should be true in North Carolina.

¶ 62 Furthermore, any suggestion that the concept that women are the property of their husbands is not, or is no longer, the basis for the torts of alienation of affections and criminal conversation is false, or worse—dishonest. Our Court explained as much almost 40 years ago in *Cannon v. Miller*: "The[se] [] actions have never fully shaken free from their property-based origins, as evidenced by fact that the consent of the participating spouse to the offending conduct, or even his or her initiation of it, will not bar the suit." 71 N.C. App. at 492, 322 S.E.2d at 801. In other words, the lack of consent as a defense means the law treats spouses as property that can be taken from one another rather than as fully autonomous and equal moral persons who can make their own voluntary choices, including the choice to engage in an extramarital relationship with a third person—whether or not the relationship is sexual.

¶ 63 Participation in extramarital relationships, sexual or not, may be wrong, and society may rightly disapprove of such behavior; however, disincentivizing people from choosing to engage in these relationships by treating a person as the property of another person is wrong and has no place in our world or society today. The Married Women Property Acts were supposed to dispose of the legal treatment of women as the property of men they had married—and of course, the law has *never* regarded husbands as the personal property of their wives. The fact that the consent of a spouse remains unavailable to a third party to the marriage as a defense to a claim belies any argument that the torts are not or are no longer fundamentally sexist, wrong, and based on the concept that women are the property of men they marry. *See* 1 Lloyd T. Kelso, *North Carolina Family Law Practice* § 5.9 (2022).

¶ 64 The fact these torts inherently treat people and their love, affection, and society as *property* makes them fundamentally different than torts that allow for the compensation of interference in contractual relationships. A party to a contract can sue a third-party for tortious interference with the contract because the party has *contractual* rights to the subject of the contract, *not inherent property rights* to the subject of the contract. "[P]roperty is about a person's right to a thing, and contract

is about promises to transfer those rights from one person to another." Blake Rohrbacher, Note, *More Equal Than Others: Defending Property-Contract Parity in Bankruptcy*, 114 Yale L.J. 1099, 1103 (2005). To justify the existence of the heartbalm torts on the basis that we allow for the compensation of interference in contractual relationships would be to view marriage as a contractual relationship in which spouses confer to one another a property right in themselves and their services. Ultimately, either view of marriage advanced by the justifications of these torts—as two people who are the property of one another or two people who contracted to exchange their companionship and services with one another—undermines the idea of a marriage as a *commitment* between two individuals who freely and joyfully promise to love, cherish, and honor one another till death do them part.

¶ 65 The existence of these torts today is indefensible. As the Missouri Supreme Court observed almost 20 years when it finally judicially abolished the tort of alienation of affection in Missouri, "[w]hen the reason for a rule of law disappears, so to[o] should the rule. . . . The original property concepts justifying the tort are inconsistent with modern law." *Helsel v. Noellsch*, 107 S.W.3d 231, 233 (Mo. 2003) (en banc) (internal citation omitted).

B. Alienation of Affection and Criminal Conversation Do Not Actually Serve the Purposes Stipulated as Modern Justifications for their Continued Existence

¶ 66 The modern justifications for these heartbalm torts, "providing a remedy for injuries of a highly sensitive nature while discouraging intentional disruptions of families[,]" McDougal, *supra* at 182 (citation omitted), simply do not remedy the poisonous origins of the torts. This would be true even if alienation of affection and criminal conversation actually "fulfill[ed] their purposes of protecting marriages and the family, compensating the plaintiff for an actual loss, and deterring undesirable behavior." *Id*. at 183 (internal marks omitted). The reality, however, is that the torts fail to serve these purposes, and lack any adequate modern justification for existence.

¶ 67 Proponents of these torts often argue that they act as a deterrent to people contemplating an extramarital affair—that a potential third party will pause and consider the potential financial repercussions before becoming involved with a married person. Corbett, *supra* at 1016-17. The subtext of this argument is that society cannot rely on individual moral decision making and thus a financial disincentive is needed to prevent extramarital affairs. The effectiveness of any such deterrent, however,

requires that the existence of the disincentive is common knowledge. If a third party does not know they could be sued for participating in an affair with a married person, then the torts have no deterrent effect whatsoever. And there is not public knowledge of the continued viability of the torts in North Carolina today. *See, e.g.*, Cary & Scudder, *supra* at 21 ("[M]any people in North Carolina do not know that they can be sued for having intercourse with a person who is married, and even if they do know, they may not be aware of the true marital status of the person they are seducing. . . . [P]eople who are not lawyers are often surprised to find out that spouses can sue the third party for monetary damages as a result of an extramarital affair.") (internal marks omitted). This lack of public awareness continues despite the media attention multi-million-dollar verdicts generate.

¶ 68 Marriages are not preserved by the torts, nor are families protected by them. No credible empirical evidence suggesting otherwise exists. These torts do not dissuade third parties from engaging in an affair with a married person. Between 2019 and 2020, the last period prior to the increased stress of the pandemic for which data is available, North Carolina tied for the 16th highest divorce rate amongst 45 states. *Divorce Rates by State*: 2019-2020, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/nchs/pressroom/sosmap/divorce_states/divorce_rates.htm (last accessed 25 July 2022). Amongst the other states where alienation of affection remains a viable cause of action, Mississippi and Utah are tied for the sixth highest divorce rate, and South Dakota is tied for the 22nd highest divorce rate. *Id.*

¶ 69 The ultimate irony of the justification that these torts help preserve marriages or protect families is that the initiation of a lawsuit almost certainly pushes a struggling marriage past the point of reconciliation. McDougal, *supra* at 183. The Court in *Cannon v. Miller* put it thusly: "[G]ranting that the marriage relation is deserving of society's protection, the efficacy of the actions as a 'preservative' has never been documented. Rather, the very institution of the lawsuit would seem likely to destroy any remaining marital harmony through the notoriety of marital failure and the stresses of litigation." 71 N.C. App. at 492, 322 S.E.2d at 800-01.

¶ 70 Similarly, the existence of these torts likely harms families and their ability to heal and move forward. Particularly examining the impact of protracted litigation on children, two authors explained:

> If children are involved in a marriage that ends in the shadow of adultery, then protecting the emotional

> stability of the children also provides a strong reason why criminal conversation and alienation of affection should be abolished.
>
> One author argues that the civil adversarial system in family law already greatly increases harm to children who are subjected to divorce by encouraging competition and power struggles between parents at the expense of the child, and that the time for litigation must be limited for the benefit of the children.
>
> To minimize the negative impact upon children involved in divorce, parents must minimize the involvement of the legal system and lengthy litigation following divorce, rather than increase the causes of action filed against the spouse or an alleged paramour. In working out the details of ending a marriage, families are better served by avoiding a situation where one spouse is pitted against the other because children suffer greater harm when they are expected to choose sides between two parents.

Cary & Scudder, *supra* at 25 (footnotes and internal marks omitted). To a certain extent, forgiveness "is required in order for a betrayed spouse to move forward into healthy relationships" and such forgiveness can, in part, be obtained by relinquishing the right or desire to punish the betraying spouse. *Id.* at 24.

¶ 71 Stripped of the proffered modern justifications, the only reasons that remain for the continued existence of the torts is the antiquated and immoral concept that a person can be the property of another person because they are married, which as discussed *infra*, has no place in our world. Continued recognition of the torts is indefensible. They should be abolished by our Court today.

II. Analyzing the Case *Sub Judice*

¶ 72 Notwithstanding my belief that alienation of affection and criminal conversation should be abolished by our Court today, I would hold that the trial court did not err in granting Defendant's motion for summary judgment and that the order of the trial court should be affirmed. First, the *Rodriguez v. Lemus*, 257 N.C. App. 493, 810 S.E.2d 1 (2018), opinion upon which Plaintiff relies was wrongly decided. The legislative history of N.C. Gen. Stat. § 52-13(a) demonstrates that the General Assembly intended for it to make an inference by the jury of pre-separation

conduct from evidence of post-separation conduct impossible. Second, even applying *Rodriguez*, I would hold that the proffered evidence of post-separation conduct in this case is insufficient to support an inference that it was Defendant who engaged in tortious pre-separation conduct with Plaintiff's wife. Any conclusion to that effect by a jury would be based on nothing more than mere conjecture.

A. *Rodriguez* Was Wrongly Decided

¶ 73 As the *Rodriguez* Court highlighted, "[i]n 2009, the General Assembly codified alienation of affection and criminal conversation in a statute specifically limiting these torts to arise only from acts committed prior to a couple's separation[.]" 257 N.C. App. at 496, 810 S.E.2d at 4. The new section added to Chapter 52 of the North Carolina General Statutes provides in relevant part: "No act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent." N.C. Gen. Stat. § 52-13(a) (2021). The Court in *Rodriguez* reasoned that the effect of this section is that claims of alienation of affection and criminal conversation "cannot be sustained without evidence of pre-separation acts satisfying the elements of these respective torts." 257 N.C. App. at 497, 810 S.E.2d at 4.

¶ 74 The Court in *Rodriguez* went on to state that it was "less clear [] whether evidence of post-separation acts is admissible to support an inference of pre-separation acts constituting alienation of affection or criminal conversation." *Id.* This is essentially a question of statutory interpretation since N.C. Gen. Stat. § 52-13 dictates that liability only attaches to pre-separation conduct.

¶ 75 "The principal goal of statutory construction is to accomplish the legislative intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (internal marks and citations omitted).

¶ 76 Here, the plain language of N.C. Gen. Stat. § 52-13 does not give a clear and unambiguous answer to the question posited by the *Rodriguez* Court and therefore the next step is to refer to the statute's legislative history. *See, e.g.*, *Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co.*, 250 N.C. App. 280, 286, 791 S.E.2d 906, 911 (2016) ("When this Court is called upon to interpret a statute, we must examine the text, consult the canons of statutory construction, and consider any relevant legislative

history, regardless of whether the parties adequately referenced these sources of statutory construction in their briefs. To do otherwise would permit the parties, through omission in their briefs, to steer our interpretation of the law in violation of the axiomatic rule that while litigants can stipulate to the facts in a case, no party can stipulate to what the law is. That is for the court to decide.")

¶ 77 The relevant legislative history of N.C. Gen. Stat. § 52-13 is as follows:

¶ 78 During the 2009 legislative session, a bill was introduced in the North Carolina House of Representatives to amend Chapter 52 of the General Statutes, by adding a new section delineating procedures in causes of action for alienation of affection and criminal conversation. H.B. 1110, Gen. Assemb., Sess. 2009 (N.C.) (Filed), https://www.ncleg.gov/Sessions/2009/Bills/House/PDF/H1110v0.pdf. After the bill was debated and passed its second reading in the House, an amendment was introduced on the House floor to add the following provision:

> Nothing herein shall prevent a court from considering incidents of post-separation acts by defendant as corroborating evidence supporting other evidence that defendant committed acts during the marriage and prior to the date of separation which would give rise to a cause of action for alienation of affection or criminal conversation.

H.B. 1110, Gen. Assemb., Sess. 2009 (N.C.) (A3), https://webservices.ncleg.gov/ ViewBillDocument/2009/827/0/A3.

¶ 79 This proposed amendment was intended to align the treatment of post-separation evidence in alienation of affection and criminal conversation cases with that of the existing statutory treatment of post-separation marital misconduct as a factor in post-separation support and alimony decisions. Indeed, the post-separation support statute provided, as it still does today, the following:

> Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as *corroborating* evidence supporting *other* evidence that marital misconduct occurred during the marriage and prior to the date of separation.

N.C. Gen. Stat. § 50-16.2A(e) (2009) (emphasis added). The alimony statute included, as it still does today, an identical provision when listing marital misconduct of either spouse as a relevant factor the trial court should consider in determining the amount, duration, and manner of payment of alimony. N.C. Gen. Stat. § 50-16.3A(b)(1) (2009).

¶ 80 Crucially, the proposed amendment failed. Accordingly, the *Rodriguez* holding permitting the use of post-separation conduct evidence to support findings or inferences of pre-separation misconduct is fundamentally inconsistent with the legislative intent behind N.C. Gen. Stat. § 52-13(a).

¶ 81 I note here that my above analysis does not run afoul of our Supreme Court's guidance regarding the use of legislative intent where there is a failure to act on behalf of the legislature. In *North Carolina Department of Corrections v. North Carolina Medical Board*, 363 N.C. 189, 675 S.E.2d 641 (2009), our Supreme Court delineated the following:

> First, this Court has previously recognized the rule "that ordinarily the intent of the legislature is indicated by its actions, and not by its failure to act." *Styers v. Phillips*, 277 N.C. 460, 472-73, 178 S.E.2d 583, 589-91 (1971) (" 'Courts can find the intent of the legislature only in the acts which are in fact passed, and not in those which are never voted upon in Congress, but which are simply proposed in committee.' " (quoting *United States v. Allen*, 179 F. 13, 19 (8th Cir. 1910), *aff'd as modified on other grounds by Goat v. United States*, 224 U.S. 458 (1912), *and by Deming Inv. Co. v. United States*, 224 U.S. 471 (1912))). That a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite. *Id.* at 472, 178 S.E.2d at 589 (declining " 'to attribute any such attitude to the Legislature' " and noting that a party's argument as to why a bill failed to pass " 'can be nothing more than conjecture' " and " '[m]any other reasons for legislative inaction readily suggest themselves' " (quoting *Moore v. Bd. of Chosen Freeholders*, 76 N.J. Super. 396, 404, 184 A.2d 748, 752, *modified on other grounds*, 39 N.J. 26, 186 A.2d 676 (1962))). Finally, "[i]n determining legislative intent, this Court does not look to the record of the internal deliberations of committees of the legislature considering proposed legislation." *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991).

Id. at 202, 675 S.E.2d at 650.

¶ 82 Here, the proposed amendment was voted on by the entire North Carolina House of Representatives and the bill was voted on and passed

by the General Assembly. This is not the case of a legislature failing to pass a bill or a bill that never left committee. Rather, the North Carolina House of Representatives had the opportunity to permit the use of post-separation evidence to corroborate pre-separation conduct and voted *not* to allow the use of such evidence in civil actions for alienation of affection and criminal conversation. By looking at the failed amendment, I am drawing on legislative history more substantial than the internal deliberations of a committee or, as another example, the testimony by a member of the legislature about a bill that failed to pass, as was the case in *Styers v. Phillips*, 277 N.C. 460, 178 S.E.2d 583, which our Supreme Court cited when outlining the rule that it is actions and not inactions that indicate the intent of the legislature.

¶ 83 Furthermore, a failed amendment to a later-enacted bill is exactly the type of legislative history our Court should draw on when interpreting an ambiguous statute. After all, legislative history is defined both as "[t]he proceedings leading to the enactment of a statute, including hearings, committee reports, and floor debates[,]" *Legislative History*, Black's Law Dictionary (11th ed. 2019), and "the textual, political, and archival record of a statute or bill as it moves from idea to draft to bill, then through the process of introduction or sponsorship, committee review, debate, amendment, voting, passage to the other chamber for a similar process, reconciliation if needed, executive treatment and, if needed, legislative response[,]" *Legislative History*, The Wolters Kluwer Bouvier Law Dictionary (Desk ed. 2012).

B. Even Applying *Rodriguez*, I Would Hold That Summary Judgment Was Proper

¶ 84 Ultimately, although *Rodriguez* conflicts with the legislative intent behind N.C. Gen. Stat. § 52-13(a), our Court is bound by its holding per our Supreme Court's directive in *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), that a panel of this Court cannot overrule a previous panel's decision. However, even applying *Rodriguez* to the case at bar, I would hold that summary judgment was proper and affirm the trial court because Plaintiff did not produce any evidence of pre-separation conduct that evidence of post-separation conduct can properly corroborate to give rise to more than mere conjecture.

1. Alienation of Affection Claim

¶ 85 "To establish a claim for alienation of affections, plaintiff's evidence must prove: (1) plaintiff and [his wife] were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the wrongful and malicious acts of

defendant produced the alienation of affections." *Darnell v. Rupplin*, 91 N.C. App. 349, 350, 371 S.E.2d 743, 745 (1988) (internal marks and citation omitted). "The plaintiff does not have to prove that his spouse had no affection for anyone else[,] . . . he only has to prove that his spouse had *some* genuine love and affection for him and that love and affection was lost as a result of defendant's wrongdoing." *Brown v. Hurley*, 124 N.C. App. 377, 380-81, 477 S.E.2d 234, 237 (1996) (emphasis in original). Furthermore, "[o]ne is not liable for merely becoming the object of the affections that are alienated from a spouse. There must be active participation, initiative or encouragement on the part of the defendant in causing one spouse's loss of the other spouse's affections for liability to arise." *Peake v. Shirley*, 109 N.C. App. 591, 594, 427 S.E.2d 885, 887 (1993).

¶ 86 As the majority notes, the issue here is with element three of Plaintiff's alienation of affection claim. Plaintiff has failed to produce any direct evidence *identifying Defendant* as the individual with whom Plaintiff's wife had an extramarital affair and sexual intercourse with prior to Plaintiff and his wife's separation on 16 December 2016. Assuming arguendo that evidence of an affair prior to Plaintiff and his wife separating equates to evidence of wrongful and malicious acts that alienated the affections of Plaintiff's wife, I would hold that the post-separation evidence Plaintiff produced about the relationship between his wife and Defendant that he argues corroborates the pre-separation evidence of marital misconduct gives rise to nothing more than conjecture. Even under *Rodriguez*, this evidence does not support Plaintiff's claims:

> [E]vidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct and can support claims for alienation of affection and criminal conversation, *so long as the evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture*.

257 N.C. App. at 498, 810 S.E.2d at 5 (emphasis added).

¶ 87 Specifically, I disagree with Plaintiff's argument that the fact his wife and Defendant began a relationship in April 2017 following their separation in December 2016 is sufficient post-separation evidence to conclude that it was in fact *Defendant* who Plaintiff's wife was having an affair with prior to their separation. Plaintiff's argument is nothing more than conjecture.

¶ 88 First, beyond Plaintiff's wife's own admission, there is no contemporaneous, pre-separation evidence of an affair. Instead, Plaintiff alleges that in January 2016 he viewed sexually explicit text messages on his

wife's phone being exchanged with a contact labeled "Bestie." These text messages though are not a part of the record and apparently have not been produced in discovery, nor has the *phone number* linked to the "Bestie" contact, or the "Bestie" contact itself. Plaintiff has every incentive in this case to provide this evidence and as yet has not supplied it. Without more, concluding that Defendant was "Bestie" based on the post-separation evidence in the record would be to reach a conclusion based on nothing more than an accusation. The simple existence of the "Bestie" contact in Plaintiff's wife's phone does not equate to pre-separation evidence of *Defendant* being the individual on the other end of the "Bestie" contact—this pre-separation evidence gives rise to nothing more than mere conjecture.

¶ 89 Second, in January 2016 when Plaintiff's wife admitted to having an affair and sexual intercourse with another individual, Plaintiff's wife offered two possibilities: that the affair was with someone named Dustin or with a co-worker. Plaintiff searched for a "Dustin" within his wife's social media accounts and could find nothing, but Plaintiff did not try and ascertain whether there was a "Dustin" working at Merck Durham, where Plaintiff's wife worked. Plaintiff's wife also told Plaintiff at one point that the co-worker she had an affair with moved to Atlanta, which Plaintiff believed to the point he objected to his wife taking a girls' weekend trip to Atlanta. Plaintiff himself suspected his wife potentially had an affair during their marriage with an individual named Jonathan Hartman because Mr. Hartman's wife sent Plaintiff's wife a message about interfering with the Hartmans' marriage. Therefore, the fact that Plaintiff's wife and Plaintiff himself identified persons other than Defendant as men Plaintiff's wife might have had an affair with indicates in part that Plaintiff's assertion that Defendant was Plaintiff's wife's paramour was no more than mere conjecture.

¶ 90 Third, Plaintiff has alleged several actions by Defendant or his wife as evidence of pre-separation conduct that could be corroborated by evidence of post-separation conduct to support his claims. There was no evidence properly before the trial court, however, of a number of these actions, specifically that Plaintiff's wife altered her appearance at work, that Plaintiff's wife and Defendant ate lunch together at work, that Defendant gave Plaintiff's wife a gift, and that Defendant joined the same gym as Plaintiff's wife.[2] Defendant did admit to seeing Plaintiff's wife

2. Plaintiff identified these actions from the depositions of Plaintiff's wife and Defendant's wife, which are contained in the Rule 11(c) supplement to the record. Per Part A of the majority's opinion in which I concur, these depositions were not certified until after the summary judgment hearing, were not considered by the trial court in granting

outside of the workplace in 2016 and earlier in his interrogatories, but only during group business lunches and on two or three occasions in the context of birthday or farewell dinners attended by other co-workers.

¶ 91 When considering other evidence that is a part of the record, during his deposition, Plaintiff could not recall how many solo vacations his wife took prior to January 2016, when they occurred, or where she went. Following the admission of an affair, Plaintiff's wife would occasionally stay the night at a female co-worker's house, and Plaintiff admitted that she told him the name of this co-worker. Plaintiff never gathered any information to verify his wife's location before or after the admission of the affair. Furthermore, Plaintiff could not identify any third parties who could provide information about when his wife met with someone to have an affair or who witnessed his wife having inappropriate interactions with other men.

¶ 92 Additionally, in his sworn interrogatories, Defendant stated that his relationship with Plaintiff's wife became romantic on 1 April 2017 after they had a daytime date picking strawberries, they had sex for the first time on 6 April 2017 after dinner at his apartment, which was also the first time Plaintiff's wife stayed overnight at Defendant's apartment, and the first time he stayed at Plaintiff's wife's apartment was in late summer or fall of 2017.

¶ 93 Altogether, the discovery that Plaintiff gathered included: (1) Defendant's phone records from September 2015 to February 2017 supplied by Verizon Wireless and Defendant's wife; (2) one set of 37 interrogatories completed by Defendant in which he detailed in part the times he saw Plaintiff's wife outside of work prior to their divorce; (3) one set of 24 requests for admission completed by Defendant; (4) text messages between Plaintiff and his wife from April to July 2018; and (5) Defendant's Facebook records ranging from September 2014 to April 2018. Plaintiff's discovery was expansive, and no direct evidence was produced that identified Defendant as Plaintiff's wife's paramour, let alone any circumstantial evidence of pre-separation conduct that could be corroborated by evidence of post-separation conduct.

¶ 94 That all of Plaintiff's pre-separation and post-separation evidence amounts to nothing more than mere conjecture is highlighted by Plaintiff himself in his deposition:

Defendant's motion for summary judgment, and therefore neither one informs this Court's review on appeal.

> Q. I think the last question I asked was how did you come to the conclusion that [Defendant] was the paramour?
>
> A. So in the spring of 2017, she told me that she was dating someone that she worked with.
>
> Q. Okay.
>
> A. *And I put two and two together.*
>
> Q. What do you mean when you say you put two and two together?
>
> A. Well, she was having an affair. She had already told me she was having an affair with someone she worked with. And then she told me that she was dating only a few months after our separation.

(Emphasis added.)

¶ 95 Even considering the evidence in the light most favorable to Plaintiff as the nonmoving party, I would hold that Defendant met his burden of proving Plaintiff cannot produce evidence to support the third element of his alienation of affection claim, especially given that under *Rodriguez*, the type of evidence being proffered gives rise to nothing more than mere conjecture.

2. Criminal Conversation Claim

¶ 96 To establish a claim for criminal conversation, plaintiff's evidence must establish "the actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture." *Brown*, 124 N.C. App. at 380, 477 S.E.2d at 237. Additionally, in a case

> [w]here adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations.

In re Estate of Trogdon, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991) (internal citations omitted). Evidence of sexual intercourse must rise above mere conjecture and "if a plaintiff can show opportunity and inclination, it follows that such evidence will tend to support a conclusion that more than 'mere conjecture' exists to prove sexual intercourse by

the parties." *Coachman v. Gould*, 122 N.C. App. 443, 447, 470 S.E.2d 560, 563 (1996).

¶ 97 The issue here is with element two of Plaintiff's criminal conversation claim. Again, Plaintiff has failed to produce any direct evidence *identifying Defendant* as the individual with whom Plaintiff's wife had sexual intercourse with prior to Plaintiff and his wife separating. Plaintiff relies on the same post-separation evidence he argues corroborates the same pre-separation evidence conduct for this claim as he did his alienation of affection claim. Accordingly, for all of the reasons delineated *supra*, I would hold that the evidence does not rise above mere conjecture.

¶ 98 Particularly given that criminal conversation acts almost as a strict liability tort, a plaintiff must produce evidence that *the named defendant* had an adulterous inclination or disposition and had the opportunity to act in satisfaction of this adulterous inclination. Here, Plaintiff has produced no evidence either post-separation or pre-separation that rises above merely conjecturing that Defendant has such an inclination. Similarly, Plaintiff has produced no evidence either post-separation or pre-separation of Defendant's opportunity to act on his adulterous inclinations. The times Plaintiff demonstrated that Plaintiff's wife and Defendant were together prior to the separation occurred at work or in the setting of work gatherings—all spaces where other people were present. The only other pre-separation evidence that even touches on opportunity is Plaintiff's testimony in his deposition that his wife took solo vacations. Plaintiff, however, provided no evidence of when or where these vacations took place, let alone evidence that Defendant was present at these vacations or even away from his own home during the same timeframes.

¶ 99 Therefore, even considering the evidence in the light most favorable to Plaintiff as the nonmoving party, I would hold that Defendant met his burden of proving Plaintiff cannot produce evidence to support the second element of his criminal conversation claim, and the evidence offered only gives rise to mere conjecture of sexual intercourse between Defendant and Plaintiff's wife.

III. Conclusion

¶ 100 Plaintiff's allegations for both claims lack adequate evidentiary support. Mere conjecture is insufficient to withstand summary judgment. As Defendant met his burden of showing that Plaintiff cannot produce evidence to support the third element of his alienation of affections claim and the second element of his criminal conversations claim, I would hold that the trial court properly granted Defendant's motion for summary judgment and would therefore affirm the order of the trial court.

BIGGS v. BROOKS

[285 N.C. App. 64, 2022-NCCOA-548]

LISA BIGGS, Individually and as Administrator,
ESTATE OF KELWIN BIGGS, Plaintiffs
v.
DARYL BROOKS, NATHANIEL BROOKS, SR., KYLE OLLIS, Individually, and
BOULEVARD PRE-OWNED, INC., Defendants

No. COA21-653

Filed 16 August 2022

1. Negligence—fatal car accident—proof of ownership theory of liability—no agency relationship between vehicle's legal owner and driver

Where a used car dealer unintentionally remained the legal owner of a vehicle after its sale—despite processing the sale and title transfer paperwork and relinquishing authority and control over the vehicle to the buyer's relative who drove the car off the lot—due to the title transfer being rejected by the Division of Motor Vehicles because of a missing piece of information, the dealer was not liable for negligence under a proof of ownership theory for a fatal accident two months later where there was undisputed evidence that no agency relationship existed between the dealer and the buyer's relative (who was driving the car while impaired and with a suspended license at the time of the accident).

2. Negligence—fatal car accident—negligent entrustment theory of liability—legal owner did not have control or authority over vehicle

Where a used car dealer unintentionally remained the legal owner of a vehicle after its sale—despite processing the sale and title transfer paperwork and relinquishing authority and control over the vehicle to the buyer's relative who drove it off the lot—due to the title transfer being rejected by the Department of Motor Vehicles because of a missing piece of information, the dealer was not liable for a fatal accident that occurred two months later under a negligent entrustment theory where there was undisputed evidence that, at the time of the accident, the buyer's relative (who drove the car while impaired and with a suspended license) was entrusted with the car by the buyer, not the dealer.

Appeal by plaintiff from order entered 4 May 2017 by Judge W. Osmond Smith, III, in Durham County Superior Court. Heard in the Court of Appeals 27 April 2022.

BIGGS v. BROOKS

[285 N.C. App. 64, 2022-NCCOA-548]

Couch & Associates, PC, by Finesse G. Couch and C. Destine A. Couch, for plaintiff-appellant.

Sue, Anderson & Bordman, LLP, by Stephanie W. Anderson, for defendants-appellees.

DIETZ, Judge.

¶ 1 In January 2015, Boulevard Pre-Owned, Inc., a used car business, sold a 1995 Camaro to Nathaniel Brooks. Nathaniel Brooks and Boulevard executed a bill of sale; signed and notarized title transfer forms; and executed various other documents typically accompanying the sale of an automobile, such as insurance and registration paperwork. After executing this paperwork, an adult relative of Nathaniel Brooks, Daryl Brooks, arrived at the dealership and drove the Camaro off the lot.

¶ 2 Shortly after the sale, the North Carolina Division of Motor Vehicles rejected the title transfer paperwork because Boulevard had misplaced its copy of Nathaniel Brooks's driver's license. Boulevard tried unsuccessfully to contact Nathaniel Brooks multiple times between January and March 2015 to obtain a replacement copy.

¶ 3 Later in March 2015, Daryl Brooks was driving the Camaro while impaired and caused a serious automobile accident that led to the death of Kelwin Biggs.

¶ 4 Lisa Biggs, individually and as the representative of Kelwin Biggs, brought claims for negligence and negligent entrustment against Boulevard and its owner, Kyle Ollis. Biggs relied on a statute, N.C. Gen. Stat. § 20-71.1, providing that proof of ownership of a motor vehicle—in this case the title and registration that had not yet been transferred to Nathaniel Brooks—was *prima facie* evidence that the motor vehicle was being operated with the authority, consent, and knowledge of Boulevard, the owner, and "being operated by and under the control of a person for whose conduct the owner was legally responsible."

¶ 5 The trial court granted summary judgment for Boulevard and Ollis on these negligence claims. Following entry of final judgment against other parties in the case, Biggs appealed.

¶ 6 We affirm. As explained below, Boulevard and Ollis presented undisputed evidence that Boulevard relinquished authority and control over the Camaro when it completed the sale and released the Camaro to the buyer. Under controlling precedent from this Court, because Biggs did

not forecast any evidence that rebutted Boulevard's evidence and created a genuine issue of material fact on this issue, Boulevard and Ollis were entitled to judgment as a matter of law on these negligence claims. We therefore affirm the trial court's summary judgment order.

Facts and Procedural History

¶ 7 Defendant Boulevard Pre-Owned, Inc. is a used car dealership. Defendant Kyle Ollis is the president and owner of Boulevard.

¶ 8 In January 2015, Boulevard sold a used 1995 Chevrolet Camaro to Nathaniel Brooks. At the time of the sale, the parties executed a bill of sale; signed and notarized reassignment of title paperwork on the form required by the North Carolina Division of Motor Vehicles; and signed various other paperwork typically accompanying an automobile sale such as an arbitration agreement governing the sale, and insurance and vehicle registration paperwork.

¶ 9 Following the sale, Daryl Brooks—who is an adult, younger relative of Nathaniel Brooks according to the record—arrived at the dealership and picked up the Camaro.

¶ 10 Although the parties undisputedly intended to transfer title of the Camaro as part of this sale, that transfer did not happen. When Boulevard submitted the title transfer paperwork to the Division of Motor Vehicles, Boulevard misplaced its copy of Nathaniel Brooks's driver's license, and the DMV rejected the title transfer for insufficient documentation. From late January through early March, Boulevard called Nathaniel Brooks eight times seeking a replacement copy of his driver's license but never heard back.

¶ 11 Two months after the sale, on 11 March 2015, Daryl Brooks was driving the Camaro. He was impaired at the time. At a speed of approximately 80 miles per hour, Brooks collided with the back of a vehicle occupied by Lisa and Kelwin Biggs. The crash pushed the Biggs's vehicle into oncoming traffic and Kelwin Biggs suffered fatal injuries.

¶ 12 At the time of the collision, Daryl Brooks was driving with a suspended license due to earlier offenses of driving while impaired, driving while license revoked, and failure to appear.

¶ 13 As part of the crash investigation, the State notified Boulevard that a vehicle still titled and registered with the company had been involved in an accident. The DMV's License and Theft Bureau later investigated and cited Boulevard for failure to timely deliver title as part of the sale.

¶ 14 After obtaining a copy of Nathaniel Brooks's driver's license, DMV ultimately transferred title of the Camaro to Nathaniel Brooks in late April 2015, long after the collision involving the Camaro.

¶ 15 Lisa Biggs, individually and as representative of her husband's estate, sued Boulevard and its owner, Kyle Ollis, for negligence, negligent entrustment, emotional distress, gross negligence, and punitive damages. Biggs also brought claims against both Daryl Brooks and Nathaniel Brooks.

¶ 16 At summary judgment, the trial court dismissed all claims against Boulevard and Ollis. Biggs sought to immediately appeal that ruling, but this Court dismissed that interlocutory appeal for lack of jurisdiction. *Biggs v. Brooks*, 261 N.C. App. 773, 818 S.E.2d 643 (2018) (unpublished).

¶ 17 The case against the remaining defendants was stayed repeatedly over the next several years because of Daryl Brooks's pending criminal trial. In 2017, Brooks was convicted and sentenced for second degree murder and other related offenses in connection with the crash.

¶ 18 Following exhaustion of the criminal appeal process, the civil case against Daryl Brooks proceeded to trial. After the trial court entered judgment finding Daryl Brooks liable for wrongful death in causing the fatal collision, the court conducted a bench trial on compensatory and punitive damages and awarded $10,000,000 in damages.

¶ 19 In June 2021, following entry of final judgment on all remaining claims in this case, Biggs appealed the trial court's May 2017 order granting summary judgment in favor of Boulevard and Kyle Ollis.

Analysis

¶ 20 Biggs challenges the trial court's order granting summary judgment in favor of Defendants Boulevard Pre-Owned, Inc. and Kyle Ollis. We review that order *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

¶ 21 Summary judgment is proper when "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). To survive a motion for summary judgment, the non-movant must forecast sufficient evidence to create a genuine issue of material fact on all essential elements of the asserted claims. *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992).

I. Agency theory of liability

¶ 22 **[1]** We begin by addressing the various negligence claims that depend on an agency relationship between Daryl Brooks and Boulevard Pre-Owned, Inc.

¶ 23 Biggs asserts that Boulevard is liable for Daryl Brooks's negligence under an agency theory that stems from a statutory provision governing ownership of motor vehicles. By law, proof of ownership of a motor vehicle at the time of a collision is *prima facie* evidence that the motor vehicle was being operated with the authority, consent, and knowledge of the owner and "being operated by and under the control of a person for whose conduct the owner was legally responsible":

> (a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.
>
> (b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment.

N.C. Gen. Stat. § 20-71.1.

¶ 24 "The purpose of the section is to facilitate proof of ownership and agency where a vehicle is operated by one other than the owner." *Winston v. Brodie*, 134 N.C. App. 260, 266, 517 S.E.2d 203, 207 (1999). Proof of ownership under Section 20-71.1 "creates a *prima facie* case of agency that permits, but does not compel a finding for plaintiff." *Id.* Importantly, Section 20-71.1 is "a rule of evidence and not substantive law." *Id.* This means that the plaintiff "continues to carry the burden of proving an agency relationship between the driver and owner at the time of the driver's negligence." *Id.* The defendant "at no point carries the burden of proof." *Id.*

¶ 25 As a result, when a plaintiff relies on proof of ownership through this statute, "the defendant may offer positive, contradicting evidence which, if believed, would establish the absence of an agency relationship." *Id.* This contradictory evidence entitles the defendant to "a peremptory instruction that if the jury does believe the contrary evidence, it must find for defendant on the agency issue." *Id.* In other words, when the defendant presents evidence contradicting this statutory agency principle, the "statutory presumption is not weighed against defendant's evidence by the trier of facts." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 756, 325 S.E.2d 223, 228 (1985). Instead, the plaintiff must present affirmative evidence supporting the agency theory. *Id.*

¶ 26 This, in turn, means that, at the summary judgment stage, when a defendant forecasts undisputed evidence that rebuts the agency relationship described by Section 20-71.1, the plaintiff must forecast at least some evidence, beyond the statute itself, that creates a genuine issue of material fact on this question. *See Thompson v. Three Guys Furniture Co.*, 122 N.C. App. 340, 345, 469 S.E.2d 583, 586 (1996). The plaintiff cannot rely solely on the statute in the face of undisputed counter-evidence, because the statutory provision alone cannot be weighed against competing evidence at trial. *DeArmon*, 312 N.C. at 756, 325 S.E.2d at 228.

¶ 27 So, for example, in *Thompson*, this Court held that summary judgment for the defendant was inappropriate after the defendant presented evidence refuting an agency relationship because "plaintiff has submitted affidavits pursuant to Rule 56(e), and thus has presented evidence *in addition to* the *prima facie* showing of agency provided by G.S. § 20–71.1." *Thompson*, 122 N.C. App. at 345, 469 S.E.2d at 586 (emphasis added). Without that affidavit, raising credibility questions with defendant's own evidence, the statute alone would have been insufficient to survive summary judgment. *Id.*

¶ 28 Here, the unique facts of this case make it one of the rare cases where there are no genuine issues of fact, and thus the trial court properly entered summary judgment in favor of the defendants. It is undisputed that, on 8 January 2015, Nathaniel Brooks and Boulevard Pre-Owned, Inc. signed various documents collectively representing the sale and intended transfer of ownership of the Camaro from Boulevard to Nathaniel Brooks. These included a bill of sale for a total purchase price of $7,500 signed by both Brooks and Boulevard; a dealer's reassignment of title on the form issued by the North Carolina Division of Motor Vehicles, signed and notarized by both Brooks and Boulevard; vehicle registration information necessary to register the vehicle in Brooks's name; and various other fully executed paperwork that often accompanies the purchase

of an automobile, such as an arbitration agreement concerning the sale transaction, and various loan and insurance paperwork.

¶ 29 Boulevard and Kyle Ollis also submitted an affidavit from Ollis describing the sale of the Camaro to Nathaniel Brooks on 8 January 2015 and testifying that Daryl Brooks had no connection to Boulevard and was not an employee or agent of Boulevard at any time.

¶ 30 This undisputed evidence demonstrates, as a matter of law, that there was no agency relationship between Boulevard and Daryl Brooks. Although the formal transfer of title to the Camaro did not occur because Boulevard misplaced its copy of Nathaniel Brooks's driver's license—and thus was unable to complete the title transfer through the DMV—Boulevard relinquished authority and control over the Camaro when it completed the sale and released the Camaro to the buyer. Accordingly, the trial court properly entered summary judgment in favor of Boulevard and Ollis on all claims that depended on the agency theory of liability.[1]

II. Negligent entrustment theory

¶ 31 **[2]** We next examine the negligent entrustment claim. Biggs contends that she forecast sufficient evidence of the direct negligence of Boulevard based on the company's negligent entrustment of the Camaro to Daryl Brooks, who had a suspended license and a history of driving while impaired.

¶ 32 "Negligent entrustment occurs when the owner of an automobile entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver who is likely to cause injury to others in its use." *Thompson*, 122 N.C. App. at 346, 469 S.E.2d at 586–87.

¶ 33 There are two fatal flaws with this negligent entrustment theory. First, as explained above, undisputed evidence demonstrates that Boulevard relinquished authority and control over the Camaro when it completed the sale and title transfer paperwork on 8 January 2015, and that Daryl Brooks, when he drove the Camaro off Boulevard's lot, was doing so on behalf of his relative, Nathaniel Brooks, who was the buyer

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1. Biggs also argues that under "North Carolina General Statutes § 20-279.21(b)(2), the owner of the vehicle is liable for the negligent conduct of the driver where the victim's damages were 'caused by an accident and resulting from the ownership, maintenance or use of' the owner's vehicle."

Section 20-279.21 is not a liability provision; it is an insurance coverage provision. Biggs did not raise this insurance coverage issue in the trial court and cannot assert it for the first time on appeal. N.C. R. App. P. 10. We therefore reject this argument as unpreserved.

of the Camaro and now had authority and control over the vehicle. Thus, the undisputed evidence demonstrates that it was not Boulevard who entrusted Daryl Brooks with the use of the Camaro at that time, but instead Nathaniel Brooks, who had recently purchased the vehicle.

¶ 34 Moreover, the collision at issue in this case did not occur when Daryl Brooks drove the Camaro off Boulevard's lot following the sale. It occurred more than two months later, on 11 March 2015. There is no evidence in the record that Boulevard entrusted Daryl Brooks with the use of the Camaro—over which it relinquished authority and control two months earlier—at the time of the collision. Accordingly, the trial court did not err in granting summary judgment in favor of Boulevard and Ollis on the negligent entrustment claim as well.

III. Remaining claims, legal theories, and requests for damages

¶ 35 Having determined that the trial court properly entered summary judgment in favor of Boulevard and Ollis on all of Biggs's negligence and negligent entrustment claims, we need not address Biggs's other arguments on appeal—including issues of piercing the corporate veil and the award of costs—because these issues necessarily depended on rejection of the trial court's summary judgment ruling on the negligence claims. We therefore affirm the trial court's order in its entirety.

Conclusion

We affirm the trial court's order.

AFFIRMED.

Judges GRIFFIN and JACKSON concur.

GARY W. BLAYLOCK, PLAINTIFF
v.
AKG NORTH AMERICA, DEFENDANT

No. COA21-607

Filed 16 August 2022

1. Appeal and Error—jurisdiction to hear appeal—late notice of appeal—waiver by appellee

The Court of Appeals had jurisdiction to hear plaintiff's appeal from the trial court's order granting defendant's motion to dismiss where plaintiff filed his notice of appeal more than four months after entry of the trial court's order (which would normally be untimely pursuant to Appellate Rule 3(c)), because defendant failed to argue that the appeal was untimely or to offer proof of actual notice—indeed, defendant conceded that "Plaintiff timely appealed."

2. Jurisdiction—personal—lack of service—general appearance—removal to federal court

In a civil action filed by plaintiff against his former employer, the trial court did not err by dismissing plaintiff's claims for lack of personal jurisdiction based on plaintiff's failure to properly serve defendant with process where, by statute, defendant's filings requesting extensions of time did not constitute general appearances and where defendant's removal of the case to federal court (and filing of the required notice in the state court) also did not constitute a general appearance.

Appeal by Plaintiff from order entered 11 December 2020 by Judge John M. Dunlow in Alamance County Superior Court. Heard in the Court of Appeals 22 March 2022.

Gary Blaylock, Plaintiff-Appellant, pro se.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Zebulon D. Anderson and David R. Ortiz, for Defendant-Appellee.

JACKSON, Judge.

¶ 1 Plaintiff, Gary Blaylock, appeals from an order granting Defendant AKG North America, Inc.'s motions to dismiss under North Carolina Rules of Civil Procedure 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6). After careful review, we affirm.

I. Background

¶ 2 Gary Blaylock ("Plaintiff") was hired by AKG North America ("Defendant") in 2017. Plaintiff alleges that Defendant fired him for repeatedly complaining about the "sexual harassment, hostile work environment, and absence of Supervisors [sic] attempt to resolve the issues."

¶ 3 On 18 December 2019, Plaintiff filed his original complaint in Alamance County Superior Court and the summons was issued that day. On 23 December 2019, Plaintiff's attempt to serve Defendant failed when the Alamance County Sheriff returned the summons, noting that Defendant had not been served because "[t]he address given is in Orange Co[unty]." Thereafter, in the nearly 12 months this case was pending, Plaintiff never properly served Defendant. On 17 January 2020, Defendant removed the action to the Middle District of North Carolina based on federal claims alleged in Plaintiff's complaint, filing notices of removal in both the state and federal courts. In the notice of removal before the federal court, Defendant raised, *inter alia*, that Plaintiff had not effected service of process.

¶ 4 After removal, on 7 February 2020, Defendant sought an extension of time to answer or otherwise respond to the Complaint, explaining that it had not been served by Plaintiff. Plaintiff, however, filed a motion to remand the action back to state court. Defendant sought a second extension of time on 5 March 2020, again explaining that it had not yet been served by Plaintiff. Thereafter, Defendant filed a brief in opposition to Plaintiff's motion to remand, arguing that removal was proper for the reasons stated in its notice of removal, namely the federal claims in Plaintiff's complaint. However, in a hearing before the federal court, Plaintiff "disavow[ed] any reliance whatsoever on federal law in his Complaint," and the motion to remand was granted.

¶ 5 On 5 August 2020, Plaintiff mailed the complaint and summons to Defendant's litigation counsel, and the complaint was received by counsel on 10 August 2020. However, on 7 August 2020, Defendant had filed a motion to dismiss the original complaint under Rule 12(b). In response to this motion, Plaintiff amended his complaint on 12 August 2020. Defendant's litigation counsel received this amended complaint at some point between 12 August and 18 August 2020.[1] On 8 September 2020, Defendant filed a motion to dismiss the amended complaint on the same Rule 12(b) grounds.

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1. The certificate of service in the amended complaint indicates it was served by hand on 12 August, but Defendant alleges that its litigation counsel received the amended complaint by email on 17 August and by certified mail on 18 August 2020.

¶ 6 On 8 December 2020, a hearing was conducted on Defendant's motion to dismiss. Plaintiff filed a motion to amend his complaint again that same morning, but the trial court informed Plaintiff that the motion was not properly before the court. Defendant's counsel told the trial court that Plaintiff was on notice of the defective service because Defendant raised the absence of service in its filings, including in both motions for extension of time and the notice of removal in federal court, and "at all times we've made it clear to Mr. Blaylock and the Court . . . that there hasn't been service[.]" After hearing from both parties, on 11 December 2020, the trial court granted Defendant's motion to dismiss under Rules 12(b)(2), 12(b)(4), and 12(b)(5), and under 12(b)(6) as an "additional and independent basis for dismissal[.]"

¶ 7 Plaintiff appealed to this Court on 16 April 2021.

II. Jurisdiction

¶ 8 **[1]** We must first address whether we have jurisdiction to hear this appeal. Although Plaintiff's notice of appeal was filed greater than four months after the trial court's order was entered, which ordinarily would be untimely under North Carolina Rule of Appellate Procedure 3(c), the record on appeal does not indicate the date the order was served or contain a certificate of service.

¶ 9 It is true that "[t]he appellant has the burden to see that all necessary papers are before the appellate court." *Ribble v. Ribble*, 180 N.C. App. 341, 342, 637 S.E.2d 239, 240 (2006) (internal quotation and citation omitted). However, in similar circumstances, we have held that "where there is no certificate of service in the record showing *when* appellant was served with the trial court judgment, *appellee* must show that appellant received actual notice of the judgment more than thirty days before filing notice of appeal in order to warrant dismissal of the appeal." *In re Duvall*, 268 N.C. App. 14, 17, 834 S.E.2d 177, 180 (2019) (internal marks and citation omitted). Therefore, "unless the appellee argues that the appeal is untimely, and offers proof of actual notice, we may not dismiss." *Id.* (internal quotation and citation omitted). Here, Defendant-Appellee fails to argue the appeal is untimely or offer proof of actual notice. In fact, Defendant concedes that "Plaintiff timely appealed." Therefore, Defendant has waived Plaintiff's failure to include proof of service in the record, and this appeal is properly before us.

III. Discussion

¶ 10 Plaintiff argues that the trial court erred by (1) dismissing his claims for lack of personal jurisdiction, (2) dismissing his claims for failure to state a claim, (3) ruling on the merits of his claims after finding no

personal jurisdiction, (4) dismissing his complaint without considering lesser remedies, and (5) not allowing him to amend his complaint a second time. Because we hold that the trial court properly concluded that it did not have personal jurisdiction over Defendant and was required to dismiss the action, we need not address Defendant's other arguments.

A. Standard of Review

¶ 11 "This Court reviews questions of law implicated by a motion to dismiss for insufficiency of service of process *de novo*." *Patton v. Vogel*, 267 N.C. App. 254, 256, 833 S.E.2d 198, 201 (2019) (cleaned up). "On a motion to dismiss for insufficiency of process where the trial court enters an order without making findings of fact, our review is limited to determining whether, as a matter of law, the manner of service of process was correct." *Id.* at 257, 833 S.E.2d at 201 (internal quotation and citation omitted).

B. Dismissal for Lack of Personal Jurisdiction

¶ 12 **[2]** Plaintiff first argues that the trial court erred by dismissing his claims for lack of personal jurisdiction because personal jurisdiction was present and this argument was waived by Defendant. We disagree.

¶ 13 "Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." *Stewart v. Shipley*, 264 N.C. App. 241, 244, 825 S.E.2d 684, 686 (2019) (internal quotation and citation omitted). The methods for proper service of process are established by Rule 4 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, R. 4 (2021). A corporation may be served by mail or delivery to an officer, director, managing agent, or authorized service agent. *Id.* § 1A-1, R. 4(j)(6). Rule 4 must be "strictly enforced[,]" *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996), and "actual notice" cannot cure insufficient service of process, *Shipley*, 264 N.C. App. at 244, 825 S.E.2d at 686 ("While a defective service of process may give the defending party sufficient and actual notice of the proceedings, such actual notice does not give the court jurisdiction over the party.") (internal quotation and citation omitted)).

¶ 14 Plaintiff repeatedly admits that Defendant was not timely served in his brief.[2] Plaintiff takes the position that Defendant, who was unserved and therefore not required to respond to the suit, waived this

2. Plaintiff's brief contains the following: "AKG NORTH AMERICA . . . was not served[;]" "Defendant, AKG, had not been served[;]" and "[t]here is no indication that the Defendant was at any point brought into the action through service of process prior to removal; instead, it appears that the Defendant learned of its possible involvement through other means."

jurisdictional argument by appearing and filing motions in court. Specifically, Plaintiff argues that because Defendant (1) removed the case to federal court and (2) "sought and was granted two extensions of time, there must be a submission to the jurisdiction of the court in order for the court to grant any motion filed by the unserved Defendant[.]" We disagree with Plaintiff's position that that the filing of *any* motion or notice in court constitutes a waiver of service of process and consent to the court's jurisdiction.

¶ 15 Our General Statutes provide:

> A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:
>
> (1) Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance[.]

N.C. Gen. Stat. § 1-75.7(1) (2021). Therefore, if a defendant makes a "general appearance," the trial court has personal jurisdiction, even if service of process was defective. *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 247, 243 S.E.2d 412, 413, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978). Here, as an initial matter and notwithstanding the fact that the motions were filed in federal court, Plaintiff's argument that filing for extensions of time constitutes a general appearance is expressly contradicted by the statute. Therefore, whether Defendant's removal of the case to federal court constituted a general appearance is primarily at issue.

¶ 16 Our "[c]ourts have interpreted the concept of 'general appearance' liberally." *Woods v. Billy's Auto.*, 174 N.C. App. 808, 813, 622 S.E.2d 193, 197 (2005). "[I]f the defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, he has made a general appearance and has submitted himself to the jurisdiction of the court whether he intended to or not." *Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E.2d 279, 288 (1978). *See also Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 151, 203 S.E.2d 769, 773 (1974) (holding that that if a party "invoked the judgment of the court for any [] purpose [other than contesting service of process,] he made a general appearance and by so doing he submitted himself to the jurisdiction of the court") (subsequently amended by statute in N.C. Gen. Stat § 1-75.7(1) to allow for extensions of time). "In short, an appearance for any purpose other than to question the jurisdiction of the court is general." *Billy's Auto.*, 174 N.C. App. at 813, 622 S.E.2d

at 197 (internal marks and citation omitted). *See also In re Blalock*, 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951) ("[A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person.").

¶ 17 In order to constitute a general appearance, "[t]he appearance must be for a purpose in the cause, not a collateral purpose." *Bullard v. Bader*, 117 N.C. App. 299, 301, 450 S.E.2d 757, 759 (1994) ("The court will examine whether the defendant asked for or received some relief in the cause, participated in some step taken therein, or somehow became an actor in the cause.") (citation omitted). In cases where this Court has found a general appearance, typically, the lower court's discretion was invoked by the moving party or the court's authority was assented to without objection. *See*, *e.g.*, *Barnes v. Wells*, 165 N.C. App. 575, 579-580, 599 S.E.2d 585, 588-589 (2004) (collecting cases); *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 319, 438 S.E.2d 471, 474 (1994) (holding that the defendant generally appeared by participating in a divorce hearing, represented by counsel, without objection); *Bullard*, 117 N.C. App. at 301-02, 450 S.E.2d at 759 (holding that the defendant made a general appearance by submitting financial documents and a letter in a child support case because "Defendant submitted these documents for a purpose in the cause, and by so doing sought affirmative relief from the court on the issues of child support and visitation"); *Humphrey v. Sinnott*, 84 N.C. App. 263, 265, 352 S.E.2d 443, 445 (1987) (holding that the defendant's motion to transfer venue before asserting jurisdictional defenses "necessarily invoked the adjudicatory and discretionary power of the court as to the relief which he requested[,]" thereby constituting a general appearance). *But see Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 248, 468 S.E.2d 600, 604 (1996) (holding where the defendants "promptly alerted plaintiff to the jurisdictional problems" in their answer and then "engaged in discovery[,]" "[l]aw nor equity permits such actions alone to be considered a general appearance" and the plaintiff "had ample opportunity to cure any jurisdictional defects and was not unfairly prejudiced by defendants' actions").

¶ 18 The parties do not point to any binding North Carolina precedent, nor have we found any, addressing whether removal to federal court is a general appearance. This is therefore an issue of first impression.

¶ 19 "Removal" is a federal process that allows a state civil action to be removed to a federal district court if it has original jurisdiction. 28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be

removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."). Therefore, removal of a state action to a federal court is necessarily a question of jurisdiction.

¶ 20 Importantly, under the federal statute, defendants can remove a case to federal court by their own election, if the case could have been filed in federal court to begin with, and therefore, state courts do not actually exercise any discretion or adjudicatory authority in determining whether a case is removed to federal court or not. Once a defendant files a notice of removal with the state court, all further proceedings take place in federal court. *See* N.C. Gen. Stat. § 1A-1, R. 12(a)(2) (2021) ("Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded."). *See also* 28 U.S.C. § 1446(d) ("Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.").

¶ 21 Because the right of removal is governed by federal statute, the federal court determines if original jurisdiction has been properly established by the defendant. *See Kerley v. Standard Oil Co.*, 224 N.C. 465, 466, 31 S.E.2d 438, 439 (1944) ("The Federal Courts have final authority in matters of removal[.]"). *See also Comm. of Road Improvement v. St. Louis Sw. Ry. Co.*, 257 U.S. 547, 557-58 (1922) ("The question of removal under the federal statute is one for the consideration of the federal court. It is not concluded by the view of a state court as to what is a suit within the statute."); *Carden v. Owle Constr., LLC*, 218 N.C. App. 179, 183, 720 S.E.2d 825, 828 (2012) ("Removal of an action from a state court to a federal court is governed by federal law. The determination of whether a case is removable is a determination left to the federal court.").

¶ 22 Therefore, a North Carolina trial court does not exercise any adjudicatory or discretionary power when presented with a notice of removal. Consequently, filing such notice cannot constitute a "general appearance" by a defendant. Because we conclude that Defendant's filing of a notice removal was not a general appearance, we reject Plaintiff's argument that service of process defects were waived by Defendant.

¶ 23 Plaintiff next argues that, even if service of process was not waived by Defendant, he eventually cured the defect in service by serving Defendant's litigation counsel. We disagree.

¶ 24 As described above, Plaintiff did not serve Defendant properly after filing the original complaint on 18 December 2019. The Sheriff returned the summons to Plaintiff on 23 December 2019, noting that Defendant was not served. After the case was remanded to state court, Plaintiff had a third-party mail the summons[3] and complaint to Defendant's litigation counsel on 5 August 2020, nearly eight months after the complaint was filed. Thereafter, Plaintiff amended his complaint on 12 August 2020 and served the amended complaint upon Defendant's litigation counsel on or around 12 August 2020. Plaintiff does not cite any binding authority to support his argument that Defendant's litigation counsel was authorized to accept service on behalf of Defendant. Nonetheless, even assuming Defendant's litigation counsel was a proper party upon which to effectuate service on the corporation, Plaintiff's argument is fruitless. Plaintiff's second attempt to serve the original complaint to Defendant's counsel was well beyond the time allotted to serve process or seek an extension under Rule 4(d). Therefore, Plaintiff failed to serve Defendant and then subsequently failed to cure the defective service in a timely manner.

C. Dismissal for Failure to State a Claim

¶ 25 Because we affirm the trial court's dismissal for lack of personal jurisdiction and improper service of process pursuant to Rules 12(b)(2) and (b)(5), conclusions of the trial court that were separate and independent bases for dismissing Plaintiff's claims, we need not address whether dismissal was also proper under Defendant's Rule 12(b)(6) argument.

IV. Conclusion

¶ 26 Because Defendant was never properly served with service of process and did not generally appear before the trial court, the trial court properly concluded that it did not have personal jurisdiction over Defendant and was thereby required to dismiss the action. The trial court's order is therefore affirmed.

AFFIRMED.

Chief Judge STROUD and Judge HAMPSON concur.

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3. Nothing in the record indicates whether the original summons was ever reissued.

GASTON CNTY. BD. OF EDUC. v. SHELCO, LLC

[285 N.C. App. 80, 2022-NCCOA-550]

GASTON COUNTY BOARD OF EDUCATION, PLAINTIFF
v.
SHELCO, LLC, S&ME, INC., BOOMERANG DESIGN, P.A. (F/K/A MBAJ ARCHITECTURE, INC.), AND CAMPCO ENGINEERING, INC., DEFENDANTS / CROSSCLAIM AND THIRD-PARTY PLAINTIFF
v.
HOOPAUGH GRADING COMPANY, LLC; HART WALL AND PAVER SYSTEMS, INC.; WORLDWIDE ENGINEERING, INC.; AND LINCOLN HARRIS, LLC, THIRD-PARTY DEFENDANTS

No. COA21-618

Filed 16 August 2022

1. Appeal and Error—interlocutory orders—motions to dismiss—multiple defendants—final judgment

In an action filed by a county board of education against four companies that worked on the development of a public high school, the trial court's interlocutory order dismissing with prejudice all claims against two defendants—and certifying that portion of the order for immediate review pursuant to Civil Procedure Rule 54(b)—constituted a final judgment, and therefore the appellate court had jurisdiction to hear the appeal. However, the portion of trial court's interlocutory order denying the other two defendants' motions to dismiss did not constitute a final judgment, and it did not affect a substantial right because it was an adverse determination on those defendants' statute of repose defenses, and therefore the appellate court dismissed their appeals.

2. Statutes of Limitation and Repose—statutes of repose—Rule 12(b)(6) dismissal—no burden on plaintiff—facts alleged in complaint—defective retaining wall

In an action filed by a county board of education arising from defendants' work on an allegedly defective retaining wall, the trial court erred by granting defendants' Rule 12(b)(6) motions to dismiss based on the statute of repose where the facts alleged in the complaint did not conclusively show that it was not filed within the applicable statute of repose—because plaintiff did not allege both the date when defendants performed their last "specific last act" and the date of the "substantial completion of the improvement" pursuant to N.C.G.S. § 1-50(a)(5)(a). Plaintiff had no burden at the pleading stage to allege facts showing that its complaint was filed within the statute of repose.

GASTON CNTY. BD. OF EDUC. v. SHELCO, LLC

[285 N.C. App. 80, 2022-NCCOA-550]

Appeal by Plaintiff and appeal by two of the Defendants, both from an order entered 13 May 2021 by Judge Athena F. Brooks in Gaston County Superior Court. Heard in the Court of Appeals 24 May 2022.

Tharrington Smith, L.L.P., by Patricia Ryan Robinson, Rod Malone and Colin A. Shive for the Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by Gerald A. Stein, II, Tyler A. Stull and M. Duane Jones for Defendant-Appellant (Shelco).

Parker Poe Adams & Bernstein LLP, by Collier R. Marsh and Daniel K. Knight, for Defendant-Appellant (Boomerang).

Ragsdale Liggett PLLC, by Sandra Mitterling Schilder and Amie C. Sivon, for Defendant-Appellee (S&ME).

Rosenwood, Rose & Litwak, PLLC by Nancy S. Litwak and Carl J. Burchette for Defendant-Appellee (Campco).

DILLON, Judge.

¶ 1 The four Defendants each moved to dismiss Plaintiff's claims based on the applicable statute of repose. The trial court granted the motions to dismiss filed by two of the Defendants. Plaintiff appeals from those portions of the order.

¶ 2 The trial court, however, denied the motions to dismiss filed by the other two Defendants. These two Defendants appeal from those portions of the order.

¶ 3 In its order, the trial court also allowed in part and denied in part Plaintiff's motion to amend its complaint to allege the existence of an agreement to toll the statute of repose for 18 months.

I. Background

¶ 4 Plaintiff, a county board of education, filed this action against four companies who worked on the development of a public high school. This appeal concerns primarily the motions to dismiss filed by Defendants pursuant to Rule 12(b)(6) of our Rules of Civil Procedure. Accordingly, for our review, we must accept the allegations pleaded in Plaintiff's complaint as true. *See Arnesen v. Rivers Edge*, 368 N.C. 440, 441, 781 S.E.2d 1, 3 (2015). Our review is therefore confined to the allegations in the complaint, which include the following:

¶ 5 Sometime prior to 2009, Plaintiff announced plans to develop a new public high school ("the Project"). To that end, Plaintiff entered separate contracts with three of the Defendants: Shelco, LLC, ("Contractor"); S&ME, Inc. ("Engineer"); and Boomerang Designs, P.A., ("Architect"). Architect entered a contract with the fourth Defendant, Campco Engineering, Inc., ("Subcontractor").

¶ 6 The Project included, in part, the construction of reinforced soil slopes and retaining walls (collectively the "Retaining Walls") around the proposed high school's athletic complex. Around 2011, construction of the Retaining Walls was completed. In 2012, Plaintiff became aware that portions of the Retaining Walls had cracked.

¶ 7 On 15 May 2013, Plaintiff, Contractor, and Architect "signed a certificate of substantial completion" for the *entire Project*. By signing the certificate, Contractor and Architect represented that the Project (including the Retaining Walls) was essentially completed. Engineer and Subcontractor did not sign the certificate.

¶ 8 In the fall of 2018, Plaintiff, along with Contractor, Engineer, Architect and Subcontractor (along with some third-party defendants) executed a tolling agreement (the "Tolling Agreement") at Plaintiff's request with a stated effective date of 1 March 2019 until 15 September 2020.

¶ 9 Then in November 2020, Plaintiff filed suit against all four Defendants, alleging that the Retaining Walls were defective. Defendants answered and moved to dismiss pursuant to Rule 12(b)(6), based in part on the six-year statute of repose. Plaintiff then moved to amend its complaint to allege that all parties had entered the Tolling Agreement, effective 1 March 2019 to 15 September 2020.

¶ 10 After a hearing on all motions, the trial court entered its order (1) allowing Subcontractor's and Engineer's respective Rule 12(b)(6) motions to dismiss based on the statute of repose (and dismissing Plaintiff's motion to amend as to its claims against Subcontractor and Engineer, as moot); and (2) denying Contractor's and Architect's respective Rule 12(b)(6) motions to dismiss based on the statute of repose (allowing Plaintiff's motion to amend its complaint as to its claims against Contractor and Architect). The trial court reasoned that the May 2013 certificate executed by Plaintiff, Contractor, and Architect, paired with the Tolling Agreement, placed Plaintiff's claims against Contractor and Architect within the 6-year statute of repose. However, since Engineer and Subcontractor did not sign the 2013 certificate, the Tolling Agreement would not place Plaintiff's claims against them within the statute of repose.

¶ 11 Plaintiff appealed the Rule 12(b)(6) dismissals and denial of its motion to amend its complaint regarding its claims against Engineer and Subcontractor. Contractor and Architect appealed the denial of Rule 12(b)(6) motions on Plaintiff's claims against them.

II. Appellate Jurisdiction

¶ 12 **[1]** This appeal is from an interlocutory order, as that order did not entirely dispose of the case. *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010). Appeals from interlocutory orders are only allowed in limited circumstances. *Id.* at 311, 698 S.E.2d at 40. Rule 54(b) of our Rules of Civil Procedure allows an immediate appeal from an interlocutory order from any part of an order which constitutes a "final judgment as to one or more but fewer that all the claims or parties[,]" so long as the trial court in its judgment determines "there is no just reason for delay" in taking the appeal. N.C. Gen. Stat. § 1A-1, Rule 54(b).

¶ 13 Here, the trial court's order constitutes a final judgment with respect to Subcontractor and Engineer, as the order dismisses all claims against these Defendants with prejudice. Additionally, the trial court certified its order dismissing these claims for immediate review under Rule 54(b), determining "there was no just reason for delay." Accordingly, we have jurisdiction to consider Plaintiff's appeal of the portion of the trial court's order allowing Subcontractor's and Engineer's respective motions to dismiss and mooting its motion to amend with respect to these Defendants.

¶ 14 However, there has been no final judgment with respect to Plaintiff's claims against Contractor and Architect. Rule 54(b), therefore, does not provide an avenue for immediate review of the portion of the trial court's order denying these Defendants' respective motions to dismiss. Further, we have held that an adverse determination regarding a defendant's statute of repose defense does not affect a substantial right. *Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001). Accordingly, we dismiss these Defendants' appeals.

III. Analysis

¶ 15 **[2]** We now address the merits of Plaintiff's appeal concerning the trial court's dismissal of its claims against Subcontractor and Engineer. We review Rule 12(b)(6) dismissals *de novo*. *Arnesen*. 368 N.C. at 448, 781 S.E.2d at 8.

¶ 16 In its ruling, the trial court relied on the six-year statute of repose found in N.C. Gen. Stat. § 1-50(a)(5)(a) (2017) in deciding to grant dismissal as to Defendants Engineer and Subcontractor. This statute of

repose provides that "[n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from *the later of*

> [1] the specific last act or omission of the defendant giving rise to the cause of action or
>
> [2] substantial completion of the improvement . . . or specified area or portion thereof (in accordance with the contract[.]"

Id. (emphasis added).

¶ 17 It is Plaintiff who "has the burden of *proving* that a statute of repose does not defeat the claim." *Head v. Gould Killian*, 371 N.C. 2, 11, 812 S.E.2d 831, 838 (2018) (emphasis added). Accordingly, Plaintiff would have the burden *at a Rule 56 summary judgment* hearing to provide evidence that (s)he filed her claim within the applicable statute of repose. *See Id.* at 12, 812 S.E.2d at 839.

¶ 18 However, as explained below, based on our jurisprudence, a plaintiff has no burden at the pleading stage to allege facts showing that its complaint was filed within the applicable statute of repose. That is, it is generally inappropriate to grant a defendant's Rule 12(b)(6) motion to dismiss a complaint merely because it failed to *allege* facts showing that it was filed within the applicable statute of repose. A Rule 12(b)(6) dismissal based on the statute of repose would only be appropriate if the complaint otherwise alleges facts *conclusively* showing that it was not filed within the applicable statute of repose. And, here, since Plaintiff did not allege both the dates when any Defendant performed its last "specific last act" and the "substantial completion of the improvement," dismissal here was inappropriate.

¶ 19 In 1994, our Supreme Court reiterated its long-standing rule that "[a] statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citations omitted).

¶ 20 Three years later in 1997, our Supreme Court adopted an opinion in a dissent from our Court explaining that a Rule 12(b)(6) dismissal is inappropriate where based on a plaintiff's simple failure to plead facts showing that its complaint was filed within the statute of repose. Specifically, the Supreme Court reversed the opinion from our Court "[f]or the *reasons* stated in the dissenting opinion by Judge Greene[.]" *Richland Run v. CHC Durham*, 346 N.C. 170, 484 S.E.2d 527 (1997) (emphasis added).

¶ 21 In *Richland*, the trial court granted a defendant's Rule 12(b)(6) motion but considered other evidence concerning some of the defendant's arguments. The trial court made two holdings. First, the trial court held that *the complaint itself* failed to allege facts showing it had been filed within the statute of repose. Second, the trial court, *considering evidence outside the complaint*, determined that the complaint should be dismissed on an alternate basis unrelated to the statute of repose. Our Court affirmed both holdings. Judge Greene, however, dissented.

¶ 22 Judge Greene reasoned that the complaint should not have been dismissed "on the basis that the plaintiff failed to specifically plead compliance with the applicable statute of repose [being G.S. 1-50(a)(5)]." *Richland Run v. CHC Durham*, 123 N.C. App. 345, 352, 473 S.E.2d 649, 654 (1996) (J. Greene dissenting). Judge Greene explained that, while a plaintiff has the burden *to prove* compliance with the statute of repose, there is no requirement that a plaintiff *plead* facts in the complaint showing that its claim was filed within the statute of repose:

> Our courts have repeatedly held that the plaintiff has the burden of *proving* the condition precedent that its cause of action is brought within the applicable statute of repose. I do not read Rule 9(c) [regarding the pleading of conditions precedent] as requiring the *pleading* of conditions precedent.

Id.

¶ 23 We note that, as our Supreme Court has explained, statutes of *limitations* and statutes of *repose* are different: where statutes of limitations "are clearly procedural, affecting the remedy directly and not the right to recover[,] [t]he statute of repose . . . acts as a condition precedent to the action itself[.]" *Boudreau v. Baughman*, 322 N.C. 331, 340, 368 S.E.2d 849, 857 (1988). Indeed, Rule 8 of our Rules of Civil Procedure recognizes that a failure to file within the applicable statute of limitations is an affirmative defense which must be pleaded. Failing to file within the applicable statute of repose, however, is not listed as an affirmative defense in Rule 8 but rather is considered a "condition precedent" under Rule 9(c).[1]

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1. Judge Greene also noted that "even if Rule 9(c) is construed to require pleading a condition precedent, [I conclude that the complaint's] allegations sufficiently comply with Rule 9." *Id.* at 353, 473 S.E.2d at 654. This reason is clearly *dicta*, as he expressly determined that Rule 9(c) did not require pleading facts to show that the complaint was filed within the statute of repose.

¶ 24 In any event, Judge Greene further held that the trial court should not have dismissed the complaint based on the court's alternate reason which was unrelated to the statute of repose. *Richland*, 123 N.C. App. at 353, 473 S.E.2d at 654.

¶ 25 We conclude that *both* holdings by Judge Greene were necessary to support his dissent. Since dismissal would have been proper under either theory advanced by the defendants and relied upon by the trial court, Judge Greene had to disagree on *both* points to reach his conclusion that the trial court's order should be reversed. Therefore, our Supreme Court necessarily adopted *both* of Judge Greene's reasons in reversing our Court's decision.[2]

¶ 26 Here, Plaintiff did not allege any date when substantial completion occurred. Therefore, a 12(b)(6) dismissal was inappropriate.

¶ 27 "Substantial completion" is defined as "that degree of completion of a project, improvement *or specified area or portion thereof* (*in accordance with the contract* . . .) upon attainment of which the owner can use the same for the purpose for which it was intended. The date of substantial completion may be established by written agreement." N.C. Gen. Stat.§ 1-50(a)5.c. (emphasis added).

¶ 28 The question before us is whether Plaintiff alleged an act, along with the date the act was performed, which would constitute "substantial completion" as contemplated under Section 1-50(a)5.c. Defendants argue that the completion of the Retaining Walls, which Plaintiff alleged occurred in 2011, constituted the act of substantial completion. Defendants essentially argue that we need not look to when the entire improvement, e.g., the Project, was substantially completed. Rather, we are to look to when the "specified area or portion thereof," i.e., the Retaining Walls, were substantially completed.

¶ 29 Neither party cites a North Carolina case which provides a clear guide on how to interpret the definition of "substantial completion" for a project that has several components. The plain language of the statute suggests that the date of substantial completion occurs with respect to a particular contractor when the part of the improvement the contractor was hired to provide services for has reached "a degree of completion"

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2. Even if *either* holding could have supported Judge Greene's resolution of the case, both holdings would still be binding. As our Supreme Court has recognized, "where a case actually presents two or more points, any one of which is sufficient to support [a] decision, but the reviewing Court decides all points, the decision becomes a precedent in respect to every point decided[.]" *Hayes v. Wilmington*, 243 N.C. 525, 537, 91 S.E.2d 673, 682 (1956).

where "the owner can use the same for the purpose for which it was intended." *Id*. For instance, when an owner contracts with a company to build the foundation of a house, the statute of repose begins when the foundation is completed such that the owner can contract with someone else to build the frame, etc. The entire house need not be complete for the statute of repose to run against the contractor hired to build the foundation. Of course, if one contractor is hired to build the entire house, then the statute of repose to sue the contractor for laying a bad foundation would not start until the entire house was completed, as the contractor contracted to build the entire house. This interpretation was followed by the Supreme Court of South Carolina considering a statute – S.C. Code Ann. § 15-3-630 – which provides a definition of "substantial completion" identical to the definition found in Section 1-50(a)5.c. *See Lawrence v. General Panel*, 425 S.C. 398, 822 S.E.2d 800 (2019).

¶ 30 Turning to the complaint at issue, Plaintiff alleged that it entered a contract with Defendant Engineer "to provide geotechnical engineering service for the Project." There is no allegation that Engineer was hired just to perform services for the Retaining Wall only. Further, there is no allegation when the entire Project was substantially completed. Finally, there is no allegation that the date was "established by written agreement" between Plaintiff and Engineer. N.C. Gen. Stat. § 1-50(a)5.c. That is, though Plaintiff alleges it had executed a "certificate of substantial agreement" with Contractor and Architect on 15 May 2013, there is no allegation that Engineer was a party to that "certificate," much less that by signing the certificate Plaintiff was agreeing that the project was substantially completed as of 15 May 2013. Accordingly, we hold that the trial court erred in granting Engineer's Rule 12(b)(6) motion to dismiss.

¶ 31 Regarding the claims against the Subcontractor, Plaintiff merely alleged that Subcontractor "was the civil engineering subcontractor to Architect[,]" without any allegation that Subcontractor was hired to work on the Retaining Wall alone. Additionally, Subcontractor was not a party to the certificate of substantial completion discussed in the preceding paragraph. Plaintiff entered into a contract with Architect "to provide architectural [and other] services for the 'Project.' " Accordingly, we hold that the trial court erred in granting Subcontractor's Rule 12(b)(6) motion, *based on the statute of repose*.[3]

¶ 32 Finally, we vacate the trial court's dismissal of Plaintiff's motion to amend its complaint against Engineer and Subcontractor. The trial court

3. Because Defendants failed to raise any other ground for dismissal, we express no opinion as to whether they would be entitled to dismissal on some other ground.

so ruled based on its conclusion that the motion was moot, based on its erroneous grant of Engineer's and Subcontractor's respective motions to dismiss. On remand, the trial court should exercise its discretion on Plaintiff's motion. We note, though, even if Plaintiff's motion is denied, all parties are free to offer evidence concerning this agreement at a hearing on a motion for summary judgment.

III. Conclusion

¶ 33 We reverse the trial court's grant of Engineer's and Subcontractor's respective motions to dismiss under Rule 12(b)(6) based on the statute of repose. We vacate the trial court's dismissal of Plaintiff's motion to amend with respect to Engineer and Subcontractor. We dismiss the appeals of Contractor and Architect for lack of appellate jurisdiction.

REVERSED IN PART, VACATED IN PART, DISMISSED IN PART & REMANDED.

Chief Judge STROUD and Judge GRIFFIN concur.

IN THE MATTER OF A.D.

No. COA22-118

Filed 16 August 2022

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings of fact—unsupported by evidence

The trial court improperly terminated a father's parental rights in his daughter for failure to make reasonable progress to correct the conditions leading to the child's removal (N.C.G.S. § 7B-1111(a)(2)), where several of the court's key factual findings were unsupported by the evidence, which showed that—although the father did not fully satisfy all elements of his family services case plan—he made adequate progress toward each element where he obtained stable full-time employment, suitable housing, and reliable transportation (by purchasing a vehicle and taking the necessary steps to have his driver's license reinstated); acted appropriately during visits with his daughter, which he attended more consistently after moving across the state to be closer to her; took parenting classes and signed up for additional classes on his own initiative; completed

substance abuse and mental health assessments; made efforts to schedule therapy sessions that accommodated his work schedule; and submitted to multiple drug tests, all of which came out negative or inconclusive.

Appeal by Respondent from an order entered 13 September 2021 by Judge David V. Byrd in Ashe County District Court. Heard in the Court of Appeals 8 June 2022.

Peter Wood, for the Respondent-Appellant.

Reeves, DiVenere, Wright, Attorneys at Law, by Anné C. Wright, for Ashe County Department of Social Services, Petitioner-Appellee.

Paul W. Freeman, Jr. and Matthew D. Wunsche, for the Guardian ad Litem.

WOOD, Judge.

¶ 1 Respondent-Father ("Father") appeals an order terminating his parental rights to his minor child, A.D. ("Allison")[1], on the ground of willful failure to make reasonable progress to correct the conditions that led to his child's removal from his care. *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2021). Because we hold the evidence does not support all the findings of fact and the findings of fact do not support the trial court's conclusion that grounds existed to terminate Father's parental rights, we reverse the order of the trial court.

I. Factual and Procedural Background

¶ 2 Respondent-Mother ("Mother")[2] gave birth to Allison on August 5, 2019. Mother was unmarried at the time of Allison's birth. Before Allison was born, Mother was in a relationship with Father for approximately three or four months prior to becoming pregnant and for one or two months after learning she was pregnant. According to Mother, the relationship ended due to Mother's concerns that Father suffered from mental health issues and what she described as aggressiveness. Mother told Father that she was pregnant prior to Allison's birth and contacted him from the hospital after giving birth.

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1. We use pseudonyms to protect the child's identity and for ease of reading.

2. Mother did not appeal the trial court's orders, and thus is not a party to this action.

¶ 3 Seven days after Allison's birth, Ashe County Department of Social Services ("DSS") filed a petition alleging Allison to be neglected because the child tested positive for barbiturates at birth and Mother tested positive for amphetamines for which she was not prescribed. Mother admitted to using amphetamines and smoking methamphetamine during her pregnancy. The petition did not list a father for Allison. DSS was awarded non-secure custody of Allison. Two days later, at a hearing for continued non-secure custody, Mother testified that Allison's father may be Father or another individual, and subsequently, the trial court ordered Father to submit to DNA testing. On this same day, Mother provided DSS with a phone number to reach Father, but the phone number was disconnected. DSS was later able to locate Father through other means and served Father with an order to submit to DNA testing on September 12, 2019 while he was in the custody of the Rowan County Jail. According to Ms. Charity Ballou ("Ms. Ballou"), the foster care social worker assigned to work with Allison, DSS did not make contact with Father until mid to late October 2019. Father completed DNA testing on November 4, 2019. On November 8, 2019, Allison was adjudicated neglected based upon Mother's substance abuse. The order did not contain any findings relating to the putative father of the child. On November 21, 2019, Father received his paternity test results, which concluded the probability of Father's paternity was 99.99%.

¶ 4 During the January 10, 2020 review hearing, paternity for Allison was established. The trial court granted Father supervised, bi-weekly, one-hour visits with Allison. At the time of the hearing, Father lived with his girlfriend and her parents in Rockwell; was employed with Premier Heating and Air in Rowan County; and did not hold a valid driver's license but did have a vehicle.[3] The trial court found that "[a]t this point [Father] is not participating in a family service case plan and has just recently become involved in the child's life." The trial court concluded that the best primary permanent plan of care for Allison was reunification with a secondary plan of adoption. On January 23, 2020, Father entered into a family service case plan with DSS and agreed to: maintain steady employment, obtain stable housing and transportation, communicate with DSS, take parenting classes, and attend visits with Allison.

¶ 5 At a permanency planning review hearing on February 28, 2020, the trial court found that Father was living in Rockwell, North Carolina

3. We take judicial notice that the distance between Father's residence in Rowan County and Allison's foster placement in Ashe County was approximately 105 miles.

with his girlfriend[4], but was attempting to relocate to Ashe County to live near Allison, including applying for employment in that county at Nations Inn and construction jobs. The court also found that Father did not have a valid driver's license; was working with a day labor company part-time in Rowan County; had made himself available to the court, DSS, and GAL; and had signed up for a parenting program in Rowan County. In terms of visitation, the trial court found that Father had difficulty attending his visits with Allison because of lack of transportation and had attended three visits at the time of the hearing. The trial court modified Father's supervised visitation to occur once per week for one hour and ordered reasonable efforts towards reunification with Mother and Father be made to eliminate the need for Allison's placement in foster care.

¶ 6 Father's case plan was later amended in March 2020. DSS communicated with Father to discuss "some ongoing concerns, based on collateral information that there was potentially some substance use and mental health issues." Subsequently, Father agreed to take a substance use assessment through Daymark, follow any resulting recommendations, and submit to random urine drug screens.[5] DSS then made referrals to different Daymark locations based upon the counties in which he was living between March and December 2020: namely, Rowan County, Ashe County, and Watauga County.

¶ 7 On May 16, 2020, Father entered into an agreement to pay child support for Allison in the amount of $50 per month and $25 per month towards arrears owed beginning June 1, 2020.

¶ 8 At a May 22, 2020 permanency plan review hearing, two months into the pandemic, the trial court found that Father continued to live in Rockwell at his girlfriend's parent's residence. In terms of his employment, the trial court found that he was currently unemployed but seeking employment, having previously "worked for the Coffee House Restaurant (1-2 weeks), a day labor company, [and] more recently for McDonald's (for 3-4 weeks)." Father was living off the stimulus payments, due to the COVID-19 pandemic, he and his girlfriend received. The court found that Father had 1) paid all fines to have his driver's license restored; 2) completed parenting classes and obtained certification of

4. The record refers to Father's girlfriend as his wife. Father and girlfriend never married.

5. We note that other than in the trial court's TPR order, the family service case plan's requirement for Father to submit to random urine drug screens does not appear in any DSS report or prior order of the trial court.

his completion along with his girlfriend; and 3) made himself available to the court, DSS, and GAL. Because Father resided with his girlfriend and her family, the trial court found she too needed to enter into a family service case plan with DSS. The trial court also found that since the beginning of the COVID-19 pandemic, Father had participated in weekly supervised video conference calls with his daughter via Zoom, which had gone well, and had sent Easter presents to his daughter. The trial court determined that Father was participating and cooperating with the family service case plan and continued the primary permanent plan of care being reunification with a secondary permanent plan of care being adoption. Shortly after the review hearing, in approximately June or July 2020, Father ended his relationship with his girlfriend because he did not feel that she was on "the same page . . . as far as . . . providing for [Allison] and assisting [him] and [his] efforts to have [Allison] in [his] life."

¶ 9 A permanency plan review hearing was held on September 11, 2020. At the time of the hearing, Father lived at the Hospitality House located in Boone, North Carolina, and "for a period of time had to stay in a tent on the grounds of the Hospitality House due to COVID-19 restrictions." Father resubmitted an application to HUD for housing allowances, opened a bank account, and saved money for housing. In terms of employment, the court found that Father had worked for a construction company in Boone for approximately two months. Father also received advice and help from the Director of the Hospitality House to build a support network. At the time, Father was on probation for larceny and was required to pay probation fees. The court also found that transportation was a barrier for Father and "[i]t would be easier for him to visit [Allison] every other week rather than once weekly." Father would not be eligible to apply for reinstatement of his driver's license until November 2020. From July 21, 2020 until August 6, 2020, Father was incarcerated.

¶ 10 On August 24, 2020, Father submitted to a drug screen, which according to the court, "was inconclusive due to the creatinine level being lower than normal. This could be due to kidney failure, or he tampered with the drug screen." A substance abuse assessment for Father was scheduled on August 26, 2020, but he did attend that appointment or a second appointment.

¶ 11 After the May 2020 hearing, Father attended five (one in June, two in July, and two in August) of the ten scheduled visits with Allison between the May and September hearings. According to Father, he and Allison bonded during these visits and having his daughter "helped him to want

to do better." Father was also under order to pay child support, and accordingly, paid $300 towards his child support obligation on the day of the hearing. Ms. Ballou testified that during this period of time, there were "times where phone numbers would change, where we were unable to make contact, but overall, I would say that [Father] has been – at least once per month I have been able to somehow make contact with him." Ms. Ballou further reported that during this time, "there have been times in which he has been difficult to locate or that there have been many attempts made to get that one contact in per month and then there have been other months where he has been very communicative where I have -- I would say -- regular contact with him." The court changed the primary permanent plan of care for Allison to adoption, with a secondary plan of care of reunification with her parents.

¶ 12 On December 9, 2020, DSS filed a petition to terminate Father's and Mother's parental rights to Allison. The petition, as it pertained to Father, stated that: Allison was adjudicated as neglected; Father failed to pay child support and willfully left Allison in placement outside of the home for more than twelve months without showing to the satisfaction of the court that reasonable progress was made; the trial court at no time had determined that Father was capable of providing a safe and stable home for Allison; and the trial court never approved unsupervised visitations between Allison and Father.

¶ 13 On February 5, 2021, Mother relinquished her parental rights to Allison. The trial court conducted the hearing on DSS's petition to terminate Father's parental rights on May 3, 2021.

¶ 14 At the termination hearing, Ms. Ballou testified that Father's communication with DSS was sporadic, there had been times in which Father was difficult to locate as he moved frequently and allegedly had issues with his phones being disconnected, but that she was somehow able to contact him once per month. Ms. Ballou reported that while Father was supposed to maintain contact with her on a weekly basis, keep her informed of any changes in his residence or contact information, and notify her of changes in his employment, he only did so "[a]t times, but not at others."

¶ 15 According to Ms. Ballou, since Allison entered the care of DSS, Father had lived at eight different addresses, although not all of them had been verified by DSS. At the time of the January 10, 2020 review hearing, Father and his girlfriend were living in Rowan County and staying with his girlfriend's parents. At the February 28, 2020 permanency planning hearing, it was determined that Father and his girlfriend had

moved to Watauga County and lived at a homeless shelter. Shortly after, Father lived in a hotel room paid for by DSS, and DSS purchased a tent for Father. In May 2020, Father lived at the Hospitality House in Watauga County. Father was incarcerated briefly from July to August 2020 and remained on supervised probation until January 2021. After his release from incarceration, and upon receiving HUD assistance, Father began renting a two-bedroom, single bathroom home on February 15, 2021, for a one-year lease period. At the time of the termination hearing, Father still resided at the rental home. Ms. Ballou testified that the home was well-kept; well stocked with food; and included a room for Allison set up with provisions such as clothes, diapers, wipes, shoes, toys, a highchair, and a stroller.

¶ 16 The trial court found that Father "has had various jobs but is currently self-employed working for his neighbor." When Father's case plan was developed on January 23, 2020, Father engaged in odd jobs such as in construction and general labor, but never provided verification of employment to DSS. Ms. Ballou testified that in the Spring of 2020, DSS helped Father obtain employment at a local restaurant, but he worked there only for two or three days. In May 2020, Father reported he was working odd jobs that provided him with some income. In July 2020, Father found a full-time job working construction, was able to save money for housing, and opened a bank account. Father's income for the year of 2020 was $3,400.00. At the time of the termination hearing, Father was self-employed, working for his neighbor doing jobs in carpentry and construction. Ms. Ballou testified Father furnished verification of his employment the week before the termination hearing and provided nine bank deposit slips for jobs worked from December 2020 to March 2021. At the termination hearing, Father testified that he earned approximately $1,000 a week and had no difficulty paying his house rent, which was $450 per month after the $200 HUD monthly assistance.

¶ 17 As required by his case plan, Father completed a parenting program in May 2020. In terms of visitation, the trial court found that Father was approved to have two supervised visitations per month with Allison, for two hours at a time. However, at a hearing on September 11, 2020, Father requested that the visits be reduced to once per month due to his work schedule, but that change was not implemented. The trial court found that since visitation began in January 2020, Father only missed a total of seven visits during the time Allison was in foster care. Ms. Ballou clarified during the termination hearing that these "missed" visits were primarily early in the case and that his visits had become more stable over time. At a May 22, 2020 permanency planning review hearing, the

trial court found that since the COVID-19 pandemic, he had participated in weekly video conference calls via Zoom with Allison, which had gone well.

¶ 18 Since the September 11, 2020 permanency planning review hearing, Ms. Ballou testified that Father has been consistent in making his visits with Allison, "has been appropriate in his interactions" with his daughter, and since December, has provided food and other small gifts for Allison during the visits. Father testified, and Ms. Ballou confirmed, that he has been in contact with the Children's Council in Boone to learn about what would be developmentally appropriate for Allison's age group and "how to become a better father." Father also testified that he signed up for two additional parenting classes through the Children's Council, which were to start in Fall 2021.

¶ 19 In accordance with his case plan, Father paid the necessary fees to restore his driver's license on March 24, 2021. Pursuant to Father's parenting plan regarding issues of substance abuse and mental health, Ms. Ballou stated she first made a referral for Father's mental health and substance abuse assessment in March 2020. Referrals were requested for Father in three different counties based upon where he resided throughout the life of the case so as to make assessments and any follow-ups more convenient for him. Father completed a virtual assessment on December 29, 2020. When asked at the termination hearing why Father took nine months to complete the assessment, Father testified that: "It's been a hard past year or so" as the COVID-19 pandemic occurred during this time which affected scheduling and transportation. Father at times lacked proper transportation; was on probation during part of this period of time; "was having to take off work quite a bit and, unfortunately, it did take some time to get the assessment from Daymark"; underwent a learning process in emailing documentation to Daymark; experienced "some phone technology issues"; and had his phones disappear or break due to his line of work.

¶ 20 As a result of the assessment, Father was diagnosed with borderline personality disorder, and it was recommended that he engage in individual therapy and DBT[6] group therapy weekly. Ms. Ballou testified

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6. Dialectical Behavioral Therapy or DBT is an "evidence-based treatment that brings together cognitive-behavioral strategies and acceptance-validation strategies to help individuals with intense emotional suffering and dysfunctional behaviors" and has been used in the treatment of "substance abuse, disordered eating, anger, depression, anxiety, and interpersonal difficulties." *Dialectical Behavioral Therapy*, UNC Sch. of Soc. Work, https://cls.unc.edu/upcoming-programs-2016-2017/clinical-lecture-institutes/dbt/ (last visited July 7, 2022).

that Father attended a therapy session on January 4, 2021. While Father signed up for three group sessions in April 2021, he was a "no-show" for all sessions. Father was requested to submit to five drug screens and submitted to two of them. One of these tests was negative and the other was inconclusive. Father did not take three of the drug screens because, when DSS asked Father at visitations with Allison to take them, he stated, "he could not stay or his ride could not wait long enough for him to submit to a screen." At the termination hearing, Ms. Ballou testified that because Father did not reside in Ashe County, it was difficult to find locations "to have him go on in and screen. So, there have not been very many tests requested due to that fact."

¶ 21 Father's counsel questioned Ms. Ballou regarding her knowledge of a letter written by Father's former probation officer which was previously submitted at a February 12, 2021 hearing.[7] The letter in question stated that Father had submitted to two drug screens on December 21, 2020 and January 20, 2021, and both results were negative.

¶ 22 In the termination order, the trial court found that Allison remained in the care and custody of DSS continuously since August 12, 2019, and at the time of the termination hearing, had been in the care and custody of DSS for approximately 21 months. The trial court also found that although Father had made some progress on his case plan, his progress "has not been adequate to meet the needs standing in his way to provide proper and adequate care for [Allison]." Therefore, the trial court concluded grounds existed for the termination of Father's parental rights based on Father willfully leaving Allison 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 [Allison]." At disposition, the court further concluded that it was in Allison's best interests to terminate Father's parental rights. The termination order was entered on September 13, 2021, and Father entered written notice of appeal on September 23, 2021.

II. Discussion

¶ 23 Father's sole contention on appeal is that the trial court committed prejudicial error by terminating his parental rights on the ground of willfully leaving Allison in foster care, when this is not supported by clear, cogent, and convincing evidence. We agree.

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7. The record before us does not contain a copy of the February 12, 2021 permanency planning review hearing. However, this review hearing and the evidence that was submitted therein is consistently referred to in the TPR hearing's transcripts.

A. Standard of Review

¶ 24 Termination of parental rights actions consist of a two-stage process: adjudication and disposition. N.C. Gen. Stat. §§ 7B-1109, 7B-1110 (2021); *In re A.U.D.*, 373 N.C. 3, 5, 832 S.E.2d 698, 700 (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."[8] *In re A.U.D.*, 373 N.C. at 5, 832 S.E.2d at 700 (quoting N.C. Gen. Stat. § 7B-1109(f)). We review a trial court's adjudication that grounds exist to terminate parental rights to determine "whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law." *In re A.B.C.*, 374 N.C. 752, 760, 844 S.E.2d 902, 908 (2020) (citation omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (cleaned up). "Clear, cogent, and convincing evidence is evidence which should fully convince." *North Carolina State Bar v. Talford*, 147 N.C. App. 581, 587, 556 S.E.2d 344, 349 (2001) (cleaned up), *aff'd as modified*, 356 N.C. 626, 576 S.E.2d 305 (2003).

¶ 25 In making this determination, "[u]nchallenged findings are deemed to be supported by the evidence and are binding on appeal." *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E. 2d 735, 738 (2020) (cleaned up). We are bound by the trial court's findings "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). "On appeal, this Court may not reweigh the evidence or assess credibility." *In re K.G.W.*, 250 N.C. App. 62, 67, 791 S.E.2d 540, 543 (2016) (citing *Kelly v. Duke Univ.*, 190 N.C. App. 733, 738-39, 661 S.E.2d 745, 748 (2008)). Additionally, we review "only those findings necessary to support the trial court's determination that grounds existed to terminate [Father's] parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58-59 (2019) (citation omitted).

¶ 26 Pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), a trial court may terminate parental rights upon a finding that "[t]he parent has willfully left

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8. While this Court reviews a trial court's conclusion that grounds exist to terminate parental rights under N.C. Gen. Stat. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law, *In re M.P.M.*, 243 N.C. App. 41, 45, 776 S.E.2d 687, 690 (2015), the statute specifies that the burden in termination proceedings "is on the petitioner or movant to prove the facts justifying the termination by clear and convincing evidence." N.C. Gen. Stat. § 7B-1111(b).

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." N.C. Gen. Stat. § 7B-1111(a)(2); *In re A.M.*, 377 N.C. 220, 2021-NCSC-42, ¶ 16.

¶ 27 A finding that a parent acted willfully for purposes of section 7B-1111(a)(2) "does not require a showing of fault by the parent. A [Father's] prolonged inability to improve [his] situation, despite some efforts in that direction, will support a finding of willfulness regardless of [his] good intentions, and will support a finding of lack of progress sufficient to warrant termination of parental rights." *In re B.J.H.*, 378 N.C. 524, 2021-NCSC-103, ¶ 12 (quoting *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020)). A "finding of willfulness is not precluded even if the [Father] has made some efforts to regain custody of the children." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) (citation omitted). Although Allison was removed from Mother's home and placed in custody before Father's paternity was established, we have previously determined that in order for a parent to avoid the termination of his or her parental rights under § 7B-1111(a)(2), the parent is required to "make reasonable progress under the circumstances towards correcting those conditions that led to the child being placed in [DSS] custody, irrespective of whoever's fault it was that the child was placed in [DSS] custody in the first place." *In re A.W.*, 237 N.C. App. 209, 217, 765 S.E.2d 111, 115-16 (2014) (cleaned up).

¶ 28 To assess the reasonableness of Father's progress in correcting the conditions that led to Allison's placement into DSS custody, Father's progress is evaluated "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). "[A] trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination" pursuant to section 7B-1111(a)(2). *In re B.O.A.*, 372 N.C. 372, 385, 831 S.E.2d 305, 314 (2019) (citation omitted).

¶ 29 Our Supreme Court has held "parental compliance with a judicially adopted case plan is *relevant* in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2)" provided that "as long as a particular case plan provision addresses an issue that, directly or indirectly, contributed to causing the juvenile's removal from the parental home, the extent to which a parent has reasonably complied with the case plan provision is, at minimum, relevant to the determination"

of whether that parent's parental rights are subject to termination for failure to make reasonable progress. *Id.* at 384-85, 831 S.E.2d at 313-14 (emphasis added).

¶ 30 Although Father was not a member of the child's home at the time of removal, it was appropriate for DSS to require Father to complete a family service case plan so that the child could be returned to a parent once conditions inhibiting reunification were met. Accordingly, we look at Father's progress in correcting the conditions which resulted in Allison being placed in DSS custody. *In re A.W.*, 237 N.C. App. at 217, 765 S.E.2d at 115-16.

B. Challenged Findings of Fact

¶ 31 Father challenges the trial court's finding of fact 10, and challenges 16 of the 42 sub-findings contained therein. Father contends the trial court's findings are unsupported by competent evidence and leave out crucial information that directly affected whether Father had made reasonable progress. The trial court made the following contested findings:

> 10. The Court finds as a fact [Father] 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.
>
> In support thereof the Court finds as a fact that:
>
> . . .
>
> g). [Father] at no time sought paternity or custody of [Allison].
>
> h). [Mother] was very honest with the Department as to the possible fathers and provided a telephone number for [Father]. Social Worker Ballou made multiple phone calls, mailings and emails to [Father].
>
> . . .
>
> k). A court order was entered August 14, 2019, for [an individual] and [Father] to submit to DNA testing. [Father] was served with the Order to submit to DNA testing on September 12, 2019 but did not complete the testing until November 4, 2019; the results indicated the probability of paternity as 99.99%.

p). Initially [Father] was residing in Rowan County with his "wife" and her family. He had no drivers [sic] license and worked odd jobs. Later he admitted they were not married; and their relationship ended in June or July 2020.

q). While in Rockwell, NC and living with his significant other the Department sent referrals for [Father] to have an assessment at the Rowan County Daymark.

. . .

y). Although a part of the family service case plan [Father] did not participate in a mental health/substance abuse assessment until December 29, 2020

z). [Father] admittedly has had difficulty with being criticized and feeling as if he is being judged. There are times he has an intense anger. Over the years he has had difficulty in relationships with others. He struggles with impulsive behaviors.

. . .

dd). [Father] has had various jobs but is currently self-employed working for his neighbor. His income for the year of 2020 was $3,400.00.

ee). [Father] is approved to have supervised visitation twice monthly for two hours. He has requested once monthly visits and gave the reason it is hard for him to get off work. [Father] has missed seven visits with [Allison] since visitation began in January 2020. Transportation to/from visits has been offered and/or provided. Gas cards have been provided to [Father] to assist with the expense of traveling to/from visits.

. . .

ii). [Father] has had inconsistent communication with the Department. There was a period of time in the spring of 2020 and 2021 that there was little if any communication. . . .

kk). [Father] made no effort to determine paternity or establish a relationship with his daughter. Upon the [trial court] entering an order for paternity testing to

be conducted [Father] did not submit to the test until November 2019.

ll). The Court finds that [Father's] progress has not been adequate to meet the needs standing in his way to provide proper and adequate care for [Allison].

. . .

nn). Substance use was the reason [Allison] came into foster care; [Father] has not attended mental health or substance use therapy as recommended by his assessments.

. . .

pp). [Father] has failed to comply with all but the most minimal requirements of his family service case plan. The limited progress made is not reasonable.

qq). Although [Father] knew prior to and after the child's birth that he might be the child's father, he did not make himself available for possible placement of the child when the child was placed in DSS custody. Indeed, he made no such efforts until the child was six months old and had been in DSS custody for all but 7 days of her life.

rr). [Father] previously denied having any relationship with the child's mother. It was only after the results of paternity testing were revealed that [Father] admitted to such a relationship.

1. Sub-findings of Fact 10(g) and 10(kk)

¶ 32 Father challenges sub-finding 10(g) that states, "[Father] at no time sought paternity or custody of [Allison]" and argues that this finding was misleading and incomplete. Father also contests a similar finding, finding of fact 10(kk), which states: "[Father] made no effort to determine paternity or establish a relationship with his daughter. Upon the [trial court] entering an order for paternity testing to be conducted [Father] did not submit to the test until November 2019." Father argues that this finding is misleading.

¶ 33 It is undisputed Mother told Father she was pregnant; according to Mother's testimony, Father was present when Mother's pregnancy test results were revealed. Father was aware that Allison's delivery was

successful when Mother contacted him from the hospital. However, according to sub-finding 10(c), Mother named two individuals as the possible father of Allison, with one being Father. Father testified at the termination hearing that when Mother contacted him from the hospital, he was unsure if Allison was "[his] child or if it was somebody else's child" and if Allison "was even at risk of not being born" because of Mother's lifestyle. The evidence shows that after Mother testified of Father's possible paternity at an August 12, 2019 hearing, DSS attempted to contact Father through several methods but was unable to reach him because the phone number Mother provided was disconnected. Once DSS made contact with Father in mid to late October 2019, Father completed DNA testing on November 4, 2019. According to Father, he did not know Allison was his daughter until he received the results from the DNA testing on November 21, 2019. The evidence and the undisputed findings of fact demonstrate that Father sought paternity once he was contacted by DSS to undergo a DNA test for Allison and did so in November 2019.

¶ 34 As to the issue of custody and establishing a relationship with Allison, we hold the trial court's findings are unsupported by the record evidence. Once adjudicated as Allison's biological father, Father entered into a family service case plan on January 23, 2020, in order to pursue custody, be "reunif[ied]," and provide a safe, permanent home for his daughter. Ample record evidence demonstrates Father put forth great effort to establish a relationship with his daughter by moving across the state to be closer to her. Ms. Ballou's testimony tended to show Father has been consistent in his visits with Allison since the September 11, 2020 hearing, and during visitations, Father talks, plays, brings gifts, and acts appropriately with his daughter. Further, Father ended the relationship with his girlfriend to be reunited with his daughter. Father also obtained employment; successfully navigated the administrative process of having his driver's license reinstated; attended every permanency planning review hearing; and purchased a vehicle. Finally, Father obtained safe and appropriate housing, which included a room for Allison in his home and made some child support and arrearage payments. Therefore, we hold sub-findings of fact 10(g) and 10(kk) are not supported by clear and convincing evidence.

2. Sub-finding of Fact 10(h)

¶ 35 Next, Father contends that sub-finding of fact 10(h) was "not necessarily wrong, but . . . incomplete" because the sub-finding leaves out that he was homeless, difficult to track down, and only had a remote

possibility of being Allison's father. Sub-finding of fact 10(h) states, "[Mother] was very honest with the Department as to the possible fathers and provided a telephone number for [Father]. Social Worker Ballou made multiple phone calls, mailings and emails to [Father]." We are unpersuaded by this argument.

¶ 36 The record demonstrates that Father's housing instability contributed to the difficulty in reaching him. Father testified that at the time he entered into a family service case plan he was seeking housing. Further, Father testified he was served with the order to obtain DNA testing while in the Rowan County jail. Ms. Ballou's testimony further confirmed that DSS tried several methods, manners, and times to contact Father without success. Mother's testimony indicated the possibility that Father might not have been Allison's father and that she provided a telephone number purported to be Father's to DSS. Therefore, we hold the trial court's sub-finding of fact 10(h) is supported by clear and convincing evidence.

3. Sub-finding of Fact 10(k)

¶ 37 Next, Father contends that sub-finding of fact 10(k) left out "crucial information" and that "[t]he [trial court's] finding makes it seem as if [Father] was trying to avoid taking the test and was denying paternity." Sub-finding of fact 10(k) states:

> A court order was entered August 14, 2019, for [an individual] and [Father] to submit to DNA testing. [Father] was served with the Order to submit to DNA testing on September 12, 2019 but did not complete the testing until November 4, 2019; the results indicated the probability of paternity as 99.99%.

In his brief, Father argues that the "crucial information" alleged to have been omitted by the trial court's finding was that: Father stayed in contact with DSS so that together they arranged for a paternity test; Father lacked the resources to arrange for the test on his own; "[i]t appears that [Father] took the test at his first opportunity"; and DSS had difficulty locating him. We disagree.

¶ 38 Record evidence tends to show on August 14, 2019, Father and another individual were ordered to submit to DNA testing to establish paternity for Allison. Father's testimony at the hearing established that he was served with the order for a paternity test on September 12, 2019. Ms. Ballou's testimony confirmed Father completed the testing on November 4, 2019. The test results indicated that Father's probability of paternity

was 99.99% and Father was officially established to be Allison's father at the January 10, 2020 review hearing. It appears that Father takes issue with just three words: "but did not" in the trial court's sub-finding of fact 10(k). While the word "and," substituted for the words "but did not," may well cast a softer impression, the chronology of events remains unchanged. We hold sub-finding of fact 10(k) is supported by clear and convincing evidence.

4. Sub-findings of Fact 10(p), 10(q), and 10(y)

¶ 39 Next, Father contends the trial court left out crucial pieces of information in sub-findings of fact 10(p), 10(q), and 10(y). Sub-finding of fact 10(p) states that when Father first became involved in this case, he resided in Rowan County "with his 'wife' and her family" at which point "[h]e had no drivers [sic] license and worked odd jobs. Later he admitted they were not married; and their relationship ended in June or July 2020." In contesting this sub-finding, we note that Father's brief does not cite to any authority supporting his theory or point to any evidence in the record that would establish that the trial court's sub-finding has omitted crucial information. Therefore, under Rule 28(b)(6) of North Carolina Rules of Appellate Procedure, this argument is deemed abandoned. N.C. R. App. P. 28(b)(6).

¶ 40 Concerning sub-findings of fact 10(q) and 10(y), Father contends that "[t]his entire situation took place during a pandemic" and many services were unavailable, causing scheduling appointments to be difficult while offices shut down and providers transitioned to working from home. Although Father's contentions are true, the record shows Ms. Ballou made referrals for Father to have a mental health and substance abuse assessment at Daymark, located in Rowan County, because Father was living there at the time. Therefore, sub-finding of fact 10(q) is supported by clear and convincing evidence in the record.

¶ 41 Regarding sub-finding of fact 10(y), Father argues that his efforts with substance abuse treatment included attending Celebrate Recovery, a faith-based support group. Father also argues that he completed a substance abuse assessment and complied with the assessment's recommendations when he was placed on supervised probation and ordered to so comply. Finally, Father contends that the disputed sub-finding does not address whether he has a current substance abuse problem.

¶ 42 According to a letter written by Father's probation officer, Father was ordered to complete a substance abuse assessment after being placed on supervised probation on February 21, 2020 for a misdemeanor larceny. Father completed the substance abuse assessment on November 24,

2020 through the TASC program.[9] Father's completion of the substance abuse assessment was also confirmed by a letter from a TASC care manager. To the extent that this sub-finding of fact implies that Father did not complete the substance abuse program until December 29, 2020, it is not supported by evidence and therefore, we disregard this specific portion of that sub-finding of fact. As to Father's participation in a mental health assessment, Father's testimony at the hearing confirmed that he did not take the assessment until the end of December 2020. Related to Father's mental health assessment, we hold that the portion of this sub-finding of fact relating to Father's mental health assessment is supported by the record evidence.

5. Sub-finding of Fact 10(z)

¶ 43 Next, Father contends sub-finding of fact 10(z) is unsupported. It states: "[F]ather admittedly has had difficulty with being criticized and feeling as if he is being judged. There are times he has an intense anger. Over the years he has had difficulty in relationships with others. He struggles with impulsive behaviors." Father contends this sub-finding "mentions no specific dates, and it is unclear how this finding applies to the twelve-month period before the filing of the termination petition." Despite Father's contentions with this sub-finding, the record demonstrates that Father's family service case plan was amended to include a mental health assessment and Father was to follow any resulting recommendations therefrom. Additionally, an undisputed finding indicates that Father and Mother's relationship ended due to Father's aggressiveness and Mother's concerns that Father had mental health issues. In determining Father's compliance with his case plan, there is a reasonable inference that the trial court would consider the status of Father's mental health.

¶ 44 The record also demonstrates that the trial court's sub-finding of fact is primarily based upon Father's testimony at the termination hearing. At the hearing, Father testified that "it is definitely an uncomfortable feeling that I get sometimes when I feel put on the spot, or judged, or -- but it is something I have been able to work on and certainly something that I have been more tolerable for in the past years[.]" Additionally,

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9. The North Carolina Treatment Accountability for Safer Communities Network or TASC "provides services to people with substance abuse or mental health problems who are involved in the criminal justice system." *Treatment Accountability for Safer Communities*, N.C. Dep't of Health & Hum. Servs., https://www.ncdhhs.gov/assistance/mental-health-substance-abuse/treatment-accountability-for-safer-communities (last visited July 7, 2022).

Father testified that in the past, he had "some hard times developing healthy relationships and long-lasting relationships, but that is definitely something that has been improving in the last couple of years[.]" Father also stated that acting impulsively "has been an issue in [his] past, . . . that is something [he is] definitely aware of . . . [i]t is something [he] will probably work on and deal with for the rest of [his] life" and he is seeking help for it. While the sub-finding does not mention specific dates, it reflects that Father's behaviors have occurred in the past and are issues that are presently improving. Based upon the undisputed findings and the record, we uphold the trial court's sub-finding as it is supported by clear and convincing evidence.

6. Sub-finding of Fact 10(dd)

¶ 45 Next, Father contests sub-finding of fact 10(dd), which states: "[Father] has had various jobs but is currently self-employed working for his neighbor. His income for the year of 2020 was $3,400.00." Father contends this sub-finding excludes information about his progress since moving to Watauga County, as he secured full-time employment in mid-2020 and makes approximately $1,000 per week. Father's argument is in substance directed at the trial court's determination of the credibility of the evidence presented at the termination hearing and the weighing of such evidence. *See In re P.A.*, 241 N.C. App. 53, 57, 772 S.E.2d 240, 244 (2015). At the termination hearing, Ms. Ballou testified that throughout the duration of Father's family service case plan, Father worked "odd jobs," working mostly construction and general labor. For a short period of time, Father obtained employment at a Coffee House in West Jefferson. Father's testimony also demonstrated that he has "a full-time gig" and has "been doing carpentry and construction." In terms of working in construction, Father testified that he works for himself and can be hired by many employers. For example, Father explained one of his employers is "a home builder that lives right across the street" from him. Further, Ms. Ballou testified that Father provided a copy of a 1099-NEC and a W-2 form, indicating an income of approximately $3,400 for the year 2020. Father testified he had not received proof of all of his income statements for taxes, and that he had more income in 2020 than what was indicated. However, at the time of the termination hearing, $3,400 was the income amount for 2020 that could be verified by documentation.

¶ 46 We note that it is "the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re S.C.R.*, 198 N.C. App. 525, 531-32, 679 S.E.2d 905, 909 (2009) (citation omitted). While the

trial court's termination order did not include the extent of Father's detailed employment history or Father's recent income, the "trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered." *In re E.S.*, 378 N.C. 8, 2021-NCSC-72, ¶ 22 (quoting *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005)). The trial court made a "brief, pertinent, and definite finding[]" about one of the matters at issue, which is supported by evidence in the record. *In re J.A.A.*, 175 N.C. App. at 75, 623 S.E.2d at 51.

7. Sub-finding of Fact 10(ee)

¶ 47 Next, Father challenges sub-finding of fact 10(ee) in which the trial court found that:

> [F]ather is approved to have supervised visitation twice monthly for two hours. He has requested once monthly visits and gave the reason it is hard for him to get off work. [Father] has missed seven visits with [Allison] since visitation began in January 2020. Transportation to/from visits has been offered and/or provided. Gas cards have been provided to [Father] to assist with the expense of traveling to/from visits.

Father argues that this sub-finding of fact relies upon old information as most of Father's missed visits were in "early 2020 when he was homeless, without a driver's license, and living across the state." Father argues that since moving to Watauga County, his visitation record has been consistent, and he stopped missing visits over a year before the termination hearing.

¶ 48 First, the order from the September 11, 2020 permanency planning review hearing indicates that Father was approved to have supervised visitation with Allison for two hours every two weeks. Ms. Ballou's testimony at the hearing illustrates it was recommended that Father have monthly visits with Allison and that Father desired his visitations to be reduced because "it was difficult to take off work as well as secure transportation to those visits." Although the trial court's findings do not indicate at what point in time Father missed seven visits with Allison since his visitation began in January 2020, the record accurately reflects this number of missed visitations. The trial court considered a previous permanency planning review order which states DSS "has transported [Allison] to Boone once for visitation and has offered to assist [Father] with transportation to and from visits." Ms. Ballou's testimony also demonstrated that transportation played a factor in Father attending his visitations, but that DSS did provide transportation for Father a few

times. Accordingly, there was clear and convincing evidence to support sub-finding of fact 10(ee).

8. Sub-finding of Fact 10(ii)

¶ 49 Next, Father contends that the trial court's sub-finding of fact 10(ii) is misleading. It states that Father "has had inconsistent communication with [DSS]. There was a period of time in the spring of 2020 and 2021 that there was little if any communication." We disagree.

¶ 50 At the hearing, Ms. Ballou testified to Father's inconsistent communication, explaining that as a part of his case plan, he was expected to contact her on a weekly basis. Ms. Ballou described their communication as "sporadic" during the time of the February 28, 2020 hearing and around the time of September 2020. Ms. Ballou elaborated that her communication with Father was

> [a]t some points better than others, but there certainly were times where phone numbers would change, where we were unable to make contact, but overall, I would say that he has been -- at least once per month I have been able to somehow make contact with him. But certainly, there have been times in which he has been difficult to locate or that there have been many attempts made to get that one contact in per month and then there have been other months where he has been very communicative where I have -- I would say -- regular contact with him.

Accordingly, there was clear and convincing evidence to support the trial court's finding of Father's inconsistent communication with DSS.

9. Sub-findings of Fact 10(ll) and 10(pp)

¶ 51 Next, Father challenges sub-finding of fact 10(ll) as misleading. It states that "[t]he [trial court] finds that [Father's] progress has not been adequate to meet the needs standing in his way to provide proper and adequate care for [Allison]." Father contests sub-finding of fact 10(pp), which states: "[Father] has failed to comply with all but the most minimal requirements of his family service case plan. The limited progress made is not reasonable." Father argues that this finding is vague, does not provide dates, and does not reference the progress Father made. We agree.

¶ 52 Based upon the evidence before us, Father's progress has been adequate to address those elements in his family service case plan which would prevent him from providing care to Allison. During the course of

Father's family service case plan, Father completed parenting classes in May 2020 and has continued efforts in learning "how to become a better father" by communicating with the Children's Council in Boone and signing up for additional parenting classes. Father also moved across the state to be closer to his daughter, facing homelessness to do so.

¶ 53 The record demonstrates that Father's career is in the construction industry and that he has consistently worked with employers on a contractual basis during the course of his family service case plan. According to Father, he obtained full-time employment in construction several months before the termination hearing by working for his neighbor. This employment was verified by a letter from his neighbor. The record also illustrates that Father obtained appropriate and permanent housing in February 2021, has a one-year lease on the home, is able to pay the monthly rent for the home, and has prepared a room for his daughter to live with him. The record shows that his driver's license was restored to him in March 2021 and that he purchased a vehicle in May 2021.

¶ 54 As to the substance abuse and mental health requirements in Father's case plan, Ms. Ballou testified Father's case plan was amended in March 2020 because of "some ongoing concerns, based on collateral information that there was potentially some substance use and mental health issues." Yet these allegations of "ongoing concerns" were never explained in her testimony or noted in previous court orders, notes from DSS or GAL, or at the termination hearing. Nonetheless, Father addressed the added requirements in his amended case plan. Father took a substance abuse assessment in November 2020 and a combined mental health and substance abuse assessment through Daymark in late December 2020. According to a letter from a TASC Care Manager, Father completed two drug screens on December 21, 2020 and January 20, 2021, which were both negative. Father also joined Celebrate Recovery, a weekly faith-based recovery group, which was recommended to him by TASC services. A Celebrate Recovery group leader confirmed Father had attended group sessions since November 2020. The TASC Care Manager's letter further stated, "[t]hroughout [Father's] time in TASC it became apparent that he has taken his pursuit of a healthy, substance free lifestyle very seriously" and has "willingly engaged in services to learn skills and tools to benefit him and support him each day." We note that there is no evidence of a positive drug screen throughout the pendency of this case.

¶ 55 In terms of mental health, Father was diagnosed with borderline personality disorder, and it was recommended that he engage in individual therapy and DBT group therapy weekly. Ms. Ballou's testimony showed Father attended one therapy session and signed up for three

group sessions during the month of April 2021 but did not attend any sessions. Father testified he had been in communication with a DBT therapy leader in Watauga County and had been given "other outlets as far as finding DBT therapy that would be . . . conducive to [his] work schedule, she just found something for [him] and [he had] been communicating to her by email." Father's testimony also indicated he is aware of his impulsive behavior and is seeking help for it through attending the Celebrate Recovery classes, church, and Bible studies. Based on Father's progress in seeking help and addressing DSS's concerns regarding his unsubstantiated mental health and substance abuse issues and his sufficient progress in addressing the other elements of his case plan, we hold the trial court's sub-findings of fact 10(ll) and 10(pp) are not supported by clear and convincing evidence.

10. Sub-finding of Fact 10(nn)

¶ 56 Next, Father contends that the trial court's sub-finding 10(nn) was misleading. It states, "[s]ubstance use was the reason [Allison] came into foster care; [Father] has not attended mental health or substance use therapy as recommended by his assessments[.]" Father argues that substance abuse was a reason for Allison's removal from Mother, not Father, and that this finding is inaccurate because Father successfully complied with the "substance abuse and mental health requirements" as a condition of his probation. The record demonstrates that Mother's substance abuse was one of the reasons why Allison was placed into foster care, and we agree with Father that Allison was placed into foster care because of *Mother's* substance abuse, not his own. However, despite Father not living with Allison at the time she was placed into foster care, Father's case plan was amended in March 2020 to include a substance abuse assessment requirement and that he follow any recommended treatments therefrom. Father's probation conditions also required him to take a substance abuse assessment through TASC services. After this assessment with TASC, Father's treatment recommendation was to go to TASC care management and attend MRT[10] weekly. TASC services then referred Father to Daymark Recovery, who recommended him to SADBT weekly group meetings and Celebrate Recovery meetings. Based upon these assessments and recommendations, Father pursued several treatment options to address his alleged mental health and substance

10. MRT or Moral Reconation Therapy is described as a "cognitive-behavioral treatment system that leads to enhanced moral reasoning, better decision making, and more appropriate behavior." *About MRT*, MRT-Moral Reconation Therapy®, http://www.moral-reconation-therapy.com/about.html (last visited July 7, 2022).

abuse issues by attending Celebrate Recovery meetings weekly, going to TASC care management monthly, and purchasing a MRT book on his own initiative, all of which he was able to verify to the court.

¶ 57 To the extent that sub-finding of fact 10(nn) states that Father has not attended mental health or substance abuse therapy as recommended by his assessments, we hold it to be unsupported by clear and convincing evidence and overrule the sub-finding.

11. Sub-findings of Fact 10(qq) and 10(rr)

¶ 58 Finally, Father challenges sub-findings of fact 10(qq) and 10(rr) and argues that they were misleading and omitted information. Finding of fact 10(qq) states:

> [a]lthough [Father] knew prior to and after the child's birth that he might be the child's father, he did not make himself available for possible placement of the child when the child was placed in DSS custody. Indeed, he made no such efforts until the child was six months old and had been in DSS custody for all but 7 days of her life.

Sub-finding of fact 10(rr) states that Father "previously denied having any relationship with the child's mother. It was only after the results of paternity testing were revealed that [Father] admitted to such a relationship."

¶ 59 According to Mother's testimony at the termination hearing, upon learning she was pregnant, Father desired her to move with him to Statesville and told her he would visit her during the pregnancy. Father testified he was not certain he was the father of the child because Mother "was involved with several other men." In fact, Mother's testimony shows she was not certain who Allison's father was and initially gave the name of another individual as the putative father. The results of the November 2019 paternity test resolved this uncertainty. The record reflects that after Mother contacted Father to inform him of Allison's birth, Father did not receive further news concerning Allison until September 12, 2019, when he was served with an order to submit to a DNA test. The record is devoid of any evidence tending to demonstrate Father knew of Allison's removal from Mother or her placement in DSS custody prior to DSS informing him. Likewise, while the record shows Mother contacted Father at the time of Allison's birth, there is no record evidence indicating that she informed Father of Allison's placement into DSS custody as a result of Mother testing positive for drugs at birth.

¶ 60 Additionally, there is no evidence in the record to support the trial court's finding that Father previously had denied having any kind of relationship with Mother. After DSS contacted Father in mid to late October 2019, Father took a paternity test on November 4, 2019. There is no indication that Father refused to take the paternity test or ever denied that he was in a relationship with Mother. Further, there was no testimony to support this finding. Therefore, we hold that the trial court lacked sufficient evidence to support its sub-findings of fact 10(qq) and 10(rr).

C. Grounds to Terminate Parental Rights

¶ 61 Finally, Father contends the trial court erred by concluding that grounds existed to terminate his parental rights based upon his willfully leaving Allison in a 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 Allison pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). We agree.

¶ 62 Although Allison remained in foster care for 21 months, we hold that the trial court's findings do not support the conclusion of law that Father has failed to make reasonable progress "under the circumstances . . . in correcting those conditions which led to the removal" of Allison.

¶ 63 Looking at the requirements of Father's family service case plan, the evidence tends to show that Father made sufficient progress in meeting each element. The trial court found Father completed his parenting classes in May 2020, and Ms. Ballou testified that Father continued to pursue opportunities to improve his parenting skills, even beyond his case plan requirement, through the Children's Council in Boone. Father's case plan required visitations with Allison. To have a relationship with Allison and to be able to have visitations with her, Father moved across the state to be closer to his daughter. Ms. Ballou testified that while Father missed some visits early on, his visits had become consistent over time. Further, Ms. Ballou's testimony tended to show that since the September 11, 2020 hearing, Father has been consistent in his visits with Allison; and during visitations, Father talks, plays, brings gifts, and acts appropriately with his daughter.

¶ 64 Father's case plan also required him to obtain stable employment and suitable housing. The record evidence shows Father obtained full-time employment in his field of construction several months before the termination hearing. The record also demonstrates Father obtained appropriate and permanent housing in February 2021, signed a one-year

lease, and had consistently paid his monthly rent. Father was also required to obtain reliable transportation. The record shows Father took the necessary steps and paid all fees to have his driver's license reinstated in March 2021. Father purchased a vehicle in May 2021.

¶ 65 Concerning the substance abuse and mental health requirements in Father's case plan, Father took a substance abuse assessment in November 2020 and a combined mental health and substance abuse assessment in late December 2020. Father was diagnosed with borderline personality disorder, and it was recommended that he engage in individual therapy and DBT group therapy. It is true that Father attended only one therapy session and signed up for three group sessions during the month of April 2021 but did not attend any sessions. However, Father has taken steps to register for DBT therapy by communicating with a DBT therapy leader who is assisting him in finding a session conducive to his work schedule. Father submitted to a number of drug tests, all of which were either negative or inconclusive. Further, Father's probation conditions also required him to take a substance abuse assessment through TASC services and comply with the recommendations, which he successfully completed.

¶ 66 After addressing the requirements of Father's case plan and the progress he has made with each one, we note a "parent's failure to fully satisfy all elements of the case plan goals is not the equivalent of a lack of reasonable progress." *In re J.S.L.*, 177 N.C. App. 151, 163, 628 S.E.2d 387, 394 (2006) (citation omitted). While Father has not met every required element in his case plan, certainly, "perfection is not required to reach the 'reasonable' standard." *In re S.D.*, 243 N.C. App. 65, 73, 776 S.E.2d 862, 867 (2015). As noted above, some portions of the trial court's findings of fact are not supported by the evidence, "and although they are just portions of the findings, they are findings on the pivotal issues." *In re S.D.*, 243 N.C. App. 65, 73, 776 S.E.2d 862, 867 (2015). When we consider the many ways Father complied with his case plan in order to correct the conditions that led to Allison's placement into custody, together with the findings of the trial court we overruled, we hold that the remaining findings of fact do not support the conclusion of law that Father has failed to make reasonable progress in correcting the conditions which led to Allison's removal and do not warrant the termination of his parental rights.

III. Conclusion

¶ 67 We hold that competent evidence in the record shows Father made reasonable progress in correcting the conditions which led to Allison

being removed from her home and placed in DSS custody. While Father has not fully satisfied all elements of his case plan, he has *not* shown "a prolonged inability to improve [his] situation," which would warrant terminating his parental rights to Allison. *In re B.J.H.*, ¶ 12. Therefore, we conclude that the trial court's findings are not supported by clear and convincing evidence and the trial court erred in concluding that grounds existed to terminate Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Accordingly, we reverse the trial court's order terminating Father's parental rights to his minor child.

REVERSED.

Judges DIETZ and MURPHY concur.

IN THE MATTER OF A.C. & A.C.

No. COA21-576

Filed 16 August 2022

Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—evidence of income but not of amount

The trial court did not err by terminating respondent-father's parental rights in his children on the grounds of failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) where the trial court's findings that respondent was employed yet paid nothing in support while his children were in foster care were supported by clear and convincing evidence, in the form of a social worker's testimony that, during the determinative time period, respondent provided zero financial support despite reporting that he was earning some income—even though respondent did not specify the amount he was receiving.

Appeal by Respondent-Father from order entered 15 June 2021 by Judge Lori Christian in Wake County District Court. Heard in the Court of Appeals 5 April 2022.

Mary Boyce Wells for petitioner-appellee Wake County Health and Human Services.

IN RE A.C.

[285 N.C. App. 114, 2022-NCCOA-552]

Anné C. Wright for respondent-appellant father.

Stam Law Firm, PLLC, by R. Daniel Gibson, for guardian ad litem.

MURPHY, Judge.

¶ 1 An adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. Where evidence at trial demonstrated that Respondent-Father, Isaac,[1] had the ability to pay some amount of the cost of the care for his children while in foster care but paid nothing during the six-month period immediately preceding the filing of the petition, the trial court had adequate grounds to terminate parental rights even though Isaac was incarcerated for a portion of that time period and the amount of income disclosed was unspecified.

BACKGROUND

¶ 2 On 18 March 2019, Wake County Health and Human Services[2] ("WCHHS") filed petitions alleging that Debby and Florence were neglected juveniles. Debby and Florence had been living with family members since at least 2018 due to their parents' substance abuse issues. WCHHS attempted to work with the family as early as September 2018. However, Isaac "refused to comply with recommended substance abuse treatment" and "random drug screens." Nonsecure custody was granted to WCHHS on 29 March 2019. In an order entered 22 May 2019, the children were adjudicated to be "neglected as defined by N.C.G.S. §[ ]7B-101(15) in that the children do not receive proper care and supervision from the parents and live in an environment injurious to their welfare."

¶ 3 As part of the adjudication order, Isaac was required to "enter into and comply with the Out of Home Family Services Agreement." The Out of Home Family Services Agreement required Isaac to:

> a. [Follow a] [v]isitation agreement.
>
> b. Obtain and maintain housing appropriate for himself and his children.

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1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identities of the juveniles and for ease of reading.

2. Wake County Human Services became Wake County Health and Human Services effective 1 July 2021.

> c. Obtain and maintain legal income sufficient to meet the needs of himself and his children.
>
> d. Refrain from use of illegal or impairing substances and submit to random drug screens.
>
> e. Refrain from all criminal activity and comply with current criminal court requirements.
>
> f. Complete a psychological evaluation and comply with recommendations.
>
> g. Complete a parenting education program approved by [WCHHS] and demonstrate skills learned.
>
> h. Maintain regular contact with the social worker at [WCHHS], notifying [WCHHS] of any change in situation or circumstances within five business days[.]

¶ 4 After entering the Out of Home Family Services Agreement, Isaac consistently failed to meet his obligations. After the first permanency planning hearing, held 20 August 2019, the trial court found that Isaac had "failed to engage in services," "refused to comply with multiple requested drug screens," inconsistently contacted WCHHS and visited with his children, and had "pending criminal charges." After a second permanency planning hearing, held 10 February 2020, the trial court once again found Isaac "failed to significantly comply with his case plan." Finally, after a third permanency planning hearing, held 3 August 2020, the trial court found yet again that Isaac "failed to significantly comply with his case plan." Moreover, later in August 2020, Isaac tested positive for morphine. Isaac was incarcerated in July 2020 and again from 1 September 2020 until 4 December 2020 for probation violations.

¶ 5 WCHHS filed a motion to terminate parental rights on 15 October 2020. A hearing on the motion was held on 3 February 2021 and 1 March 2021. The trial court terminated both parents' parental rights, concluding (I) "[Isaac] willfully left the children in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the [trial] [c]ourt that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the children"; (II) "[Isaac] neglected the children within the meaning of [N.C.G.S. § 7B-101]"; and (III)

> [t]he children have been placed in the custody of [WCHHS] and [Isaac has] for a continuous period of six months immediately preceding the filing of the

> motion willfully failed to pay a reasonable portion of the cost of care for the children although physically and financially able to do so.

Isaac timely filed a *Notice of Appeal*.[3]

ANALYSIS

¶ 6 On appeal, Isaac contests all three of the trial court's grounds for terminating parental rights pursuant to N.C.G.S. § 7B-1111(a).

> However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. Therefore, if [the reviewing court] upholds the trial court's order in which it concludes that a particular ground for termination exists, then [it] need not review any remaining grounds.

In re J.S., 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted); *see also In re J.M.*, 373 N.C. 352, 356, 838 S.E.2d 173, 176 (2020). Here, as one of the trial court's three conclusions is sufficient to terminate Isaac's parental rights, we limit our review to whether the trial court erred in concluding that

> [t]he children have been placed in the custody of [WCHHS] and the parents have for a continuous period of six months immediately preceding the filing of the motion willfully failed to pay a reasonable portion of the cost of care for the children although physically and financially able to do so.

¶ 7 N.C.G.S. § 7B-1111(a)(3) provides for the termination of parental rights when

> [t]he juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

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3. Only Isaac appealed from the trial court's order. As Respondent-Mother did not appeal from the trial court's order, the order as it pertains to her remains undisturbed.

N.C.G.S. § 7B-1111(a)(3) (2021).[4] "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." *In re J.M.*, 373 N.C. at 357, 838 S.E.2d at 176 (marks omitted). "The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo." *In re J.S.*, 374 N.C. at 814, 845 S.E.2d at 71.

¶ 8 Here, Isaac contests several aspects of the trial court's conclusion that he willfully failed to pay a reasonable portion of the cost of the children's care during the six months at issue. First, he argues the trial court could not consider some of the evidence at trial—namely, the report of the guardian ad litem ("GAL")—because it was not offered or admitted at the termination hearing. Second, Isaac argues the trial court's findings that he was employed and paid nothing in child support were not themselves sufficient to justify termination of his parental rights under N.C.G.S. § 7B-1111(a)(3) because the trial court did not make a finding regarding the specific amount he earned during the statutory time period. Finally, he argues "[t]he only evidence regarding [Isaac's] employment during [the statutory] time period was that[,] between [Isaac's] July and September incarcerations, he told [WCHHS] that he was waiting on his first job from a temporary employment agency." None of these contentions are meritorious.

¶ 9 As to the first contention, Isaac asserts that the trial court could not consider the GAL report because it was not offered or admitted at the termination hearing. However, the trial court did not need to consider the GAL report to make its finding. The trial court had other "clear, cogent and convincing evidence" concerning Isaac's employment and income before it. *In re J.M.*, 373 N.C. at 357, 838 S.E.2d at 176. At trial, a WCHHS employee testified:

> [COUNTY ATTORNEY:] [WCHHS employee], has he reported to you working anywhere or making any kind of income in 2020?
>
> [WCHHS EMPLOYEE:] So, yes. He—when he was out in between his July and September incarcerations, he reported working at another temporary agency.

4. In this case, the motion to terminate Isaac's parental rights was filed on 15 October 2020, making the relevant time period in relation to N.C.G.S. § 7B-1111(a)(3) 15 April 2020 to 15 October 2020.

[COUNTY ATTORNEY:] Okay. And did he say what his approximate income was or how much—how frequently he was paid? Did he give you any of those details?

[WCHHS EMPLOYEE:] He did not. He said he was waiting to get his first job. But he was—he was employed by the temporary agency. When he and I talked—because he was only about for—about five weeks, he said he had been hired by the temporary agency.

[COUNTY ATTORNEY:] Okay. So he was reporting some income, he just wasn't telling you what it was?

[WCHHS EMPLOYEE:] That's correct.

[COUNTY ATTORNEY:] And that was during the six-month period prior to the filing of the TPR motion; is that right?

[WCHHS EMPLOYEE:] Yes, ma'am.

[COUNTY ATTORNEY:] All right. And, [WCHHS employee], what does it cost per month for Wake County to care for the children?

[WCHHS EMPLOYEE:] So currently we are paying the current caregivers a half four [sic] payment because they're in the process of being licensed. So [Debby], it's $237.50 for the half four [sic] payment.

[COUNTY ATTORNEY:] And for [Florence]?

[WCHHS EMPLOYEE:] Her half four [sic] payment is $290.50.

[COUNTY ATTORNEY:] Okay. [Have the parents] provided any kind of financial support to the agency or offered any payments to the agency while the children have been in foster care?

[WCHHS EMPLOYEE:] The only thing I can find in the record is, is [Respondent-Mother] reported giving [the previous caretaker] a hundred dollars on [6 June 2019].

[COUNTY ATTORNEY:] [6 June 2019]. And that was the only thing that you're aware of?

> [WCHHS EMPLOYEE:] That's the only thing I can see in the file that—as far as monetary. She did give [Florence] $20 on her birthday. But that was to [Florence] as a birthday gift.
>
> [COUNTY ATTORNEY:] Okay. But, I mean, separate from the file, [WCHHS employee], you've been the foster care social worker since January 2020. Has either parent provided any other financial support to the kids—or provided any other portion of the cost of care?
>
> [WCHHS EMPLOYEE:] No, no child support or direct payment to myself or to [the foster parent], as far as financial support directly, like money.

The testimony from the WCHHS employee, which was not objected to at trial, established that Isaac had earned income during the requisite period without any need for the trial court to refer to the GAL report. We need not consider whether the trial court's review of the GAL report was error because the trial court's finding is supported by other clear and convincing evidence.

¶ 10 Isaac also argues the trial court's findings that he was employed and paid nothing in child support were not themselves sufficient to justify termination of his parental rights under N.C.G.S. § 7B-1111(a)(3) because the trial court did not make a finding regarding the amount he earned during the statutory time period. Isaac is mistaken. "The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo." *In re J.S.*, 374 N.C. at 814, 845 S.E.2d at 71. When a trial court finds that a respondent-parent had the ability to pay some amount toward the cost of care of his or her children while in the custody of social services but he or she paid nothing, the trial court is permitted to conclude that this was a willful failure to pay a reasonable portion of the cost of care under N.C.G.S. § 7B-1111(a)(3). *In re J.M.*, 373 N.C. at 359-60, 838 S.E.2d at 178. Evidence of a failure to pay any portion of the cost of care while earning some amount of income is sufficient to conclude that a parent did not pay a reasonable portion of the cost of care. *Id.* at 359, 838 S.E.2d at 178.

¶ 11 Isaac cites *In re Faircloth*, 161 N.C. App 523, 588 S.E.2d 561 (2003), for the proposition that a finding of a parent having been employed and a finding of a parent having paid nothing in child support are not sufficient to show N.C.G.S. § 7B-1111(a)(3) has been met. However, *In re Faircloth* is distinguishable from the case at hand because, in that case,

the trial court had failed to specifically address the parent's employment during the relevant time frame defined by N.C.G.S. § 7B-1111(a)(3). *In re Faircloth*, 161 N.C. App. at 526, 588 S.E.2d. 561 at 564. The evidence in *In re Faircloth* "did not specifically address whether [the mother] was employed at *any* time [during the six months immediately preceding the filing of the motion.]" *Id.* (emphasis added). Here, while the trial court noted that Isaac's incarceration impacted his employment within the statutory period, there is evidence in the Record specifically addressing Isaac's employment and income at some point during the statutory time period when he was not incarcerated:

> [COUNTY ATTORNEY:] Okay. So he was reporting some income, he just wasn't telling you what it was?
>
> [WCHHS EMPLOYEE:] That's correct.
>
> [COUNTY ATTORNEY:] And that was during the six-month period prior to the filing of the TPR motion; is that right?
>
> [WCHHS EMPLOYEE:] Yes, ma'am.

Isaac reported earning some income during the six-month period by working jobs for a temporary agency, as was his custom both before and after being incarcerated. The evidence before the trial court in this case specifically addressed the statutory time period, unlike in *In re Faircloth*. Isaac's attempt to use *In re Faircloth* to avoid financial responsibility for his children because he was incarcerated during a portion of the six-month period has no merit when the evidence supports that Isaac was earning income during a portion of the same period while he was not incarcerated.

¶ 12 Finally, as to Isaac's third contention—that "[t]he only evidence regarding [Isaac's] employment during this time period was that[,] between [Isaac's] July and September incarcerations, he told [WCHHS] that he was waiting on his first job from a temporary employment agency"—the evidence at trial contravenes this position. The testimony from the WCHHS employee at the adjudication hearing, *supra* at ¶ 9, provided clear and convincing evidence that supports the trial court's findings that Isaac was employed at some point within the six months preceding the filing of the motion for termination of parental rights and had failed to contribute anything to the financial care of the children even though Isaac had been incarcerated for part of the statutory time period. Furthermore, Isaac had reported earning some income, and there was evidence demonstrating that Isaac worked for a temporary

agency before going to prison in July 2020, worked for another temporary agency afterward, and worked for his father's company in 2019.[5] Although Isaac was not reporting his specific earnings, the trial court had evidence before it that Isaac was employed and earning income in some capacity. Even assuming Isaac's statement made in between his incarcerations about waiting for a job from the temporary agency contradicts the evidence presented by the WCHHS employee about Isaac earning income, "the trial court was not bound to find respondent's evidence to be credible or give it more weight than any other evidence[.]" *In re K.G.W.*, 250 N.C. App. 62, 66, 791 S.E.2d 540, 543 (2016).

¶ 13 Isaac's incarcerations and failure to report a specific amount of income were certainly evidence for the trial court to consider regarding his ability to pay, but they were not the only evidence before the trial court from which it could have determined whether his failure to pay a reasonable portion of his children's care was willful. "We note that it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25, *reh'g denied*, 337 N.C. 807, 449 S.E.2d 750 (1994); *see also In re D.E.M.*, 254 N.C. App. 401, 403, 802 S.E.2d 766, 769 (2017) ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony."), *aff'd per curiam*, 370 N.C. 463, 809 S.E.2d 567 (2018). The trial court considered the evidence regarding Isaac's incarcerations. Isaac was incarcerated in July of 2020 and again from September 2020 to December 2020. The trial court recognized there was a disruption of his employment due to his incarcerations:

> With regards to [Isaac], he has worked for different labor finder organizations. And, again, the [c]ourt recognizes there was a period of time in which he was

5. We note that it was appropriate for the trial court to consider Isaac's physical and financial ability in the near past to determine that Isaac had the ability to provide more than zero dollars toward the care of the children within the six-month time period. *See In re A.P.W.*, 378 N.C. 405, 2021-NCSC-93, ¶¶ 44-45 (finding respondent-mother's nonpayment of a support agreement during the six-month period to be willful where she had "demonstrated an ability to work by multiple reported periods of employment"). In *In re A.P.W.*, the trial court noted: "The [respondent-mother's] employment status is unclear. She has reported work at Lydall, Van Heusen, the Candle Company, and Tyson." *Id.* at ¶ 21. The record in *In re A.P.W.* demonstrates that the respondent-mother had reported working at Van Heusen in March 2018, at Lydall in January 2018, and at Candle Company at an unspecified time before August 2018. The petition to terminate parental rights in that case was filed in April 2019.

> incarcerated and he could not have worked during that time. But the evidence is that he provided zero toward the cost of the children.

The trial court was not required to find that Isaac worked throughout the entire six-month period. The trial court's finding that Isaac had the ability to pay something toward the cost of care for his children within the six-month period but paid nothing was sufficient to terminate his parental rights. *See In re J.M.*, 373 N.C. at 359-60, 838 S.E.2d at 178 ("Here, the trial court's findings establish [the] respondent-mother had the ability to pay some amount toward the cost of care for her children while they were in DSS custody but paid nothing. These findings support its conclusion that grounds exist to terminate [the] respondent-mother's parental rights to the children pursuant to N.C.G.S. § 7B-1111(a)(3)."). Although more detailed findings on a parent's ability to pay would generally be helpful in appellate review, the trial court is under no obligation to make specific findings on the amount a parent earns when the evidence demonstrates a discrepancy between his or her ability to pay and the actual amount paid towards the care of the children while in foster care during the six-month period. *See id.* The trial court's findings of fact support its conclusion of law.

CONCLUSION

¶ 14 The trial court properly concluded it had grounds to terminate Isaac's parental rights under N.C.G.S. § 7B-1111(a)(3) for a willful failure "to pay a reasonable portion of the cost of care for the children although physically and financially able to do so." The trial court's conclusion is supported by its finding that Isaac was employed during the six-month period but did not provide any reasonable portion of the cost of the children's care. This finding is supported by the evidence. Based on what Isaac had reported to her, the WCHHS employee testified that he had earned an unspecified amount of income within the six months preceding WCHHS filing the petition to terminate parental rights. Since this N.C.G.S. § 7B-1111(a) ground adjudicated by the trial court is supported by the evidence, there is no need to review any remaining grounds. *See id.* at 356, 838 S.E.2d at 176 ("[O]nly one ground is needed to terminate parental rights . . . .").

¶ 15 Isaac does not separately contest the trial court's determination at the dispositional stage of the termination proceeding that terminating his parental rights is in the children's best interest on appeal, so we

need not consider it.[6] Accordingly, we affirm the termination orders as to Isaac.

AFFIRMED.

Judges GORE and GRIFFIN concur.

ESTATE OF KIE LANDON JOHNSON, BY AND THROUGH WILLIAM JOHNSON AND MONA ELLISON, ADMINISTRATORS OF THE ESTATE, PLAINTIFFS
v.
GUILFORD COUNTY BOARD OF EDUCATION, DEFENDANT

OLIVIA BROWN, BY AND THROUGH HER GUARDIAN AD LITEM, EMILY HOEPFL, AND EMILY HOEPFL, INDIVIDUALLY, PLAINTIFFS
v.
GUILFORD COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA21-630

Filed 16 August 2022

Negligence—sudden emergency—intoxicated driver in wrong lane—school bus—no contribution to emergency

Where an intoxicated driver traveled into an oncoming lane of traffic and crashed into a school bus, killing the intoxicated driver's passenger, the appellate court affirmed the decision of the Industrial Commission applying the doctrine of sudden emergency and concluding that the school bus driver did not act negligently in her attempt to avoid the collision. The doctrine applied because the bus driver had fewer than five seconds to act after realizing that the oncoming vehicle would not correct its path, and the bus driver did not contribute to or cause the emergency—despite plaintiff's argument that the bus driver should have maneuvered to the right (into a ditch) rather than to the left (although the bus remained fully within its own lane).

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6. "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." N.C.G.S. § 7B-1110(a) (2021). However, the trial court's conclusion as to best interests at disposition must be challenged separately. *In re A.P.W.*, 378 N.C. 405, 2021-NCSC-93, ¶ 46. As Isaac did not contest these conclusions, we do not address them here.

Appeal by Plaintiffs from decision and order entered 10 June 2021 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 10 May 2022.

Frazier, Hill & Fury, R.L.L.P., by Torin L. Fury, and R. Steve Bowden & Associate, P.C., by Edward P. Yount, for Plaintiffs-Appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Carl Newman, for Defendant-Appellee.

INMAN, Judge.

¶ 1 This appeal arises out of a head-on collision between a car and a school bus on a rural road, which killed one passenger and injured others. Plaintiffs contend the Commission erred in concluding: (1) the bus driver was not negligent by application of the doctrine of sudden emergency; and (2) Plaintiffs failed to establish the bus driver had the last clear chance to avoid the collision. After careful review, we affirm the decision and order of the Commission.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 The record below tends to show the following:

¶ 3 On 26 August 2015, at approximately 4:30 p.m., Lakeisha Miller ("Ms. Miller") was driving a Guilford County school bus north on Knox Road, a two-lane road divided by a double yellow, no-passing center line in a rural part of Guilford County, when Jacob Larkin ("Mr. Larkin"), an 18-year-old high school student, drove in the wrong direction in Ms. Miller's lane and crashed his Toyota Camry head-on into the bus. The collision killed one of the car's passengers, Kie Johnson, and injured Mr. Larkin, the car's remaining passengers, including Olivia Brown, and Ms. Miller. At the time of the collision, Ms. Miller had one minor passenger on the bus. Mr. Larkin was impaired from a mixture of marijuana and Xanax, "was driving erratically," and had been "reckless" before the crash.

¶ 4 When Ms. Miller first saw Mr. Larkin's vehicle traveling toward her in the wrong lane, she immediately took her foot off the gas pedal and slowed down to allow him to return to the correct lane. She sounded the bus's horn twice to alert the driver. As the car approached, Ms. Miller noticed that the driver was slumped over in the driver's seat and appeared to be reaching down, looking at the floor of his car. The shoulder of the road to the bus's right was wide and grassy but sloped down into

a ditch. Ms. Miller considered turning right to avoid a collision but was worried the bus would overturn in the uneven ditch or crash into the fence running parallel to the road on the right. She could see there was no traffic behind Mr. Larkin, so "at the last minute," she maneuvered the bus left—toward the oncoming lane of traffic that the approaching car should have been in—to avoid the collision.

¶ 5 Ms. Miller had driven buses for Guilford County Schools for approximately ten years. She had obtained her commercial driver's license in 2005, completed the State's requisite training courses for school bus traffic and safety, and renewed her certification every few years. North Carolina school bus drivers are trained that when an approaching driver is in the wrong lane, that driver's natural response will be to return to his or her correct lane if the driver realizes what has happened and it may be best to move right. The instruction "Steering to Avoid A Crash" further provides: "Top heavy vehicles such as school buses may turn over . . . . If something is blocking your path, the best direction to steer will depend on the situation . . . . If the shoulder is clear, going right may be best." Knox Road was on Ms. Miller's regular route for two to three years, and she had driven the road at least one hundred times, if not more.

¶ 6 On 11 April and 23 July 2018, Plaintiffs, administrators of Kie Johnson's estate and guardian for Olivia Brown, respectively, filed claims against the Guilford County Board of Education (the "Board") for $1,000,000 in damages under the Tort Claims Act with the North Carolina Industrial Commission. Plaintiffs alleged: (1) Ms. Miller's maneuver of the school bus was not sufficient to avoid colliding with Mr. Larkin's vehicle; and (2) Ms. Miller was negligent when she failed to recognize the danger of Mr. Larkin's oncoming car, honk her horn to warn Mr. Larkin, maintain proper control of the school bus, maintain a proper lookout, and crossed left of center while operating the Board's bus. The Board denied all allegations of negligence and raised defenses of (1) contributory negligence, (2) intervening, superseding, and criminal acts of Mr. Larkin, (3) intervening and superseding negligence and acts of the surviving car passengers, and third parties, and (4) the sudden emergency doctrine.

¶ 7 The matter was bifurcated on the issues of liability and damages, and these consolidated claims came on for trial before a Deputy Commissioner on 17 June 2019. The Deputy Commissioner denied Plaintiffs' claims and Plaintiffs appealed to the Full Commission (the "Commission").

¶ 8 Reviewing the evidence, the Commission concluded Ms. Miller's evasive actions were proper and lawful because the bus was not left

of the center yellow lines at the point of impact and, even if it was, Mr. Larkin's oncoming car was an obstruction that permitted Ms. Miller to deviate from the right lane of traffic. The Commission concluded Ms. Miller's actions were further insulated from liability under the doctrine of sudden emergency, and she "did not breach a duty of care owed to Plaintiffs." Even if Ms. Miller was negligent, the Commission alternatively concluded Plaintiffs were barred from recovery because they were contributorily negligent for "ignor[ing] unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety" and failing to leave Mr. Larkin's car when they had the opportunity prior to the collision. Finally, the Commission concluded that the Board was not liable under the doctrine of last clear chance because Plaintiffs "failed to prove that Ms. Miller was negligent in the operation of her school bus" and "that Ms. Miller, by the exercise of reasonable care, 'failed or refused to use every reasonable means' at her command to avoid the impending injury." Plaintiffs appeal.

II. ANALYSIS

A. Standard of Review

¶ 9 We review the Commission's decision under the Tort Claims Act " 'for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.' " *Simmons v. Columbus Cty. Bd. of Educ.*, 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005) (quoting N.C. Gen. Stat. § 143-293 (2003)). "As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding." *Id.* at 728, 615 S.E.2d at 72 (citation omitted). "Under the Tort Claims Act, when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001) (quotation marks and citation omitted).

¶ 10 Where the Commission's factual findings are unchallenged, they are binding on appeal. *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014). "In addition, findings of fact to which error is assigned but which are not argued in the brief are deemed abandoned." *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 706, 654 S.E.2d 263, 265 (2007) (citation omitted).

B. The Doctrine of Sudden Emergency

¶ 11 Plaintiffs assert two challenges to the Commission's application of the sudden emergency doctrine: (1) Ms. Miller contributed to the sudden emergency by failing to exercise due care when she accelerated towards the collision and swerved left, in violation of her training; and (2) the oncoming collision did not require Ms. Miller to act instantly by swerving. Neither argument is persuasive.

¶ 12 Plaintiffs have not challenged any of the Commission's findings of fact, so they are binding on this Court. *See Medlin*, 367 N.C. at 423, 760 S.E.2d at 738. Further, though Plaintiffs' proposed issues on appeal included challenges to findings 38 and 39, their brief does not challenge whether either finding is supported by competent evidence. Therefore, they have abandoned any challenge to these findings. *See Strezinski*, 187 N.C. App. at 706, 654 S.E.2d at 265.

¶ 13 We consider, based on the binding findings of fact and applicable law, whether the Commission erred in applying the doctrine of sudden emergency. *See Simmons*, 171 N.C. App. at 727, 615 S.E.2d at 72. For the reasons explained below, we affirm the Commission.

1. The emergency compelled Ms. Miller to act instantly.

¶ 14 Our courts have defined an emergency situation "as that which compels one to act instantly to avoid a collision or injury." *Keith v. Polier*, 109 N.C. App. 94, 98, 425 S.E.2d 723, 726 (1993) (cleaned up).

¶ 15 Plaintiffs contend the emergency did not require Ms. Miller to act instantly because she had between 10.9 and 15.6 seconds to react from the moment she first observed Mr. Larkin's vehicle in her lane until the point of impact. In its decision and order, the Commission explicitly considered the timing of the collision and described an accident reconstruction expert's testimony on this issue: "Ms. Miller had *10.9 to 15.6 seconds to first perceive and react*, slow the bus to a stop, and then accelerate to impact speed[,]" and she "had 5 seconds from slowing the bus to the point of impact." (Emphasis added). The Commission further found that Ms. Miller had "less than five seconds" to act after realizing that the oncoming vehicle would not correct its path:

> 38. . . . . When it became apparent that Mr. Larkin was slumped over the steering wheel and Mr. Larkin would not return his vehicle to the proper lane, *Ms. Miller* had less than five seconds to choose to either (1) steer right and risk overturning the school

> bus in the ditch with her student passenger, or (2) steer left into the empty lane.

We are bound by the Commission's unchallenged findings, *Medlin*, 367 N.C. at 423, 760 S.E.2d at 738, and we will not reweigh the evidence, *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("[O]n appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight." (quotation marks and citation omitted)). *See also Simmons*, 171 N.C. App. at 728, 615 S.E.2d at 72.

¶ 16 Our Court has held that reacting in less than five seconds qualifies as acting "instantly" to avoid injury for the purposes of the sudden emergency doctrine. *See, e.g.*, *Schaefer v. Wickstead*, 88 N.C. App. 468, 471-72, 363 S.E.2d 653, 655 (1988) (holding an instruction on the doctrine of sudden emergency was warranted when the defendant had between 4.55 and 5.5 seconds to avoid hitting a pedestrian with his vehicle).

¶ 17 The decisions Plaintiffs cite—*Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993), and *Colvin v. Badgett*, 120 N.C. App. 810, 463 S.E.2d 778 (1995)—are factually distinguishable. In *Keith*, we held the defendant was not entitled to the benefit of an instruction on the sudden emergency doctrine because the alleged emergency was not sudden where he rear-ended a car stopped at a traffic signal, 109 N.C. App. at 99-100, 425 S.E.2d at 726-27, and, in *Colvin*, we held that the driver's "fear and apprehension upon seeing his sister-in-law's truck on the side of the road, while understandable, did not give rise to a situation where he had to act instantly to avoid injury to himself or another" to warrant a jury instruction on the doctrine of sudden emergency, 120 N.C. App. at 812, 463 S.E.2d at 780.

¶ 18 The Commission properly concluded the emergency, created by Mr. Larkin driving in the wrong lane of travel, compelled Ms. Miller to act instantly, in less than five seconds, to avoid a head-on collision. *See Schaefer*, 88 N.C. App. at 471-72, 363 S.E.2d at 655.

2. Ms. Miller did not contribute to or cause the sudden emergency.

¶ 19 "The doctrine of sudden emergency applies when a defendant is confronted with an emergency situation *not of his own making* and requires [a] defendant only to act as a reasonable person would react to similar emergency circumstances." *Weston v. Daniels*, 114 N.C. App. 418, 420, 442 S.E.2d 67, 71 (1994) (citation omitted) (emphasis added). But a defendant shall not be "held liable for failure to act as a calm, detached reflection at a later date would dictate." *Id.* (citation omitted).

¶ 20 As an initial matter, the Board contends Plaintiffs have waived review of this challenge to the application of the sudden emergency doctrine—that Ms. Miller is not entitled to the defense because her negligence caused or contributed to the sudden emergency—because they did not present the specific challenge to the Commission on appeal from the Deputy Commissioner's decision and order. Assuming without deciding whether Plaintiffs preserved this issue for our review, we hold the Commission correctly concluded Ms. Miller's actions are insulated from liability under the doctrine of sudden emergency.

¶ 21 Plaintiffs disregard the Commission's binding findings that Ms. Miller did not cross the center, yellow line and that she acted reasonably in maneuvering the bus to the left:

> 23. . . . . The school bus is fully in its appropriate lane, angled slightly to the left, with its front left tire slightly over the nearest double yellow line but not across the second yellow line. Thus, based on the simulation, the point of impact is within Ms. Miller's lane of traffic with the front right of Mr. Larkin's car striking the front right of the school bus.
>
> 38. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds . . . that Ms. Miller, at the time, had to make an immediate decision when confronted with an impending collision. The Full Commission finds that, given the relatively short window of time in which she had to react, Ms. Miller acted reasonably in her evasive maneuvers to avoid a collision with Mr. Larkin's vehicle. . . . Ms. Miller assessed what she thought was the best course of action based on her years of experience as a driver, her training, and familiarity with her school bus route. While it may be best to move the school bus right when a vehicle drifts into the path of a school bus, training materials acknowledge that there are times when going right is not possible. The Full Commission finds that Ms. Miller acted reasonably when she drove to the left in an attempt to avoid the collision with Mr. Larkin's car.
>
> 39. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that even if Ms. Miller's school bus crossed the

> double yellow line prior to the collision, doing so was reasonable given that Ms. Miller was attempting to avoid Mr. Larkin's vehicle.

These findings support the Commission's legal conclusion that Ms. Miller's actions are insulated from liability under the doctrine of sudden emergency. *See Fennell*, 145 N.C. App. at 589, 551 S.E.2d at 490.

¶ 22 Plaintiffs compare this case to several cases where a driver was precluded from invoking the sudden emergency doctrine because of their own negligence—for failure to travel at a safe speed, maintain control, or keep a proper lookout—because it contributed to the emergency. *See, e.g.*, *Goins v. Time Warner Cable Se., LLC*, 258 N.C. App. 234, 238-40, 812 S.E.2d 723, 727-28 (2018) (cyclists were traveling too fast and failed to keep proper lookout for downed utility line in the roadway); *Sobczak v. Vorholt*, 181 N.C. App. 629, 639, 640 S.E.2d 805, 812 (2007) (driver was "on notice of a potential encounter with ice" in snowy conditions); *Gupton v. McCombs*, 74 N.C. App. 547, 549-50, 328 S.E.2d 886, 888 (1985) (driver "failed to keep a vigilant lookout for the [pedestrian]" and sound her horn); *White v. Greer*, 55 N.C. App. 450, 454, 285 S.E.2d 848, 851-52 (1982) (motorcyclist failed to avoid a car turning left in the oncoming lane). Those cases are inapposite because, throughout the sequence of this collision, Ms. Miller drove the bus at a reasonable speed, maintained control of the bus, and kept a lookout for Mr. Larkin's vehicle and her surroundings.

¶ 23 In this case, Mr. Larkin created an emergency by traveling in the wrong lane toward a head-on collision with the school bus. *See, e.g.*, *Casey v. Fredrickson Motor Express Corp.*, 97 N.C. App. 49, 56, 387 S.E.2d 177, 181 (1990) (holding evidence of an oncoming vehicle in the wrong lane of travel was sufficient to warrant a jury instruction on the sudden emergency doctrine). And Ms. Miller's subsequent actions did not contribute to or cause the sudden emergency. *See Weston*, 114 N.C. App. at 420, 442 S.E.2d at 71. When Ms. Miller first saw Mr. Larkin's vehicle in her lane, she immediately slowed the bus and honked her horn to warn the driver. Because Mr. Larkin did not return to the correct lane and Ms. Miller was concerned about the slope on the right shoulder of the roadway as well as the safety of the bus's remaining passenger, she accelerated to the left in her lane to avoid a collision. Ms. Miller did not cross the yellow line and school bus safety training materials "acknowledge that there are times when going right is not possible." She cannot be held liable "for failure to act as a calm, detached" accident reconstruction expert with the benefit of hindsight. *Id.* (citation omitted).

¶ 24 Since Ms. Miller was compelled to act instantly and her actions did not contribute to the creation of the emergency, we hold the Commission appropriately applied the doctrine of sudden emergency and concluded the Board, through the actions of its employee Ms. Miller, was not negligent.

¶ 25 Because we affirm the Commission's conclusion that Ms. Miller was not negligent and Plaintiffs do not challenge the Commission's alternative conclusion that Plaintiffs' claims were further barred based on their own contributory negligence, we need not address Plaintiffs' remaining argument about the doctrine of last clear chance. *See Wray v. Hughes*, 44 N.C. App. 678, 684-85, 262 S.E.2d 307, 311 (1980) ("[W]here there is no evidence that [a] defendant failed to keep a reasonable lookout in the direction of travel or that a person exercising a proper lookout would have been able in the exercise of reasonable care to avoid the collision, the last clear chance doctrine does not apply." (citations omitted)).

III. CONCLUSION

¶ 26 For the reasons outlined above, we affirm the decision and order of the Commission.

AFFIRMED.

Judges ARROWOOD and WOOD concur.

KEENAN v. KEENAN

[285 N.C. App. 133, 2022-NCCOA-554]

MEGAN KEENAN, PLAINTIFF
v.
JASON KEENAN, DEFENDANT

No. COA21-579

Filed 16 August 2022

1. Domestic Violence—protective order—fear of continued harassment—single act—legitimate purpose—mowing lawn

The trial court did not err by granting plaintiff's petition for a domestic violence protective order (DVPO) and denying defendant's motion to dismiss for insufficiency of the evidence where defendant mowed plaintiff's lawn even though plaintiff warned him ahead of time not to do so and told him to leave at the time he trespassed on her property to mow. The trial court did not err by using defendant's single act of mowing plaintiff's lawn as the basis for the DVPO, and it did not err by finding that his conduct in mowing plaintiff's lawn did not serve a legitimate purpose.

2. Appeal and Error—abandonment of issues—necessary reasons or arguments—prejudice

On appeal from the trial court's domestic violence protective order (DVPO) issued against defendant in favor of his ex-wife, defendant's Rule 404(b) argument that the trial court erred by considering a prior DVPO issued against him in favor of his sister was deemed abandoned because defendant failed to argue—as necessary to prevail on appeal—that the alleged error prejudiced him.

3. Domestic Violence—protective order—prior DVPO—relevance—considered alongside current act

In a hearing on plaintiff's petition for a domestic violence protective order (DVPO) against defendant, the trial court did not err by considering a prior DVPO issued against defendant in favor of plaintiff where the prior DVPO was relevant and was considered alongside defendant's current act of trespassing on plaintiff's property to mow her lawn.

Appeal by Defendant from order entered 7 May 2021 by Judge Resson Faircloth in Johnston County District Court. Heard in the Court of Appeals 22 March 2022.

Walker Kiger, PLLC, by David "Steven" Walker, for plaintiff-appellee.

The Law Office of Robert L. Schupp, PLLC, by Robert L. Schupp, for defendant-appellant.

MURPHY, Judge.

¶ 1 In accordance with N.C.G.S. § 50B-3, "[i]f [a] court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence." N.C.G.S. § 50B-3(a) (2021). "Domestic violence," for purposes of N.C.G.S. § 50B-3, includes "[p]lacing the [party seeking a domestic violence protective order] or a member of [his or her] family or household in fear of imminent serious bodily injury or continued harassment, as defined in [N.C.G.S. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]" N.C.G.S. § 50B-1(a)(2) (2021). Placing a person in fear of continued harassment does not require multiple acts by a defendant. Here, where Defendant challenges a domestic violence protective order ("DVPO") entered against him by specifically arguing the trial court was required to find he committed two or more acts as the basis for the alleged error, the trial court did not err, as a single act was sufficient for it to grant Plaintiff a domestic violence protective order.

¶ 2 However, a defendant's act does not constitute "continued harassment" if it served a legitimate purpose. Whether an act served a legitimate purpose is a determination reserved for the finder of fact; thus, when reviewing the trial court's determination on the issue of legitimate purpose, we uphold its determination as long as "there was competent evidence to support the trial court's findings of fact." *Stancill v. Stancill*, 241 N.C. App. 529, 531, 773 S.E.2d 890, 892 (2015). In this case, there was competent evidence that the only purpose of Defendant's conduct was to harass Plaintiff; and, as such, the trial court did not err in determining Defendant's act did not serve a legitimate purpose.

¶ 3 In challenging the admissibility of allegedly improper character evidence under Rule 404(b), a defendant must show the admission of that evidence created probable prejudice in the factfinder's determination at trial. Here, where Defendant makes no attempt to show he was prejudiced by an alleged evidentiary error, that issue is deemed abandoned in accordance with Rule 28(b)(6) of our Rules of Appellate Procedure.

¶ 4 In determining whether to issue a DVPO, the trial court's consideration of a prior DVPO entered against the defendant is permissible as long as it otherwise constitutes relevant evidence under Rule 401 and is considered alongside at least one current, specific act. Here, where the trial court considered a prior DVPO alongside evidence of a specific

act by Defendant and the prior DVPO was relevant to contextualize Plaintiff's emotional response to his current act, the trial court did not err in considering the prior DVPO.

BACKGROUND

¶ 5 This appeal arises out of a *Complaint and Motion for Domestic Violence Protective Order* filed by Plaintiff on 18 August 2020 alleging Defendant, her ex-husband, came to her house "to cut [her] grass" on 17 August 2020 after she repeatedly told him he did not have permission to do so and he refused to leave after Plaintiff asked him to leave several times. Plaintiff indicated she was "very afraid" of Defendant, as he had a history of physically, emotionally, and verbally abusing her, was "showing [a] progression of unstable behavior[,]" and sent her text messages, including sexual ones, despite being asked to stop.

¶ 6 The trial court issued a temporary *ex parte* DVPO on 18 August 2020, adopting by reference the facts as alleged in Plaintiff's complaint. Then, after several continuances, the trial court held a hearing on 7 May 2021 to determine whether a permanent DVPO was warranted. Plaintiff testified about the 17 August 2020 incident and also introduced text messages between her and Defendant from 16 August 2020 and 17 August 2020. The testimony and text messages demonstrated that Defendant came to Plaintiff's house, began cutting her grass, and refused to leave on 17 August 2020, despite at least three requests by Plaintiff on 16 August 2020 that he not come and four requests on 17 August 2020 that he leave. Plaintiff testified she did not need or allow Defendant to come and cut her grass because she had arranged for Defendant's brother to do so, which she communicated to Defendant. She also testified that Defendant's presence on 17 August 2020 made her "nervous" and gave her a "panic attack." Finally, in addition to testifying about the August 2020 incident, Plaintiff introduced a prior consent DVPO against Defendant issued for her protection on 14 October 2016, which expired in September 2019 after two extensions, and text messages from Defendant during April 2020, including unsolicited sexual messages, which corroborated the allegations in her complaint. At the close of Plaintiff's evidence, Defendant moved to dismiss, and the trial court denied his motion.

¶ 7 Defendant, for his part, did not contradict Plaintiff's account of the August 2020 incident at the hearing; rather, he testified and presented evidence that Plaintiff's lawn was overgrown and that he ignored Plaintiff's requests and cut the grass "to protect [his] kids and their best interests and their health and well-being." Regarding the April 2020 text messages, Defendant acknowledged that he understood "[Plaintiff] doesn't

want [him] sending those type[s] [of] messages to her" and testified he had stopped doing so. Plaintiff cross-examined Defendant about another prior DVPO against him, one issued for his sister's protection. Plaintiff did not introduce this DVPO into evidence, but she showed Defendant a copy and questioned him about it. Defendant objected to these questions, first on relevancy grounds and then on the grounds that the DVPO constituted impermissible character evidence. *See generally* N.C.G.S. § 8C-1, Rule 401 (2021); N.C.G.S. § 8C-1, Rule 403 (2021); N.C.G.S. § 8C-1, Rule 404 (2021). The trial court, however, overruled both objections. At the close of all evidence, Defendant renewed his motion to dismiss for insufficiency of the evidence, but the trial court, again, denied his motion.

¶ 8 At the close of the hearing, the trial court granted Plaintiff a permanent DVPO; and, on 18 May 2021, Defendant appealed.

ANALYSIS

¶ 9 On appeal, Defendant argues that "the trial court erred in denying Defendant's motion[s] to dismiss for insufficiency of the evidence"; that "the trial court erred in granting Plaintiff's petition for a domestic violence protective order"; and that "the trial court erred in admitting . . . prior domestic violence protective order[s] entered against Defendant . . . ." However, as Defendant's arguments with respect to both his motions to dismiss and the granting of the DVPO revolve entirely around two blanket arguments about the interpretation of N.C.G.S. § 50B-1—namely, that a DVPO "requires two or more acts in order for a defendant to have engaged in [domestic violence]" and that "Defendant's acts served a legitimate purpose"—we review these underlying arguments in order to resolve both the motion to dismiss and DVPO arguments simultaneously, then proceed to consider the character evidence issue. Neither blanket argument by Defendant is meritorious, and the trial court did not err in considering evidence of Defendant's prior DVPOs. We affirm.

A. Multiple Acts Not Required for Chapter 50B

¶10 **[1]** "We review issues of statutory construction *de novo*." *In re Ivey*, 257 N.C. App. 622, 627, 810 S.E.2d 740, 744 (2018). Under N.C.G.S. § 50B-3, "[i]f [a] court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence." N.C.G.S. § 50B-3(a) (2021). For purposes of issuing a DVPO,

> [d]omestic violence means the commission of one or more of the following acts upon an aggrieved party

> or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in [N.C.G.S. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in [N.C.G.S. §] 14-27.21 through [N.C.G.S. §] 14-27.33.

N.C.G.S. § 50B-1(a) (2021). Specifically at issue in this case is whether Defendant "[placed] the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment, as defined in [N.C.G.S. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress[,]" as this was the primary basis for the DVPO. *Id.*

¶ 11 Defendant argues that the phrasing "fear of imminent serious bodily injury or continued harassment, as defined in [N.C.G.S. §] 14-277.3A" incorporates not only N.C.G.S. § 14-277.3A(b)(2)'s definition of "harassment," but also N.C.G.S. § 14-277.3A(b)(1)'s definition of "[c]ourse of conduct." *See generally* N.C.G.S. § 14-277.3A(b) (2021). Under this argument, "harassment," for purposes of N.C.G.S. § 50B-1, would require a "[c]ourse of conduct," which is defined as

> [t]wo or more acts, including, but not limited to, acts in which the [defendant] directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

N.C.G.S. § 14-277.3A(b)(1) (2021). This definitional requirement, Defendant suggests, would accompany the definition of "harassment" in N.C.G.S. § 14-277.3A(b)(2), which describes the covered acts as

> [k]nowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions,

> answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

N.C.G.S. § 14-277.3A(b)(2) (2021).

¶ 12 However, we are not persuaded that N.C.G.S. § 50B-1(a) contemplates only the behaviors falling at the intersection of these two descriptions; rather, in accordance with the plain language of the statute, the definition N.C.G.S. § 50B-1 imports from N.C.G.S. § 14-277.3A is that of "harassment," exclusive of any further definitions discussed in N.C.G.S. § 14-277.3A. *See* N.C.G.S. § 50B-1(a)(2) (2021) (emphasis added) (referring to "*harassment*, as defined in [N.C.G.S. §] 14-277.3A"). Generally speaking, N.C.G.S. § 14-277.3A is not a harassment statute, but a stalking statute; its subsections, including those defining harassment, do so to elaborate on the definition of "stalking." *See generally* N.C.G.S. § 14-277.3A (2021). In other words, "harassment, as defined in [N.C.G.S. §] 14-277.3A[,]" does not refer to the *whole* statute, as a reference to stalking would, but instead refers to an individual subpart dedicated to "harassment" within a broader, section-wide definition of "stalking." N.C.G.S. § 50B-1(a)(2) (2021). Thus, the statutory definition incorporated is limited to that of "harassment" in N.C.G.S. § 14-277.3A(b)(2). This interpretation finds ample support in our caselaw. *See*, *e.g.*, *Kennedy v. Morgan*, 221 N.C. App. 219, 222, 726 S.E.2d 193, 195 (2012) (quoting N.C.G.S. § 14-277.3A(b)(2) (2011)) ("Chapter 50B does not define 'harassment,' but [N.C.G.S.] § 50B-1(a)(2) refers to [N.C.G.S.] § 14-277.3A which defines 'harassment' as 'knowing conduct directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.' "); *Martin v. Martin*, 266 N.C. App. 296, 307, 832 S.E.2d 191, 200 (2019) (referring to N.C.G.S. § 14-277.3A's definition of "harassment" while ignoring its definition of "course of conduct" and the overall definition of "stalking"); *Bunting v. Bunting*, 266 N.C. App. 243, 250, 832 S.E.2d 183, 188 (2019) (same); *Thomas v. Williams*, 242 N.C. App. 236, 243-44, 773 S.E.2d 900, 905 (2015) (same); *Stancill*, 241 N.C. App. at 541, 773 S.E.2d at 898 (same).

¶ 13 As N.C.G.S. § 50B-1(a)(2) imports only the definition of "harassment" from N.C.G.S. § 14-277.3A and not "[c]ourse of conduct," more than one act is not required for a trial court to find domestic violence has occurred and issue a DVPO. Instead,

> a conclusion of law that an act of domestic violence has occurred require[s] evidence and findings of

> the following: (1) [the] [d]efendant "has or has had a personal relationship," as defined by [N.C.G.S. §] 50B-1(b), with [the] plaintiff; (2) [the] defendant committed *one or more acts* upon [the] plaintiff or "a minor child residing with or in the custody of" [the] plaintiff; (3) the *act or acts* of [the] defendant placed [the] plaintiff "or a member of her family or household in fear of imminent serious bodily injury *or* continued harassment, as defined in [N.C.G.S. §] 14-277.3A;" and (4) the fear "rises to such a level as to inflict substantial emotional distress."

Kennedy, 221 N.C. App. at 222, 726 S.E.2d at 195 (emphases added) (footnote omitted) (quoting N.C.G.S. § 50B-1(a)(2) (2011)). The trial court, therefore, did not err in using only one act by Defendant as the basis for its DVPO.

B. Legitimate Purpose of Defendant's Act

¶ 14 Defendant further argues that the act supporting the DVPO—mowing Plaintiff's grass against her repeated requests, both on the day of his appearance and the day before, that he not come—served a legitimate purpose and, therefore, could not serve as the basis for a DVPO. The act in question, Defendant argues, could not have "[placed] the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment," N.C.G.S. § 50B-1(a)(2) (2021), because acts that serve a legitimate purpose cannot amount to harassment under N.C.G.S. § 14-277.3A(b)(2).

¶ 15 Despite the language of N.C.G.S. § 50B-1 only indicating that a defendant's act or acts may support a DVPO if they "placed the aggrieved party . . . *in fear of* . . . *continued* harassment," N.C.G.S. § 50B-1(a)(2) (2021) (emphasis added), we have consistently required the act itself to constitute harassment for the DVPO to issue on that basis. *See*, *e.g.*, *Bunting*, 266 N.C. App. at 250-51, 832 S.E.2d at 188-89 (examining whether a defendant's acts supporting a DVPO qualified as harassment). Thus, "to support a conclusion of law that an act of domestic violence has occurred due to 'harassment,' . . . [the] defendant's acts [must] (1) [be] knowing, (2) [be] 'directed at a specific person,' . . . (3) torment[], terrorize[], or terrif[y] the person, . . . and (4) serve[] no legitimate purpose." *Kennedy*, 221 N.C. App. at 222, 726 S.E.2d at 195-96 (quoting N.C.G.S. § 14-277.3A(b)(2) (2011)). However, when conducting this inquiry, "we defer to the trial court's assessment of [the parties'] credibility and its resulting determination [of whether the conduct served a] legitimate purpose" rather than heeding a defendant's own characterization of the

conduct. *Stancill*, 241 N.C. App. at 543, 773 S.E.2d at 899. Contrary to Defendant's suggestion, "[w]hether conduct served a legitimate purpose is a factual inquiry," not a legal question subject to de novo review on appeal. *Bunting*, 266 N.C. App. at 250, 832 S.E.2d at 188.

¶ 16 "We review both an *ex parte* DVPO and a DVPO to determine whether there was competent evidence to support the trial court's findings of fact[.]" *Stancill*, 241 N.C. App. at 531, 773 S.E.2d at 892 (mark omitted). Here, the trial court was presented with evidence that Defendant, after being warned not to mow Plaintiff's lawn the day before and being told to leave day-of, trespassed on Plaintiff's property and mowed her lawn. These events provide an adequate basis for a finder of fact—here, the trial court—to conclude Defendant's actions were taken to "torment[], terrorize[], or terrif[y]" Plaintiff rather than for a "legitimate purpose." N.C.G.S. § 14-277.3A(b)(2) (2021). Whatever persuasive value Defendant's characterization of the events may have—that his actions served the legitimate purpose of mowing Plaintiff's lawn and were directed at Plaintiff's lawn rather than Plaintiff—they do not establish that his actions were somehow legitimate as a matter of law or negate competing interpretations of his conduct. Indeed, the ability to torment a person while ostensibly targeting a nearby object makes conduct of this type especially appealing to a passive-aggressive harasser, producing the intended effect while maintaining deniability. This very phenomenon underscores the importance of the factfinder's credibility determination. Here, where the finder of fact determined that Defendant's conduct did not serve a legitimate purpose, we will not undermine that determination by speculating over a cold Record. *See Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980) ("The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.").

¶ 17 As the trial court was not required to find Defendant committed multiple acts and properly found as a matter of fact that Defendant's conduct did not serve a legitimate purpose, the trial court neither erred in denying Defendant's motion to dismiss nor in granting Plaintiff's DVPO.

C. Prior DVPO Concerning Defendant's Sister

¶ 18 **[2]** Defendant further argues the trial court erred when it considered prior DVPOs issued against him concerning his sister. Defendant argues the order should not have been admitted at trial because it constituted inadmissible character evidence under Rule 404(b) of our Rules of Evidence. *See* N.C.G.S. § 8C-1, Rule 404(b) (2021) ("Evidence 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."). As Defendant properly objected at trial, ordinarily, we would "review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

¶ 19 However, "evidentiary errors are considered harmless unless a different result would have been reached at trial. The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Keller v. Deerfield Episcopal Ret. Cmty., Inc.*, 271 N.C. App. 618, 635, 845 S.E.2d 156, 167, *disc. rev. denied*, 376 N.C. 544, 851 S.E.2d 372 (2020). Defendant makes no argument that he was prejudiced by the trial court's consideration of the prior DVPO concerning his sister.[1] Without such an argument, Defendant cannot show the trial court erred in entering the current DVPO.

¶ 20 We have previously held that, when an issue raised by an appellant "is missing necessary reasons or arguments" without which he cannot prevail on appeal, that issue is deemed abandoned. *State v. Patterson*, 269 N.C. App. 640, 645, 839 S.E.2d 68, 72, *disc. rev. denied*, 375 N.C. 491, 847 S.E.2d 886 (2020); *see also* N.C. R. App. P. 28(b)(6) (2022) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Here, where Defendant was required to show prejudice and did not attempt to do so, he has abandoned his Rule 404(b) argument on appeal.

D. Prior DVPO Concerning Plaintiff

¶ 21 **[3]** Finally, Defendant argues the trial court erred in considering, over a relevancy objection at trial, a prior DVPO entered against him concerning Plaintiff. Defendant argues consideration of this prior DVPO was improper because, under *Kennedy*, "a general history of abuse is not an act of domestic violence." "We review relevancy determinations by the trial court de novo . . . ." *State v. Triplett*, 368 N.C. 172, 175, 775 S.E.2d 805, 807 (2015); *see also* N.C.G.S. § 8C-1, Rule 401 (2021) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

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1. Indeed, the argument appears to quite literally be incomplete, with the final sentence ending in the middle of a subordinate clause.

¶ 22 Defendant's contention appears to be that, under *Kennedy*, the trial court's reliance, in any part, on the prior DVPO concerning Plaintiff constitutes reversible error. However, *Kennedy* is inapposite with respect to relevancy. Our remark in *Kennedy* that "a vague finding of a general history of abuse is not a finding of an act of domestic violence" was made in the context of a challenge to the sufficiency of the evidence at trial, not a challenge to the admissibility of the evidence. *Kennedy*, 221 N.C. App. at 223, 726 S.E.2d at 196 (marks omitted). This distinction is evident from *Kennedy*'s express contemplation that a trial court *may* consider a prior DVPO as long as it is not the sole consideration leading to the entry of the current DVPO. *See id.* (marks omitted) ("[W]e appreciate that a history of abuse may at times be quite relevant to the trial court's determination as to whether a recent act constitutes domestic violence[.]").

¶ 23 Reviewing the trial court's admission of the prior DVPO concerning Plaintiff, then, we have no difficulty determining that the trial court did not err. The prior DVPO, at minimum, would demonstrate to the finder of fact whether Plaintiff was placed "in fear of imminent serious bodily injury or continued harassment[] . . . that rises to such a level as to inflict substantial emotional distress" by contextualizing Plaintiff's emotional response to Defendant trespassing on her property. N.C.G.S. § 50B-1(a)(2) (2021). Moreover, a detailed sense of the relationship dynamic between Plaintiff and Defendant would assist the finder of fact in determining Defendant's state of mind when evaluating whether Defendant's actions served a legitimate purpose. As such, the trial court did not err in admitting the prior DVPO concerning Plaintiff.

CONCLUSION

¶ 24 Defendant's blanket arguments that the trial court was required to find he engaged in a course of conduct and that his acts served a legitimate purpose as a matter of law are both without legal support. Moreover, Defendant has not argued he was prejudiced by the trial court's consideration of allegedly inadmissible evidence, and the trial court did not otherwise err in considering prior DVPOs issued against him.

AFFIRMED IN PART; DISMISSED IN PART.

Judges INMAN and GRIFFIN concur.

MORRIS v. RODEBERG

[285 N.C. App. 143, 2022-NCCOA-555]

FREEDOM MORRIS, Plaintiff
v.
DAVID RODEBERG, M.D., individually and in his individual capacity, and PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED d/b/a VIDANT MEDICAL CENTER, Defendants

No. COA21-378

Filed 16 August 2022

1. Appeal and Error—interlocutory orders—motion to dismiss denied—not immediately appealable—certiorari—judicial efficiency

Where the trial court denied defendants' motions to dismiss in a medical malpractice action based upon the statute of limitations, although the trial court's interlocutory order was not immediately appealable, the Court of Appeals granted defendants' petition for a writ of certiorari to review the order because interlocutory review of this dispositive question of law would be more efficient than deferring the issue until final judgment at the trial level, and it would prevent unnecessary delay in the administration of justice.

2. Statutes of Limitation and Repose—medical malpractice—minor plaintiff—thirteen years old at time of accrual of claim—ordinary three-year limitations period

A medical malpractice action alleging that defendants negligently performed plaintiff's appendectomy was time-barred by the statute of limitations where plaintiff's action accrued at the time of the appendectomy, when he was thirteen years old, and he filed his complaint more than five years later (before he reached the age of nineteen). N.C.G.S. § 1-17(c) controlled, as the subsection regarding medical malpractice actions, and according to its plain language the three-year statute of limitations that ordinarily applied to medical malpractice actions applied here because plaintiff did not fall within the exception for minors for whom the limitations period expires before they reach the age of ten.

3. Statutes of Limitation and Repose—minor plaintiff—as-applied constitutional challenge—rational basis review

In a medical malpractice action in which plaintiff was a minor at the time his claim accrued, assuming without deciding that plaintiff's as-applied constitutional challenge to N.C.G.S. § 1-17(c) was properly before the trial court and preserved for appellate review, the Court of Appeals held that his challenge lacked merit because

statutes of limitations do not affect any fundamental right and therefore are not subject to strict scrutiny—rather, rational basis review applied. Because plaintiff failed to argue or cite any authority to demonstrate that subsection 1-17(c) did not pass rational basis review, his constitutional challenge was rejected.

Judge HAMPSON dissenting.

Appeal by defendants from order entered 16 March 2021 by Judge J. Carlton Cole in Pitt County Superior Court. Heard in the Court of Appeals 8 February 2022.

Cranfill Sumner LLP, by Steven A. Bader and Colleen N. Shea, for defendant-appellant Pitt County Memorial Hospital Incorporated, et al.

Ellis & Winters LLP, by Alex J. Hagan, Michelle A. Liguori, and Robert L. Barry, for defendant-appellant David Rodeberg, M.D.

Oxendine Barnes & Associates PLLC, by Ryan D. Oxendine, James A. Barnes, IV, and Spencer S. Fritts, for plaintiff-appellee.

Roberts & Stevens, PA, by David C. Hawisher, for Amicus Curiae North Carolina Association of Defense Attorneys.

GORE, Judge.

¶ 1 Plaintiff Freedom Morris initiated this medical malpractice action against Dr. Rodeberg and Vidant Hospital (collectively, "defendants"). Defendants filed Motions to Dismiss plaintiff's Complaint as time-barred under N.C. Gen. Stat. § 1-17(c). The trial court entered a written order denying defendants' motions, and defendants appealed. Upon review, we reverse.

I. Factual and Procedural Background

¶ 2 On 23 February 2015, plaintiff presented to the Emergency Department at Vidant Medical Center with complaints of right-sided abdominal pain. Plaintiff was evaluated by the pediatric surgery team, and an abdominal ultrasound confirmed acute appendicitis. Plaintiff was a thirteen-year-old minor at the time, and his mother was present with him.

¶ 3 The following day, on 24 February 2015, plaintiff underwent a laparoscopic appendectomy—a minimally invasive surgery to remove the appendix through several small incisions, rather than one large incision. Dr. Rodeberg, the chief of pediatric surgery at Vidant Hospital, performed the surgery.

¶ 4 Plaintiff alleges that Dr. Rodeberg negligently performed the appendectomy by failing to remove the entire appendix and properly irrigate the operative site. After the initial surgery, plaintiff developed an infection and underwent two additional surgeries. Plaintiff was released from the hospital on 20 March 2015.

¶ 5 On 14 September 2020, plaintiff filed the instant lawsuit against defendants, alleging medical malpractice claims arising from defendants' care and treatment of plaintiff's appendicitis. Plaintiff alleged that Dr. Rodeberg breached the standard of care in performing the appendectomy, and that Vidant Hospital was negligent and vicariously liable for Dr. Rodeberg's conduct.

¶ 6 In his Complaint, plaintiff specifically alleged, "The statute of limitations has not expired prior to the filing of this civil action; more specifically, this action is being brought prior to the one year statute of limitations provided by N.C.G.S. § 1-17(b), as [plaintiff] was a minor until November 28, 2019." On 12 and 16 November 2020, defendants filed Motions to Dismiss under Rule 12(b)(6), alleging N.C. Gen. Stat. § 1-17(c) applied, and the statute of limitations on plaintiff's claim ran three years after plaintiff's surgery while he was still a minor.

¶ 7 In response to defendants' Motions to Dismiss, plaintiff submitted a brief for the trial court's consideration, arguing that:

> 1. The statute of limitations for Plaintiff's causes of action had not run by the filing of Plaintiff's Complaint because Plaintiff's Complaint was filed prior to him turning nineteen years of age and thus was timely under N.C. Gen. Stat. § 1-17(b); and
>
> 2. Defendants' strained interpretation of Subsection 1-17(c) would violate the Equal Protection Clause of the United States and North Carolina Constitutions as applied to Plaintiff.

¶ 8 On 15 February 2021, Superior Court Judge J. Carlton Cole heard defendants' Motions to Dismiss. At the outset of the hearing, counsel for defendants noted the parties agreed that plaintiff's action accrued in

February 2015, when the appendectomy was performed. Counsel for defendants argued that, based on the February 2015 accrual date, plaintiff's age of thirteen at the time of accrual, and the fact that the Complaint was filed in September of 2020—more than five years later—the complaint should be dismissed pursuant to the plain language of sections 1-17(c) and 1-15(c), which provided a three-year statute of limitations.

¶ 9 Plaintiff argued subsection (c) of § 1-17 did not apply to medical malpractice actions involving minors over the age of ten at the time of accrual of the action. Instead, subsection (b) of § 1-17 applied. Plaintiff also contended, if subsection (c) applied, it was unconstitutional as applied to plaintiff. Specifically, he argued defendants' statutory interpretation violated his Equal Protection rights because it treated minors differently, based on whether they were under or over the age of ten at the time of accrual of the action.

¶ 10 Defendants contended plaintiff's constitutional argument was a facial challenge to subsection (c) of § 1-17. Further, defendants asserted this argument was not properly before the trial court because it was not raised in plaintiff's Complaint, and because only a three-judge panel of the Superior Court of Wake County could determine that a North Carolina statute is unconstitutional.

¶ 11 On 15 March 2021, the trial court entered an Order denying defendants' Motions to Dismiss. The Order did not specify on which grounds the trial court based its ruling, stating only that defendants brought their Motions "under N.C. Gen. Stat. §§ 1-15(c), 1-17(c), and 1-52." The trial court did not rule on plaintiff's constitutional argument. Fifteen days later, on 31 March 2021, Judge Cole retired from the bench. On 5 April 2021, defendants filed their Joint Notice of Appeal to this Court from Judge Cole's Order Denying Defendants' Motions to Dismiss entered 16 March 2021.

II. Appellate Jurisdiction

¶ 12 **[1]** "Orders denying motions to dismiss based upon the statute of limitations are interlocutory and not immediately appealable." *Nello L. Teer Co. v. N.C. DOT*, 175 N.C. App. 705, 711, 625 S.E.2d 135, 139 (2006). However, there are at least two routes by which a party may obtain immediate review of an interlocutory order or judgment. First, if the order or judgment is final as to some but not all the claims or parties, and the trial court certifies there is no reason for delay. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2021). Second, an interlocutory order can be immediately appealed under §§ 1-277(a) and 7A-27(b)(3)(a) if the trial court's

decision deprives the appellant of a substantial right which would be lost absent immediate review. §§ 1-277(a), 7A-27(b)(3)(a) (2021).

¶ 13 Here, defendants assert the trial court's Order affects a substantial right because Judge Cole retired shortly after denying their motions to dismiss, thereby depriving them of an opportunity to bring a motion for reconsideration. Defendants cite generally to our well-established rule "that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citation omitted).

¶ 14 While not explicitly argued by either party, it is unclear why N.C. R. Civ. P. 63 does not afford relief to an aggrieved party under these circumstances. "This Court has interpreted the language of Rule 63 to statutorily authorize a substitute judge to reconsider an order entered by a judge who has since retired." *Springs v. City of Charlotte*, 222 N.C. App. 132, 135, 730 S.E.2d 803, 805 (2012) (citations omitted). Additionally, fifteen days passed from entry of the trial court's Order and Judge Cole's retirement. For more than two weeks, defendants did not seek reconsideration of that Order under N.C. R. Civ. P. 54(b). After Judge Cole had retired, defendants did not seek reconsideration by another trial judge pursuant to N.C. R. Civ. P. 63. Regardless, it is unnecessary to determine whether the trial court's Order is appealable as a matter of right pursuant to §§ 1-277(a) and 7A-27(b)(3)(a), and we make no such holding here, since we elect to assert jurisdiction over this matter on other grounds. *See Hill v. StubHub, Inc.*, 219 N.C. App. 227, 232, 727 S.E.2d 550, 554 (2012).

¶ 15 Defendants also filed a petition for writ of *certiorari* pursuant to N.C. R. App. P. 21 asking this Court to permit review in the event we determine that the trial court's Order is not immediately appealable. This Court may issue a writ of *certiorari* in "appropriate circumstances" to permit review of a trial court's order "when no right of appeal from an interlocutory order exists." N.C. R. App. P. 21(a). For the writ to issue, the petitioner has the burden of showing "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). Defendants argue there are three reasons the writ should issue: (1) the trial court's denial of their Motions to Dismiss presents a pure question of law that is fully developed for this Court's review; (2) the trial court's failure to apply the three-year statute

of limitations in § 1-17(c) was clearly erroneous; and (3) they have no avenue for seeking reconsideration in the trial division.

¶ 16 It is true that the mere fact that an interlocutory appeal could resolve the litigation is not enough to justify a grant of *certiorari*. *See Newcomb v. Cnty. of Carteret*, 207 N.C. App. 527, 553, 701 S.E.2d 325, 344 (2010). However, when interlocutory review of a dispositive question of law would be more efficient than deferring the issue until final judgment at the trial level, review by *certiorari* is appropriate. This Court has previously granted our writ of *certiorari* to review purely legal questions in cases where we have determined that "the administration of justice will best be served by granting defendants' petition." *Reid v. Cole*, 187 N.C. App. 261, 264, 652 S.E.2d 718, 720 (2007) (citation omitted); *see also Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 872 (1983) (affirming this Court's grant of *certiorari* to review the denial of a motion for summary judgment where "[t]he issue is strictly a legal one and its resolution is not dependent on further factual development . . . [and] the issue of the applicability and interpretation of th[e] statute is squarely presented . . . ."); *Valentine v. Solosko*, 270 N.C. App. 812, 814-15, 842 S.E.2d 621, 624 (2020) (granting *certiorari* to review the trial court's denial of a motion to dismiss where judicial economy would be best served by reviewing the interlocutory order); *Harco Nat'l Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 691, 698 S.E.2d 719, 722 (2010) (granting *certiorari* to review the trial court's denial of a motion for summary judgment brought on an outcome determinative choice of law issue).

¶ 17 In the case *sub judice*, defendants have demonstrated interlocutory review would promote the interest of public policy by preventing unnecessary delay in the administration of justice. Accordingly, in the exercise of our discretion, we issue our writ of *certiorari* and review defendants' appeal on the merits.

III. Statute of Limitations

¶ 18 **[2]** A trial court's interpretation of a statute of limitations is an issue of law that is reviewed de novo on appeal. *Goetz v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 421, 425, 692 S.E.2d 395, 398 (2010).

¶ 19 The parties dispute whether subsection (b) or subsection (c) of § 1-17 applies to this medical malpractice action filed by a minor. Plaintiff contends subsection (b) controls and argues his claim is not time-barred because he filed suit prior to turning nineteen years of age. Plaintiff further contends subsection (c) only applies to minors under the age of ten years old.

¶ 20 Defendants assert the statute of limitations as a complete bar to plaintiff's claim. Defendants argue the plain language of subsection (c) provides a three-year limitations period for accrual of a medical malpractice claim for a minor over the age of ten. We conclude that § 1-17(c) controls, and plaintiff's suit is untimely.

¶ 21 Section 1-17 has three relevant subsections. Subsection (a) is the general tolling provision, which allows a person who is under a disability at the time the cause of action accrued to file suit within three years after the disability is removed. A person under the age of 18 years is under a disability for the purpose of this section. § 1-17(a)(1).

¶ 22 Subsection (b) applies to professional malpractice actions if the plaintiff is a minor. The text of § 1-17(b), provided in full:

> Notwithstanding the provisions of subsection (a) of this section, and *except as otherwise provided in subsection (c) of this section*, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform *professional services* shall be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years.

§ 1-17(b) (emphasis added).

¶ 23 Subsection (c) is narrower and apples to medical malpractice actions. The plain language of § 1-17(c) provides, in pertinent part:

> *Notwithstanding the provisions of subsection (a) and (b) of this section*, an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a *health care provider's performance* of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except as follows:
>
> (1) If the time limitations specified in G.S. 1-15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.
>
> . . . .

§ 1-17(c)(1) (emphasis added).[1] Under subsection (c), a plaintiff who is older than age seven when his medical malpractice cause of action accrued does not receive any extension to the statute of limitations.

¶ 24 "The cardinal principle of statutory construction is that the intent of the legislature is controlling." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (quotation marks and citation omitted).

> Just as a more specific statute will prevail over a general one, a specific provision of a statute ordinarily will prevail over a more general provision in that same statute. Moreover, just as it "is true *a fortiori*" that a specific statute prevails over a general one "when the special act is later in point of time," the later addition of a specific provision to a pre-existing more general statute indicates the General Assembly's most recent intent.

LexisNexis Risk Data Mgmt. v. N.C. Admin. Office of the Courts, 368 N.C. 180, 187, 775 S.E.2d 651, 656 (2015) (internal citations omitted).

¶ 25 In *King v. Albemarle Hosp. Auth.*, our Supreme Court was tasked with interpreting and applying § 1-17(b), prior to the addition of subsection (c). 370 N.C. 467, 470-71, 809 S.E.2d 847, 849 (2018). The Court observed that, "Section 1-17(b) . . . reduces the standard three-year statute of limitations, after a plaintiff reaches the age of majority, to one year by requiring a filing before the age of nineteen." *Id.* at 471, 809 S.E.2d at 850. The Court elaborated upon the General Assembly's amendment to this section in 2011, which "reduce[d] the minor's age from nineteen to ten years . . . *thus further narrowing the time period for a minor to pursue a medical malpractice claim*." *Id.* at 471 n.2, 809 S.E.2d at 850 n.2 (emphasis added). This specific footnote on the application of § 1-17(c) was not necessary to the decision and is therefore nonbinding *dicta*. Nonetheless, this commentary by our Supreme Court is a relevant guideline for our instant task of interpreting the application of subsection (c) to medical malpractice cases brought by a minor.

¶ 26 Subsection (c) is a narrower and later addition to the statute. It applies to a subset of claims to which § 1-17(b) also applies, specifically medical malpractice as opposed to a more general professional malpractice. It provides that, despite the provisions in subsections (a) and (b),

1. Subsections (c)(2) and (c)(3) are omitted as they are not applicable in this case.

in a medical malpractice action on behalf of a minor, the usual § 1-15(c) statute of limitations applies. Except, if the statute of limitations expires before the minor turns ten years old, then it is extended until the minor's tenth birthday. Under § 1-15(c), the statute of limitations for a medical malpractice action is three years (plus an additional year under the latent discovery rule). § 1-15(c).

¶ 27 Subsection 1-17(c) controls the applicable statute of limitations in this case. Plaintiff was over the age of ten at the time of accrual of his claim. Thus, the three-year statute of limitations that ordinarily governs medical malpractice actions applies. Plaintiff's lawsuit is untimely because his medical malpractice action accrued when he was thirteen years old, and he filed suit five years later.

IV. As-Applied Constitutional Challenge

¶ 28 **[3]** In the alternative, plaintiff raises an as-applied constitutional challenge to § 1-17(c). He argues § 1-17(c), as-applied, violates the Equal Protection Clause of both the United States and North Carolina Constitutions because it does not pass strict scrutiny review.

¶ 29 Assuming, without deciding, that plaintiff's constitutional challenge to § 1-17(c) was properly before the trial court and preserved for appellate review, his argument lacks merit.

¶ 30 "Strict scrutiny applies only when a regulation classifies persons on the basis of certain suspect characteristics or infringes the ability of some persons to exercise a *fundamental* right." *DOT v. Rowe*, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001) (citation omitted) (emphasis added). Plaintiff asserts subsection 1-17(c) runs counter to the "fundamental" right provided by Article I, Section 18 of the North Carolina Constitution. That article provides that "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18.

¶ 31 Plaintiff contends subsection (c) creates a separate class of medical-malpractice plaintiffs over the age of ten but less than fifteen years who—unless appointed a guardian ad litem, adjudicated abused or neglected juveniles, or placed in the custody of the State—are subject to a three-year statute of limitations and thus will always be barred from bringing their claims upon reaching the age of majority.

¶ 32 However, plaintiff acknowledges § 1-17(c) is a statute of limitation; it does not bar his suit. "Statutes of limitation represent a public policy about the privilege to litigate. Their shelter has never been regarded as

what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual." *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 408, 71 L. Ed. 2d 250, 256 (1982) (*purgandum*). "Persons with malpractice claims are not a suspect class and a classification so as to shorten the statute of limitations as to them does not affect a fundamental interest. This classification is not inherently suspect." *Hohn v. Slate*, 48 N.C. App. 624, 626, 269 S.E.2d 307, 308 (1980) (citation omitted).

¶ 33 Thus, statutes of limitation do not affect a fundamental right and are not subject to strict scrutiny analysis. Intermediate scrutiny attaches to other classifications, including gender and illegitimacy. *Rowe*, 353 N.C. at 675, 549 S.E.2d at 207. All other classifications, including age-based discrimination, receive rational-basis scrutiny. *Id.* Under rational-basis review, "the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest." *Id.*

¶ 34 In *Hohn*, this Court heard a similar equal protection challenge to an earlier version of § 1-17, wherein the plaintiff argued § 1-17(b) "create[d] an arbitrary class and there is no rational basis for this distinction." 48 N.C. App. at 626, 269 S.E.2d at 308. We flatly rejected that argument. *Id.*

¶ 35 In this case, plaintiff offers no argument and cites no authority to demonstrate that § 1-17(c) does not pass rational-basis review. Accordingly, his as-applied constitutional challenge is without merit.

V. Conclusion

¶ 36 For the foregoing reasons, the trial court erred by denying defendants' Motions to Dismiss the Complaint as time-barred under § 1-17(c). We reverse.

REVERSED.

Judge WOOD concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

¶ 37 At the outset, I completely agree with the majority that this appeal is interlocutory and does not impact any substantial right of Defendants that would be lost absent immediate appeal. I would, however, also deny the Petition for Writ of Certiorari in the exercise of judicial restraint; thereby allowing the litigation to proceed apace and obviating the need

for this Court to wade into a question of first impression involving novel statutory interpretation and to reach—in the first instance—a constitutional question we might otherwise judiciously avoid at this stage or, potentially, altogether in this litigation. All the trial court did here was deny Defendants' pre-answer Motions to Dismiss. The trial court's Order does not finally rule on the application of the Statute of Limitations nor does it finally rule on the constitutionality of Section 1–17(c) as applied to Plaintiff in this case. Nevertheless, the majority of this panel voted in favor of allowing the Petition, and reaches the merits of this case. On those merits, I respectfully dissent from the Opinion of the Court.

I.

¶ 38 The majority's thoughtful and concise statutory analysis here focuses narrowly on the language of N.C. Gen. Stat. § 1–17(c). However, in a manner consistent with our prior precedent, the proper approach is to read Section 1–17(c) *in pari materia* with Section 1–15(c) and then, in turn, Sections 1–17(a) and (b). *Cf. Osborne by Williams v. Annie Penn Mem'l Hosp., Inc.*, 95 N.C. App. 96, 101, 381 S.E.2d 794, 797 (1989) ("In the case at bar, we are called upon to interpret the language of G.S. 1–17(b), and to determine its applicability to the statute of limitations covering malpractice actions as set forth in G.S. 1–15(c). The very language of G.S. 1–17(b) requires that these two statutes be construed *in pari materia*.").

¶ 39 Indeed, as in *Osborne*, the very language of N.C. Gen. Stat. § 1–17(c) requires these statutes to be read together:

> Notwithstanding the provisions of subsection (a) and (b) of this section, an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health care provider's performance of or failure to perform professional services *shall be commenced within the limitations of time specified in G.S. 1–15(c)*, except as follows:
>
> (1) If the time limitations specified in G.S. 1–15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.
>
> (2) If the time limitations in G.S. 1–15(c) have expired and before a minor reaches the full age of 18 years a court has entered judgment or consent order under the provisions of Chapter 7B of the

> General Statutes finding that said minor is an abused or neglected juvenile as defined in G.S. 7B–101, the medical malpractice action shall be commenced within three years from the date of such judgment or consent order, or before the minor attains the full age of 10 years, whichever is later.
>
> (3) If the time limitations in G.S. 1–15(c) have expired and a minor is in legal custody of the State, a county, or an approved child placing agency as defined in G.S. 131D–10.2, the medical malpractice action shall be commenced within one year after the minor is no longer in such legal custody, or before the minor attains the full age of 10 years, whichever is later.

N.C. Gen. Stat. § 1–17(c) (2021) (emphasis added).

¶ 40 By its own plain terms, Section 1-15(c) provides:

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

> the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1–15(c) (2021) (emphasis added). If Section 1–15(c) is to be faithfully applied, it must be applied as a whole—not merely in piecemeal—in order to effectuate the intent of the General Assembly. As such, any and every application of Section 1–15(c) by its very terms requires a determination of whether another statutory exception applies.

¶ 41 Section 1–17 is, of course, a statutory exception to Section 1–15(c). *See* N.C. Gen. Stat. § 1–17 (2021). *King v. Albemarle Hosp. Auth.*, 370 N.C. 467, 470, 809 S.E.2d 847, 849 (2018) ("Section 1–17 tolls certain statutes of limitation periods while a plaintiff is under a legal disability, such as minority, that impairs her ability to bring a claim in a timely fashion."). The *King* Court examined the interplay of these statutes as applicable to that case.

¶ 42 "[U]nder subsection 1–17(a), a minor plaintiff who continues under the disability of minority, upon reaching the age of eighteen, has a three-year statute of limitations to bring a claim based on a general tort." *Id.* at 471, 809 S.E.2d at 849-50 (citing N.C. Gen. Stat. § 1–17(a)(1)). "Whereas the tolling provision of subsection (a) focuses on general torts, the tolling provision of subsection (b) specifically addresses professional negligence claims, including medical malpractice. As with general torts, when a medical malpractice claim accrues while a plaintiff is a minor, N.C.G.S. § 1–17(b) tolls the standard three-year statute of limitations provided by N.C.G.S. § 1–15(c)." *Id.* at 471, 809 S.E.2d at 850 (citation omitted).

¶ 43 "Section 1–17(b), however, reduces the standard three-year statute of limitations, after a plaintiff reaches the age of majority, to one year by requiring a filing before the age of nineteen." *Id.* "Thus, a minor plaintiff who continues under that status until age eighteen has one year to file her claim." *Id.* The Court explained: "The language of 'Notwithstanding the provisions of subsection (a)' refers to this reduced time period to bring an action. Like subsection (a), subsection (b) still allows the minor to reach adulthood before requiring her to pursue her medical malpractice claim, assuming her disability is otherwise uninterrupted." *Id.* at 471–72, 809 S.E.2d at 850 (citations omitted).

¶ 44 In this case, it then follows that Section 1–17(c) is itself an exception to the general rule applicable to minors injured by professional negligence set forth in Section 1–17(b). Indeed, Section 1–17(b), as amended, makes this express. N.C. Gen. Stat. § 1–17(b) ("Notwithstanding the provisions of subsection (a) of this section, *and except as otherwise provided in subsection (c)* of this section . . ." (emphasis added)). As such, Section 1–17(b) remains generally applicable unless one of the exceptions under Section 1–17(c) applies. As in Section 1–17(b), the language in Section 1–17(c) of "Notwithstanding the provisions of subsection (a) and (b) of this section" references the reduced time period to bring an action in the three instances to which subsection (c) is applicable.

¶ 45 Relevant to this case, is the first instance in which 1–17(c) applies:

> an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health care provider's performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1–15(c), except as follows:
>
> (1) If the time limitations specified in G.S. 1–15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.

N.C. Gen. Stat. § 1–17(c)(1). By its terms, and using language similar to Section 1–17(b), Section 1–17(c)(1) provides that (A) in medical malpractice cases involving a minor Section 1–15(c) remains generally applicable, except when (B) the general statute of limitations under Section 1–15(c) would begin to run before the minor attains the age of seven, in which case the expiration of the statute of limitations is delayed until the minor attains the age of ten.

¶ 46 Thus, Section 1–17(c)(1) targets only those very young children who are injured by alleged medical negligence requiring them to bring suit by age ten. Other minor plaintiffs remain governed by the terms of Section 1–15(c). With respect to those other minor plaintiffs not governed by 1–17(c)(1), Section 1–15(c), in general provides, for a three-year statute of limitations running from the accrual of the claim "Except where otherwise provided by statute . . . ." Section 1–17(b) remains such a statutory exception. Reading Sections 1–15(c) and 1–17(b) and (c) *in pari materia*—as we must—if the narrow statutory exceptions found in 1–17(c) to Section 1–15(c) do not apply to a minor plaintiff, then Section 1-17(b) applies where the statute of limitations would otherwise

expire and provides "a minor plaintiff who continues under that status until age eighteen has one year to file her claim." *King*, 370 N.C. at 471, 809 S.E.2d at 850. Thus, read together, these statutes operate to provide a minor injured by alleged medical negligence until the age of nineteen to bring suit, unless the action accrues before the minor turns seven, in which case, the minor has until age ten to bring suit.

¶ 47 This analysis is consistent with the purpose of statutes of limitation and the interplay with the tolling provisions of Section 1–17 articulated by our Supreme Court. "The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *King*, 370 N.C. at 470, 809 S.E.2d at 849 (citations omitted). However:

> [b]alanced against the disadvantage of stale claims as protected by the statute of limitations is the problem that individuals under certain disabilities are unable to appreciate the nature of potential legal claims and take the appropriate action. Section 1–17 tolls certain statutes of limitation periods while a plaintiff is under a legal disability, such as minority, that impairs her ability to bring a claim in a timely fashion.

Id.

¶ 48 Reading Section 1–17(c)(1) as depriving child victims—without the aid of a Guardian ad litem—of alleged medical negligence of any tolling provision beyond the age of ten for filing a claim for damages personal to them results in untenable result of forcing minors to have to bring lawsuits when they remain legally "unable to appreciate the nature of potential legal claims" and unable to "take the appropriate action" impairing their ability to bring a timely claim. *See id.* On the other hand, reading Section 1–17(c)(1) in conjunction with 1–17(b) preserves the statutory protections of minors by tolling the statute of limitations but carves out a limited exception for claims involving alleged malpractice when a child is very young. It could be supposed that this would balance the need to preserve the rights of minors against forcing medical professionals to defend against stale claims. For example, prior to Section 1–17(c), an infant injured at birth would arguably have had almost twenty years to bring a lawsuit for personal claims arising from alleged medical negligence. One can imagine the difficulty of defending such a claim after the passage of so many years, "for '[w]ith the passage of time, memories fade or fail altogether, witnesses die or move away, [and] evidence is lost or destroyed.' " *King*, 370 N.C. at 470, 809 S.E.2d at 849. Such concerns

are lessened when the minor is thirteen, fourteen, or fifteen. As such, a common-sense plain reading of these statutes reflects a legislative intent to preserve the tolling provisions for minors but to limit the tolling for claims occurring when the minor is very young to balance against stale claims and loss of evidence prejudicing medical defendants.[1]

¶ 49 Applying this proper interpretation of the statutes to the facts of this case is a simple exercise. Defendants contend this action accrued when Plaintiff was thirteen years old. On its face, because the statute of limitations did not expire before Plaintiff turned ten, Section 1–17(c)(1) does not apply. Instead, Section 1–15(c) read *in pari materia* with Section 1–17(b) applies to Plaintiff's professional malpractice claim. As such, Plaintiff was required to bring this lawsuit before reaching age nineteen. The Complaint in this case alleges Plaintiff brought this action prior to attaining the age of nineteen. Thus, Plaintiff's Complaint on its face does not reflect the statute of limitations had expired creating a bar to Plaintiff's claim. Therefore, the Complaint states a claim upon which relief might be granted. Consequently, the trial court did not err in denying Defendants' Motions to Dismiss. Accordingly, the trial court's Order should be affirmed.

II.

¶ 50 Even if the interpretation and application of Section 1–17(b) and (c) *in pari materia* with Section 1–15(c) set forth in Part I of this dissent is not correct and the majority's interpretation holds, the correct result is still to affirm the trial court's interlocutory Order denying Defendants' Motions to Dismiss. This is so because Plaintiff has raised, in the alternative, the colorable argument if Section 1–17(c) did operate to require Plaintiff to bring suit as a sixteen year old, while still under a legal disability and legally unable to do so, that as applied to Plaintiff, such an application of the statute would violate his federal and state constitutional right to equal protection of the laws including by depriving him of the fundamental right under the North Carolina Constitution that: "All

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1. Although not directly at issue in this case, this same interpretation applies to the other two instances found in Section 1–17(c)(2) and (3). Notably, unlike subsection (c)(1) both of these subsections apply when the "time of limitations have expired". Subsection (c)(2) operates to extend the tolling provisions for up to three years after entry of an abuse or neglect adjudication even if the statute of limitations has otherwise expired. Subsection (c)(3) extends the tolling provisions while a minor is in custody of the State, County DSS, or other approved child placement agency and provides an additional year to file suit after such custody is relinquished. By its terms, subsection (c)(3) would also seem to require a minor injured by medical malpractice to file suit at the very latest by the time they reach 19, consistent with Section 1–17(b).

courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. Art. I, Sec. 18.

¶ 51 Again, the trial court's Order is not a final determination of whether Section 1–17(c) is unconstitutional as applied to Plaintiff. It merely allowed the litigation to proceed. This litigation would include permitting the parties to develop the factual and legal bases supporting or opposing Plaintiff's as-applied challenge to the extent it even needed to be reached. At this preliminary 12(b)(6) stage, reaching the merits of Plaintiff's as-applied challenge prior to the development of the facts applicable to Plaintiff's claim is inappropriate. Indeed, in the absence of those facts, the majority embarks on what is effectively a facial constitutional analysis without any analysis of how the statute applies to Plaintiff. This facial analysis is also improper in the absence of a facial challenge to the statute first considered by a three-judge panel of the Superior Court. The trial court, here, properly denied Defendants' Motions to Dismiss and should be affirmed.

NORTH CAROLINA FARM BUREAU
MUTUAL INSURANCE COMPANY, INC., Plaintiff
v.
MATTHEW BRYAN HEBERT, Defendant

No. COA22-82

Filed 16 August 2022

Motor Vehicles—insurance—underinsured motorist coverage—interpolicy stacking—multiple claimant exception

In a declaratory judgment action to determine the underinsured motorist (UIM) coverage available to defendant, who sought to recover under his own policy (as owner of the car in which he was riding as a passenger at the time of a two-car accident) and his parents' policy, the trial court properly granted judgment on the pleadings for defendant, thereby allowing him to recover under both policies. Since the multiple claimant exception of the Financial Responsibility Act (N.C.G.S. § 20-279.21(b)(4)) did not apply, defendant was not prevented from stacking multiple UIM policies.

Judge ARROWOOD dissenting.

Appeal by plaintiff from order entered 21 December 2021 by Judge Vince M. Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 25 May 2022.

William F. Lipscomb for plaintiff-appellant.

Law Offices of James Scott Farrin, by Preston W. Lesley, for defendant-appellee.

GORE, Judge.

¶ 1 North Carolina Farm Bureau Mutual Insurance Company, Inc. ("plaintiff") appeals from the Order Denying Plaintiff's Motion for Judgment on the Pleadings and Granting Judgment on the Pleadings for Defendant. We affirm.

I. Background

¶ 2 On 21 October 2020, Matthew Bryan Hebert was a passenger in his 2004 Chevrolet car. Sincere Corbett was driving Mr. Hebert's 2004 Chevrolet east on highway N.C. 42 in Johnston County, North Carolina. Jamal Direll Hicks, Jr. and Chase Everette Hawley were also passengers in Mr. Hebert's 2004 Chevrolet. Mr. Hebert's 2004 Chevrolet collided with a vehicle owned and operated by William Rayvoin Coats. Mr. Corbett and Mr. Hicks were killed in the collision. Mr. Hebert, Mr. Hawley, and Mr. Coats sustained significant injuries.

¶ 3 Mr. Hebert's vehicle was covered by a personal auto insurance policy issued by plaintiff to Mr. Hebert ("Mr. Hebert's policy"). Mr. Hebert's policy provided bodily injury liability coverage of $50,000 per person / $100,000 per accident, and underinsured motorists ("UIM") coverage of $50,000 per person / $100,000 per accident. Plaintiff tendered the $100,000 per accident limit of the liability coverage for Mr. Hebert's policy to the four claimants. The claimants agreed to divide the $100,000 per accident limit as follows:

Matthew Bryan Hebert	$ 100.00
The Estate of Jamal Direll Hicks, Jr.	$ 49,500.00
Chase Everette Hawley	$ 49,500.00
William Rayvoin Coats	$ 900.00

¶ 4 On 21 October 2020, Mr. Hebert also qualified as an insured of the UIM coverage of a personal auto policy issued by plaintiff to Mr. Hebert's parents, Bryan J. Hebert and Kristie M. Hebert ("the parents' policy"). The parents' policy provides UIM coverage of $100,000 per person / $300,000 per accident and medical payments coverage of $2,000.

¶ 5 On 29 July 2021, plaintiff filed a Complaint for Declaratory Judgment. In its complaint, plaintiff alleged that the UIM coverage of Mr. Hebert's policy does not apply to Mr. Hebert's claim because Mr. Hebert's 2004 Chevrolet is not an underinsured motor vehicle for Mr. Hebert's claim under his policy. Plaintiff also alleged that the "multiple claimant exception" to the definition of underinsured motor vehicle, found in N.C. Gen. Stat. § 20-279.21(b)(4), does not apply to Mr. Hebert's claim under the parents' policy because Mr. Hebert's 2004 Chevrolet was not insured under the liability coverage of the parents' policy. Plaintiff alleged that the amount of UIM coverage available to Mr. Hebert under the parents' policy is $99,900 ($100,000 per person UIM limit minus $100 from Mr. Hebert's liability coverage). Plaintiff sought declaratory relief requesting the trial court enter judgment declaring the only insurance coverage Mr. Hebert is entitled to recover from plaintiff related to the 21 October 2020 collision is the $99,900 UIM coverage from the parents' policy.

¶ 6 On 15 September 2021, Mr. Hebert filed his Answer. Mr. Hebert's Answer alleges that the 2004 Chevrolet is an underinsured motor vehicle as defined by North Carolina's Financial Responsibility Act. Mr. Hebert admitted that the 2004 Chevrolet satisfied the definition of an underinsured motor vehicle under the parents' policy but denied plaintiff's claims that the multiple claimant exception does not apply to his claim.

¶ 7 Plaintiff moved for judgment on the pleadings. On 21 December 2021, the trial court denied plaintiff's Motion for Judgment on the Pleadings. The trial court concluded that Mr. Hebert's policy does provide UIM coverage for Mr. Hebert's claim and entered Judgment on the Pleadings in favor of Mr. Hebert. Plaintiff filed a timely Notice of Appeal on 28 December 2021.

II. Discussion

¶ 8 We review *de novo* a trial court's order granting judgment on the pleadings. *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (citation omitted). In considering a motion for judgment on the pleadings,

> 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. As with a motion to dismiss, the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. A Rule 12(c) movant must show that the complaint fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar to a cause of action.

Id. at 51-52, 790 S.E.2d at 659-60 (cleaned up).

¶ 9 On appeal, plaintiff argues that the trial court erred in denying plaintiff's Motion for Judgment on the Pleadings, granting Judgment on the Pleadings for Mr. Hebert, and declaring that Mr. Hebert's policy provides UIM coverage for Mr. Hebert's claim. More specifically, plaintiff argues that the 2004 Amendment to N.C. Gen. Stat. § 20-279.21(b)(4) (commonly referred to as the multiple claimant exception) prevents Mr. Hebert's 2004 Chevrolet from being an underinsured vehicle for Mr. Hebert's claim under his own policy that insured that vehicle because the UIM limits of Mr. Hebert's policy are not greater than the bodily injury liability limits of his policy.

¶ 10 Section 20-279.21(b)(4) defines an underinsured motor vehicle as follows:

> An "underinsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (2021). The 2004 Amendment/multiple claimant exception reads as follows:

> For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies

> applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's injury liability limits.

N.C. Gen. Stat. § 20-279.21(b)(4). Plaintiff contends that the second sentence of the 2004 Amendment prevents Mr. Hebert's vehicle from being an underinsured motor vehicle for Mr. Hebert's claim under his own policy that insured the 2004 Chevrolet, because the UIM limits of Mr. Hebert's policy are not greater than the bodily injury liability limits of his policy.

¶ 11 Our analysis is guided by the "avowed purpose" of the Financial Responsibility Act, which is:

> to compensate the innocent victims of financially irresponsible motorists. The Act is remedial in nature and is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. The purpose of the Act, we have said, is best served when every provision of the Act is interpreted to provide the innocent victim with the fullest possible protection.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573-74, 573 S.E.2d 118, 120 (2002) (cleaned up). In liberally construing the Act, this Court has declined to apply the multiple claimant exception in a way which would reduce compensation to innocent victims and conflict with the avowed purpose of the Act. *Nationwide Affinity Ins. Co. of Am. v. Le Bei*, 259 N.C. App. 626, 634, 816 S.E.2d 251, 257 (2018).

¶ 12 The Financial Responsibility Act permits interpolicy stacking of UIM coverage to calculate the "applicable limits of underinsured motorist coverage for the vehicle involved in the accident." *N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 50-51, 483 S.E.2d 452, 458 (1997). "After stacking, the parties use the stacked amount to determine if the tortfeasor's vehicle is an underinsured highway vehicle, under N.C. Gen.

Stat. § 20-279.21(b)(4)." *Le Bei*, 259 N.C. App. at 630, 816 S.E.2d at 254 (citing *Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458).

¶ 13 This Court has held that the multiple claimant exception is not triggered "simply because there were two injuries in an accident." *Integon Nat'l Ins. Co. v. Maurizzo*, 240 N.C. App. 38, 44, 769 S.E.2d 415, 420 (2015). Instead, the Court limited the exception's applicability to "when the amount paid to an individual claimant is less than the claimant's limits of UIM coverage after liability payments to multiple claimants." *Id.* at 44, 769 S.E.2d at 420-21.

¶ 14 Additionally, in *Le Bei*, this Court interpreted the multiple claimant exception in a manner that would not limit the recovery of innocent occupants of a tortfeasor's vehicle. *See Le Bei*, 259 N.C. App. at 634, 816 S.E.2d at 257. In the case *sub judice*, plaintiff contends *Le Bei* was decided incorrectly.

¶ 15 In *Le Bei*, an individual was driving their vehicle with five passengers in the vehicle. *Id.* at 627, 816 S.E.2d at 252. The driver maintained an insurance policy with liability limits of $50,000 per person / $100,000 per accident and UIM coverage with limits of $50,000 per person / $100,000 per accident. *Id.* at 627, 816 S.E.2d at 253. The driver's reckless driving resulted in an accident with two other vehicles. *Id.* Two of the passengers suffered personal injuries from the accident and the other three passengers died because of their injuries suffered in the accident. *Id.* The plaintiff insurance company distributed the $100,000 liability insurance between the estates of the deceased passengers and the drivers of the two additional vehicles involved in the accident. *Id.* The plaintiff in *Le Bei* claimed that the passengers were not able to recover the difference between the amounts received under the liability coverage and the per person limits of the UIM coverage due to the multiple claimant exception in N.C. Gen. Stat. § 20-279.21(b)(4). This Court, in following relevant precedent, held that the multiple claimant exception did not apply, and the deceased claimants were entitled to recover UIM coverage from their own policies and UIM coverage from the tortfeasor's policy. *Id.* at 634, 816 S.E.2d at 251.

¶ 16 The case *sub judice* presents a similar factual scenario to *Le Bei*, in that a plaintiff insurance company is arguing that the multiple claimant exception prevents an innocent occupant of a vehicle driven by the tortfeasor from stacking and recovering UIM coverage from multiple insurance policies. In following this Court's precedent, we hold that Mr. Hebert is entitled to stack insurance policies and the multiple claimant exception does not apply to the present case.

¶ 17 Because we hold the multiple claimant exception does not apply, the trial court properly held Mr. Herbert is entitled to recover UIM coverage from his insurance policy and the parents' insurance policy. Accordingly, the trial court properly granted Judgment on the Pleadings in favor of Mr. Hebert and properly denied plaintiff's Motion for Judgment on the Pleadings.

AFFIRMED.

Judge WOOD concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

¶ 18 I respectfully dissent from the majority's holding that the multiple claimant exception does not apply. This case concerns defendant's underinsured motorist claim under his own policy, and accordingly I would hold that the multiple claimant exception applies, and that defendant's vehicle does not qualify as an "underinsured motor vehicle" as defined by N.C. Gen. Stat. § 20-279.21(b)(4).

¶ 19 The statute defines an "underinsured motor [or highway] vehicle" in two categories. The first definition includes highway vehicles where "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy." N.C. Gen. Stat. § 20-279.21(b)(4) (2021). In this case, defendant's insurance policy provided bodily injury liability coverage of $50,000 per person and $100,000 per accident, with equal coverage limits of underinsured motorist coverage. Accordingly, because the sum of liability limits for bodily injury was equal to the applicable limits of underinsured motorist coverage for the vehicle involved and defendant's policy, defendant's vehicle does not qualify as an underinsured motor vehicle under the first definition.

¶ 20 The second definition, also referred to as the multiple claimant exception, provides that, in accidents with more than one person injured, a highway vehicle is underinsured "if the total amount actually paid to the person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident

and insured under the owner's policy." N.C. Gen. Stat. § 20-279.21(b)(4). However, a vehicle is not included in this definition "unless *the owner's policy* insuring that vehicle provides underinsured motorist coverage with limits that are *greater than that policy's* bodily injury liability limits." *Id.* (emphasis added).

¶ 21 This case concerns defendant's underinsured motorist claim under his own policy. Pursuant to the second sentence of the multiple claimant exception, in an uninsured motorist claim under an owner's policy, the owner's underinsured motorist coverage limits must be "greater than that policy's bodily injury liability limits." Defendant's policy for that vehicle, however, provided underinsured motorist coverage with limits that were equal to that policy's bodily injury liability limits.

¶ 22 Although the majority holds that defendant's vehicle qualifies as an underinsured motor vehicle after inter-policy stacking with his parents' policy limits, I believe the multiple claimant exception applies and that defendant was not entitled to stack insurance policies. The General Assembly contemplated underinsured motorist claims under an owner's policy and specifically confined the limit coverage comparison to the owner's policy. N.C. Gen. Stat. § 20-279.21(b)(4) ("Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an 'underinsured motor vehicle' *for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle* unless *the owner's policy insuring that vehicle* provides underinsured motorist coverage with limits that are greater *than that policy's* injury liability limits." (emphasis added)). Because this case involves an underinsured motorist claim under the owner's policy insuring the vehicle involved in the accident, the statute requires a comparison of coverage limits within that policy.

¶ 23 Additionally, I believe this case is distinguishable from *Nationwide Affinity Ins. Co. of Am. v. Le Bei*, which the majority cites as a "similar factual scenario." In *Le Bei*, several passengers were injured or killed in a multi-vehicle accident and subsequently brought underinsured motorist claims under the tortfeasor's policy. *Nationwide Affinity Ins. Co. of Am. v. Le Bei*, 259 N.C. App. 626, 627, 816 S.E.2d 251, 253 (2018). None of the claimants were the owner of the vehicle, nor were the claims under their own policies. *Id.* at 627, 816 S.E.2d at 252-53. This Court held that the multiple claimant exception did not apply and that the defendants were permitted to recover underinsured motorist coverage under the driver's policy. *Id.* at 634, 816 S.E.2d at 257.

¶ 24 Although this case is similar in that defendant was a passenger at the time of the accident, he was a passenger in his own vehicle and has brought a claim under his own policy for that vehicle, not under the tortfeasor's policy. Because defendant was the owner of the vehicle and brought an underinsured motorist claim under his own policy, I believe the second sentence of the multiple claimant exception applies and that the trial court was not permitted to stack defendant's policy limits with the limits of his parents' policy. Although inter-policy stacking is generally permitted as part of the statute's "avowed purpose" of compensating "the innocent victims of financially irresponsible motorists[,]" *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573, 573 S.E.2d 118, 120 (2002) (citation and quotation marks omitted), considering multiple insurance policies in this particular type of claim is impermissible pursuant to the statute. I believe *Le Bei* is factually distinct and not controlling in this case.

¶ 25 Because this case involves an underinsured motorist claim under the owner's policy, the statute, specifically the second sentence of the multiple claimant exception, must be strictly applied here. For the foregoing reasons, I would reverse the trial court's order and I respectfully dissent.

R.E.M. CONSTRUCTION, INC., PLAINTIFF
v.
CLEVELAND CONSTRUCTION, INC.; MHG ASHEVILLE TR, LLC; ASHEVILLE ARRAS RESIDENCES, LLC; AND FEDERAL INSURANCE COMPANY; DEFENDANTS
AND
UNITED STATES SURETY COMPANY, INTERVENOR

No. COA21-781

Filed 16 August 2022

Arbitration and Mediation—motion to confirm arbitration award—amount of damages—authority to grant equitable relief

In a dispute between a construction company (defendant) and a subcontractor (plaintiff), the arbitration panel did not exceed its authority by fashioning an equitable remedy to compensate plaintiff subcontractor—who had been improperly terminated for default—since, although the terms of the parties' subcontracts provided for the award of the "actual direct cost" of the subcontract work, there was no evidence of such cost in the record and an equitable

remedy estimating that cost was both authorized by state law and not unequivocally precluded by the subcontracts' terms. The subcontracts explicitly adopted the rules of the American Arbitration Association, which allowed for the grant of equitable remedies.

Appeal by defendant Cleveland Construction, Inc., from judgment and order entered 10 September 2021 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 24 May 2022.

Erwin, Capitano & Moss, P.A., by Fenton T. Erwin, Jr., and Erin C. Huegel, for plaintiff-appellee R.E.M. Construction, Inc.

Chamberlain Hrdlicka White Williams & Aughtry, by Seth R. Price, pro hac vice, and Hamilton Stephens Steele + Martin, PLLC, by Tracy T. James and Carmela E. Mastrianni, for defendant-appellant Cleveland Construction, Inc.

Everett Gaskins Hancock LLP, by James M. Hash, and Thompson Law Group, LLC, by Kelley Herrin, pro hac vice, for intervenor-appellee.

ZACHARY, Judge.

¶ 1 Defendant Cleveland Construction, Inc., ("CCI") appeals from the trial court's judgment and order (1) granting the motion of Plaintiff R.E.M. Construction, Inc., ("REM") to confirm the arbitration panel's award, and (2) denying CCI's motion to modify or, in the alternative, to partially vacate the panel's award. After careful consideration, we affirm.

Background

¶ 2 This appeal arises out of an arbitration proceeding following CCI's termination of REM from a construction project in Asheville. CCI's appeal presents a narrow question of law concerning the arbitration panel's award of damages to REM. On appeal, CCI does not challenge the panel's conclusions that (1) CCI did not properly terminate REM for default under the terms of the parties' subcontracts, and (2) REM was "entitled to monetary compensation from CCI[.]" Instead, CCI argues that the panel exceeded its authority by awarding damages that were not permissible under the express terms of the parties' subcontracts, and that the trial court thus erred by confirming the panel's award. As CCI does not contest the panel's conclusions regarding the merits of REM's claims, we recite only those facts pertinent to the present dispute concerning the award of damages.

¶ 3 On 29 August 2017, CCI entered into a pair of substantially identical subcontracts ("the Subcontracts") with REM for work on the "exterior envelope" of a nineteen-story building in Asheville. Intervenor United States Surety Company ("USSC") issued performance bonds dated 25 January 2018 for both of the Subcontracts. REM began work in November 2017, but between May and September 2018 the project suffered several problems and resultant delays. On 5 October 2018, CCI terminated REM for default and notified USSC of the termination.

¶ 4 On 3 April 2019, REM filed suit against Defendants CCI, MHG Asheville TR, LLC, and Asheville Arras Residences, LLC in Buncombe County Superior Court.[1] CCI elected to arbitrate REM's claims pursuant to the terms of the Subcontracts, each of which provides in pertinent part that "[a]ny controversy or claim of . . . [REM] against [CCI] shall, at the option of [CCI], be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made." Accordingly, on 3 May 2019, CCI filed a motion to stay pending arbitration alongside its motion to dismiss. On 26 June 2019, the trial court entered an order staying proceedings pending the arbitration.

¶ 5 A panel of arbitrators confirmed by the American Arbitration Association ("AAA") and approved by the parties heard this matter. On 15 March 2021, the panel issued its award, determining in pertinent part "that CCI did not properly terminate REM for default; . . . and REM shall be entitled to monetary compensation from CCI in accordance with the terms of" the Subcontracts. To calculate the amount of the damage award, the panel first looked to the terms of the Subcontracts:

> 73. As stated above, the termination for default by [CCI] against REM was improper. In a case of an improper termination, the contract provides in Article 31.8 as follows:
>
> > "If after termination it is determined that, for any reason, [REM] was not in default or that [REM] is not properly terminated for default, then such termination shall have been deemed to be for the convenience of [CCI] and [REM] shall be entitled to the *actual direct cost* of all Subcontract Work

1. On 26 June 2019, the trial court entered an order allowing Plaintiff to amend its complaint to bring claims against additional Defendant Federal Insurance Company. Defendants MHG Asheville TR, LLC, Asheville Arras Residences, LLC, and Federal Insurance Company are not involved in the present appeal.

> satisfactorily performed and materials furnished prior to notification of termination. [REM] shall not be entitled to compensation for profit and overhead. [REM] shall not be entitled to compensation for work not performed or materials not furnished. [REM] shall *not be entitled to recover exemplary, special or consequential damages, or anticipated profit* on account of such termination or on account of [CCI's] breach of the subcontract agreement."

(Emphases added.)

¶ 6 The panel then reviewed the record, but found insufficient evidence on which to base a calculation of the "actual direct cost" to which REM was entitled under the Subcontracts. As such, the panel determined that it would fashion an equitable remedy pursuant to the AAA rules:

> 74. The contractual starting point for determining the damages or compensation for REM is the actual direct cost of all Subcontract Work prior to October 5, 2018. The problem is that there is no evidence of "actual direct cost" of all work. There was little evidence of the job costs of REM presented to the Panel.
>
> 75. It is unfair to deny any compensation to REM as a result of the improper termination of its subcontracts with [CCI]. Therefore, the Panel develops an equitable remedy pursuant to the AAA Rules. Specifically, Rule R-48 (a) of the Construction Industry Rules of the AAA states, "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract."

¶ 7 Therefore, the panel set out to estimate REM's "actual direct cost" under Article 31.8 of the Subcontracts. The panel examined the evidence in the record to determine "the amount of the contract funds earned by REM at the time of termination." The panel identified a document provided by CCI as "the best source for contract funds earned by REM through September 30, 2018" and calculated a total of $211,151.00 in earnings for that period. Then, recognizing that this amount "d[id] not include the work of REM performed from October 1-5, 2018[,]" the panel

determined that "the labor and equipment, including demobilization for October 1-5, 2018, is $25,000.00." Ultimately, the panel concluded that "REM is entitled to a total of $236,151.00 for contract work performed on this project." The panel added $926.00 for technical violations of the North Carolina Prompt Pay Act to its total award, and ordered that CCI pay the administrative costs and fees of arbitration as well as prejudgment interest; the panel rejected REM's other claims for additional payment and compensation.

¶ 8 Upon request from CCI, the panel entered a modified award on 30 April 2021, correcting a computation in the amount of prejudgment interest. Although CCI also "complain[ed] about the [p]anel's reliance" on the document that the panel used to calculate REM's actual direct cost when determining the damage award, the panel declined to otherwise modify its award.

¶ 9 The parties then returned to the trial court, where they filed a series of motions. On 10 May 2021, REM filed a motion to confirm the award. On 24 May 2021, USSC filed a motion to intervene and to modify the award. On 1 June 2021, CCI filed motions to lift the stay and to modify or, alternatively, to partially vacate the award. The matter came on for hearing on 12 July 2021 in Buncombe County Superior Court. On 10 September 2021, the trial court entered its judgment and order, in which it: (1) lifted the stay; (2) allowed USSC to intervene; (3) denied CCI's motion to modify or, alternatively, partially vacate the award; (4) granted REM's motion to confirm the award; and (5) entered judgment confirming the award. CCI timely filed notice of appeal.

Discussion

¶ 10 As stated above, CCI does not challenge the merits of the panel's conclusions that (1) CCI did not properly terminate REM for default under the terms of the Subcontracts, and (2) REM was "entitled to monetary compensation[.]" Further, CCI notes that it does not contest the award of costs and fees of arbitration and has already reimbursed REM for that amount.

¶ 11 Instead, CCI argues that the trial court erred by denying its motion to modify or, alternatively, to partially vacate the award because the panel "improperly applied Rule 48 of the AAA Construction Industry Rules . . . to award [REM] money to which it was not entitled." Alternatively, CCI argues that the trial court should have vacated the panel's award "because the panel manifestly disregarded the law." We disagree.

I. Standard of Review

¶ 12 "Since this appeal arises from a decision on a motion to confirm an arbitration award, we first note that a strong policy supports upholding arbitration awards." *WMS, Inc. v. Weaver*, 166 N.C. App. 352, 357, 602 S.E.2d 706, 709 (citation and internal quotation marks omitted), *disc. review denied*, 359 N.C. 197, 608 S.E.2d 330 (2004). "Judicial review of an arbitration award is confined to a determination of whether there exists one of the specific grounds for vacation of an award" under the Revised Uniform Arbitration Act, N.C. Gen. Stat. § 1-569.1 *et seq.* (2021). *Dalenko v. Peden Gen. Contr'rs, Inc.*, 197 N.C. App. 115, 125, 676 S.E.2d 625, 632 (2009) (citation omitted), *notice of appeal dismissed*, 363 N.C. 801, 690 S.E.2d 534, *cert. denied*, 363 N.C. 854, 694 S.E.2d 202 (2010).

¶ 13 "[E]rrors of law or fact or erroneous decisions of matters submitted to arbitration are not sufficient to invalidate an arbitration award fairly and honestly made." *Carteret Cty. v. United Contr'rs of Kinston, Inc.*, 120 N.C. App. 336, 346, 462 S.E.2d 816, 823 (1995), *petition for disc. review withdrawn*, 343 N.C. 121, 471 S.E.2d 65 (1996).

> An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus[,] arbitration instead of ending would tend to increase litigation.

Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) (citation omitted). Accordingly, "[i]f the dispute is within the scope of the arbitration agreement, then the court must confirm the award unless one of the statutory grounds for vacating or modifying the award exists." *United Contr'rs*, 120 N.C. App. at 346, 462 S.E.2d at 823.

II. Analysis

¶ 14 CCI argues that the trial court should have vacated the panel's award of damages under N.C. Gen. Stat. § 1-569.23(a)(4), which provides that a trial court may vacate an arbitration award where "[a]n arbitrator exceeded the arbitrator's powers[.]" N.C. Gen. Stat. § 1-569.23(a)(4). CCI contends that the panel "exceeded its authority by electing to fashion an award outside of what was contemplated in the negotiated contract" when it applied AAA Rule 48 to "develop[ ] an equitable remedy" where

there was "no evidence of 'actual direct cost' of all work" in the record before the panel.

¶ 15 In light of the strong public policy that "supports upholding arbitration awards[,]" *Weaver*, 166 N.C. App. at 357, 602 S.E.2d at 709 (citation omitted), this Court has recognized with regard to the award of remedies that "an arbitrator does not exceed his powers if (1) state law allows the remedy for the specified cause of action, and (2) the arbitration contract does not unequivocally preclude it[,]" *id.* at 359, 602 S.E.2d at 711.[2] In the present case, state law unquestionably allows for the equitable remedy fashioned by the panel. *See* N.C. Gen. Stat. § 1-569.21(c) ("[A]n arbitrator may order any remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that a remedy could not or would not be granted by the court is not a ground for . . . vacating an award under G.S. 1-569.23."). Thus, the issue presented here is whether the Subcontracts "unequivocally preclude[d]" the panel's award. *Weaver*, 166 N.C. App. at 359, 602 S.E.2d at 711.

¶ 16 Each of the Subcontracts provides, in pertinent part, that "[a]ny controversy or claim of . . . [REM] against [CCI] shall, at the option of [CCI], be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made." AAA Rule 48(a), as quoted by the panel in its award, provides that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract." The Subcontracts do not explicitly preclude the equitable remedy that the panel fashioned; rather, they expressly vest the arbitration panel with broad discretion to craft equitable remedies through the specific adoption of the AAA Rules, including Rule 48(a). Hence, in estimating the "actual direct cost" incurred by REM pursuant to Article 31.8 of the Subcontracts, the panel did not exceed the vast equitable powers with which it was endowed by the parties.

¶ 17 Notably, CCI does not directly argue on appeal that the Subcontracts explicitly precluded the equitable remedy fashioned by the panel. Instead, CCI offers a series of arguments otherwise attacking the panel's

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2. Although *Weaver* concerned arguments under the Federal Arbitration Act, the applicable federal and state provisions both allow a trial court to vacate an award where, *inter alia*, the arbitrators exceeded their powers. *Compare* 9 U.S.C. § 10(a)(4) (2018), *with* N.C. Gen. Stat. § 1-569.23(a)(4).

equitable authority, including: (1) that "Rule 48(a) is an equitable remedy that is not applicable in this context"; (2) that even if Rule 48(a) were applicable, the relief designed by the panel was not "within the scope of the agreement of the parties" as required by Rule 48(a); and (3) that "Rule 48(a) does not allow an arbitration panel to award monetary damages in direct contradiction of the governing contract's terms" and that "[t]o hold otherwise would be to eviscerate the central concept underlying all arbitrations: that the arbitrators derive their powers from the parties' contract and are thus limited to awarding relief within the scope of that contract." These arguments are unpersuasive.

¶ 18 Although CCI asserts that the panel's award of monetary damages was in "direct contradiction of the [Subcontracts'] terms[,]" we again note that the Subcontracts themselves do not contain any express limitation that would preclude the panel's award. The Subcontracts provide that, in the event that CCI improperly terminated REM for default, REM would not be entitled to "compensation for profit and overhead"; "compensation for work not performed or materials not furnished"; or "exemplary, special or consequential damages, or anticipated profit[.]" But the Subcontracts explicitly state that REM "shall be entitled to the actual direct cost of all Subcontract Work satisfactorily performed and materials furnished prior to notification of termination." And AAA Rule 48(a), which the Subcontracts specifically adopt, authorizes the arbitration panel to "grant *any remedy* or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, *including*, but not limited to, *equitable relief*[.]" (Emphases added).

¶ 19 In its equitable award, the arbitration panel did not provide REM with any of the forms of compensation prohibited by the Subcontracts. In fact, it expressly constrained its calculation of equitable relief—authorized by Rule 48(a)—to an approximation of "the amount of the contract funds earned by REM at the time of termination" and rejected REM's claims for "additional payment or compensation." Therefore, the arbitration panel's estimation of REM's "actual direct cost" was properly calculated to be consistent with the Subcontracts' terms.

¶ 20 At its essence, the sole source of CCI's complaints on appeal is that the panel estimated an approximate "amount of the contract funds earned by REM at the time of termination" when REM had not submitted any evidence to that effect, based on the panel's statement that it would be "unfair to deny any compensation to REM" under the circumstances presented. However, CCI cannot point to any provision in the Subcontracts that forbids the panel from (1) awarding this equitable relief—which, again, was explicitly authorized by Rule 48(a) and not

specifically precluded by the terms of the Subcontracts—and thus (2) estimating the "actual direct cost" to which REM was entitled based on evidence in the record before it, regardless of which party provided that evidence. "[T]he parties could have—but did not—write into the contract a limiting provision" forbidding the arbitration panel from fashioning this specific remedy. *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 577, 654 S.E.2d 47, 54 (2007) (citation omitted).

¶ 21 We conclude that in the case at bar the arbitration panel did not "act[ ] contrary to the express authority conferred on them by statute and by the language of the parties' private arbitration agreement." *Id.* at 575, 654 S.E.2d at 52. "In making [its] award the arbitrat[ion panel] construed the contract, as it was [its] right and duty to do. [It] added nothing to the agreement. Instead, [it] based [its] conclusions on a permissible construction of the written instrument." *Id.* at 577, 654 S.E.2d at 54 (citation omitted). Because the arbitration panel did not exceed the authority afforded it by the parties in the Subcontracts, the trial court did not err by confirming the award.

¶ 22 Lastly, CCI contends that "the panel's award should be vacated because the panel manifestly disregarded the law." CCI maintains that the panel acted in manifest disregard of the law by declining to apply the parties' subcontracts as written in calculating its damages award.

¶ 23 "To establish manifest disregard, a party must demonstrate: (1) the disputed legal principle is clearly defined and is not subject to reasonable debate; and (2) the arbitrator refused to apply that legal principle." *Warfield v. Icon Advisers, Inc.*, 26 F.4th 666, 669–70 (4th Cir.) (citation and internal quotation marks omitted), *reh'g and reh'g en banc denied*, 2022 U.S. App. LEXIS 7583 (2022).

¶ 24 The "manifest disregard" analysis has been adopted by other jurisdictions, but has not been employed by the North Carolina courts; indeed, the federal circuit courts of appeal are split as to whether the "manifest disregard" ground is viable as a matter of federal law. *See id.* at 669–70 n.3. However, CCI asks this Court to adopt an arbitrator's "manifest disregard of the law" as an additional, non-statutory ground for vacating an arbitrator's award.

¶ 25 In that we have already determined that the arbitration panel here did not "act[ ] contrary to the express authority conferred on them by statute and by the language of the parties' private arbitration agreement[,]" *Faison*, 187 N.C. App. at 575, 654 S.E.2d at 52, we need not accept CCI's invitation to adopt this alternative analysis, *see In re Fifth Third Bank, Nat. Ass'n*, 216 N.C. App. 482, 488, 716 S.E.2d 850, 855 (2011)

(concluding that, because the appellant "fail[ed] to demonstrate that the Arbitrator either 'manifestly disregarded the law' or 'dispensed his own brand of industrial justice,' . . . we need not determine the extent, if any, to which 'manifest disregard of the law' remains a valid non-statutory basis for vacating an arbitration award" under the Federal Arbitration Act).

Conclusion

¶ 26 For the foregoing reasons, we conclude that the trial court did not err in denying CCI's motion to modify or, alternatively, to partially vacate the award. The trial court's judgment and order confirming the arbitration award is affirmed.

AFFIRMED.

Judges INMAN and JACKSON concur.

JENNIFER SNIPES, PLAINTIFF
v.
TITLEMAX OF VIRGINIA, INC., DEFENDANT

No. COA21-374

Filed 16 August 2022

1. Arbitration and Mediation—arbitration award—vacatur—where arbitrator exceeds delegated powers—"essence of the contract" doctrine

In a legal dispute between parties to a car loan agreement, in which plaintiff-borrower alleged that the agreement's terms violated the North Carolina Consumer Finance Act (NCCFA), the trial court properly vacated an arbitration award issued in plaintiff's favor on grounds that the award failed to draw its essence from the loan agreement where the arbitrator disregarded the agreement's plain and unambiguous choice-of-law provision favoring Virginia law and instead applied North Carolina law—specifically, the NCCFA—to resolve plaintiff's claims. Under § 10(a)(4) of the Federal Arbitration Act (permitting vacatur of arbitration awards where "the arbitrators exceeded their powers"), an arbitrator's failure to draw from the "essence of a contract" is a valid ground on which to vacate an arbitration award, and therefore plaintiff's argument that the court impermissibly reviewed the award de novo was meritless.

2. Arbitration and Mediation—Federal Arbitration Act—vacatur of award—dismissal of underlying case—improper

In a legal dispute between parties to a car loan agreement, in which the trial court properly vacated an arbitration award issued in plaintiff-borrower's favor, the court erred by subsequently dismissing all of plaintiff's claims with prejudice where the Federal Arbitration Act (FAA) did not authorize the court to do so. Rather, the FAA provides that if a trial court vacates an award, it may either—in its discretion—order a rehearing by the arbitrator or decide the issues originally referred to the arbitrator.

Appeal by plaintiff from order entered 24 March 2021 by Judge Caroline Pemberton in District Court, Guilford County. Heard in the Court of Appeals 11 January 2022.

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

Troutman Pepper Hamilton Sanders, LLP, by Jason D. Evans and William J. Farley III, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiff, Jennifer Snipes, appeals from an order vacating an arbitration award in her favor and dismissing her claims against Defendant, TitleMax of Virginia. Because the trial court properly reviewed the arbitrator's award based on the essence of the contract doctrine and, upon *de novo* review, properly found the arbitrator's award did not draw its essence from the parties' contract, we affirm the *vacatur* of the arbitrator's award. But because the trial court could not dismiss Plaintiff's claims based on its *vacatur* of the arbitrator's award, we remand for the trial court, in its discretion, to either direct a rehearing by the arbitrator or decide the issues originally sent to the arbitrator.

I. Background

¶ 2 This case arises out of a "Motor Vehicle Title Loan Agreement" between Plaintiff and Defendant from August 2016 in which Plaintiff received a loan of just under $2,500 secured by title to her vehicle with an interest rate and fees of approximately 144%. While Plaintiff lives in North Carolina, she traveled to Virginia, where Defendant is based, to enter into the Loan Agreement. The Loan Agreement contains two provisions pertinent to this appeal. A provision entitled "Governing Law,

Assignment and Amendment" provides, in relevant part, "This Loan Agreement shall be governed by the laws of the State of Virginia, except that the Waiver of Jury Trial and Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 ('FAA')."

¶ 3 The "Waiver of Jury Trial and Arbitration Provision" provides for an arbitrator to "issue a final and binding decision" on any dispute that arises under the Loan Agreement, with the term "dispute" being "given the broadest possible meaning and includ[ing], without limitation" *inter alia* "all federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to th[e] Loan Agreement." (Capitalization altered.)

¶ 4 On 14 January 2019, Plaintiff filed a complaint against Defendant arising out of the Loan Agreement. Specifically, Plaintiff alleged the Loan Agreement violated "the North Carolina Consumer Finance Act, North Carolina usury statutes, and the North Carolina Unfair and Deceptive Trade Practices Act." "Plaintiff also sought punitive damages." Pursuant to the Loan Agreement's arbitration provision, Plaintiff included a motion to compel arbitration in her complaint explaining she filed the action "to toll the application of the statute of limitations." In response, Defendant filed a motion to dismiss the case for improper venue under North Carolina Rule of Civil Procedure 12(b)(3), N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2019), on the grounds Plaintiff did not live in the county where the case was filed and Defendant did not have an office there.

¶ 5 On 22 May 2019, the trial court entered an order denying Defendant's motion to dismiss, granting Plaintiff's motion to compel arbitration, and staying litigation "pending completion of the arbitration ordered." The parties then "arbitrated their dispute on the papers" they had submitted "without an evidentiary hearing."

¶ 6 On 16 November 2020, the arbitrator issued an award in favor of Plaintiff for approximately $12,800—representing treble damages. In the award, the arbitrator explained he had to choose between applying Virginia law and applying North Carolina law to the dispute as well as the importance of the difference between those two options:

> This case involves the extension of a loan to Claimant, a North Carolina resident, secured by an automobile titled in North Carolina, where the loan documents were signed in Respondent's office in Virginia. The loan carried an interest rate of nearly 150%, a rate that clearly violates the North Carolina Consumer Finance Act (the "CFA"), but that is arguably not

> illegal in Virginia. The question to be resolved is whether the language of the CFA applies to the transaction at issue here.

Despite this recognition, the arbitration award never mentioned the Loan Agreement's express Virginia choice of law provision. The arbitration award exclusively focuses on North Carolina's Consumer Finance Act in its primary analysis before also discussing an argument Defendant made based on the Commerce Clause of the United States Constitution and addressing damages and fees.

¶ 7 The same day the arbitrator entered his award, Plaintiff filed a motion to confirm the arbitration award and enter judgment. On 15 February 2021, Defendant filed a motion to vacate the arbitration award. In its motion, Defendant argued the trial court should vacate the arbitration award for two reasons: (1) because the award "strayed both from the interpretation and application of the agreement" in that it *inter alia* "refus[ed] to enforce the parties' valid choice-of-law provision" and (2) because the arbitrator "showed a manifest disregard for the law" by refusing to enforce the choice-of-law provision and by ignoring "a well-established principle of constitutional law," the Commerce Clause. As part of its prayer for relief in its motion to vacate, Defendant also asked the trial court to dismiss Plaintiff's claims and enter judgment on its behalf.

¶ 8 On 24 March 2021, the trial court entered an order "granting Defendant's motion to vacate [the] arbitration award and denying Plaintiff's motion to confirm [the] arbitration award." (Capitalization altered.) After making Findings of Fact on the procedural history of the case, the trial court made Conclusions of Law explaining how it could only vacate an arbitration award on limited grounds including manifest disregard of law and an award failing to draw its essence from the parties' agreement. Applying those doctrines to the arbitration award, the trial court concluded the Loan Agreement "contains an unambiguous, valid, and enforceable choice-of-law provision confirming that Virginia law applies" and the arbitration award "demonstrated a manifest disregard of the law" and "fail[ed] to draw its essence from the Loan Agreement" by ignoring the choice of law provision favoring Virginia law and instead applying North Carolina law. As a result, the trial court granted Defendant's motion to vacate the arbitration award and denied Plaintiff's motion to confirm the arbitration award. Based on its decision to vacate the arbitration award, the trial court also dismissed Plaintiff's claims stating: "Plaintiff's claims against Defendant are hereby dismissed with prejudice."

¶ 9 On 20 April 2021, Plaintiff filed a written notice of appeal from the trial court's order.

II. Analysis

¶ 10 **[1]** Plaintiff contends the trial court erred by "granting Defendant-Appellee's motion to vacate [the] arbitration award" and by "denying Plaintiff-Appellant's motion to confirm [the] arbitration award." (Capitalization altered.) As both parties agree, these two arguments are two sides of the same coin because under the Federal Arbitration Act ("FAA")[1] a court "must" confirm an arbitration award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11" of the Act. 9 U.S.C. § 9. We first provide background on the law governing *vacatur* under the FAA to help situate the parties' specific arguments on the trial court's order vacating the arbitrator's award.

¶ 11 "The FAA declares a liberal policy favoring arbitration," such that "[j]udicial review of an arbitration award is severely limited in order to encourage the use of arbitration and in turn avoid expensive and lengthy litigation." *See Carpenter v. Brooks*, 139 N.C. App. 745, 750–51, 534 S.E.2d 641, 645 (2000) (citing *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765 (1983)) (including "liberal policy" quote immediately before listing FAA grounds for vacating an arbitration award); *First Union Securities, Inc. v. Lorelli*, 168 N.C. App. 398, 399–400, 607 S.E.2d 674, 676 (2005) (including other quote immediately after listing FAA grounds for *vacatur*). This policy favoring arbitration by limiting judicial review manifests in two ways. First, "under the FAA, an arbitration award is presumed valid, and the party seeking to vacate it must shoulder the burden of proving the grounds for attacking its validity." *First Union*, 168 N.C. App. at 400, 607 S.E.2d at 676 (quoting *Carpenter*, 139 N.C. App. at 751, 534 S.E.2d at 646) (internal quotations, citations, and alterations omitted).

¶ 12 Second, the FAA limits *vacatur* of arbitration awards to the situations listed in § 10 of the statute. *See Carpenter*, 139 N.C. App. at 750–51,

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1. The FAA governs this case because the title loan between Plaintiff and Defendant specifies the arbitration clause "is governed by the" FAA. *See In re Fifth Third Bank, Nat. Ass'n*, 216 N.C. App. 482, 487, 716 S.E.2d 850, 854 (2011) (explaining the FAA governed because the arbitration clause of the promissory note in question stated the FAA would "apply to the construction, interpretation, and enforcement of this arbitration provision" (quotations omitted)). As the Supreme Court of the United States has explained, state courts have a "prominent role in arbitral enforcement" under the FAA. *See Badgerow v. Walters*, ___ U.S. ____, _____, 212 L. Ed. 2d 355, 363 (2022) (quotations and citation omitted) (stating as part of an analysis on how the FAA does not provide independent jurisdiction for "applications to confirm, vacate, or modify arbitral awards (under Sections 9 through 11)").

534 S.E.2d at 645–46 (explaining "[u]nder the FAA, arbitration awards may be vacated only in limited situations" before listing the grounds in § 10). Specifically, § 10(a) limits *vacatur* to the following situations:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. "The text of the FAA" and the "national policy favoring arbitration with just the limited [judicial] review needed to maintain arbitration's essential virtue of resolving disputes straight away" in turn "compel[] a reading of the §[] 10 . . . categories as exclusive." *In re Fifth Third Bank*, 216 N.C. App. at 487, 716 S.E.2d at 854 (alterations from original omitted and own alterations added) (quoting *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588, 170 L. Ed. 2d 254, 265 (2008)).

¶ 13 The exclusivity of the § 10(a) categories does not require a party seeking *vacatur* of an arbitration award or a court vacating such an award to cite the specific language of the section; rather courts have at times read other doctrines into § 10's specific text. For example, the Supreme Court of the United States recognized the essence of the contract doctrine fits within § 10(a)(4)'s provision for *vacatur* when the "arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4); *see Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569–70, 186 L. Ed. 2d 113, 119–20 (2013) (explaining a court can overturn the arbitrator's determination under § 10(a)(4) only when the arbitrator exceeded his contractually delegated authority by issuing an award based on his own policy determinations rather than "drawing its essence from the contract" (quoting *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57, 62, 148 L. Ed. 2d 354 (2000) (alterations omitted))).

¶ 14 The essence of the contract doctrine pre-existed *Hall Street Associates*'s declaration § 10's categories were exclusive. *See Eastern Associated Coal Corp.*, 531 U.S. at 62, 148 L. Ed. 2d at 360 (a case from 2000 stating, "[A]n arbitrator's award must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." (quotations and citations omitted)). But, post-*Hall Street Associates*, the doctrine was incorporated into one of the categories within § 10(a). *See Oxford Health Plans*, 569 U.S. at 569–70, 186 L. Ed. 2d at 119–20 (laying out the essence of the contract doctrine as part of determining "the arbitrator did not exceed his powers" under § 10(a)(4) (alterations omitted)).

¶ 15 Not all pre-existing doctrines necessarily survived *Hall Street Associates*, however. For example, before *Hall Street Associates*, courts would vacate arbitration awards when the arbitrator "manifestly disregarded the law." *See In re Fifth Third*, 216 N.C. App. at 487–89, 716 S.E.2d at 854–55 (quoting Fourth Circuit case *Three S Delaware, Inc. v. DataQuick Information Systems, Inc.*, 492 F.3d 520, 529 (4th Cir. 2007), to explain manifest disregard of the law after recognizing appellant only cited cases from before *Hall Street Associates*). As this Court has recognized, "the United States Supreme Court has 'not decided whether manifest disregard survives the decision in *Hall Street Associates* . . . .' " *In re Fifth Third Bank*, 216 N.C. App. at 487–88, 716 S.E.2d at 854 (alterations from original omitted) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3, 176 L. Ed. 2d 605, 616 n.3 (2010)); *see also Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) (noting a federal circuit court split on the issue because the Fourth Circuit considers manifest disregard still in existence in contrast to the Fifth and Eleventh Circuits).[2]

¶ 16 With this background on the FAA and the limited grounds on which it allows judicial review, we now return to Plaintiff-Appellant's specific arguments. Plaintiff argues three grounds on which we should reverse the trial court's decision to vacate the arbitration award: (1) "the trial court impermissibly conducted a *de novo* review" of the award; (2) "the essence of the contract doctrine does not apply" such that the trial court could not have vacated the award on that ground; and (3) the arbitrator

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2. We cite *Wachovia Securities* on the circuit-split issue only for ease of reference because the trial court relied on it in its order vacating the arbitration award here. For a discussion of the circuit split more broadly, *see generally* Stuart M. Boyarsky, *The Uncertain Status of the Manifest Disregard Standard One Decade After* Hall Street, 123 Dick. L. Rev. 167, 187–205 (2018) (recounting *Hall Street Associates* and the ensuing circuit split with decision from each circuit).

"did not commit a manifest disregard of law" as the trial court found.[3] (Capitalization altered.)

¶ 17 We first address Plaintiff's argument the trial court "impermissibly conducted a *de novo* review" because if the manner of the trial court's review was wrong, we must reverse. *See First Union Securities*, 168 N.C. App. at 400, 607 S.E.2d at 676 ("Judicial review of an arbitration award is severely limited . . . ."). Given the trial court's order rests on two independent grounds of essence of the contract and manifest disregard, we can proceed on either basis. Given our courts and the Supreme Court of the United States have thus far declined to answer whether manifest disregard survived *Hall Street Associates*, *see In re Fifth Third Bank*, 216 N.C. App. at 487–88, 716 S.E.2d at 854–55 (explaining the U.S. Supreme Court has not decided the matter before declining to determine whether manifest disregard is still valid), we will address the trial court's "essence of the contract" grounds first and only proceed to "manifest disregard" if the trial court erred by vacating the arbitrator's award on the basis of the essence of the contract doctrine.

A. Applicable Law and Standard of Review

¶ 18 Before addressing the trial court's review of the arbitrator's award, we first examine the applicable law and our standard of review of the trial court's decision.

¶ 19 When reviewing orders based on federal statutes such as the FAA, we look to a mix of state and federal court decisions. As this Court explained in *In re Fifth Third Bank*:

> According to well-established law, when an "action is brought under [a] Federal statute . . . in so far as it has been construed by the Supreme Court of the United States, we are bound by that construction." *Dooley v. R.R.*, 163 N.C. 454, 457–58, 79 S.E. 970, 971 (1913). However, "North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme

3. Plaintiff also includes a sub-section arguing the arbitrator "had no obligation to further explain his rejection of [Defendant]'s choice-of-law provision" in the award such that the lack of explanation "certainly was no basis on which the trial court could properly vacate" the award. The trial court's order included a Conclusion of Law explaining "[t]he arbitrator demonstrated a manifest disregard of the law by ignoring and refusing to enforce the unambiguous choice-of-law provision in the Loan Agreement." As a result, the further explanation argument best fits within Plaintiff's broader manifest disregard of law argument.

> Court." *Enoch v. Inman*, 164 N.C. App. 415, 420–21, 596 S.E.2d 361, 365 (2004) (citing *Security Mills v. Trust Co.*, 281 N.C. 525, 529, 189 S.E.2d 266, 269 (1972)). Even so, despite the fact that they are " 'not binding on North Carolina's courts, the holdings and underlying rationale of decisions rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute.' " *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 488 n. 4, 687 S.E.2d 690, 695 n. 4 (2009) (quoting *Security Mills*, 281 N.C. at 529, 189 S.E.2d at 269), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010).

216 N.C. App. at 488–89, 716 S.E.2d at 855. Of course, we are also bound by decisions of our Supreme Court and by prior panels of this Court. *See, e.g.*, *In re O.D.S.*, 247 N.C. App. 711, 721–22, 786 S.E.2d 410, 417 (2016) ("One panel of this Court cannot overrule a prior panel of this Court, or our Supreme Court." (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989))).

¶ 20 Turning to "the standard of review of the trial court's vacatur of [an] arbitration award," it "is the same as for any other order in that we accept findings of fact that are not clearly erroneous and review conclusions of law *de novo*." *Carpenter*, 139 N.C. App. at 750, 534 S.E.2d at 645 (quotations and citation omitted).

B. Trial Court's Review

¶ 21 Plaintiff first argues "the trial court impermissibly conducted a *de novo* review of" the arbitration award. (Capitalization altered.) Specifically, Plaintiff argues "[t]he transcript of the proceedings demonstrates" the trial judge "simply misunderstood the role of the court in connection with a request for the confirmation of an arbitration award" in that she "impermissibly substituted her judgment for that of" the arbitrator.

¶ 22 We reject Plaintiff's argument because it improperly focuses on the hearing rather than the written order. "The trial judge's comments during the hearing as to . . . law are not controlling; the written court order as entered is controlling." *Fayetteville Publishing Co. v. Advanced Internet Technologies, Inc.*, 192 N.C. App. 419, 425, 665 S.E.2d 518, 522 (2008) (citing *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 215, 580 S.E.2d 732, 737 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004)). Thus, all the trial judge's comments to which Plaintiff

points here are not controlling; we only review the entered written order vacating the arbitrator's award.

¶ 23 Turning to the written order, Plaintiff does not demonstrate the trial court impermissibly conducted a *de novo* review. As laid out above, "[u]nder the FAA, arbitration awards may be vacated only in limited situations." *Carpenter*, 139 N.C. App. at 750, 534 S.E.2d at 645. The trial court's written order lists two alternative bases for vacating the arbitration award: (1) "the award fails to draw its essence from the Loan Agreement" and (2) the arbitrator "demonstrated a manifest disregard of the law." We have already explained essence of the contract is an acceptable grounds for review as the Supreme Court of the United States has determined it falls within § 10(a)(4) of the FAA. *See Oxford Health Plans*, 569 U.S. at 569–70, 186 L. Ed. 2d at 119–20 (laying out the essence of the contract doctrine as part of determining "the arbitrator did not exceed his powers" under § 10(a)(4)). Thus, on at least one of the alternative grounds, the trial court's review was proper.

¶ 24 If at least one of the grounds for review was proper and with the uncertainty around the continued existence of manifest disregard, we would not need to address the propriety of the trial court's review on that ground. First, we can consider whether to uphold the trial court's order based on the essence of the contract doctrine. Second, even if we cannot uphold the order based on essence of the contract grounds, we could determine the order needs to be reversed because, presuming *arguendo* manifest disregard is still a valid ground, Defendant failed to show a manifest disregard below. *See In re Fifth Third Bank*, 216 N.C. App. at 488, 716 S.E.2d at 855 (concluding party failed to demonstrate manifest disregard of the law such that the court did not need to "determine the extent, if any, to which 'manifest disregard of the law' remains a valid non-statutory basis for vacating an arbitration award"). Thus, only if we first determine the trial court improperly applied essence of the contract but correctly applied manifest disregard do we need to determine whether the trial court properly reviewed for manifest disregard. Only in that scenario would the existence of manifest disregard be dispositive such that we have to address the question the Supreme Court of the United States and this Court have avoided. *In re Fifth Third Bank*, 216 N.C. App. at 487–88, 716 S.E.2d at 854–55. We first evaluate the essence of the contract ground.

C. Essence of the Contract

¶ 25 Plaintiff argues the trial court's *vacatur* of the arbitration award based on the essence of the contract doctrine "is erroneous in two

regards." First, Plaintiff argues the doctrine does not apply because she did "not assert[] any breach of contract claims." Second, she contends even if it applies, the award "is, at a minimum, rationally inferable from material terms contained in the parties' loan agreement."

¶ 26 As noted, essence of the contract is a doctrine that fits with the FAA provision allowing for *vacatur* where the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4); *see Oxford Health Plans*, 569 U.S. at 569–70, 186 L. Ed. 2d at 119–20 (explaining a court can overturn the arbitrator's determination under § 10(a)(4) only when the arbitrator exceeded his contractually delegated authority by issuing an award based on his own policy determinations rather than "drawing its essence from the contract" (quoting *Eastern Associated Coal*, 531 U.S. at 62, 148 L. Ed. 2d 354)). The bar for an arbitrator's award drawing its essence from a contract is low; the arbitrator need only be " 'arguably construing or applying the contract.' " *See Eastern Associated Coal*, 531 U.S. at 62, 148 L. Ed. 2d at 360 (explaining as long as the arbitrator is doing that, "the fact that 'a court is convinced he committed serious error does not suffice to overturn his decisions.' " (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 98 L. Ed. 2d 286 (1987)); *see also Oxford Health Plans*, 569 U.S. at 573, 186 L. Ed. 2d at 122 ("Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all.").

¶ 27 As an example of this low bar, in *Oxford Health Plans*, when the arbitrator explained "his . . . decision was 'concerned solely with the parties' intent as evidenced by the words' " of the relevant contract clause and performed a "textual analysis," the Supreme Court of the United States found the arbitrator was construing the contract "focusing, per usual, on its language." 569 U.S. at 570–71, 186 L. Ed. 2d at 120–21. As a result, "to overturn his decision, [the Court] would have to rely on a finding that he misapprehended the parties' intent," but "§ 10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly." *Id.*, 569 U.S. at 571–72, 186 L. Ed. 2d at 121.

¶ 28 The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") has also expanded upon the essence of the contract doctrine in a persuasive manner. It has clarified *vacatur* is appropriate for "an award that contravenes the plain and unambiguous terms of the" contract. *See Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 237 (4th Cir. 2006) (citing *United Paperworkers Int'l Union*, 484 U.S. at 38, 98 L. Ed. 2d 286) (explaining the "deferential" standard of review of arbitration

awards "does not require" affirming such an award). In other words, a court can vacate an arbitration award on the grounds it fails to draw its essence from the contract "when an arbitrator has disregarded or modified unambiguous contract provisions or based an award upon his own personal notions of right and wrong." *Three S Delaware*, 492 F.3d at 528 (citing *Patten*, 441 F.3d at 235).

¶ 29 For example, in *Patten*, the Fourth Circuit considered an issue of the timeliness of the arbitration demand when the governing agreement "contained no explicit time limitation." 441 F.3d at 236. The Fourth Circuit found the arbitrator's award "failed to draw its essence from the governing arbitration agreement" because the arbitrator's imposition of a one-year limitations period "contradicted the plain and unambiguous terms" of the agreement. *Id.* at 236–37. While that example covers interpreting the scope of arbitration, the essence of the contract doctrine extends to other provisions as well. *E.g.*, *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 861–62 (4th Cir. 2010) (applying doctrine to aspects of contract related to "damages claim").

¶ 30 Here, the trial court vacated on essence of the contract grounds by explaining: "Additionally, the award fails to draw its essence from the Loan Agreement as the application of North Carolina law is inconsistent with the plain language of the Loan Agreement stating that Virginia law applies." In a section on "Governing Law, Assignment and Amendment," the Loan Agreement states: "This Loan Agreement shall be governed by the laws of the State of Virginia, except that the Waiver of Jury Trial and Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 ('FAA')." Thus, a "plain and unambiguous term[]" of the contract provides Virginia law applies. *Patten*, 441 F.3d at 237.

¶ 31 The arbitration award recognized the arbitrator needed to decide whether to apply North Carolina law or Virginia law and explained the differences between the two:

> This case involves the extension of a loan to Claimant, a North Carolina resident, secured by an automobile titled in North Carolina, where the loan documents were signed in Respondent's office in Virginia. The loan carried an interest rate of nearly 150%, a rate that clearly violates the North Carolina Consumer Finance Act (the "CFA"), but that is arguably not illegal in Virginia. The question to be resolved is whether the language of the CFA applies to the transaction at issue here.

¶ 32 Despite this recognition, the arbitration award never considers or even mentions the Loan Agreement's Virginia choice of law provision. Instead, the arbitration award exclusively focuses on North Carolina's Consumer Finance Act in its primary analysis. Thus, as in *Patten*, *vacatur* is appropriate here because the arbitration award "contradicted the plain and unambiguous terms" of the Loan Agreement. *Patten*, 441 F.3d at 236. The arbitrator here did not construe the governing contract "at all." *See Oxford Health Plans*, 569 U.S. at 573, 186 L. Ed. 2d at 122 ("Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all."). As such, the arbitration award does not draw its essence from the contract and therefore the arbitrator exceeded his power. *See id.*, 569 U.S. at 569–70, 186 L. Ed. 2d at 119–20 (explaining a court can overturn the arbitrator's determination under § 10(a)(4) when the award does not "draw[] its essence from the contract"). As a result, the trial court properly vacated the arbitrator's award.

¶ 33 Plaintiff first argues "the essence of the contract doctrine does not apply" because she did not assert "any breach of contract claims." (Capitalization altered.) First, this statement has no basis when looking at Fourth Circuit precedent we found persuasive above. *E.g.*, *MCI Constructors*, 610 F.3d at 852, 861–62 (applying essence of the contract doctrine in case where complaint alleged claims including negligent misrepresentation and wrongful termination). *Patten* is one of the cases applying essence of the contract doctrine when the claims were not all contractual in nature, *see* 441 F.3d at 232, 236–37 (applying doctrine when underlying claims submitted to arbitration included age discrimination and wrongful termination), and Plaintiff cites *Patten* a page later in her own briefing on essence of the contract doctrine.

¶ 34 Second, the only case law authority Plaintiff cites to support this proposition is a "Memorandum Opinion and Order" from the United States District Court for the Middle District of North Carolina ("Middle District") in *Strange et al. v. Select Management Resources, LLC et al.*, No. 1:19-cv-00321 (M.D.N.C. 2021). (Capitalization altered.) According to the copy of *Strange et al.* included in the addendum to Plaintiff's brief, when the Middle District was analyzing a party's argument the arbitrator refused to apply a choice of law provision, it was reviewing on the grounds of manifest disregard of the law, not essence of the contract. Thus, we reject Plaintiff's unsupported assertion that essence of the contract doctrine only applies to contract claims.

¶ 35 Plaintiff's other argument is that even if the essence of the contract doctrine does apply, the arbitrator's award is "at a minimum, rationally

inferable from material terms contained in the parties' loan agreement." (Citing *Patten*, 441 F.3d at 235.) Plaintiff is correct that "[a]n arbitration award fails to draw its essence from the agreement only when the result is not 'rationally inferable from the contract.' " *Patten*, 441 F.3d at 235 (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir. 1998). But *Patten* itself defeats Plaintiff's argument. In *Patten*, when the arbitrator's award "disregarded the plain and unambiguous language of the" governing contract, the Fourth Circuit found "[t]he arbitrator's ruling . . . resulted in an award that, in the language of *Apex Plumbing*, simply was 'not rationally inferable from the contract.' " *Id.* at 235–37 (quoting *Apex Plumbing*, 142 F.3d at 193 n.5). While Plaintiff points to a portion of the Loan Agreement relating to the interest rate and possession of title taking place at the NCDMV, that does not cure the arbitrator's failure to mention the choice of law provision when choice of law was the question he recognized he had to answer. Because the arbitrator's award "disregarded the plain and unambiguous language of the" Loan Agreement requiring application of Virginia law, the award "simply was 'not rationally inferable from the contract.' " *Id.* at 235–37. Therefore, the arbitrator's award failed to draw its essence from the Loan Agreement.

¶ 36 The issue before us is solely "Whether the trial court erred by granting Defendant-Appellee's Motion to Vacate [the] Arbitration Award." We conclude the trial court did not err in granting that motion because the arbitrator's lack of mention or consideration of the Loan Agreement's choice of law provision means his award does not draw its essence from the parties' contract containing that provision, and a failure to draw from the essence of the contract is a valid ground on which to vacate an arbitration award.

¶ 37 Therefore, after *de novo* review, we affirm the trial court's order vacating the arbitration award. Because we affirm, the trial court's *vacatur* order on essence of the contract grounds, we do not need to address its alternative ground of manifest disregard. Also, as we explained above, because we affirm the trial court's order granting Defendant's motion to vacate the arbitration award, we also affirm its order denying Plaintiff's motion to confirm the arbitration award. *See* 9 U.S.C. § 9 (explaining a court "must grant" an order confirming an arbitration award "unless the award is vacated . . .").

III. Trial Court's Dismissal

¶ 38 **[2]** After vacating the arbitration award, the trial court also dismissed the case saying, "Plaintiff's claims against Defendant are hereby dismissed

with prejudice." The trial court's use of the word "hereby" indicates its dismissal of Plaintiff's claims turns on its decision to vacate the arbitration award. While the trial court properly vacated the arbitration award as we have explained above, the FAA does not allow it to then dismiss the action. The FAA explains, "If an award is vacated . . . the court may, in its discretion, direct a rehearing by the arbitrators."[4] 9 U.S.C. § 10(b). The United States Supreme Court has explained if a court, in its discretion, chooses not to " 'direct a rehearing by the arbitrators' " then the court "must . . . decide the question that was originally referred to the" arbitrators. *See Stolt-Nielsen*, 559 U.S. at 677, 176 L. Ed. 2d at 619 (quoting 9 U.S.C. § 10(b)) (so explaining in terms of its own review after vacating an arbitration panel's award). Therefore, a court cannot dismiss a case following *vacatur* of an arbitration award under the FAA. As a result, we remand to the trial court to, in its discretion, choose between " 'direct[ing] a rehearing by the arbitrator[]' " or "decid[ing] the question that was originally referred" to the arbitrator. *Stolt-Nielsen*, 559 U.S. at 677, 176 L. Ed. 2d at 619 (quoting 9 U.S.C. § 10(b)).

IV. Conclusion

¶ 39 We hold the trial court properly reviewed to determine whether the award drew its essence from the Loan Agreement and did not err in vacating the arbitrator's award and, based on our *de novo* review, properly concluded the award did not. Because we affirm based on the essence of the contract doctrine, we do not reach the trial court's alternative ground for *vacatur*, i.e. manifest disregard. Given we affirm the trial court's order vacating the arbitrator's award, we also affirm its order denying Plaintiff's motion to confirm the award. The trial court, however, could not dismiss the case in reliance on its *vacatur* of the arbitration award. We remand for the trial court, in its discretion, to either direct a rehearing by the arbitrator or decide for itself the issues originally sent to the arbitrator.

AFFIRMED AND REMANDED.

Judges TYSON and GORE concur.

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4. The omitted portion of § 10(b) restricts the trial court's ability to direct a rehearing to situations where "the time within which the agreement required the award to be made has not expired." 9 U.S.C. §10(b). That restriction does not apply here because the arbitration provisions of the Loan Agreement do not include a "time within which" the award has to be made.

STATE v. GORDON

[285 N.C. App. 191, 2022-NCCOA-559]

STATE OF NORTH CAROLINA
v.
AARON LEE GORDON

No. COA17-1077-3

Filed 16 August 2022

Satellite-Based Monitoring—lifetime—imposition after lengthy prison term—aggravated offender—reasonableness

The imposition of lifetime satellite-based monitoring (SBM) on an aggravated offender—to be imposed upon the completion of his fifteen- to twenty-year sentence for statutory rape, indecent liberties with a child, and other charges—was affirmed as a reasonable search under the Fourth Amendment given the limited intrusion into the diminished privacy expectation of aggravated offenders when weighed against the State's paramount interest in protecting the public—especially children—from sex crimes and the efficacy of SBM in promoting that interest. Further, the State was not required to demonstrate the reasonableness of SBM at the time of its effectuation in the future; rather, the State was required to show reasonableness at the time in which it requested the imposition of SBM (i.e. at sentencing).

Appeal by defendant from order entered 13 February 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Originally heard in the Court of Appeals 22 March 2018, with opinion issued 4 September 2018. On 4 September 2019, the North Carolina Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *State v. Grady* (*Grady III*), 372 N.C. 509, 831 S.E.2d 542 (2019). Upon remand, this Court issued its opinion on 17 March 2020. On 14 December 2021, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decisions in *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, and *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, as well as the North Carolina General Assembly's 2021 amendments to the satellite-based monitoring program.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

ZACHARY, Judge.

¶ 1 In accordance with our Supreme Court's recent decisions in *State v. Hilton* and *State v. Strudwick*, and in light of the 2021 amendments to North Carolina's satellite-based monitoring statutes, we affirm the trial court's order imposing satellite-based monitoring for the remainder of Defendant's natural life following his release from incarceration.

Background

¶ 2 In February 2017, Defendant pleaded guilty to statutory rape, second-degree rape, taking indecent liberties with a child, assault by strangulation, and first-degree kidnapping. Defendant was sentenced to 190 to 288 months' imprisonment and ordered to submit to lifetime sex-offender registration. After determining that Defendant was convicted of an "aggravated offense,"[1] and conducting an extensive satellite-based monitoring hearing, the trial court ordered that Defendant enroll in the satellite-based monitoring program for the remainder of his natural life upon his release from prison in 15 to 20 years.

¶ 3 Defendant timely appealed the trial court's satellite-based monitoring order. Relying heavily on *Grady v. North Carolina* (*Grady I*), 575 U.S. 306, 191 L. Ed. 2d 459 (2015), and *State v. Grady* (*Grady II*), 259 N.C. App. 664, 817 S.E.2d 18 (2018), *aff'd as modified*, 372 N.C. 509, 831 S.E.2d 542 (2019), this Court held that the State failed to meet its burden of showing that the implementation of satellite-based monitoring of Defendant will be a reasonable search when executed in 15 to 20 years. *See State v. Gordon* (*Gordon I*), 261 N.C. App. 247, 260, 820 S.E.2d 339, 349 (2018), *remanded*, 372 N.C. 722, 839 S.E.2d 840 (2019). Accordingly, we vacated the trial court's order mandating Defendant's lifetime enrollment in satellite-based monitoring following his eventual release from imprisonment, and remanded "with instructions for the trial court to dismiss the State's application for satellite-based monitoring without prejudice to the State's ability to reapply." *Id.* at 261, 820 S.E.2d at 349.

¶ 4 On 4 September 2019, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *Grady III*. Upon reconsideration, we concluded that the *Grady III*

1. An "aggravated offense" is "[a]ny criminal offense that includes either of the following: (i) 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; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old." N.C. Gen. Stat. § 14-208.6(1a) (2021).

analysis did not alter our earlier determination that the State had failed to meet its burden of establishing that lifetime satellite-based monitoring following Defendant's eventual release from prison would constitute a reasonable search. *See State v. Gordon* (*Gordon II*), 270 N.C. App. 468, 477, 840 S.E.2d 907, 914 (2020), *remanded*, 379 N.C. 670, 865 S.E.2d 852 (2021). Therefore, we reversed the trial court's satellite-based monitoring order. *See id.*

¶ 5 On 14 December 2021, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding the case to this Court for reconsideration in light of the Supreme Court's decisions in *State v. Hilton* and *State v. Strudwick*, as well as the North Carolina General Assembly's amendments to the satellite-based monitoring program, which became effective on 1 December 2021, *see* An Act . . . to Address Constitutional Issues with Satellite-Based Monitoring . . . , S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf. Upon reconsideration, we affirm the trial court's order mandating satellite-based monitoring.

Discussion

¶ 6 After this appeal's remand from our Supreme Court, the parties submitted supplemental briefings addressing the impact of *Hilton*, *Strudwick*, and the 2021 amendments to the satellite-based monitoring program on the issues raised in the present case. Defendant maintains that despite these jurisprudential developments, the satellite-based monitoring regime is unconstitutional because satellite-based monitoring is not a reasonable search, as he is unlikely to reoffend. However, for the reasons explained below, we affirm the trial court's imposition of satellite-based monitoring.

I. Developments in Satellite-Based Monitoring Jurisprudence

¶ 7 The United States Supreme Court held in *Grady I* that the imposition of satellite-based monitoring constitutes a warrantless search under the Fourth Amendment, requiring an inquiry into the reasonableness of the search under the totality of the circumstances. 575 U.S. at 310, 191 L. Ed. 2d at 462.

¶ 8 After *Grady I*, our Supreme Court considered whether mandatory lifetime satellite-based monitoring based solely on the defendant's status as a recidivist[2] sex offender "is reasonable when its intrusion on the

2. An offender is a "recidivist" if he or she "has a prior conviction for an offense that is described" as a "reportable conviction" in N.C. Gen. Stat. § 14-208.6(4). N.C. Gen. Stat. § 14-208.6(2b).

individual's Fourth Amendment interests is balanced against its promotion of legitimate governmental interests." *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557 (citation and internal quotation marks omitted). The Court concluded that for recidivist offenders, "a mandatory, continuous, nonconsensual search by lifetime satellite-based monitoring" violated the Fourth Amendment. *Id.* at 545, 831 S.E.2d at 568.

¶ 9 Our Supreme Court next addressed the constitutionality of the satellite-based monitoring regime as applied to aggravated offenders, and concluded that the satellite-based monitoring "statute as applied to aggravated offenders is not unconstitutional" because the "search effected by the imposition of lifetime [satellite-based monitoring] on the category of aggravated offenders is reasonable under the Fourth Amendment." *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 36. As the Court explained, the lifetime satellite-based monitoring of aggravated offenders is reasonable under the totality of the circumstances, given the program's "limited intrusion into [the] diminished privacy expectation" of aggravated offenders, *id.*, when weighed against the State's "paramount interest in protecting the public—especially children—by monitoring certain sex offenders after their release[,]" *id.* ¶ 19, which the Court determined is manifestly furthered by the satellite-based monitoring regime, *id.* ¶¶ 26–27. Indeed, the Court explicitly "recognized the efficacy of [satellite-based monitoring] in assisting with the apprehension of offenders and in deterring recidivism," and concluded that therefore "there is no need for the State to prove [satellite-based monitoring]'s efficacy on an individualized basis." *Id.* ¶ 28.

¶ 10 Following *Hilton*, the Supreme Court analyzed the necessity of assessing the *future* reasonableness of the imposition of satellite-based monitoring on an aggravated offender, where the offender is sentenced to serve a lengthy prison term prior to the anticipated imposition of satellite-based monitoring. *See Strudwick*, 379 N.C. 94, 2021-NCSC-127. In *Strudwick*, the trial court sentenced the defendant to a minimum of thirty years in prison. *Id.* ¶ 7. The trial court also ordered that the defendant, as an aggravated offender, enroll in lifetime satellite-based monitoring for the remainder of his natural life upon his release from imprisonment. *Id.* ¶ 9. Our Supreme Court clarified that "the 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"; instead, the State need only "demonstrate the reasonableness of a search at its evaluation in the present for which the State is bound to apply for future effectuation of a search." *Id.* ¶ 13. With regard to the reasonableness of the search of the defendant, an

aggravated offender, the Court ultimately concluded that "the lifetime [satellite-based monitoring] program is constitutional due to its promotion of the legitimate and compelling governmental interest which outweighs its narrow, tailored intrusion into [the] defendant's expectation of privacy in his person, home, vehicle, and location." *Id.* ¶ 28.

¶ 11 Shortly after the Supreme Court's issuance of its decisions in *Hilton* and *Strudwick*, the General Assembly's amendments to the satellite-based monitoring program became effective. *See* S.L. 2021-138, § 18(p). Among other revisions, these amendments changed the maximum term of enrollment in satellite-based monitoring from lifetime to ten years, and provided that any offender who was ordered to enroll in satellite-based monitoring for a term longer than ten years may petition for termination or modification of the offender's enrollment. *Id.* § 18(d)–(e), (*i*); *see* N.C. Gen. Stat. § 14-208.46(a), (d)–(e). "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[,]' " *State v. Anthony*, 2022-NCCOA-414, ¶ 19 (quoting N.C. Gen. Stat. § 14-208.46(d)); however, "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 program be terminated[,]' " *id.* (quoting N.C. Gen. Stat. § 14-208.46(e)).

¶ 12 The General Assembly also codified its "[l]egislative finding of efficacy" of satellite-based monitoring, expressly "recogniz[ing] that the GPS monitoring program is an effective tool to deter criminal behavior among sex offenders." S.L. 2021-138, § 18(a); *see* N.C. Gen. Stat. § 14-208.39.

¶ 13 With these developments in mind, we evaluate the reasonableness of the trial court's imposition of lifetime satellite-based monitoring on Defendant in the instant case.

II. Analysis

¶ 14 Defendant argues that this Court should reverse the trial court's satellite-based monitoring order because the satellite-based monitoring regime is unconstitutional. Specifically, Defendant asserts that at his satellite-based monitoring hearing, "the State's evidence was that [Defendant] was unlikely to reoffend. A warrantless search of this magnitude cannot be reasonable as applied to someone who does not present the risk used to justify the search against a facial challenge." In light of *Hilton*, *Strudwick*, and the 2021 amendments to the satellite-based monitoring program, we disagree.

¶ 15 "As in cases challenging pre-trial searches as violating the Fourth Amendment, trial courts must . . . conduct reasonableness hearings before ordering [satellite-based monitoring] unless a defendant waives his or her right to a hearing or fails to object to [satellite-based monitoring] on this basis." *State v. Carter*, 2022-NCCOA-262, ¶ 19. This reasonableness inquiry requires a balancing of competing interests. *See Grady I*, 575 U.S. at 310, 191 L. Ed. 2d at 462 ("The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.").

¶ 16 "Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Samson v. California*, 547 U.S. 843, 848, 165 L. Ed. 2d 250, 256 (2006) (citation and internal quotation marks omitted). Our Supreme Court has described this "reasonableness" test as "a three-pronged inquiry into (1) the nature of the . . . defendant's privacy interest itself, (2) the character of the intrusion effected" by lifetime satellite-based monitoring, and (3) "the nature and purpose of the search where we consider[ ] the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 19 (citations and internal quotation marks omitted).

¶ 17 As a preliminary matter, we note that Defendant's status as an aggravated offender is not challenged. Moreover, it is clear that the trial court conducted a thorough reasonableness hearing. Consequently, we review de novo the trial court's "determination [that satellite-based monitoring] is reasonable as applied to Defendant." *Anthony*, 2022-NCCOA-414, ¶ 33. As part of de novo review, "we evaluate the reasonableness of [satellite-based monitoring] 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" satellite-based monitoring. *Id.* (citing *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶¶ 19, 29, 32).

¶ 18 In determining "the legitimacy of the State's interest" in the imposition of satellite-based monitoring, *id.*, we examine "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it[,]" *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 19 (citation omitted). As our Supreme Court explained, the purposes underlying satellite-based monitoring of aggravated offenders—"assisting law enforcement agencies in solving crimes" and "protecting

the public from aggravated offenders by deterring recidivism[,]" *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶¶ 25, 27—are "of paramount importance," *id.* ¶ 42. Although in the case at bar Defendant argues that "the State's evidence . . . that [he] was unlikely to reoffend" renders unreasonable, and therefore unconstitutional, the imposition of satellite-based monitoring, our Supreme Court and General Assembly have recognized satellite-based monitoring's efficacy as a matter of law; thus, "there is no need for the State to prove [satellite-based monitoring]'s efficacy on an individualized basis." *Id.* ¶ 28; *see* N.C. Gen. Stat. § 14-208.39. Moreover, the State need not "demonstrate the reasonableness of a search at its effectuation in the future for which the State is bound to apply in the present[.]" *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 13. Therefore, this factor weighs in favor of finding the imposition of lifetime satellite-based monitoring here to be reasonable.

¶ 19 We next evaluate "the scope of Defendant's privacy interests[.]" *Anthony*, 2022-NCCOA-414, ¶ 33. Our Supreme Court has established that "the imposition of lifetime [satellite-based monitoring] causes only a limited intrusion into [the] diminished privacy expectation" of all aggravated offenders. *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 36. Like the defendant in *Hilton*, Defendant is an aggravated offender; consequently, his expectation of privacy is diminished. *Id.* ("[A]n aggravated offender has a diminished expectation of privacy both during and after any period of post-release supervision as shown by the numerous lifetime restrictions that society imposes upon him."). Hence, this factor supports the conclusion that the imposition of lifetime satellite-based monitoring on Defendant was reasonable.

¶ 20 Finally, we assess the "intrusion imposed by" lifetime satellite-based monitoring upon Defendant's diminished privacy interest. *Anthony*, 2022-NCCOA-414, ¶ 33. As our Supreme Court first determined in *Hilton* and reinforced in *Strudwick*, the search effected by satellite-based monitoring presents a "narrow, tailored intrusion into [the] defendant's expectation of privacy in his person, home, vehicle, and location" when the defendant is an aggravated offender. *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 28; *see Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 36. Thus, this factor suggests that the imposition of lifetime satellite-based monitoring in this case was reasonable.

¶ 21 Accordingly, in considering the totality of the circumstances, we weigh the State's significant interest in protecting the public and the recognized efficacy of satellite-based monitoring in promoting that interest, *Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶¶ 22–23, 28, against the "incremental intrusion" of lifetime satellite-based monitoring into Defendant's

"diminished expectation of privacy" as an aggravated offender, *id.* ¶ 35. After careful consideration of these factors in light of *Hilton*, *Strudwick*, and the 2021 amendments to the satellite-based monitoring program, we conclude that the search of Defendant as imposed is reasonable and therefore withstands Fourth Amendment scrutiny.

Conclusion

¶ 22 Under the totality of the circumstances, the imposition of lifetime satellite-based monitoring following Defendant's conviction for an aggravated offense does not constitute an unreasonable search under the Fourth Amendment. *See id.* ¶ 12; *Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 28. Accordingly, we affirm the trial court's order imposing lifetime satellite-based monitoring following Defendant's release from incarceration.

AFFIRMED.

Judges DIETZ and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
DEREK EDWIN HIGHSMITH, DEFENDANT

No. COA21-593

Filed 16 August 2022

1. Search and Seizure—sufficiency of findings and conclusions—marijuana—similarity to hemp—totality of circumstances

In denying defendant's motion to suppress, the trial court made sufficient findings and conclusions regarding the seizure of marijuana from a vehicle in which defendant was a passenger, despite defendant's novel argument that, because illegal marijuana and legal hemp look and smell the same, the appearance and scent of a marijuana-like substance alone cannot provide probable cause. Under the totality of the circumstances—where officers found a vacuum-sealed bag of what appeared to be marijuana hidden under a seat, digital scales, more than one thousand dollars of cash, and a flip cell phone, and where defendant did not claim that the substance was hemp—the trial court properly concluded that defendant's Fourth Amendment rights were not violated by the seizure.

2. Drugs—felony possession of marijuana—jury instructions—actual knowledge—plain error analysis

In a prosecution for felony possession of marijuana, the trial court did not commit plain error by not providing a jury instruction ex mero motu on actual knowledge where, in light of the totality of the circumstances—in which officers found a vacuum-sealed bag of marijuana hidden under one of the vehicle's seats, digital scales, more than one thousand dollars of cash, and a flip cell phone—the absence of an actual knowledge instruction did not have a probable impact on the jury's finding that defendant was guilty. For the same reason, even assuming trial counsel rendered deficient performance by failing to request the instruction, defendant failed to establish that he received ineffective assistance of counsel.

Appeal by Defendant from judgments entered 16 March 2021 by Judge Henry L. Stevens, IV, in Duplin County Superior Court. Heard in the Court of Appeals 10 May 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Stroud, for the State.

Joseph P. Lattimore for Defendant-Appellant.

INMAN, Judge.

¶ 1 On 23 July 2018, Defendant Derek Edwin Highsmith ("Defendant") was charged with one count each of felony possession of marijuana, possession with intent to manufacture, sell and deliver marijuana, and possession of marijuana paraphernalia.

¶ 2 The recent emergence of hemp—another plant that looks and smells the same as illegal marijuana but is legal in North Carolina—to the North Carolina market has brought about speculation and discussion surrounding the ability of law enforcement to use the sight and scent traditionally associated with marijuana as a basis to establish probable cause for a warrantless search or seizure.[1] Defendant argues that given the

1. *See, e.g.*, *Omar Al-Hendy, Smokable Hemp in North Carolina: Gone for Good? An Analysis of the Constitutionality of the North Carolina Farm Act of 2019*, 10 Wake Forest J.L. & Pol'y 371, 371-72 (2020) ("Law enforcement must now satisfy a stronger burden to establish probable cause because both hemp and marijuana look and smell the same."); Robert M. Bloom & Dana L. Walsh, *The Fourth Amendment Fetches Fido: New Approaches to Dog Sniffs*, 48 Wake Forest L. Rev. 1271, 1285 (2013) ("[S]tudies indicate that drug-detection dogs do not alert to the illegal substances themselves, but to

shared appearance and scent of marijuana and hemp, the sight or scent alone cannot support a finding of probable cause to seize a substance that appears to be marijuana.

¶ 3 For the following reasons, we conclude Defendant has failed to demonstrate reversible error.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 4 On 31 August 2017, Detective Mobley and Lieutenant Smith of the Duplin County Sheriff's Office witnessed a vehicle leave a residence after receiving numerous complaints of narcotics being sold there. The officers followed the vehicle, noted it had a broken brake light, and observed the vehicle illegally cross a yellow line. The officers initiated a stop of the vehicle.

¶ 5 Defendant was sitting in the vehicle's front passenger seat. The officers quickly recognized Defendant from past encounters and arrests involving marijuana, and at that point contacted a nearby K-9 unit to investigate the vehicle.

¶ 6 Meanwhile, Detective Mobley approached Defendant's side of the vehicle and immediately noticed a box of ammunition sitting behind Defendant in the rear passenger seat. The officers spoke separately with Defendant and the driver of the vehicle, who gave inconsistent stories about where they were headed and from where they were coming. The officers further noted the vehicle was not registered to any occupant of the vehicle, which Lieutenant Smith testified at Defendant's suppression hearing was "part of the criminal indicators that we observe as to a third-party vehicle."

¶ 7 When the K-9 unit arrived, the dog sniffed the exterior of the vehicle and alerted to the possible presence of drugs. Defendant was removed from the vehicle and the officers searched the vehicle. The officers located what they believed to be marijuana in a vacuum-sealed bag underneath the passenger seat. Officers also found on Defendant's person cash totaling $1,200.00, along with "a digital scale commonly used to weigh out narcotics or drug paraphernalia" and a flip cellphone.

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byproducts of the drug. . . . Thus, a dog merely detects what it has been conditioned to detect, which could be a lawful scent. This is noticeable in the case of discerning marijuana and hashish from objects that have similar smells, such as hemp products[.]").

¶ 8 Detective Mobley testified Defendant "stated that the marijuana and the other items found inside of the vehicle were his[.]"[2] Defendant did not mention anything about hemp or otherwise lead the detectives to believe he was referring to legal hemp instead of illicit marijuana. The officers seized the items, which were sent to the State Crime Lab for analysis. Lab results subsequently confirmed the officers' suspicions that the seized substance consisted of 211.28 grams of illicit marijuana.

¶ 9 Defendant was indicted for felony possession with intent to sell, manufacture, or deliver a controlled substance, felony possession of a controlled substance, possession of marijuana and drug paraphernalia, manufacture of a controlled substance, and attaining the status of habitual felon.

¶ 10 Defendant filed a motion to suppress, challenging the lawfulness of the search and subsequent seizure of the marijuana. Defendant premised his argument on the emerging industry of legal hemp, indistinguishable by either sight or smell from marijuana. Defendant argued at the hearing that a K-9 alert standing alone cannot support probable cause when legalized hemp is widely available. Because marijuana and hemp are indistinguishable, Defendant argued, an unlawful seizure would first be needed in order to perform testing to confirm the substance was marijuana. The K-9 alert therefore could not support the warrantless search, and the ensuing evidence recovered should be suppressed, as the result of both an illegal search and an illegal seizure following the search.[3]

¶ 11 The State argued the existence of legal hemp does not change the analysis that a K-9 alert can support probable cause. The prosecutor explained that because the K-9 alert was not the only factor giving rise to the officers' probable cause to believe Defendant was engaged in criminal activity, this is "a K-9 sniff *plus*" case. (Emphasis added). Other factors cited by the prosecutor were the inconsistent statements made to officers by Defendant and the driver of the vehicle, the fact that neither the driver nor Defendant was the registered owner of the vehicle, and the officers' knowledge of Defendant's prior arrests related to marijuana.

¶ 12 The trial court denied Defendant's motion to suppress by order entered 8 February 2021. The trial court concluded that "K-9 Mindy's

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2. It is unclear from the record whether Defendant had himself used the term "marijuana" when speaking with the officers or whether the officer was summarizing Defendant's statement regarding what later was confirmed to be marijuana.

3. On appeal Defendant does not argue that the search of the vehicle was unsupported by probable cause but limits his argument to the seizure of the marijuana found during the search.

positive alert for narcotics at the SUV, along with other factors in evidence, provided the officers on the scene with sufficient facts to find probable cause to conduct a warrantless search of the inside of the vehicle."

¶ 13 Defendant's case came on for jury trial on 15 March 2021. The jury returned a guilty verdict against Defendant on one count of felony possession of marijuana in excess of one-and-one-half ounces. Defendant subsequently pled guilty to attaining habitual felon status. The trial court sentenced Defendant to 33 to 52 months in prison. Defendant gave proper oral notice of appeal to this Court.

¶ 14 On appeal, Defendant "specifically and distinctly" contends that the trial court denying his motion to suppress and subsequently admitting the contraband into evidence amounted to plain error. N.C. R. App. P. 10(a)(4) (2022).

II. ANALYSIS

¶ 15 On appeal, Defendant argues that the trial court erred by failing to make adequate findings of fact and conclusions of law regarding the seizure of the marijuana. He also argues the trial court committed plain error in failing to instruct the jury that the State must prove Defendant had actual knowledge that the plastic bag contained marijuana and not hemp. Finally, Defendant argues he received ineffective assistance of counsel because his trial counsel did not request the instruction on actual knowledge.

A. Defendant's Motion to Suppress

¶ 16 **[1]** Defendant does not argue on appeal that the search of the vehicle was unconstitutional. Instead, he argues the trial court failed to make adequate findings of fact and conclusions of law regarding the seizure of the marijuana found during the search, given the difficulty of distinguishing legal hemp from illegal marijuana. We disagree.

¶ 17 The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures and apply to "brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005) (citation and quotation marks omitted). However, "[i]t is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a public roadway . . . may take place." *Id.* at 795-96, 613 S.E.2d at 39. This probable cause standard is met where the totality of "the facts and circumstances within the

officers' knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (brackets and quotation marks omitted).

¶ 18 "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Faulk*, 256 N.C. App. 255, 263, 807 S.E.2d 623, 628-29 (2017). Findings of fact are upheld if supported by competent evidence, and conclusions of law are reviewed *de novo*. *Id.* at 262, 807 S.E.2d at 629. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.*

> When ruling on a motion to suppress following a hearing, the judge must set forth in the record his findings of facts and conclusions of law. While [the] statute has been interpreted by the North Carolina Supreme Court to require findings of fact only when there is a material conflict in the evidence, our Court has explained that it is still the trial court's responsibility to make the conclusions of law.

Id. at 262-63, 807 S.E.2d at 629 (cleaned up); *see also* N.C. Gen. Stat. § 15A-977(f) (2021).

¶ 19 Defendant argues that the trial court's conclusions address only the legality of the search of the vehicle, and not the legality of the seizure of the marijuana found during the search. Defendant overlooks Conclusion of Law 7, which explicitly states that Defendant's "rights against unreasonable detentions, searches *and seizures* . . . have not been violated." Defendant also argues that the trial court's findings of fact were insufficient to support its holding that the seizure of the marijuana was constitutional. When ruling on a motion to suppress, the trial court must "make the findings of fact necessary to decide the motion." *State v. Bartlett*, 368 N.C. 309, 314, 776 S.E.2d 672, 675 (2015).

¶ 20 The trial court found that the officer's search revealed not only marijuana, but also additional items including a digital scale, over one thousand dollars in folds of money, ammunition, and a flip cellphone. Under the totality of the circumstances: a vacuum-sealed bag of what appeared to be marijuana, hidden under the seat and found with these items, without any evidence that Defendant claimed to the officers the substance was legal hemp, the officers' suspicions were bolstered, amounting to

probable cause to believe the substance at issue was in fact illicit marijuana and not hemp. The trial court therefore did not err in concluding that Defendant's Fourth Amendment rights were not violated.

B. Jury Instructions

¶ 21 **[2]** We also reject Defendant's argument that the trial court plainly erred in failing to provide a jury instruction on actual knowledge. Plain error exists when the defendant demonstrates "that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334. "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.* (quotation marks omitted). "In the absence of such impact, relief is unavailable to a defendant who has not objected." *State v. Inman*, 174 N.C. App. 567, 573, 621 S.E.2d 306, 311 (2005).

¶ 22 "Felonious possession of a controlled substance has two essential elements. The substance must be possessed and the substance must be knowingly possessed." *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015) (citation omitted). "[W]hen the defendant denies having knowledge of the controlled substance that he has been charged with possessing . . . , the existence of the requisite guilty knowledge becomes a determinative issue of fact about which the trial court must instruct the jury." *Id.* at 49, 772 S.E.2d at 437 (quotation marks omitted).

¶ 23 Here, the same facts supporting the trial court's denial of Defendant's motion to suppress also reveal there is no support in the record for his argument that the trial court erred—much less plainly erred—in failing to instruct the jury *ex mero motu* on actual knowledge. Given the above circumstances under which the contraband was found—*e.g.*, its location and packaging with the scale, ammunition, and cash, all of which were before the jury—we cannot conclude that the absence of an actual knowledge instruction had a probable impact on the jury's verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

C. Ineffective Assistance of Counsel

¶ 24 Finally, Defendant maintains he also received ineffective assistance of counsel because his trial counsel failed to request an actual knowledge instruction. *See State v. Lane*, 271 N.C. App. 307, 314, 844 S.E.2d 32, 39 (2020) (explaining that the prejudice prong of the ineffective assistance of counsel claim "is something less than that required under plain error"). Even assuming deficient performance in failing to request the instruction, and for the same reasoning based on the totality of the evidence stated above, we hold Defendant cannot show a "reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different." *Id.* at 313-14, 844 S.E.2d at 39 (explaining that "under the reasonable probability standard the likelihood of a different result must be substantial, not just conceivable") (cleaned up).

III. CONCLUSION

¶ 25 We conclude the trial court did not err in denying Defendant's motion to suppress or failing to instruct the jury on actual knowledge, and Defendant has failed to establish that he received ineffective assistance of counsel.

NO ERROR.

Judges ARROWOOD and WOOD concur.

STATE OF NORTH CAROLINA
v.
AKEEM DEVONTE McIVER, DEFENDANT

No. COA22-107

Filed 16 August 2022

1. Appeal and Error—preservation of issues—admissibility of evidence—timing of objection—plain error review

In a first-degree murder prosecution, defendant failed to preserve for appellate review his objection to the admission of evidence—specifically, expert testimony regarding the locations of the victim's and defendant's cell phones before and after the victim's death—where defendant's counsel filed a motion in limine to exclude the testimony and objected to the testimony at voir dire outside the jury's presence but did not object at the time the testimony was actually introduced at trial. Consequently, defendant was entitled only to plain error review of his challenge on appeal.

2. Homicide—first-degree—evidence locating victim's and defendant's cell phones—jury instruction on flight—no plain error

The trial court in a first-degree murder prosecution did not commit plain error when it allowed an expert to testify about the locations of the victim's and defendant's cell phones before and after the victim's death and when it instructed the jury on flight. Even if the court had erred, any error could not have had a probable impact

on the jury's verdict given the ample evidence of defendant's guilt: namely, the testimony of a friend who drove defendant and another man to the victim's house, heard gunshots a few minutes later from the direction defendant had walked, and saw the other man hand a gun to defendant as they reentered the car; and testimony from the victim's mother, who also heard gunshots coming from her daughter's house, saw defendant and the other man run away from the house and drive away, and found her daughter lying on the sidewalk in front of the house.

Appeal by Defendant from judgment entered 16 July 2021 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 8 June 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph L. Hyde, for the State.

Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Akeem Devonte McIver ("Defendant") appeals his conviction of first degree murder. On appeal, Defendant argues the trial court erred or plainly erred by 1) allowing an expert to testify about the location of Nakeshia Washington's ("Washington") and his cell phones, and 2) instructing the jury on flight. After a careful review of the record and applicable law, we conclude Defendant received a fair trial free from error.

I. Factual and Procedural Background

¶ 2 On the evening of July 16, 2018, Antonio Johnson ("Johnson") visited Defendant at Defendant's house. Johnson drove his girlfriend's white Dodge Charger, which she permitted him to use while she worked a 12 hour shift at the hospital. When Johnson arrived at Defendant's house, Defendant entered the Dodge Charger, sat in the car, and asked Johnson to drive him to visit Alkeen Hair ("Hair").

¶ 3 Defendant and Johnson arrived at Hair's residence around 8:00 p.m. Defendant, Johnson, and Hair talked for a few minutes and then Hair asked Johnson to drive him to Cattail, a location across the river. Johnson agreed and drove Defendant and Hair to Cattail. Approximately one hour later, Hair asked Johnson if he could "take him to go get some weed." Hair offered to give Johnson gas money and some weed for driving him. Johnson agreed, and the three men got back into the Dodge

Charger with Johnson driving, Defendant sitting in the front seat, and Hair sitting in the back.

¶ 4 Hair directed Johnson to Washington's house to get the marijuana. Washington lived in a house owned by her mother, Vickey McArthur ("McArthur"), on Slater Avenue in Fayetteville, North Carolina. The house was located across the street from McArthur. Washington was known to sell marijuana in mason jars from this residence and had just received a new shipment of marijuana. When Defendant, Johnson, and Hair arrived at Washington's house, Hair directed Johnson not to park directly in front of the house, because Washington "don't [sic] like just anybody pulling up in front of the house . . . ." Johnson parked a "[c]ouple hundred yards[]" from Washington's house. Defendant and Hair exited the car around 9:40 p.m.

¶ 5 Washington was on the phone with a friend when they arrived. While they were speaking, Washington began saying, "who is it, who is it[]" followed by several gun shots before the phone call was terminated.

¶ 6 McArthur was at home that evening. At approximately 9:45 p.m., McArthur heard gunshots she believed to be coming from her daughter's house. She stepped outside to find the source of the sound, looked towards Washington's house, and saw two men leaving Washington's porch. According to McArthur, one man was "a dark-skinned tall male, male or boy, with dreads, blue jeans, white sneakers, hair hat on, blue jeans." McArthur realized she had seen this man "several mornings" at Washington's house. At trial, McArthur identified Defendant as the man she had seen leaving her daughter's porch that night. As McArthur approached her daughter's house, she simultaneously heard one of the men, later identified as Hair, say "Hurry up. Come on 'cause she gonna call the police[]" and saw Washington lying on the sidewalk in front of her house. McArthur saw Defendant and Hair run away from Washington's house, enter a white Dodge Charger, and drive away towards Murchison Road. Another neighbor also observed two black males fleeing the scene with one holding "a cellphone that was glowing." McArthur immediately dialed 911 and attempted to flag down a police officer. McArthur had purchased an iPhone for Washington prior to the date of the shooting but did not see the iPhone in Washington's house after the shooting occurred.

¶ 7 Meanwhile, Johnson, who had waited in the Dodge Charger, heard gunshots coming from "the direction that . . . [Defendant and Hair] walked in." He "turned the car on and slowly crept around the corner." Hair then ran up to the Dodge Charger and got into the back seat while

holding a mason jar of weed. Approximately ten seconds later Defendant also got into the Dodge Charger. Johnson then "pulled off kind of fast" from the scene towards Murchison Road.

¶ 8 Hair directed Johnson to drive to Hair's girlfriend's trailer which was located across the river. On the way there, Hair pulled out a loaded gun and handed it to Defendant, who then placed the gun in the Dodge Charger's console. According to Johnson, Defendant kept asking Hair, "[w]hat the f*** you got going on? What type time you on?" over and over.[1] The three men drove for about ten to twenty minutes, reached Johnson's girlfriend's trailer, and went inside to smoke marijuana from the mason jar Hair had acquired from Washington's house. They stayed there for about an hour and then Johnson drove Hair and Defendant back to their houses before returning to his own house.

¶ 9 Meanwhile, McArthur got the attention of Officer Percy Evans ("Officer Evans") of the Fayetteville Police Department who was patrolling the area. McArthur told Officer Evans that Washington had been shot, and Officer Evans then ran over to Washington and saw her lying on the ground, bleeding from her mouth. Officer Evans immediately called for Emergency Medical Services ("EMS"), the fire department, and police back up, and he attempted to administer first aid. EMS arrived and declared Washington was "deceased on scene." Diana Engel, ("Engel"), a forensic technician, photographed the scene and collected evidence at Washington's house that same evening.

¶ 10 Fayetteville Police Department Homicide detectives arrived on the scene; and after obtaining a search warrant, began an investigation. Inside Washington's house, Detectives determined that the gunshots had been fired within the entrance to Washington's house and gathered several spent 9mm and .40 shell casings. However, Washington's iPhone was not located during their search of the property.

¶ 11 Johnson continued to drive around in the white Dodge Charger while his girlfriend was at work. After noticing that police officers were asking questions about the Dodge Charger, he attempted to conceal it within a wood-lined area behind an apartment complex on Caledonia Drive. Police officers ultimately found the Dodge Charger where Johnson had attempted to conceal it.

¶ 12 On July 16, 2018, Defendant was indicted for first degree murder and robbery with a dangerous weapon. On June 28, 2021, Defendant filed a

1. At trial, Johnson explained "[w]hat type time you on?" means "what you got going through your mind, like what's going on with you?"

motion *in limine* to exclude evidence of the GeoTime Report and the testimony of investigative assistant William Potter ("Potter") asserting it lacks proper evidentiary foundation, uses multiple cell towers, contains prejudicial hearsay, and contains conclusory references and statements.

¶ 13 This case came on for jury trial from July 12 to July 16, 2021. At trial, Potter, an investigative assistant with the homicide unit of Fayetteville Police Department, testified on behalf of the State. When the State tendered Potter as an expert in cell phone analytics, Defendant's counsel was allowed to *voir dire* outside of the presence of the jury. After *voir dire* and still outside the presence of the jury, Defense counsel objected to Potter being accepted by the trial court as an expert. The trial court overruled Defendant's objection and accepted Potter as an expert. Potter testified he used GeoTime, based off the call record of Johnson's and Washington's cell phones, to plot the respective locations of their phones at various points of time before and after the shooting. Defense counsel did not object to Potter's testimony during examination or in the presence of the jury. At the end of Potter's testimony and cross-examination, the court stated, in the presence of the jury, "put it on the record so that it is in front of the jury that the objection was overruled as to Mr. Potter being tendered and accepted as an expert."

¶ 14 The jury found Defendant guilty of first-degree murder and robbery with a dangerous weapon. The court sentenced Defendant to life imprisonment without parole for his first-degree murder conviction and arrested judgment on the charge of robbery with a dangerous weapon. Defendant gave oral notice of appeal in open court.

II. Discussion

¶ 15 Defendant raises several issues on appeal; each will be addressed in turn.

A. Expert's Testimony

¶ 16 Defendant first contends the trial court erred by allowing Potter's testimony regarding the location of Washington's and Johnson's cell phones alleging it was based on hearsay because the call detail records were never produced nor authenticated as accurate or confirmed as belonging to Washington and Johnson. We disagree.

1. Standard of Review

¶ 17 **[1]** As an initial matter, Defendant contends the motion *in limine* and oral objection at the trial are sufficient to preserve his first issue for appellate review. Alternatively, Defendant contends we should review

Potter's testimony under a plain error standard of review. The State, in turn, argues Defendant altogether failed to preserve his first issue.

¶ 18 The North Carolina Appellate Rules of Procedure provide, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1); *see State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) ("[T]he appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection.").

¶ 19 Defendant first raises this issue concerning Potter's testimony in his motion *in limine*. It is firmly established that a "motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence." *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (internal quotation marks omitted) (quoting *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845 (1995)); *see Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 620, 504 S.E.2d 102, 105 (1998). Rather, "[r]ulings on these motions . . . are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial and thus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the question of the admissibility of the evidence.' " *Hill*, 347 N.C. at 293, 493 S.E.2d at 274 (quoting *T&T Dev. Co. v. Southern Nat'l Bank*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 349 (1997)).

¶ 20 In order for an objection to admission of evidence to be considered timely it "must be made 'at the time it is actually introduced at trial.' " *Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (quoting *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000)). Thus, "to preserve for appeal matters underlying a motion in limine, the movant must make at least a general objection when the evidence is offered at trial." *Beaver v. Hampton*, 106 N.C. App. 172, 177, 416 S.E.2d 8, 11 (1992), *aff'd in part and vacated in part on other grounds*, 333 N.C. 455, 427 S.E.2d 317 (1993); *see Hill*, 347 N.C. at 293, 493 S.E.2d at 274 ("A party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted.")); *Thibodeaux*, 352 N.C. at 581, 532 S.E.2d at 806. Such objections may not be made "*only* during a hearing out of the jury's presence prior to the actual introduction of the testimony." *Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (emphasis added).

¶ 21 The record before us demonstrates Defendant renewed his objection to Potter's testimony during *voir dire* outside of the presence of the jury. Our Supreme Court addressed a similar issue in *State v. Ray*. There, the prosecutor informed the trial court judge outside the presence of the jury he intended to conduct a line of questioning concerning the defendant's prior conduct to prove motive and intent. *Id*. at 275, 697 S.E.2d at 321-22. Defense counsel objected at the hearing but did not object once the jury returned and the State proceeded with its line of questioning. *Id*. at 276, 692 S.E.2d at 321. Our Supreme Court held the defendant failed to preserve this issue for appellate review because he "objected to the State's forecast of the evidence, but did not then subsequently object when the evidence was 'actually introduced at trial.' " *Id*. at 277, 697 S.E.2d at 322 (quoting *Thibodeaux*, 352 N.C. at 581, 532 S.E.2d at 806).

¶ 22 This court addressed the issue in the case *sub judice* more recently in *State v. Williams*. In *Williams*, defense counsel first objected to evidence of a prior incident before jury selection, but the trial court judge deferred its ruling until the State presented its evidence. *State v. Williams*, 253 N.C. App. 606, 612, 801 S.E.2d 169, 173 (2017), *rev'd in part and remanded*, 370 N.C. 526, 809 S.E.2d 581 (2018). When the witness began to testify about the circumstances surrounding the prior incident, the trial court took a recess, during which defense counsel reminded the trial court judge about his objection. *Id*. The session then resumed and a *voir dire* of the witness was conducted. *Id*. Ultimately, the trial court judge ruled the testimony was admissible, but defense counsel requested an exception for the record which was granted by the trial court judge. *Id*. at 612-13, 801 S.E.2d at 173. Defense counsel, however, failed to object once the jury returned and the witness testified about the incident. *Id*. at 613, 801 S.E.2d at 173-74. The majority held it "would be fundamentally unfair to fault defendant on appeal" and proceeded to review for prejudicial error. *Id*. at 613, 801 S.E.2d at 174. Judge Dillon dissented, arguing the appropriate standard of review was plain error as "[o]ur Supreme Court has held that a defendant who objects during a forecast of evidence outside the presence of the jury does not preserve the objection *unless he objects when the testimony is offered into evidence in the jury's presence*." *Id*. at 620, 801 S.E.2d at 178 (Dillon, J. dissenting). On appeal, our Supreme Court reversed "for reasons stated in the dissenting opinion." *State v. Williams*, 370 N.C. 526, 809 S.E.2d 581 (2018) (order).

¶ 23 In this case, Defendant's objection to the admission of Potter's testimony regarding the location of Johnson's and Washington's cell phones was proffered only outside of the jury's presence. The trial

court noted Defendant's objection, but only after Potter's testimony and cross-examination had concluded. Thus, an objection, if any, was not made "contemporaneous[ly] with the time . . . [Potter's] testimony . . . [was being] offered into evidence." *Thibodeaux*, 352 N.C. at 582, 532 S.E.2d at 806. We conclude Defendant merely "objected to the State's forecast of the evidence, but did not then subsequently object when the evidence was 'actually introduced at trial.' " *Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (quoting *Thibodeaux*, 352 N.C. at 581, 532 S.E.2d at 806). Defendant failed to properly preserve his objection for appeal.

¶ 24 Our Supreme Court has "been clear on this point[,]" *Williams*, 253 N.C. App. at 621, 801 S.E.2d at 178 (Dillon, J. dissenting), and "we are bound by our Supreme Court's holding." *State v. Shepherd*, 156 N.C. App. 69, 72, 575 S.E.2d 776, 778 (2003); *see also In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act etc.*, 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."). Therefore, we hold the proper standard of review is plain error.

2. Analysis

¶ 25 **[2]** On appeal, Defendant argues the admission of Potter's testimony rises to the level of plain error. We disagree.

¶ 26 As a general rule, the plain error standard of review is applied when a defendant fails to preserve an error at trial. *See* N.C. R. App. P. 10(a)(4); *see State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). A defendant has a heavier burden to show the alleged error rises to the level of plain error. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330. Appellate courts must only apply the plain error rule 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.

Id. at 516-517, 723 S.E.2d at 333 (cleaned up) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). To determine whether an unpreserved error was prejudicial, an appellate court must "examine[] the entire record to determine if the . . . error had a probable impact on the jury's finding of guilt." *Id.* at 517, 723 S.E.2d at 334 (cleaned up) (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 379).

¶ 27 Defendant is unable to meet the required burden of proof to show his alleged error was plain error. In the case *sub judice*, there was sufficient evidence presented at trial from which the jury could deduce Defendant committed the crimes of first-degree murder and robbery with a dangerous weapon. The jury heard testimony from Johnson that he drove Defendant to Washington's house, saw Defendant exit the car, and then heard the sound of gunshots approximately five minutes later from the direction Defendant had walked. He explained he observed Defendant get back into the Dodge Charger; frantically ask Hair "[w]hat the f*** you got going on? What type time you on?"; and then receive a gun from Hair. Likewise, McArthur testified she heard gunshots coming from Washington's house and saw two men leaving Washington's front porch. McArthur told the jury she recognized Defendant because she had previously seen him "several mornings" at Washington's house. McArthur further explained that she saw Washington lying in front of the front porch of the house and overheard Hair saying, "[h]urry up. Come on 'cause she gonna call the police." Furthermore, McArthur testified she had purchased an iPhone for Washington but did not see it at her daughter's house after the shooting occurred. Engel corroborated McArthur's testimony, testifying she did not see Washington's iPhone during the search of her house.

¶ 28 In light of this evidence, we cannot say Potter's testimony had a "probable impact on the jury's finding of guilt[,]" was a "fundamental error[,]" "amount[ed] to a denial of a fundamental right" for Defendant, "resulted in a miscarriage of justice[,]" denied Defendant a fair trial, or "seriously affect[ed] 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." *Lawrence*, 365 N.C. at 516-17, 723 S.E.2d at 333 (emphasis omitted) (quotations omitted).

B. Jury Instruction

¶ 29 Next, Defendant argues the trial court plainly erred on instructing the jury on flight because there was insufficient evidence presented to demonstrate he took steps to avoid apprehension. We disagree.

¶ 30 Under Rule 10 of our North Carolina Rules of Appellate Procedure, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict." N.C. R. App. P. 10(a)(2). Defendant concedes he did not object to the challenged jury instruction. Additionally, the State asserts Defendant may have even invited his own error when he assisted with the drafting of the jury instruction and expressed satisfaction with the result. If true, we would be prohibited from reversing for plain error. *State v. McPhail*, 329 N.C. 636, 643, 406, S.E.2d 591, 596 (1991). Nevertheless, as we explain below, Defendant would not be afforded reversal under plain error review even if the error was uninvited.

¶ 31 Applying the principles of law as discussed *supra*, we hold ample evidence exists to support the jury's finding Defendant guilty of first-degree murder. First, Johnson testified he drove Defendant and Hair to Washington's house and shortly thereafter heard gunshots from "the direction that . . . [Defendant and Hair] walked." Johnson then saw Defendant get back into the white Dodge Charger, observed Hair pull out a gun, and hand it to Defendant while Defendant repeated "[w]hat the f*** you got going on? What type time you on?" Moreover, McArthur stated at trial she heard gunshots coming from Washington's house, stepped outside to investigate the noise, and observed two men leaving Washington's porch, one of which she recognized as Defendant. As McArthur approached Washington's house, she observed Defendant and the other man run away and get into a white Dodge Charger, and she observed Washington lying on the sidewalk.

¶ 32 In light of these testimonies and record evidence, we conclude the trial court's jury instruction on flight did not have "a probable impact on the jury's finding of" Defendant's guilt. *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 334 (emphasis omitted) (quotation omitted). Therefore, we hold Defendant has not met his burden of proving the trial court committed plain error by instructing the jury on flight.

III. Conclusion

¶ 33 For the foregoing reasons, we hold Defendant has failed to meet his burden to show that the trial court committed plain error by allowing Potter's testimony or by giving the jury instruction on flight. Therefore, we conclude Defendant received a fair trial free from error.

NO ERROR.

Judges DIETZ and MURPHY concur.

STATE v. WILLIAMS

[285 N.C. App. 215, 2022-NCCOA-562]

STATE OF NORTH CAROLINA
v.
SERGIO MONTRELL WILLIAMS AND KENDRIC DESHAWN PERSON, DEFENDANTS

No. COA20-859

Filed 16 August 2022

1. Appeal and Error—preservation of issues—constitutional objection to evidence—apparent from context

In a prosecution for multiple charges arising from an armed robbery, defendant preserved for appellate review his argument that the trial court violated his constitutional due process right to the presumption of innocence by permitting the jury to view a video showing him in shackles during a police interrogation. Although defendant's constitutional argument was not immediately apparent from his initial objection at trial (that the video was "substantially prejudicial"), it became apparent where defense counsel requested a curative instruction clarifying that the jurors are "not to make any inference from the fact that he's in those chains," and where the court subsequently instructed the jury not to make any inferences about defendant's guilt or innocence based on the shackling.

2. Constitutional Law—due process—presumption of innocence—video of defendant in shackles—harmless error

There was no prejudicial error in a prosecution for multiple charges arising from an armed robbery, where defendant argued on appeal that the trial court violated his constitutional due process right to the presumption of innocence by permitting the jury to view a video showing him in shackles during a police interrogation. Even if the court had erred in admitting the video into evidence, defendant could not show prejudice because the court gave a limiting instruction to the jury directing them not to make any inferences about defendant's guilt or innocence based on the shackling and because overwhelming evidence of defendant's guilt existed beyond the video.

3. Criminal Law—courtroom restraints—statutory authority—mandatory factual findings—inapplicable to video of shackled defendant

In a prosecution for multiple charges arising from an armed robbery, where the trial court permitted the jury to view a video showing defendant in shackles during a police interrogation, defendant's argument that the court failed to make mandatory factual findings

under N.C.G.S. § 15A-1031 regarding whether defendant needed to be restrained during police questioning (and instead simply took "the prosecutor's word" for it) lacked merit and was rejected on appeal. Section 15A-1031 addresses a trial judge's authority to subject a defendant to "physical restraint in the courtroom;" defendant was not physically restrained in the courtroom, and therefore the statute did not apply.

4. Appeal and Error—preservation of issues—constitutional challenge to Habitual Felon Act—not raised at trial

In a prosecution for multiple charges arising from an armed robbery, defendant failed to preserve for appellate review his argument that his sentences under the Habitual Felon Act violated his federal and state constitutional rights to be free from cruel and unusual punishment, where he did not raise the argument before the trial court.

5. Criminal Law—effective assistance of counsel—conflict of interest—no adverse effect on performance—prejudice not otherwise shown

In a prosecution for multiple charges arising from an armed robbery, where the trial court failed to adequately inquire into a potential conflict of interest that defendant's attorney carried from previously representing one of the State's witnesses, who happened to be one of the robbery victims, defendant was still not entitled to a new trial because he could neither show that an "actual conflict of interest" adversely affected his counsel's performance (the record showed that defense counsel objected to the State's main evidence in the case, repeatedly impeached the witness's credibility during cross-examination, and had objectively sound strategic reasons for not questioning the witness about his mental health history and his deal with the State to testify) nor otherwise show prejudice where he was acquitted of the most serious charges he faced at trial, including attempted first-degree murder.

6. Judges—improper delegation of statutory authority—introduction of criminal case to jury—impermissible expression of opinion—no prejudice shown

In a prosecution for multiple charges arising from an armed robbery, where the trial court improperly delegated to the prosecutor its statutory obligation under N.C.G.S. § 15A-1213 to introduce the case to the jury, defendant's argument that the court's error constituted an improper intimation as to his guilt was rejected on appeal because defendant could not show the error prejudiced him where the trial court instructed the jury on the presiding judge's

impartiality—saying the jury must not infer from what the judge did or said that the evidence is to be believed or disbelieved or that a fact has been proved or disproved—and where the jury acquitted defendant of the most serious charges he faced at trial, including attempted first-degree murder.

Appeal by defendants from judgments entered on or about 14 January 2020 by Judge J. Carlton Cole in Superior Court, Edgecombe County. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorneys General Erika N. Jones and Yvonne B. Ricci, for the State.

Daniel J. Dolan for defendant-appellant Sergio Montrell Williams.

Anne Bleyman for defendant-appellant Kendric Deshawn Person.

STROUD, Chief Judge.

¶ 1 Defendants Sergio Montrell Williams and Kendric Deshawn Person were jointly tried and appeal from judgments for robbery with a dangerous weapon and felon in possession of a firearm. While only Defendant Williams properly appealed by entering his notice of appeal, we grant Defendant Person's petition for writ of certiorari.

¶ 2 On appeal, Defendant Person argues (1) the trial court denied him the right to the presumption of innocence in violation of his constitutional due process rights and North Carolina General Statute § 15A-1031 (2019) when it allowed the jury to watch a video in which he was shackled and (2) his sentences under North Carolina's Habitual Felon Act, North Carolina General Statute §§ 14-7.1–7.6 (2019), violate his federal and state constitutional rights to be free from cruel and unusual punishment. Because the trial court gave a limiting instruction that the jury should not infer Defendant Person's guilt or innocence from watching the video and because overwhelming evidence of his guilt existed beyond the video, we conclude any error in relation to the video was not prejudicial, and we further determine § 15A-1031 does not apply. Because Defendant Person failed to raise his habitual felon status sentencing argument before the trial court, we conclude he has not preserved it for our review.

¶ 3 Turning to his appeal, Defendant Williams argues the trial court erred because (1) it failed to adequately investigate a potential conflict

of interest his attorney carried from previously representing a witness for the State and (2) it intimated an opinion as to Defendant Williams's guilt by delegating a statutory obligation under North Carolina General Statute § 15A-1213 to the prosecutor. Because Defendant Williams cannot show any conflict of interest adversely affected his attorney's performance such that we would presume prejudice and cannot show any prejudice, we find no prejudicial error as to his first argument. After reviewing the totality of the circumstances, we also reject Defendant Williams's argument that the trial court delegated its duties under § 15A-1213 to the prosecutor, as he cannot show prejudice. As a result, we determine the trial court did not commit prejudicial error.

I. Background

¶ 4 The State's evidence tended to show that on 6 February 2019, Taron Battle ("Mr. Battle"), his friend Brandon Deans, and his nephew Tyrell Battle went to JMS Food Mart and Grill in Rocky Mount to purchase cigars for smoking marijuana. Mr. Battle drove them to JMS in his silver Pontiac Grand Prix. Prior to going to JMS, all three individuals consumed alcohol and various drugs. While at JMS, two men approached Mr. Battle and Mr. Deans seeking to purchase marijuana. These two men were described as "a slender, brown-skinned guy with dreads in his head" and "a heavyset, kind of stocky guy." Defendant Williams was later identified as the "heavyset" individual and Defendant Person as the slender individual with "dreads in his head." Mr. Battle and Mr. Deans told Defendants they did not want to sell their marijuana.

¶ 5 Mr. Battle then entered JMS to purchase the cigars. Upon leaving JMS, he noticed Defendant Person had entered his car and was in the backseat negotiating the sale of marijuana with Mr. Battle's nephew. Defendant Person then handed a pint-sized mason jar containing marijuana to Defendant Williams through the car window. Defendant Williams then said "you-all trying to play me" and drew his gun. Defendant Person also drew his gun. Mr. Battle drew his gun in response. At this time, Tyrell Battle got out of the Pontiac and ran away. Defendant Person then took Mr. Dean's gun from the seat beside Mr. Deans and got out of the car to join Defendant Williams in taking Mr. Battle's gun. Defendants Williams and Person then left the scene together.

¶ 6 After the Defendants left, Mr. Battle and Mr. Deans drove around to look for Tyrell. While they were driving around the area, a "dark-colored car, like a sedan" slammed on the brakes in front of Mr. Battle's car, causing Mr. Battle to rear end the car. Mr. Deans identified the vehicle as a black Nissan Sentra. Defendants Williams and Person then leaned

out the windows of the Nissan and opened fire on Mr. Battle and Mr. Deans. Mr. Battle followed the Nissan attempting to "do a pit maneuver" or otherwise knock the Nissan out of the way. At some point both cars stopped, and Defendants Williams and Person left their car while they continued to fire upon Mr. Battle and Mr. Deans.

¶ 7 One of the bullets struck Mr. Battle in the chest passing near his heart and puncturing his lung. Because Mr. Battle had been shot, Mr. Deans took over driving and drove Mr. Battle to the hospital. At the hospital, Detective Woods of the Rocky Mount Police Department interviewed Mr. Battle, and Mr. Battle told Detective Woods that he would not be able to identify the shooters if he saw them again. But Mr. Battle gave Detective Woods descriptions of the shooters, although at trial he could not recall the details. Due to his injuries, Mr. Battle was then airlifted to another hospital.

¶ 8 Detective Woods also interviewed Mr. Deans at the initial hospital. Mr. Deans told Detective Woods he drove Mr. Battle to the hospital following a "robbery that went bad" at JMS. Mr. Deans described the shooters as "a light-skinned black male with dreads, [with] unknown tattoos on [his] face" and "a dark-skinned male, heavyset, wearing a white tee shirt and blue and red shorts." Officers then took Mr. Deans to the police department, and he later identified Defendant Williams in an eight-person photo lineup with eighty percent certainty.

¶ 9 On the same evening, Rocky Mount Police Department officers responded directly to JMS after receiving a report of shots fired. Officer Kuhn reviewed surveillance footage from JMS security cameras and noticed one of the suspects was wearing a white shirt, black shorts, red sneakers, and a GPS ankle monitor. Officer Kuhn used BI Total Access, a GPS ankle monitoring program, and determined Defendant Williams was at JMS around the time of the shooting. Officer Kuhn located a booking photo of Defendant Williams and visually confirmed that Defendant Williams was the same person in the surveillance video. Using BI Total Access, officers located Defendant Williams and took him into custody. Defendant Williams was wearing the same shirt and shoes observed in the surveillance video.

¶ 10 Detective Woods then interviewed Defendant Williams at the police department. During the interview, Defendant Williams was wearing the same clothing described by Mr. Deans and seen in the surveillance video. Defendant Williams confessed he was at JMS and took the guns from Mr. Battle and Mr. Deans, but Defendant Williams never admitted to the shooting.

¶ 11 Defendant Person was apprehended approximately one month after the robbery and shooting. After his arrest, Defendant Person admitted to being at the JMS the night of 6 February 2019, but never admitted to participating in the shooting.

¶ 12 Based on these events, both Defendant Williams and Defendant Person were indicted on numerous charges. On or about 10 June 2019, Defendant Williams was indicted on: assault with a deadly weapon and attempted first degree murder on Mr. Deans; attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury on Mr. Battle; possession of firearm by a felon; discharge of a weapon into occupied property inflicting serious bodily injury on Mr. Battle; and robbery with a dangerous weapon. On or about the same day, Defendant Person was indicted on: attempted first degree murder on Mr. Deans; attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury on Mr. Battle; robbery with a dangerous weapon; discharge of a weapon into occupied property inflicting serious bodily injury on Mr. Battle; discharge of a firearm into an occupied vehicle while in operation; possession of firearm by a felon; and habitual felon status.

¶ 13 On or about 21 October 2019, the State filed superseding indictments against both Defendants. Defendant Williams was indicted on: discharge of a weapon into occupied property inflicting serious bodily injury on Mr. Battle; robbery with a dangerous weapon on both Mr. Battle and Mr. Deans; and discharge of a weapon into an occupied vehicle while in operation on both Mr. Battle and Mr. Deans. Defendant Person was indicted on the same charges except for discharge of a weapon into an occupied vehicle.

¶ 14 These charges came for trial starting 6 January 2020. During trial, the State presented evidence as recounted above. During the course of trial, on or about 13 and 14 January 2020, the State dismissed Defendant Williams's charges of assault with a deadly weapon and discharge of a firearm into an occupied vehicle while in operation. Neither of the Defendants presented evidence at trial.

¶ 15 The jury found Defendant Williams guilty of possession of a firearm by a felon and robbery with a dangerous weapon as to Mr. Battle but acquitted Defendant Williams of the attempted first degree murder as to Mr. Battle and as to Mr. Deans, assault with a deadly weapon with intent to kill inflicting serious injury and its lesser included offense as to Mr. Battle, discharge of a weapon in a vehicle while in operation causing serious bodily injury as to Mr. Battle, and robbery with a dangerous

weapon as to Mr. Deans. Pursuant to the not guilty verdicts, on or about 14 January 2020, the trial judge entered documents entitled "Judgment/ Order or Other Disposition" noting Defendant Williams was found not guilty by the jury on both counts of attempted first degree murder and the assault with a deadly weapon charge.

¶ 16 As to Defendant Person, the jury found him guilty of robbery with a dangerous weapon as to both Mr. Battle and Mr. Deans, and possession of a firearm by a felon. The jury acquitted Defendant Person on the charges of: attempted first degree murder as to Mr. Deans and as to Mr. Battle, assault with a deadly weapon with intent to kill inflicting serious injury and its lesser included offense as to Mr. Battle, discharge of a weapon in a vehicle while in operation causing serious bodily injury as to Mr. Battle, and discharge of a firearm into an occupied vehicle while in operation. Pursuant to the not guilty verdicts, on or about 14 January 2020, the trial judge entered documents entitled "Judgment/ Order or Other Disposition" noting Defendant Person was found not guilty by the jury on both counts of attempted first degree murder, the assault with a deadly weapon charge, and the discharge of a firearm into occupied vehicle while in operation charge. Following these jury verdicts, also on or about 14 January 2020, Defendant Person also stipulated to three prior felony convictions and pled guilty to habitual felon status.

¶ 17 The trial court entered judgment and sentenced both Defendants on or about 14 January 2020. Defendant Williams was sentenced to 97 to 129 months on the robbery with a dangerous weapon charge and 19 to 32 months on the possession of a firearm by a felon charge to start "at the expiration of the sentence imposed" for the robbery conviction. As enhanced by his habitual felon status, Defendant Person was sentenced to 96 to 128 months on the two charges of robbery with a dangerous weapon and to 96 to 128 months on the possession of a firearm by a felon charge, again to start "at the expiration of the sentence imposed" for the robbery convictions. Defendant Williams gave notice of appeal in open court.

II. Defendant Person's Petition for Writ of Certiorari

¶ 18 Defendant Person did not enter either an oral or written notice of appeal from the judgments entered by the trial court. Defendant Person requests we consider an appeal from the judgment via a petition for writ of certiorari, due to his counsel's failure to properly appeal the judgment. At trial, the following exchange occurred after the trial court orally announced the judgments:

THE COURT: Yes, sir. Anything further, Mr. Williams?

> [DEFENDANT WILLIAMS'S TRIAL COUNSEL]: Other than, Your Honor, would respectfully would [sic] enter notice of appeal.
>
> THE COURT: Okay.
>
> [DEFENDANT WILLIAMS'S TRIAL COUNSEL]: I would ask that my representation be limited to this trial.
>
> THE COURT: I will take care of it. Madam Clerk, *as to both of these young men*, note their appeals and [Counsel for both Defendants] are relieved of any further obligation to represent them and it's ordered that the appellate defender's office be assigned to represent them in their appeals.

(Emphasis added.) Defendant Person's trial counsel did not object to the court's statement and did not enter a notice of appeal for Defendant Person, and Appellate Entries were created for both Defendants. The State simply notes the issue is in this Court's discretion. In our discretion, we allow Defendant Person's petition for certiorari. *See generally* N.C. R. App. P. 21; *see, e.g.*, *State v. Gardner*, 225 N.C. App. 161, 165, 736 S.E.2d 826, 829 (2013) ("We have also held that where a defendant has lost his right of appeal through no fault of his own, but rather as a result of the actions of counsel, failure to issue a writ of *certiorari* would be manifestly unjust. We are persuaded that [the defendant] lost her right of appeal through no fault of her own, but rather because of an error on the part of trial counsel. Thus, we exercise our discretion and grant *certiorari*." (citation omitted)).

III. Defendant Person's Appeal

¶ 19 Defendant Person argues the trial court erred as to two issues. First, he argues "the trial court denied . . . his right to the presumption of innocence when he was presented to the jury as an obviously bad and dangerous individual whose guilt was a foregone conclusion" when "the jury was permitted to view [him] in shackles" in a video of his police interrogation. (Capitalization altered.) Second, he contends sentencing him under the North Carolina Habitual Felon Act, North Carolina General Statutes §§ 14-7.1 *et. seq.*, violated his federal and state constitutional "rights to be free of cruel and unusual punishment." (Capitalization altered.) We hold the trial court committed no prejudicial error with respect to the first issue and Defendant Person failed to preserve the second issue for appellate review.

A. Presumption of Innocence

¶ 20 Defendant Person first argues the trial court denied his right to the presumption of innocence—protected as part of his due process rights—because it allowed the prosecution to play for the jury a video interrogation in which Defendant Person was shackled, although he acknowledges the trial court gave "a limiting instruction that the jury was not to make any inferences about his guilt or innocence." Defendant Person also contends the trial court's ruling allowing the jury to view the video in which he is shackled involved "an improper delegation of the trial court's mandatory statutory authority." Specifically, he contends the trial court did not follow North Carolina General Statute § 15A-1031, which Defendant acknowledges addresses when a trial judge "may order a defendant be restrained at trial," because the trial court "took the prosecutor's word" police needed to shackle Defendant Person in the video and improperly delegated to the prosecutor the trial court's required findings of fact and final order on the topic.

¶ 21 The State responds Defendant Person "failed to preserve the issue for appellate review" before making a variety of arguments on the merits. We first address the preservation issue before reaching the merits.

1. Preservation of Presumption of Innocence Issue

¶ 22 **[1]** We first address the preservation issue acknowledged by Defendant Person and argued by the State. Defendant Person first argues the video was played over his objections and that he renewed his objection at the close of evidence, thereby preserving the issue for appellate review. He then argues the alleged constitutional violation was apparent from the context given his objections and motions. In the alternative, Defendant Person argues this Court should exercise its authority pursuant to Rule 2 to suspend the Rules of Appellate Procedure and allow review of Defendant Person's claim to prevent manifest injustice to a party. The State responds all objections at trial were based on non-constitutional grounds and any constitutional argument has been waived.

¶ 23 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). As a result, "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the reviewing court." *State v. Spence*, 237 N.C. App. 367, 369, 764 S.E.2d 670, 674 (2014) (quoting *State v. Ellis*, 205 N.C. App. 650, 654, 696 S.E.2d 536, 539

(2010)). "[E]ven constitutional challenges are subject to the same strictures of Rule 10(a)(1)." *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019).

¶ 24 As the language of Rule 10(a)(1) implies, *see* N.C. R. App. P. 10(a)(1) (requiring a party state the specific grounds if they "were not apparent from the context"), in the context of constitutional rights, "a defendant must voice his objection at trial such that it is apparent from the circumstances that his objection was based on the violation of a constitutional right." *Spence*, 237 N.C. App. at 370, 764 S.E.2d at 674. For example, in *Spence*, this Court held the defendant preserved an argument based on his constitutional right to a public trial because it was "apparent from the context" his attorney objected "in direct response to the trial court's ruling to remove all bystanders from the courtroom—a decision that directly implicate[d]" that right. *Id.*, 237 N.C. App. at 371, 764 S.E.2d at 674–75.

¶ 25 Here, Defendant Person's attorney first brought up the issue of Defendant Person being shackled in a video of his police interview during a motions conference held in the middle of jury selection. Defendant Person's attorney specifically argued the interview should be excluded for being "substantial[ly] prejudic[ial]":

> And it certainly would be our position that him being shackled like that would create a substantial prejudice towards him by the jury or certainly a potential of that prejudice as to why he was so dramatically chained during the interview and we would think that would create a prejudice to the jury about him and we would request that you exclude the video for that reason.

¶ 26 From this argument alone, it is a close call whether the constitutional presumption of innocence basis of the objection "is apparent from the circumstances." *See Spence*, 237 N.C. App. at 370, 764 S.E.2d at 674. On the one hand, as Defendant Person argues, one of the main problems with the jury seeing a defendant in shackles is "it tends to create prejudice in the minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion" such that "it so infringes upon the presumption of innocence that it interferes with a fair and just decision of the question of guilt or innocence." *See State v. Tolley*, 290 N.C. 349, 366, 226 S.E.2d 353, 367 (1976) (quotations, citations, and alterations omitted) (explaining in the context of a jury seeing a defendant shackled at trial). Thus, the defense

attorney's reference to substantial prejudice could be enough because the decision to allow the jury to view a video with Defendant Person in shackles would necessarily implicate the right to a presumption of innocence; the prejudice of the shackles could scarcely refer to anything else.

¶ 27 On the other hand, as the State points out, Defendant Person's attorney did not mention the constitution and the trial court also made a statement indicating it thought the statement about prejudice was a reference to Rule of Evidence 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2019). Specifically, in denying Defendant Person's motion at that time, the trial court ruled:

> That the Court in its discretion would deny the motion based on the 401 and 403 analysis and also having been informed that at that time the defendant was considered a flight risk and note Mr. Sperati's exception to the Court's ruling. And, Mr. Clark, if you'll prepare an order with those findings and whatever is necessary to support the Court's decision.

Based on the record before us, it does not appear any written order on this objection was ever prepared. Although a written order is not required for this type of ruling, in this instance a written order would likely have clarified the legal basis for the objection and the trial court's rationale for its ruling, perhaps eliminating the need for this issue to be raised on appeal. Without such written order, the trial court's oral ruling leaves a question of whether the constitutional basis of Defendant Person's objection was apparent from the context because it appears the trial court did not address any constitutional basis for the objection.

¶ 28 Moving beyond the initial objection, Defendant Person preserved this issue as seen by the subsequent curative instruction. Shortly after the trial court made its ruling, Defendant Person's attorney requested the trial court give "a curative instruction right before the video is played to the jury, that they're not to make any inference from the fact that he's in those chains" and the trial court agreed to do so. The jury could only make one inference from the shackling that would need to be cured: "that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion." *Tolley*, 290 N.C. at 366, 226 S.E.2d at 367. As such, the request for a curative instruction supports Defendant Person's argument that he was making an objection on constitutional grounds.

¶ 29 The trial court's actual curative instruction to the jury when the video interview was about to be played further supports our interpretation of the curative instruction. The trial court specifically mentioned

the jury should not "make any inferences about [Defendant Person's] guilt or innocence" based on the shackling:

> Ladies and gentlemen of the jury, you're about to witness an interview of Mr. Kendric Person conducted by Detective Thompson. In this video, you'll see that Mr. Person is in handcuffs on both and leg irons.
>
> You are not to make any inferences about his guilt or innocence based on the - - him being in handcuffs and leg irons. Thank you. You may continue.

Thus, the trial court ultimately addressed Defendant Person's objection to the video of the interview showing him in shackles as based on his constitutional right to a presumption of innocence.

¶ 30 Because the constitutional due process and presumption of innocence basis of Defendant Person's objection is apparent from the context, we hold he properly preserved this issue for our review. *See Spence*, 237 N.C. App. at 371, 764 S.E.2d at 674–75 (holding the defendant preserved an issue for appeal when the basis of the objection was "apparent from the context"). Since we hold Defendant Person preserved this issue, we do not need to reach his Rule 2 argument.

2. Merits of Presumption of Innocence Issue

¶ 31 **[2]** Having determined Defendant Person properly preserved his presumption of the innocence issue, we now turn to the merits. Specifically, Defendant Person contends the trial court violated his right to a presumption of innocence because it allowed the State to play a video of a police interview in which he was shackled.

¶ 32 Beginning with the standard of review, Defendant Person argues because the shackling issue "involves alleged violations of constitutional rights" we should review it de novo. But both our Courts and the United States Supreme Court have long said trial court rulings on physical restraints on a defendant in the context of the due process right to presumption of innocence are reviewed for abuse of discretion. *See State v. Lee*, 218 N.C. App. 42, 48–49, 720 S.E.2d 884, 890 (2012) ("In reviewing the propriety of physical restraints in a particular case, 'the test on appeal is whether, under all of the circumstances, the trial court abused its discretion.' " (quoting *Tolley*, 290 N.C. at 369, 226 S.E.2d at 369); *Deck v. Missouri*, 544 U.S. 622, 629, 125 S. Ct. 2007, 2012 (2005) ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its

discretion, that they are justified by a state interest specific to a particular trial."). "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." *State v. Gray*, 337 N.C. 772, 776, 448 S.E.2d 794, 797 (1994) (quotations and citation omitted).

¶ 33 In making his argument, Defendant Person only cites cases involving shackling the defendant in the courtroom at trial. *See Tolley*, 290 N.C. at 363, 226 S.E.2d at 365 ("Defendant contends that this action by the trial judge rendered his trial fundamentally unfair, in that his appearance before the jury while shackled with leg irons during the entire course of his three-day trial destroyed the presumption of innocence to which he was entitled until proven guilty beyond a reasonable doubt."); *State v. Sellers*, 245 N.C. App. 556, 558, 782 S.E.2d 86, 88 (2016) ("Defendant contends the trial court violated N.C. Gen.[ ]Stat. § 15A–1031 by allowing him to appear before the jury in leg shackles, and failing to issue a limiting instruction."). Defendant Person does not cite nor have we found any binding precedent addressing a defendant appearing in shackles in a video played for the jury at trial.

¶ 34 We need not decide whether our case law on the jury viewing a defendant in shackles or other restraints extends to watching a video where the defendant is restrained because, even assuming *arguendo* it does, Defendant Person cannot show prejudice. In evaluating prejudice in cases on the presumption of innocence and restraints on the defendant, we have looked at both any limiting instruction the trial court gave and the strength of the evidence against the defendant. *See Lee*, 218 N.C. App. at 51–52, 720 S.E.2d at 891 (finding harmless error because "the trial court clearly and emphatically instructed the jury not to consider [the] defendant's restraints" and "given the overwhelming evidence against [the] defendant"); *State v. Thomas*, 134 N.C. App. 560, 570, 518 S.E.2d 222, 229 (1999) (concluding the defendant was not prejudiced because "the State offered overwhelming evidence" to support the conviction).

¶ 35 Here, the trial court explicitly instructed the jury to not "make any inferences about [Defendant Person's] guilt or innocence" based on his restraints in the video:

> Ladies and gentlemen of the jury, you're about to witness an interview of Mr. Kendric Person conducted by Detective Thompson. In this video, you'll see that Mr. Person is in handcuffs on both and leg irons.

> You are not to make any inferences about his guilt or innocence based on the - - him being in handcuffs and leg irons. Thank you. You may continue.

"The law presumes that jurors follow the court's instructions." *State v. Jackson*, 235 N.C. App. 384, 394 n.5, 761 S.E.2d 724, 732 n.5 (2014) (quoting *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004)). Thus, we presume the jurors did not make any inferences about Defendant Person's guilt based on his appearing in restraints in the video.

¶ 36 Even if they had made such inferences, Defendant Person could still not show prejudice because of the overwhelming evidence against him. Defendant Person matched the description Mr. Battle and Mr. Dean gave of the people who took their guns, and Mr. Dean identified him in court testimony as one of those people. Further, the incident at the store was captured on security footage, and police identified Defendant Person in the video. Thus, the State presented overwhelming evidence of Defendant Person's guilt.

¶ 37 As a result, assuming *arguendo* the precedents surrounding the jury viewing a defendant in shackles or other restraints at trial extend to watching a video where the defendant is restrained, we conclude Defendant Person cannot show prejudice from any alleged error. Therefore, we reject his arguments.

3. North Carolina General Statute § 15A-1031

¶ 38 **[3]** Finally on the issue of the video of the interview showing Defendant Person shackled, Defendant Person argues the trial court failed to make mandatory findings of fact under North Carolina General Statute § 15A-1031. The State responds "by its plain language N.C.G.S. § 15A-1031 does not apply since this statute only applies when the trial court itself makes the difficult determination that a defendant needs to be restrained in the courtroom." Before we address any failure to follow § 15A-1031, we therefore first need to determine if it applies at all. While in a similar context above we were reluctant to determine the reach of the constitutional rule, we do not have the same hesitancy in addressing statutory questions as compared to constitutional ones. *See State v. Wallace*, 49 N.C. App. 475, 484–86, 271 S.E.2d 760, 766 (1980) (explaining, "A constitutional question will not be passed upon if there is also present some other ground upon which the case may be decided" before settling the issue on appeal on statutory rather than constitutional grounds); *see also State ex rel. Utilities Com'n v. Public Staff-North Carolina Utilities Com'n*, 123 N.C. App. 43, 51, 472 S.E.2d 193, 199 (1996) ("[A]n appellate court will not consider constitutional questions, such as a violation of

due process, when they are 'not necessary to the decision of the precise controversy presented in the litigation before it.' " (quoting *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969))).

¶ 39 Since the question of whether § 15A-1031 applies is a question of statutory interpretation, we review it de novo on appeal. *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014) ("Issues of statutory construction are questions of law, reviewed de novo on appeal." (quoting *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010))). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Id.* (quoting *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008)).

¶ 40 Section 15A-1031 provides:

> A trial judge may order a defendant or witness subjected to *physical restraint in the courtroom* when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons. If the judge orders a defendant or witness restrained, he must:
>
> > (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and
> >
> > (2) Give the restrained person an opportunity to object; and
> >
> > (3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.
>
> If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact.

N.C. Gen. Stat. § 15A-1031 (2019) (emphasis added). The plain language of the statute thus clearly applies only to "physical restraint in the courtroom." *Id.* And we are bound by the plain language of the statute. *See State v. Alonzo*, 373 N.C. 437, 440, 838 S.E.2d 354, 356 (2020) ("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." (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990))). Since Defendant Person was not physically restrained in the courtroom, the statute does not apply.

¶ 41 Because, based on our de novo review of the statutory interpretation question, § 15A-1031 does not apply, we reject Defendant Person's argument based on it and find the trial court did not err under the statute.

B. Habitual Felon and Cruel and Unusual Punishment

¶ 42 **[4]** Defendant Person next argues that his sentences under North Carolina's Habitual Felon Act, North Carolina General Statute §§ 14-7.1–7.6 (2019), "violate[] his [federal and state] constitutional right to be free of cruel and unusual punishment." (Citing U.S. Const. Amends. VIII, XIV; N.C. Const. Art. I, §§ 19, 27.) Specifically, Defendant Person argues proportionality is an "importan[t]" concept as part of the "right to be free of cruel and unusual punishment" and "[s]entences under the Habitual Felon Act are excessive and grossly disproportionate to those under Structured Sentencing alone." Defendant Person acknowledges "this Court has previously upheld the statutory scheme against an identical challenge," but "raises this issue in brief to urge the Court to re-examine its prior holdings" in light of the fact "most of the rulings relied on by this Court to uphold the Habitual Felon Act against constitutional challenges predate higher authority decisions of the United States Supreme Court reaffirming the importance of . . . proportionality." He also raises the issue "so as not to be considered to have abandoned these claims under" North Carolina Rule of Appellate Procedure 28(b)(6).

¶ 43 The State initially argues Defendant Person failed to preserve this argument because "Defendant Person did not raise this issue at the trial level." Defendant Person admits he did not raise the issue below saying he "is mindful that constitutional arguments not raised at trial will not be considered for the first time on appeal." (Citing *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 586, 607 (2001).) Our review of the record also does not reveal any time when this issue was mentioned below. Under Rule of Appellate Procedure 10(a)(1), Defendant Person has failed to preserve the issue for appeal because he did not present it to the trial court.

¶ 44 Defendant argues, however, this Court " will review constitutional arguments related to sentencing for the first time on appeal" and then contends "[t]he proportionality protections afforded by the Eighth Amendment demand that this case be reviewed on its own merits without regard for whether the sentence was objected to on these grounds in the court below." The two cases on which Defendant relies for this argument, *State v. Clifton*, 158 N.C. App. 88, 580 S.E.2d 40 (2003), and

State v. Hensley, 156 N.C. App. 634, 577 S.E.2d 417 (2003), do not support his argument. While both cases address proportionality challenges to habitual felon sentences, *Clifton*, 158 N.C. App. at 91–96, 580 S.E.2d at 42–46, *Hensley*, 156 N.C. App. at 638–39, 577 S.E.2d at 421, neither case addresses whether the arguments were raised for the first time on appeal let alone says this Court will undertake such a review. Thus, we reject Defendant's argument.

¶ 45 Because Defendant Person did not properly raise this argument before the trial court, we hold he did not preserve it for appellate review and therefore do not address it.

IV. Defendant Williams's Appeal

¶ 46 Defendant Williams contends the trial court erred as to two issues: (1) "failing to conduct an adequate and complete inquiry into" his attorney's conflict of interest, and (2) "intimat[ing] an opinion by instructing the prosecutor, in the presence of prospective jurors, to inform the prospective jurors as to the charges, victims, and dates of offenses." (Capitalization altered.) We hold the trial court committed no prejudicial error with respect to either issue.

A. Attorney Conflict of Interest

¶ 47 **[5]** Defendant Williams alleges his trial counsel "had an actual conflict of interest that adversely affected his performance" during trial. Specifically, he argues his trial counsel had a conflict because his trial counsel "previously represented" Taron Battle, "one of the two alleged victims in this case" who was also "one of the State's main witnesses." Because "[t]he court was on notice" of the conflict, it was "required to conduct an adequate and complete inquiry sufficient to address" the conflict, including ensuring Defendant Williams (1) was "fully advised of the facts of any potential or actual conflict," (2) "fully understood the consequences of any potential or actual conflict," and (3) only made a waiver "of his right to conflict-free representation . . . knowingly, intelligently, and voluntarily." Defendant Williams alleges "the trial court failed to completely and adequately determine the extent of the conflict of interest and failed to completely and adequately inform the [D]efendant of the consequences of any potential conflict of interest" such that "any alleged waiver of" his right to counsel "was not knowingly, intelligently, and voluntarily made." He also argues his attorney had "an actual conflict of interest" that prevented his attorney from "seek[ing] to vigorously cross-examine Mr. Battle," the prosecution witness in question. Defendant Williams contends he is therefore "entitled

to a new trial or, alternatively," remand to the trial court "for an adequate and complete inquiry" into the issue of his attorney's conflict of interest.

¶ 48 "A defendant in a criminal proceeding has the right to effective assistance of counsel under both the federal and state constitutions." *State v. Choudhry*, 365 N.C. 215, 219, 717 S.E.2d 348, 352 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063–64 (1984); *State v. Braswell*, 312 N.C. 553, 561–63, 324 S.E.2d 241, 247–48 (1985)). A defendant's "right to effective assistance of counsel includes the 'right to representation that is free from conflicts of interest.' " *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (quoting *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103 (1981)). "A conflict of interest arises where 'the representation of one client will be directly adverse to another client' or 'the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.' " *State v. Lynch*, 275 N.C. App. 296, 299, 852 S.E.2d 924, 927 (2020) (quoting N.C. R. Pro. Conduct 1.7(a) (2019)). Our courts apply the same analysis whether the conflict issue arises because of current or former clients. *See State v. Phillips*, 365 N.C. 103, 120–21, 711 S.E.2d 122, 137 (2011) (stating the same test is used "[w]hen issues involving successive or simultaneous representation of clients in related matters have arisen before" our courts and then citing cases where "[d]efense counsel previously represented in a different case a witness testifying for the State in the case at bar" and where "[o]ne attorney represented codefendants at same trial" (citing *State v. Murrell*, 362 N.C. 375, 405, 665 S.E.2d 61, 81 (2008) (witness) and *Bruton*, 344 N.C. at 391, 474 S.E.2d at 343 (codefendants))). Here, the alleged conflict came from a former client of Defendant Williams's attorney, Mr. Battle, the victim and a witness for the State.

¶ 49 Turning to the specific analysis of such conflicts, our Courts analyze ineffective assistance of counsel claims based on conflicts under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708 (1980), rather than employ the standard ineffective assistance of counsel analysis under *Strickland*. *Phillips*, 365 N.C. at 120–21, 711 S.E.2d at 137. The *Sullivan*[1] and *Strickland* standards differ on whether the defendant always must show prejudice to be entitled to relief; under *Strickland*, a defendant must show prejudice, but under *Sullivan* a defendant who shows an

1. *Sullivan* refers to *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708. S*ee Choudhry*, 365 N.C. at 219–20, 717 S.E.2d at 352 (using *Sullivan* as the short name for that case instead of *Cuyler*).

actual conflict of interest "may not be required to demonstrate prejudice." *Choudhry*, 365 N.C. at 219, 717 S.E.2d at 352.

¶ 50 The test of whether to apply *Sullivan*—and not require a showing of prejudice—or *Strickland*—with a required showing of prejudice—focuses on "the level of notice given to the trial court and the action taken by that court" in regard to the conflict issue. *Id.* "[W]hen the court 'knows or reasonably should know' of 'a particular conflict,' that court must inquire" into the conflict. *Id.*, 365 N.C. at 220, 717 S.E.2d at 352 (quoting *Sullivan*, 446 U.S. at 346–47, 100 S. Ct. at 1717). If the trial court fails to inquire into the conflict or "the trial court's inquiry is inadequate or incomplete," reversal is automatic only if the defendant objected to the conflict issue at trial. *Id.*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355. If the defendant did not object to the conflict issue and the trial court failed to adequately conduct the required inquiry, "prejudice will be presumed" under *Sullivan* "only if a defendant can establish on appeal that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Id.* (quoting *Sullivan*, 446 U.S. at 350, 100 S. Ct. at 1719). "However, if [a] defendant is unable to establish an actual conflict causing an adverse effect, he must show that he was prejudiced in order to obtain relief." *Id.*, 365 N.C. at 224, 717 S.E.2d at 355.

¶ 51 Thus, in reviewing the alleged conflict issue, we employ a multi-step test. First, we ask whether the trial court had notice of the conflict such that it was required to inquire into the conflict. *Id.*, 365 N.C. at 219–20, 717 S.E.2d at 352. Second, we determine whether the trial court conducted an adequate inquiry into the conflict. *Id.*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355. If the trial court conducted an adequate inquiry, our review ends. *See State v. Yelton*, 87 N.C. App. 554, 557–59 361 S.E.2d 753, 756–57 (1987) (linking the adequacy of the trial court's inquiry with whether a defendant has made a "knowing, intelligent and voluntary waiver" of their rights to be free from conflicted counsel such that either the record reflects a knowing, intelligent, and voluntary waiver of any conflict or "an actual conflict of interest exists" without such waiver such that "the attorney must be disqualified"). But if the trial court did not conduct an adequate inquiry, we third consider whether the defendant objected to the conflict issue at trial; if the defendant objected to the conflict, we must reverse. *See Choudhry*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355 (explaining "prejudice is presumed" if a defendant objected and was not given the opportunity to show the dangers of the potential conflict through a trial court inquiry). If, however, the defendant did not object to the conflict, we move to the fourth step and determine whether the defendant can establish "an actual conflict of interest adversely affected

his lawyer's performance." *Id.* If a defendant can establish such adverse performance, we presume prejudice. *Id.* If a defendant cannot establish adverse performance, we move to the fifth and final step and determine whether the defendant can show prejudice and thus obtain relief. *Id.*, 365 N.C. at 224, 717 S.E.2d at 355. We now walk through this test to determine if Defendant Williams has made an adequate showing to obtain relief.

¶ 52 First, we look at whether the trial court was on notice of the potential conflict. *Id.*, 365 N.C. at 219–20, 717 S.E.2d at 352. The trial court is on notice if it "knows or reasonably should know of a particular conflict." *Id.*, 365 N.C. at 220, 717 S.E.2d at 352. For example, in *State v. Mims*, this Court found the following statement from the State was sufficient to put the trial court on notice of a potential conflict:

> [THE STATE]: I want to be clear Your Honor brought this up with defense counsel now he has mentioned what the defense is. Mr. Chavis [whom the defendant claimed she was protecting when she admitted to drug possession] is presently charged with heroin offenses as well, is represented by counsel's boss. I want to make sure this is not a conflict of interest. They're going to be using the defense.

180 N.C. App. 403, 410–11, 637 S.E.2d 244, 248–49 (2006) (first alteration in original). Similarly, in *Choudhry*, our Supreme Court determined the court was on notice when a party, again the State, told the trial court there was a potential conflict and explained the basis for that conflict—in that case the fact that the defendant's counsel had previously represented a prosecution witness. 365 N.C. at 220–22, 717 S.E.2d at 353.

¶ 53 Turning to the facts here, Defendant Williams's counsel put the trial court on sufficient notice of the potential conflict. Specifically, he explained on the record the basis for the potential conflict:

> MR. MOORE/DEFENDANT WILLIAMS: Judge, a couple of things I want to touch on from Mr. Clark talking about just then. But I think, first, just want to make the Court aware, and I need to do this on the record in front of my client, the mind is a crazy thing.
>
> You don't realize I've been preparing to cross-examine Mr. Battle for a couple of months now and when I walked in the courtroom and I've seen videotapes, I immediately knew him today. I did not realize that I knew him.

> I represented him about seven years ago he said and I've spoken to him. He said I represented him about seven years ago. His uncle and I were in a hunting club together. I have not had any contact with him in years, I'm assuming.
>
> I probably haven't seen him in six or seven years. I've informed Mr. Williams of that. I don't see that there's any sort of conflict with the two. I felt like I needed to get it on the record.

Defense counsel's summary of the basis for the conflict contains a level of detail similar to *Choudhry*, 365 N.C. at 220–21, 717 S.E.2d at 353, and greater than *Mims*, 180 N.C. App. at 410–11, 637 S.E.2d at 248–49, so it put the trial court on notice.

¶ 54 Moving to the second step, we ask whether the trial court conducted an adequate inquiry into the conflict. *Choudhry*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355. The goal of this inquiry is twofold. First, it aims to protect a defendant's right to conflict free counsel. *See Yelton*, 87 N.C. App. at 557, 361 S.E.2d at 756 ("Foremost in the court's inquiry must be the preservation of the accused's constitutional rights. The hearing by the trial court must ensure that the defendants are aware of these rights and that any waiver is a knowing, intelligent and voluntary waiver."). Second, it "avoid[s] the appearance of impropriety" and thereby preserves public confidence in the courts. *See State v. Shores*, 102 N.C. App. 473, 475, 402 S.E.2d 162, 163 (1991) (explaining " 'courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them' " before going on to describe the inquiry as important to "avoiding the appearance of impropriety" (quoting *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692 (1988)).

¶ 55 Turning to its nature, "the inquiry must be adequate 'to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment.' " *Lynch*, 275 N.C. App. at 299, 852 S.E.2d at 927 (quoting *Mims*, 180 N.C. App. at 409, 637 S.E.2d at 248). As a result, "the trial court is responsible for ensuring that the defendant fully understands the consequences of a potential or actual conflict." *Choudhry*, 365 N.C. at 223, 717 S.E.2d at 354. In ensuring such full understanding, the trial court has the discretion to decide "whether a full-blown evidentiary proceeding is necessary or whether some other form of inquiry is sufficient." *Lynch*, 275 N.C. App. at 299, 852 S.E.2d at 927 (citing *Choudhry*, 365 N.C. at 223, 717 S.E.2d at 354).

¶ 56 In *Choudhry*, our Supreme Court conducted a detailed review of the trial court's inquiry. 365 N.C. at 221–24, 717 S.E.2d at 353–55. The trial court there "informed [the] defendant directly" about his attorney's previous representation of a witness for the State and asked the defendant whether he "had any concerns about [his attorney's] ability appropriately to represent him, if he was satisfied with [his attorney's] representation, and if he desired to have [his attorney] continue to represent him." *Id.*, 365 N.C. at 224, 717 S.E.2d at 354. But our Supreme Court still concluded the inquiry was inadequate because "the trial court did not specifically explain the limitations that the conflict imposed on defense counsel's ability to question" the State's witness about her conviction in the case defense counsel had previously represented her during "nor did defense counsel indicate he had given [the] defendant such an explanation." *Id.*, 365 N.C. at 224, 717 S.E.2d at 355. Thus, the trial court had not fulfilled its responsibility to ensure the defendant had a "sufficient understanding of the implications" of the conflict "to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest." *Id.*

¶ 57 Here, the trial court's inquiry resembled the inquiry in *Choudhry*. The trial court ensured Defendant Williams knew about the conflict by asking him if he had heard what his attorney said regarding the potential conflict—as we recounted above—to which Defendant Williams responded he had. The trial court then confirmed Defendant Williams was "prepared to waive any conflict of interest that may have arisen as a result of" his attorney's previous representation of Mr. Battle and was "still prepared to move forward with [his attorney] representing" him to which Defendant Williams responded he was. Finally, the trial court asked, "Do you have any questions about anything I've said or anything that Mr. Moore [Defendant Williams's attorney] has said?" to which Defendant Williams responded, "No, I think we have an understanding," referring to Defendant Williams and his attorney.

¶ 58 Notably absent from the trial court's inquiry were any questions to ensure Defendant Williams had a "sufficient understanding of the implications" of the conflict "to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest." *Choudhry*, 365 N.C. at 224, 717 S.E.2d at 355. Because the trial court did not ensure Defendant Williams had such an understanding, it did not conduct an adequate inquiry.

¶ 59 Turning to the third step in our review, we consider whether Defendant Williams objected to the conflict issue at trial. *See id.*, 365 N.C. at 220, 717 S.E.2d at 352 (explaining the importance of an objection to the determination of whether prejudice is presumed or not). For

example, in *Choudhry*, our Supreme Court determined "no party objected" when the prosecutor had raised the issue but the defendant's attorney denied there was a conflict and said he was not even sure it needed to be addressed. *Id.*, 365 N.C. at 220–21, 717 S.E.2d at 353. By contrast, in *Lynch*, this Court found the defendant properly objected because he "consistently articulated his worry that he was not receiving a fair trial." 275 N.C. App. at 301, 852 S.E.2d at 928. Here, Defendant Williams did not object to the potential conflict. First, similar to *Choudhry*, Defendant Williams's attorney told the trial court, "I don't see that there's any sort of conflict with the two." 365 N.C. at 221, 717 S.E.2d at 353. Further, when the trial court asked Defendant Williams about the potential conflict, he said he and his attorney "ha[d] an understanding." That language indicates Defendant Williams did not have any concern about the potential conflict.

¶ 60 Moving on to the fourth step in our review, we must consider whether Defendant Williams can establish "an actual conflict of interest adversely affected his lawyer's performance." *Id.*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355. The required inquiry is fact specific and considers whether "objectively sound strategic reasons" can justify defense counsel's choices. *See id.*, 365 N.C. at 225–26, 717 S.E.2d at 355–56 (walking through defense counsel's "vigor[ous]" cross examination of the witness who he had previously represented on various topics before rejecting the defendant's argument about the impact of not cross examining the witness on the prior charge based on sound strategy); *see also State v. Walls*, 342 N.C. 1, 40–41, 463 S.E.2d 738, 758 (1995) (assuming *arguendo* a conflict of interest, explaining why the defendant had not shown an adverse effect on representation by recounting objections during direct and "a detailed and thorough cross-examination").

¶ 61 For example, in *Choudhry*, our Supreme Court found no adverse effect where defense counsel cross examined the witness he previously represented on topics including: the witness cooperating to get out of jail; inconsistencies between the witness's testimony at trial and statements to police; and the "rancorous and volatile" relationship between the witness and the defendant characterized by "spiteful and vindictive" actions towards the defendant. 365 N.C. at 225–26, 717 S.E.2d at 355–56. The *Choudhry* Court also noted how defense counsel's decision not to cross examine the witness on the charge for which he had previously represented her was an "objectively sound strategic" decision because the defendant was also implicated in that crime and asking about it on cross examination "could have opened the door for redirect examination by the State relating to any role [the] defendant may have played." *Id.*, 365 N.C. at 226, 717 S.E.2d at 356.

¶ 62 By contrast, in *State v. James*, this Court found an "overlap of representation prior to and at the time of trial" of the defendant and a State witness adversely affected the lawyer's performance such that prejudice was presumed. 111 N.C. App. 785, 790–91, 433 S.E.2d 755, 758 (1993). Specifically, this Court explained the conflict "affected counsel's ability to effectively impeach the credibility" of the witness because defense counsel never explored a potential plea agreement on cross examination of the witness he represented, in contrast to exploring it with another witness. *Id.*

¶ 63 Here, we conclude Defendant Williams has failed to establish any conflict his attorney had through his previous representation of Mr. Battle adversely affected the attorney's representation of Defendant Williams. First, during direct examination, Defendant Williams's attorney objected to two key aspects of the State's case. Defense counsel initially objected when the State sought to introduce video evidence of the robbery itself. Second, Defendant Williams's attorney objected when the prosecutor sought to lead Mr. Battle into giving a better description of the people accused of robbing him by asking: "You don't remember him asking you about any tattoos or marks or anything like that?" Both these objections sought to undermine the State's attempts to have Mr. Battle identify Defendant Williams as one of his assailants, a fact the State must prove to get a conviction in any case. *C.f. State v. Privette*, 218 N.C. App. 459, 470–71, 721 S.E.2d 299, 308 (2012) (explaining to overcome 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" (quotations, citation, and alterations omitted)). These objections during direct examination thus support finding no adverse effect. *See Walls*, 342 N.C. at 41, 463 S.E.2d at 758 (concluding the defendant "failed to carry his burden of showing that an actual conflict of interest adversely affected his lawyers' performance" in part because "[t]he record show[ed] that defense counsel objected to several lines of questioning during" the witness in question's direct examination).

¶ 64 Turning to his cross examination of Mr. Battle, the counsel for Defendant Williams took numerous steps to undermine Mr. Battle's credibility and call into question his testimony. *See Choudhry*, 365 N.C. at 225–26, 717 S.E.2d at 355–56 (finding no adverse effect because of "vigor[ous]" cross examination). First, he repeatedly called into question Mr. Battle's motives for testifying by highlighting Mr. Battle had his charge for possession of a firearm by a felon dropped in exchange for testimony, which helped Mr. Battle avoid "significant" prison time. As part of this testimony, Defendant Williams's attorney asked Mr. Battle

about his past felony convictions, which our Supreme Court has recognized has the purpose of "impeach[ing] the witness's credibility." *E.g. State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 165 (1991) (emphasis removed). This line of questioning culminated on re-cross with Defendant Williams's counsel asking, "Would you be testifying here today if you were going to prison?" to which Mr. Battle responded, "No, sir."

¶ 65 In other parts of the cross examination, Defendant Williams's counsel sought to undermine Mr. Battle's credibility through numerous different lines of questioning. First, under questioning, Mr. Battle admitted on cross that on the night of the incident, he was under the effect of numerous drugs and of alcohol such that he had "impaired judgment." Further, Defendant Williams's counsel asked Mr. Battle about mental health issues, any medication he received for such issues, and whether he was taking that medication on the night of the incident. Finally, Defendant Williams's attorney repeatedly asked Mr. Battle about inconsistencies in his statements to the police, his statements to the prosecutor in preparation for trial, and his testimony at trial. While all these lines of questions could undermine Mr. Battle's credibility, the questions regarding inconsistencies are particularly significant because the *Choudhry* Court highlighted a line of questioning using the same strategy in finding the attorney's performance was not adversely affected there. 365 N.C. at 225, 717 S.E.2d at 355.

¶ 66 Defendant Williams contends his trial counsel's performance was adversely affected because of a lack of vigor around Mr. Battle's "deal to testify" and "history of mental health issues." Specifically as to the "deal to testify" component, Defendant Williams faults his trial counsel for not having Mr. Battle "read the entire memorandum of understanding to the jury." As explained above, Defendant Williams's attorney questioned Mr. Battle repeatedly about the contents of the memorandum of understanding, and Defendant Williams does not make clear what additional impact reading the entire memorandum would have had. Further, the standard underpinning our review of the impact on trial counsel's performance is whether trial counsel had an "objectively sound strategic" reason for his actions. *Id.*, 365 N.C. at 226, 717 S.E.2d at 356. Here, reading the entire memorandum of understanding to the jury may have diluted the effect of the deal; the key features and incentives of the deal could have been lost absent trial counsel's focused questioning. Thus, there was an objectively sound strategic reason to not read the whole memorandum of understanding for the jury.

¶ 67 Defendant Williams's arguments on the vigor or lack thereof in his attorney's cross examination of Mr. Battle on mental health issues also

fail for the same reason; his trial counsel's strategy reflects objectively sound strategic decisions. Vigorous cross examination does not necessarily require the most aggressive questioning possible; in other words, trial counsel can have sound strategic reasons for constraining some aspects of cross examination. For example, here, more aggressive cross examination on Mr. Battle's mental health issue may have engendered the jury's sympathy for Mr. Battle.

¶ 68 Turning to Defendant Williams's specific contentions on the mental health issues, all of them focus on his attorney's argument to the trial court about what it should allow him to examine with Mr. Battle regarding his mental health. In addition to the above reasons, we note Defendant Person's attorney—who was not affected by any potential conflict—said "Same argument, Your Honor" after Defendant Williams's attorney made his arguments about examining Mr. Battle on mental health issues. Defendant Person's attorney not seeking to examine further on the mental health issues shows the same decision of Defendant Williams's attorney was not driven by his past representation of Mr. Battle. Thus, Defendant Williams cannot show his attorney's performance was adversely affected by any conflict arising from his past representation of Mr. Battle, and, thus, prejudice is not presumed. *See id.*, 365 N.C. at 220, 224, 717 S.E.2d at 352, 355 (explaining prejudice is not presumed if an attorney's performance is not adversely affected by the conflict).[2]

¶ 69 Finally, because prejudice is not presumed, we ask whether Defendant Williams can show prejudice and obtain relief through that means. *Id.*, 365 N.C. at 224, 717 S.E.2d at 355. The prejudice inquiry closely follows the adverse effect inquiry because often the same facts answer both questions. *See id.*, 365 N.C. at 226, 717 S.E.2d at 356 (finding no adverse effect before immediately finding no prejudice). Thus, here since we have found no adverse effect on the performance of Defendant Williams's trial counsel because of his past representation of Mr. Battle, we also find Defendant Williams has failed to show prejudice. To the contrary, Defendant Williams was acquitted of the most serious charges

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2. Defendant Williams argues one potential remedy would be to remand to the trial court for "an adequate and complete inquiry." Because the record is clear and allows us to determine any conflict did not adversely affect the performance of Defendant Williams's counsel, we need not remand. *See James*, 111 N.C. App. at 791, 433 S.E.2d at 759 (not requiring remand where adverse effect was "clear[]" on the face of the record); *Mims*, 180 N.C. App. at 411, 637 S.E.2d at 249 (remanding when "unable to determine from the face of the record whether an actual conflict of interest adversely affected" defense counsel's performance).

he faced at trial, which suggests the representation by his attorney was quite effective indeed.

¶ 70 As a result, we conclude Defendant Williams has failed to show prejudicial error arising from his attorney's past representation of Mr. Battle and overrule his argument on these grounds.

B. Trial Court Implying an Opinion on the Case in the Presence of Prospective Jurors

¶ 71 **[6]** Defendant Williams next argues the trial court "prejudicially erred when it intimated an opinion" on the case in the presence of prospective jurors. (Capitalization altered.) Specifically, he asserts the trial court erred when, instead of personally informing the prospective jurors of all aspects of the case, it directed the prosecutor to inform prospective jurors of the charges, victims, and dates of offense in violation of North Carolina General Statute § 15A-1213. Defendant Williams contends the judge directing the prosecutor to inform the jury "could have led prospective jurors to reasonably infer . . . that the prosecutor and the prosecutor's evidence should be given great weight, that the prosecutor's witnesses were credible, or that the defendant should be found guilty." We agree this was error, but Defendant Williams was not prejudiced by this error.

¶ 72 While Defendant Williams did not object to the trial court's action, this issue was automatically preserved for appellate review because Section 15A-1213 both "requires a specific act by a trial judge," and "leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial[.]" *See State v. Austin*, 378 N.C. 272, 2021-NCSC-87, ¶ 13 (alteration in original) (quoting *In re E.D.*, 372 N.C. 111, 121, 827 S.E.2d 450, 457 (2019)) (discussing automatic preservation by statute in the context of North Carolina General Statutes §§ 15A-1222 and -1232, which are also part of the same subchapter—on trial procedure in superior court—of Chapter 15A as Section 15A-1213). Here, Section 15A-1213 states "*the judge* must" undertake the following specific acts: "identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice . . . ." N.C. Gen. Stat. § 15A-1213 (2019) (emphasis added).

¶ 73 Because this alleged statutory violation is properly preserved, we review for prejudicial error under North Carolina General

Statute § 15A-1443(a). *Austin*, ¶ 15. North Carolina General Statute § 15A-1443(a) states:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. . . . .

N.C. Gen. Stat. § 15A-1443(a) (2019). Where a defendant alleges an error is an improper expression of judicial opinion, here via Section 15A-1443(a), this Court utilizes a totality of the circumstances test to determine whether the trial court impermissibly expressed an opinion. *See State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995).

¶ 74 North Carolina General Statute § 15A-1213 requires presiding judges to "identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense[s]." N.C. Gen. Stat. § 15A-1213. "The judge may not read the pleadings to the jury." *Id.* Section 15A-1213 is designed "to avoid giving jurors a distorted view of the case through use of the stilted language of indictments and other pleadings." *State v. Brunson*, 120 N.C. App. 571, 575–76, 463 S.E.2d 417, 419 (1995) (quotations and citations omitted).

¶ 75 In the present case, the trial court informed the prospective jurors of only a portion of the requirements of Section 15A-1213. The court first informed the prospective jurors of the parties and their respective counsel. The trial court then delegated some requirements of Section 15A-1213 to the prosecutor and asked the prosecutor to read the charges, victims, and date of offense as to both Defendants. The judge then informed the jury as to the Defendants' pleas. Defendant Williams argues that the judge's failure to personally inform the jurors of every component under Section 15A-1213 amounted to prejudicial error warranting a new trial. The State argues "the spirit of the statute was satisfied by orienting the jurors to the case" but "concedes that the trial court did violate" North Carolina General Statute § 15A-1213 by delegating a portion of the requirements to the prosecutor.

¶ 76 While the trial court certainly erred in delegating its responsibilities under Section 15A-1213, Defendant Williams was not prejudiced by this

delegation. Defendant Williams's argument that this delegation could have led prospective jurors to infer that the judge believed the prosecutor's case was stronger—whether that be in the quality of the prosecutor's evidence, the credibility of the prosecutor's witnesses, or generally that the Defendant was guilty—is not compelling. "[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant." *Id.* For a defendant to show prejudice, he must demonstrate a "reasonable possibility," absent the error, that "a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (2019).

¶ 77 This Court has not addressed the specific issue of a judge's failure to comply with Section 15A-1213 by not personally informing prospective jurors about a case. However, the State highlights a recent case from this Court, *State v. Grappo*, for an example of when a defendant is not prejudiced by a trial court failing to comply with a statutory obligation. (Citing 271 N.C. App. 487, 845 S.E.2d 437 (2020).) We find *Grappo* illustrative. In *Grappo*, the trial court erred because it failed to personally instruct the jury and instead delegated a portion of the jury instructions to the courtroom clerk in violation of North Carolina General Statutes §§ 15A-1231 and -1232. *Id.*, 271 N.C. App. at 492, 845 S.E.2d at 440–41. Despite recognizing the "*momentous*," "foundational," and constitutionally important nature of some of the delegated jury instructions, *id.*, 271 N.C. App. at 492–93, 845 S.E.2d at 441 (quotations and citations omitted; emphasis in original), this Court ultimately held no prejudicial error occurred because the defendant did not show "that the inferred expression of [an] opinion 'had a prejudicial effect on the result of the trial' necessary to elevate it from a harmless error to a prejudicial one." *Id.*, 271 N.C. App. at 493–94, 845 S.E.2d at 441–42 (quoting *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808). Specifically, the *Grappo* Court highlighted how, applying *Blackstock*'s totality of the circumstances test, "various portions of the record undercut a conclusion of prejudicial effect" and then summarized those portions. *Id.*, 271 N.C. App. at 494, 845 S.E.2d at 442.

¶ 78 Similar to *Grappo*, Defendant Williams has not shown the trial judge delegating the introduction of the case to the prosecutor "had a

prejudicial effect on the trial necessary to elevate it from a harmless error to a prejudicial one." *Id.*, 271 N.C. App. at 493–94, 845 S.E.2d at 442 (quotation and citation omitted); *see also id.*, 271 N.C. App. at 494, 845 S.E.2d at 442 ("Mindful of the totality of the circumstances test applicable in this case, various portions of the record undercut a conclusion of prejudicial effect." (citation omitted)). Notably, the trial court remedied any prejudicial effect of its delegation by instructing the jury on the presiding judge's impartiality.

¶ 79 During its final jury instructions, the trial court expressly told the jury:

> The law requires the presiding judge to be impartial. You should not infer from anything that I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be. It is your duty to find the facts and render a verdict reflecting the truth.

"The law presumes that jurors follow the court's instructions." *Tirado*, 358 N.C. at 581, 599 S.E.2d at 535; *see also Grappo*, 271 N.C. App. at 494, 845 S.E.2d at 442 (relying on the presumption jurors follow the trial court's instructions to help show no prejudice because the trial court instructed the jurors in a way that corrected its error). Moreover, this Court has previously held a trial court can correct misstatements in its earlier remarks to the jury when it gives them final jury instructions. *See Brunson*, 120 N.C. App. at 576, 463 S.E.2d at 420 (finding no reversible error despite determining the trial court's preliminary remarks included a misstatement because the trial court correctly stated the law during final jury instructions). Here, therefore, we presume the jurors followed the court's instructions and that the trial court's statement during final jury instructions could correct any earlier misimpression it could have left on the jurors. With those presumptions in mind, the jurors would not have gone into the jury room thinking the judge had implied any opinion by having the prosecutor give part of the case overview; the jury instructions explicitly told them not to make such inferences. Since the jurors would know to not make such inferences when going into deliberations, it could not have impacted their verdict, thereby undercutting any prejudice claim.

¶ 80 Further undercutting any claim of prejudice, although the prosecutor read all the charges, victims, and dates of offenses to the jury, here, the jury acquitted Defendant Williams of the more serious charges of

attempted first degree murder as to Mr. Battle and as to Mr. Deans, assault with a deadly weapon with intent to kill inflicting serious injury and its lesser included offense as to Mr. Battle, discharge of a weapon in a vehicle while in operation causing serious bodily injury as to Mr. Battle, and robbery with a dangerous weapon as to Mr. Deans and convicted him only of possession of a firearm by a felon and robbery with a dangerous weapon as to Mr. Battle. We cannot discern any prejudice to Defendant Williams from this technical violation of North Carolina General Statute § 15A-1213 where the jury clearly considered each charge separately, as it should, and acquitted him of several of the charges, even though the prosecutor read all of them.

¶ 81 After reviewing the totality of the circumstances, Defendant Williams has failed his burden of proving prejudice. Thus, the trial court's improper delegation of its § 15A-1213 duty to the prosecutor did not constitute reversible error.

V. Conclusion

¶ 82 We conclude neither Defendant Person nor Defendant Williams can show prejudicial error. Assuming *arguendo*, the trial court erred in showing the jury the video of Defendant Person in shackles, it did not prejudicially err because it gave a limiting instruction and because of the other overwhelming evidence of Defendant Person's guilt. Defendant Person failed to preserve his other argument concerning his sentencing as a habitual felon. Turning to his appeal, Defendant Williams failed to show his attorney's performance was adversely affected by any conflict such that we cannot presume prejudice, and he also failed to show any prejudice. Defendant Williams also failed to show prejudice arising from the trial court delegating its statutory duty to inform the jury about the case under § 15A-1213.

NO PREJUDICIAL ERROR.

Judges HAMPSON and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 AUGUST 2022)

IN RE K.S. 2022-NCCOA-390 No. 20-271-2	Cumberland (19JA211)	Affirmed.
ALSTON v. COOKE 2022-NCCOA-563 No. 21-655	Vance (21CVD485)	Affirmed
BROOKSIDE PARK AFFORDABLE, LLC v. HART 2022-NCCOA-564 No. 21-680	Moore (21CVD209)	Reversed and Remanded
HERRON v. TOWN OF JAMESTOWN 2022-NCCOA-566 No. 21-605	Guilford (20CVS4259)	Affirmed
IN RE A.D-D. 2022-NCCOA-567 No. 21-615	Durham (16JA171-173)	Affirmed
IN RE A.R. 2022-NCCOA-568 No. 22-155	Mecklenburg (19JT415) (19JT416)	Affirmed
IN RE E.B. 2022-NCCOA-569 No. 21-621	Ashe (21JA6)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED.
IN RE E.L.G. 2022-NCCOA-570 No. 22-139	Wake (20JT45)	Affirmed
IN RE H.K.Q. 2022-NCCOA-571 No. 21-739	Affirmed (12SPC337)	Granville
IN RE H.S. 2022-NCCOA-572 No. 21-726	Wilson (19JA30) (20JA53) (20JA54) (21CVD686)	Vacated in part, Reversed and Remanded in part

IN RE M.M.H. 2022-NCCOA-573 No. 22-25	Surry (19JT62)	Affirmed
IN RE N.C. 2022-NCCOA-574 No. 22-161	Alleghany (19JT13)	Affirmed
IN RE Z.R.F.D. 2022-NCCOA-575 No. 21-602	Haywood (17JA38) (17JA39) (17JA40)	Affirmed
MOZELEY v. CITY OF CHARLOTTE 2022-NCCOA-576 No. 21-712	Mecklenburg (20CVS13103)	Affirmed
RIOPELLE v. RIOPELLE 2022-NCCOA-577 No. 22-18	Cabarrus (13CVD179)	Affirmed
SALTER v. SALTER 2022-NCCOA-578 No. 21-201	Cleveland (17CVD1379)	Affirmed in Part, Reversed in Part, and Remanded
STATE v. EVERETT 2022-NCCOA-579 No. 21-596	Pitt (20CRS55579)	Affirmed in Part; Vacated and Remanded in Part
STATE v. HARDY 2022-NCCOA-580 No. 21-603	Randolph (18CRS51503) (18CRS51505)	No Error
STATE v. KUHL 2022-NCCOA-581 No. 21-751	Surry (19CRS51921) (19CRS847)	No Plain Error
STATE v. LEE 2022-NCCOA-582 No. 21-711	Burke (19CRS52866) (19CRS943)	Affirmed in Part; Vacated in Part and Remanded
STATE v. McNEIL 2022-NCCOA-583 No. 21-629	Edgecombe (19CRS52075)	No Error
STATE v. PARHAM 2022-NCCOA-584 No. 21-728	Granville (18CRS50800)	Affirmed
STATE v. PRICE 2022-NCCOA-585 No. 22-65	Rutherford (19CRS51114)	Affirmed

STATE v. RESER 2022-NCCOA-586 No. 20-695	Onslow (18CRS053675)	No Error
TOWN OF NAGS HEAD v. BUDLONG ENTERS., INC. 2022-NCCOA-587 No. 21-22	Dare (11CVS250)	Affirmed

BARTLETT v. EST. OF BURKE

[285 N.C. App. 249, 2022-NCCOA-588]

LENNARD BARTLETT, SR. ADMINISTRATOR OF THE ESTATE OF MARY SUSAN WHITE BARTLETT, PLAINTIFF
v.
ESTATE OF JEFFREY L. BURKE; AIR METHODS CORPORATION; AIRBUS HELICOPTERS DEUTSCHLAND, GMBH; AIRBUS HELICOPTERS, INC.; SAFRAN HELICOPTER ENGINES; AND SAFRAN HELICOPTER ENGINES USA, INC., DEFENDANTS

KASEY HOBSON HARRISON, EXECUTRIX OF THE ESTATE OF KRISTOPHER RAY HARRISON, PLAINTIFF
v.
ESTATE OF JEFFREY L. BURKE; AIR METHODS CORPORATION; AIRBUS HELICOPTERS DEUTSCHLAND, GMBH; AIRBUS HELICOPTERS, INC.; SAFRAN HELICOPTER ENGINES; AND SAFRAN HELICOPTER ENGINES USA, INC., DEFENDANTS

No. COA22-95

Filed 6 September 2022

1. Appeal and Error—interlocutory order—denial of motion to dismiss—personal jurisdiction—substantial right

An interlocutory order denying defendants' motions to dismiss a set of consolidated wrongful death actions for lack of personal jurisdiction was immediately appealable as affecting a substantial right.

2. Jurisdiction—personal—action "arising out of or relating to" defendant's contacts—stream of commerce—no purposeful availment

In a set of consolidated wrongful death actions filed after four people died in a helicopter crash in North Carolina, the trial court erred by denying motions to dismiss for lack of personal jurisdiction filed by the helicopter manufacturer and the manufacturer of the helicopter engines that overheated during the accident where plaintiffs (the crash victims' estates) failed to show that their lawsuits "arose out of or related to" the manufacturers' contacts with North Carolina. The German helicopter manufacturer and French engine manufacturer, neither of whom sold their products directly to North Carolina, did not purposefully avail themselves of the privilege of conducting business in North Carolina where they merely injected their products into the "stream of commerce" through actions directed at an international market (including the United States generally) rather than at North Carolina specifically.

Appeal by defendants from orders entered 13 September 2021 by Judge David L. Hall in Durham County Superior Court. Heard in the Court of Appeals 9 August 2022.

Robb & Robb LLC, by Gary C. Robb, admitted pro hac vice, Anita Porte Robb, admitted pro hac vice, and Brittany Sanders Robb, admitted pro hac vice, and Ward and Smith P.A. by Christopher S. Edwards for plaintiff-appellees Lennard Bartlett, Sr. Administrator of the Estate of Mary Susan White Bartlett and Kasey Hobson Harrison, Executrix of the Estate of Kristopher Ray Harrison.

Pangia Law Group, by Amanda C. Dure and Joseph L. Anderson, and Mast, Mast, Johnson, Wells & Trimyer, PA, by Charles D. Mast and Nichole G. Booker for cross claimant-appellee the Estate of Jeffrey L. Burke.

Crouse Law Offices by James T. Crouse for plaintiff-intervenor-appellee Robert Sollinger.

Ellis & Winters LLP, by Alex J. Hagan and Kelly Margolis Dagger, and Wilson Elser Moskowitz Edelman & Dicker, LLP by Kathryn A. Grace and William J. Katt, admitted pro hac vice, for defendants-appellees Estate of Jeffrey L. Burke and Air Methods Corporation.

Moore & Van Allen PLLC, by Christopher D. Tomlinson and Anthony T. Lathrop, and Locke Lord LLP by Eric C. Strain, admitted pro hac vice, and Paul E. Stinson, admitted pro hac vice, for defendant-appellant Airbus Helicopters Deutschland GmbH.

Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf and William M. Starr, and Jackson Walker LLP, by Stuart B. Brown, Jr., admitted pro hac vice, for defendant-appellant Safran Helicopter Engines.

TYSON, Judge.

¶ 1 Safran Helicopter Engines ("SHE") and Airbus Helicopters Deutschland GmbH ("AHD") appeal from orders entered denying their motions to dismiss for lack of specific personal jurisdiction. We reverse and remand.

I. Background

¶ 2 At approximately 11:08 a.m. on 8 September 2017, a Eurocopter Deutschland GmbH model MBB-BK117 C2 helicopter ("Helicopter") took off from the helipad at Sentara Albemarle Regional Medical Center in Elizabeth City with a flight plan bound for the helipad located at Duke University Hospital in Durham. The Helicopter's manufacturer designated the unit as serial number 9474, and it was assigned a Federal Aviation Administration ("FAA") registration number of N146DU. Air Methods Corporation operated the Helicopter for the owner, Duke University Health Systems, Inc., specifically as a medevac flight for Duke Life Flight.

¶ 3 The Helicopter pilot commenced a turn to the south at approximately 11:16 a.m. A minute later, the Helicopter's computer transmitted flight data stating the aircraft was flying at an altitude of 1,200 feet above mean sea level with a ground speed of 75 knots or 86.3 miles per hour. Witnesses on the ground later reported they observed smoke trailing from behind the Helicopter while in flight. Witnesses also reported the Helicopter appeared to be hovering and not traveling forward. The Helicopter quickly descended and impacted a shallow turf drainage pathway about 30 feet wide and 2,000 feet long located between two fields of eight-foot-tall grass on a wind turbine farm in Hertford. The Helicopter landed upright, but the cabin collapsed downward upon impact and was partially consumed by post-impact fire.

¶ 4 Onboard the Helicopter was pilot-in-charge, Jeffrey L. Burke; two flight nurses: Kristopher R. Harrison and Crystal Sollinger; and patient, Mary Susan White Bartlett. All individuals aboard perished in the crash. Burke was employed by Air Methods Corporation and Harrison and Sollinger were employed by Duke University Health Systems, Inc.

¶ 5 The National Transportation Safety Board ("NTSB") investigated the crash. Examination of the Helicopter's wreckage revealed the second engine's rear turbine shaft bearing exhibited dislocation consistent with overheating and lack of lubrication, and the bearing roller pins were worn down to the surface of the bearing race. The FAA issued a Special Airworthiness Information Bulletin ("SAIB") SW-18-04 alerting owners, operators, maintainers, and certified repair facilities of the MBB-BK117 C2 helicopters of possible blockages of the engine oil drainage system. The SAIB SW-18-04 bulletin references an emergency landing by a MBB-BK117 C2 helicopter in Sioux Falls, South Dakota on 26 January 2017 resulting in no fatalities and the 8 September 2017 crash of this Helicopter. The SAIB noted "block drain line may, under certain circumstances, present a risk for an engine fire and/or inflight shutdown

of the affected engine." SAIB SW-18-04 recommended operators of MBB-BK117 C2 helicopters perform inspections of the bearing lines and drain collector at a maximum of 100 hours of time-in-service.

¶ 6 The Helicopter at issue was equipped with two Arriel 1E2 jet turbine engines (the "Engines") manufactured by Turbomeca S.A.S, which company was purchased by Safran SA in 2005 and rebranded as SHE in 2016. SHE is a wholly-owned subsidiary of Safran SA, a French public limited company, which is not a party to this action. SHE's principal place of business is located in Paris, France, and it maintains a place of business in Bordes, France, where it manufactured the Engines at issue. SHE sold and delivered the Engines to Eurocopter Deutschland GmbH located in Germany in December 2010. SHE sells and delivers Arriel engines to AHD in both France and Germany.

¶ 7 Safran Helicopter Engines USA is a Delaware corporation with its principal place of business located in Grand Marie, Texas. Safran Helicopter Engines USA is a wholly-owned subsidiary of Safran USA, a Delaware corporation with its principal place of business located in Irving, Texas. Safran USA is also a wholly owned subsidiary of Safran S.A. Safran USA fulfills orders for engines, provides technical support to customers, and markets these services and products within the United States.

¶ 8 Safran S.A. and Safran USA chartered Turbomeca Manufacturing, a Delaware Corporation, in July 2007. Turbomeca Manufacturing, Inc. was later renamed Turbomeca Manufacturing LLC. Turbomeca Manufacturing, Inc. manufactured helicopter engine components. Turbomeca Manufacturing, Inc. opened a manufacturing facility in Monroe. Safran purchases engine components from Turbomeca Manufacturing LLC for use in engines it manufactured in France.

¶ 9 AHD is formerly known as Eurocopter Deutschland GmbH. Eurocopter Deutschland GmbH was renamed AHD in 2014. AHD is a company engaged in the design, manufacture, testing, inspection, assembly, labeling, advertising, sale, promotion, and distribution of helicopters, with its principal place of business located in Germany. AHD sourced two helicopter components from companies located in North Carolina.

¶ 10 Airbus Helicopters, Inc. is a Delaware corporation with its principal place of business in Texas. Airbus Helicopters, Inc. is the successor to American Eurocopter Corporation. In 2009, Eurocopter entered a Distribution and Service Center Agreement with American Eurocopter Corporation, which was assigned to successor entity Airbus Helicopters, Inc.

¶ 11 The Distribution and Service Center Agreement defines their relationship and granted American Eurocopter Corporation the exclusive right to sell new Eurocopter helicopters within the United States. American Eurocopter Corporation obligated itself to promote, market, and support products it purchased from Eurocopter for resale within the United States.

¶ 12 In 2011, Eurocopter sold and delivered the Helicopter at issue to American Eurocopter Corporation. This transaction occurred in Germany. The purchase agreement is governed by German law. American Eurocopter Corporation was responsible for importing the Helicopter into the United States. The Helicopter was delivered in a standard configuration.

¶ 13 American Eurocopter Corporation imported and sold the Helicopter to Duke University Health System, Inc. in Texas also in a standard configuration. American Eurocopter Corporation agreed to provide Duke University Health System, Inc. as the Helicopter's owner with technical publications, pilot training, and maintenance training.

¶ 14 AHD was made aware Air Methods was operating the Helicopter as an EMS medevac Duke Life Flight on behalf of Duke University Health System, Inc. AHD was also made aware of approximately two dozen other similar helicopter operators in North Carolina. In 2017, Air Methods asked Airbus Helicopters, Inc. a technical question about the Helicopter that required Airbus Helicopters, Inc. to obtain information from AHD, which then responded to Air Methods. The subject of this inquiry is not at issue in the accident involving the Helicopter.

¶ 15 Lennard Bartlett, Sr., in his capacity as administrator of the estate of Mary Susan White Bartlett, and Kasey Hobson Harrison, in her capacity as executrix of the estate of Kristopher Ray Harrison, each filed negligence and breach of warranty actions for wrongful death damages against the Estate of Jeffrey L. Burke; Air Methods Corporation; AHD; Airbus Helicopters, Inc.; SHE; and, Safran Helicopter Engines USA, Inc. on 11 December 2017.

¶ 16 Dina Burke, as administrator of the Estate of Jeffrey L. Burke, filed crossclaims against SHE and AHD.

¶ 17 Lennard Bartlett, Sr., in his capacity as administrator of the estate of Mary Susan White Bartlett ("Bartlett Action"), and Kasey Hobson Harrison, in her capacity as executrix of the estate of Kristopher Ray Harrison ("Harrison Action"), each filed amended complaints. The Estate of Jeffrey L. Burke and Air Methods Corporation answered,

asserted affirmative defenses, and cross-claimed for indemnity against SHE and AHD.

¶ 18 SHE moved to dismiss the Bartlett and Harrison Actions on 15 June 2018. SHE also moved to dismiss the indemnity claims filed by the Estate of Jeffrey L. Burke and Air Methods Corporation. Both the Bartlett and Harrison Actions were consolidated by order on 14 August 2018.

¶ 19 AHD moved to dismiss the Bartlett and Harrison Actions for lack of personal jurisdiction on 21 August 2018 and 11 September 2018, respectively. AHD moved to dismiss the crossclaim of the Estate of Jeffrey L. Burke on 6 May 2019.

¶ 20 On 1 October 2018, Robert Sollinger, in his capacity as executor of the estate of Crystal Sollinger, moved to intervene and file a complaint, which was granted by order entered on 13 November 2018. SHE and AHD moved to dismiss the Sollinger action for lack of personal jurisdiction on 6 May 2019. The trial court entered orders denying SHE's and AHD's motions to dismiss under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure and holding North Carolina had personal jurisdiction over SHE and AHD by orders entered 13 September 2021. SHE and AHD appeal.

II. Jurisdiction

¶ 21 **[1]** SHE and AHD correctly concede this appeal is interlocutory but assert their substantial rights will be impacted without immediate review. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2021).

¶ 22 "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).

¶ 23 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) (internal citations omitted).

¶ 24 "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) (citation and internal quotations omitted).

¶ 25 Our General Statutes recognize a limited right to an 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[.]"). 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).

¶ 26 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). This appeal is properly before this Court.

III. Issue

¶ 27 **[2]** SHE and AHD argue the trial court erred in asserting and holding it had acquired personal jurisdiction over them.

IV. Personal Jurisdiction

¶ 28 North Carolina applies a two-step analysis to determine whether a non-resident defendant is subject to *in personam* jurisdiction. *See Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citation omitted). "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) (internal citations and quotation marks omitted).

¶ 29 The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a non-resident defendant. *See International Shoe Co. v. Washington*, 326 U.S. 310, 315 90 L. Ed. 95, 101 (1945). The Supreme Court of the United States recognizes "two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction." *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 592 U.S. __, __, 209 L.

Ed. 2d 225, 233 (2021) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 180 L. Ed. 2d 796, (2011)).

¶ 30 "The application of that rule will vary with the quality and nature of the defendant's activity, but it 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" the forum state's laws. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75, 85 L. Ed. 2d 528, 542 (1985) (internal citation omitted). This " 'purposefully avails' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts[.]" *Id.* (citation omitted).

¶ 31 The basis of the suit must "arise out of or relate to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 582 U.S. __, __, 198 L. Ed. 2d 395, 403 (2017) (citation omitted); *see Ford Motor Co.*, 592 U.S. at ___, 209 L. Ed. 2d at 234 (citations omitted); *Burger King*, 471 U.S. at 472, 85 L. Ed. 2d at 541 (citation omitted); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 411 (1984) (citations omitted); *International Shoe*, 326 U.S. at 319, 90 L. Ed. at 104.

A. Standard of Review

¶ 32 "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). As noted above, "it 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.*, 471 U.S. at 475, 85 L. Ed. 2d at 542 (citation omitted).

¶ 33 "The standard of review [on appeal] 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) (citation and quotation marks omitted). "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." *Id.* (citation omitted).

B. Minimum Contacts

¶ 34 North Carolina's Long Arm Statute, N.C. Gen. Stat. § 1-75.4 (2021), grants North Carolina's courts specific personal jurisdiction "over defendant[s] to the extent allowed by due process." *Dillon*

v. Numismatic Funding Corp., 291 N.C. 674, 676 ,231 S.E.2d 629, 631 (1977). The two-step inquiry from *Tom Togs* "collapses into the question of whether" the defendant moving to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) "has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Sherlock v. Sherlock*, 143 N.C. App. 300, 303, 545 S.E.2d 757, 760 (2001) (citations and quotation marks omitted).

1. Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.

¶ 35 The Supreme Court of the United States recently addressed the issue of a state court's authority under the Due Process Clause of the Fourteenth Amendment to exercise personal jurisdiction over an out-of-state defendant in *Ford Motor Co.*, 592 U.S. at __, 209 L. Ed. 2d at 232. In *Ford*, the action arose out of two separate automobile accidents occurring in Montana and Minnesota involving vehicles manufactured by Ford Motor Company. *Id.* Ford Motor Company is incorporated in Delaware and headquartered in Michigan. *Id.* at __, 209 L. Ed. 2d at 231.

¶ 36 Ford Motor Company conceded "it does substantial business in" both states, "that it actively seeks to serve the market for automobiles and related products" in both states, and "it ha[d] purposefully avail[ed] itself of the privilege of conducting activities in both places." *Id.* at __, 209 L. Ed. 2d at 235 (citation and quotation marks omitted). Ford Motor Company maintained and argued a strict causal relationship was required to be shown between the injury and conduct.

¶ 37 Ford Motor Company asserted the required link had to "be causal in nature" and "jurisdiction attaches only if the defendant's forum conduct *gave rise* to the plaintiff's claims." *Id.* (quotation marks omitted).

¶ 38 The Supreme Court of the United States held:

> None of our precedents ha[ve] suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit "arise out of *or relate to* the defendant's contacts with the forum." The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. *That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately*

> *protect defendants foreign to a forum*. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct.

Id. at __, 209 L. Ed. 2d at 235-36 (last emphasis supplied, citations omitted).

¶ 39 The Supreme Court's majority opinion drew the following example analyzing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 297, 62 L. Ed. 2d 490 (1980):

> [I]ndeed, this Court has stated that specific jurisdiction attaches in cases . . . when a company like Ford serves a market for a product in the forum State and the product malfunctions there. In *World-Wide Volkswagen*, the Court held that an Oklahoma court could not assert jurisdiction over a New York car dealer just because a car it sold later caught fire in Oklahoma. But in so doing, we contrasted the dealer's position to that of two other defendants—Audi, the car's manufacturer, and Volkswagen, the car's nationwide importer (neither of which contested jurisdiction):
>
> > "[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in [several or all] other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."
>
> Or said another way, if Audi and Volkswagen's business deliberately extended into Oklahoma (among other States), then Oklahoma's courts could hold the companies accountable for a car's catching fire there—even though the vehicle had been designed and made overseas and sold in New York. For, the Court explained, a company thus "purposefully avail[ing] itself" of the Oklahoma auto market "has clear notice" of its exposure in that State to suits

> arising from local accidents involving its cars. And the company could do something about that exposure: It could "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are [still] too great, severing its connection with the State."

Id. at __, 209 L. Ed. 2d at 236-37 (citations omitted).

¶ 40 The Supreme Court concluded: "Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction." *Id.* at __, 209 L. Ed. 2d at 238 (citation omitted).

¶ 41 The majority's opinion in *Ford*, does not explain how a large national, ubiquitous company could not be subject to jurisdiction in all courts, however, it cites with approval and does not overrule its decision in *Goodyear*. In *Goodyear*, the Supreme Court of the United States found North Carolina could not hale Goodyear Dunlop Tires Operations, S.A. into a North Carolina court, when the allegedly defective tire was manufactured in Turkey and purportedly malfunctioned in France. *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 918, 180 L. Ed. 2d at 802.

¶ 42 The majority's opinion's "assortment of nouns" in *Ford* does not establish outer limits for lower courts to follow when evaluating whether due process protections prohibit a court from establishing specific personal jurisdiction over a non-forum defendant. *Ford Motor Co.*, 592 U.S. at __, 209 L. Ed. 2d at 245 (Gorsuch, J., concurring). Justice Gorsuch's concurrence asserts the majority opinion's holding may affect lower court's evaluation of specific personal jurisdiction after *Ford*:

> Where this leaves us is far from clear. For a case to "relate to" the defendant's forum contacts, the majority says, it is enough if an "affiliation" or "relationship" or "connection" exists between them. But what does this assortment of nouns *mean*? Loosed from any causation standard, we are left to guess. The majority promises that its new test "does not mean anything goes," but that hardly tells us what does. In some cases, the new test may prove more forgiving than the old causation rule. But it's hard not to wonder whether it may also sometimes turn out to be more demanding. Unclear too is whether,

> in some cases like that, the majority would treat causation and "affiliation" as alternative routes to specific jurisdiction or whether it would deny jurisdiction outright.

Id. (internal citations omitted).

¶ 43 This Court's post-*Ford* opinions in *Cohen v. Cont'l Motors, Inc.*, 2021-NCCOA-449, 279 N.C. App. 123, 864 S.E.2d 816 (2021) and *Miller v. L.G. Chem, Ltd.*, 2022-NCCOA-55, 281 N.C. App. 531, 868 S.E.2d 896 (2022) analyze prior specific personal jurisdiction precedents. *Cohen* and *Miller* are instructive and set precedential goalposts and boundary lines to determine whether sufficient or insufficient jurisdictional contacts are shown and proven.

2. Cohen v. Cont'l Motors, Inc.

¶ 44 In *Cohen*, the plaintiffs' aircraft starter adapter failed, causing a loss of oil pressure and ultimate failure of the aircraft's engine. *Cohen*, 2021-NCCOA-449 at ¶ 2, 279 N.C. App. at 125, 864 S.E.2d at 818. The plane crashed and both owners/pilots perished. *Id.* Continental Motors, Inc., the engine's manufacturer, is domiciled in Delaware, made nearly 3,000 sales, earning almost $4 million from North Carolina-based consumers. *Id.* at ¶¶ 3-4, 279 N.C. App. at 125, 864 S.E.2d at 819. Continental Motors worked closely with fourteen paid North Carolina maintenance providers and paid subscribers from its electronic subscription account for manuals and technical support. *Id.* at ¶ 6, 279 N.C. App. at 126, 864 S.E.2d at 819.

3. Miller v. L.G. Chem, Ltd.

¶ 45 "LG Chem manufactures and sells lithium-ion batteries which are designed and sold solely to corporate and industrial businesses for inclusion in battery packs used for specified products" not for use in the vape devices for which they were inserted in the underlying action. *Miller*, 2022-NCCOA-55 at ¶ 23, 281 N.C. App. at 537, 868 S.E.2d at 901. LG Chem never sold battery or battery components to North Carolina-based companies. *Id.* at ¶ 26, 281 N.C. App. at 538, 868 S.E.2d at 902. This Court held the defendants in *Cohen* could be haled into North Carolina's courts, but the defendants in *Miller* could not.

C. Analysis

¶ 46 This Court has held: "The mere fact that [a defendant] was 'connected' to the manufacture and distribution of [a product] is not sufficient to support a conclusion that [the defendant] purposefully availed

itself of North Carolina jurisdiction by injecting its products into the stream of commerce." *Id.* at ¶ 19, 281 N.C. App. at 536, 868 S.E.2d at 901 (citation omitted).

¶ 47 Our Supreme Court recently summarized the Supreme Court of the United States' prerequisites for a forum to exercise personal jurisdiction under a stream of commerce theory in *Mucha v. Wagner*, 2021-NCSC-82, 378 N.C. 167, 861 S.E.2d 501 (2021):

> These cases have drawn a distinction between conduct targeted at states generally and conduct targeted at the specific forum state seeking to exercise jurisdiction over the defendant. Thus, the Court has held that a forum state may exercise personal jurisdiction over a defendant who delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State, but not over a defendant who directed marketing and sales efforts at the United States without engaging in conduct purposefully directed at the forum state.

Id. at ¶ 15, 378 N.C. at 173, 861 S.E.2d at 507-08 (citations, alterations, and internal quotation marks omitted).

¶ 48 Neither Bartlett, Harrison, nor any of the plaintiffs make any arguments to "pierce the corporate veil" of AHD or SHE or assert either entity is an "alter ego" of the United States- based defendants to AHD and SHE. SHE has no relationship with Safran Helicopter Engines USA. AHD has no ownership interest in Airbus Helicopters, Inc. The parties' relationship is governed by the distributor agreement. Neither Airbus SE nor Safran S.A., the corporate parents, of AHD and SHE are parties in this action. *Glenn v. Wagner*, 313 N.C. 450, 455, 329 S.E.2d 326, 330-31 (1985) (lays out elements and factors for a court to consider whether to pierce the corporate veil). *See Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E.2d 570, 575 (1966) ("[A] corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary or affiliated corporations may be disregarded.") (citation omitted).

¶ 49 A federal trial court has held the North Carolina court "would adopt the internal affairs doctrine and apply the law of the state of incorporation" in piercing the corporate veil. *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345, 349 (M.D.N.C. 1995). However, while not explaining why it used North Carolina law, this Court applied North

Carolina law to pierce the corporate veil of a Florida corporation doing business in North Carolina to uphold personal jurisdiction in North Carolina. *See Copley Triangle Assoc. v. Apparel America, Inc.*, 96 N.C. App. 263, 265, 385 S.E.2d 201, 203 (1989). The structural and governance integrity of the foreign corporate entities is unchallenged.

1. AHD

¶ 50 AHD argues the trial court erred by finding it "availed itself of the privilege of conducting business in North Carolina through its continuous and deliberate efforts to serve the market here, individually[,]" and that "AHD has continuously and deliberately served the North Carolina market with regard to the Subject Helicopter and similar models."

¶ 51 AHD challenges the following finding of fact:

> 11. The sales and marketing services AHD *sought and obtained* for the North Carolina market *are contacts* with North Carolina for purposes of this Motion;

(emphasis supplied).

¶ 52 "The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (citation omitted). "As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations and quotation marks omitted). This "finding[] of fact" is properly characterized and reviewed as a conclusion of law.

¶ 53 AHD also challenges the following conclusions of law:

> 3. Discovery taken in this action fairly demonstrates that at the time AHD manufactured the Subject Helicopter, it knew and intended that the craft would be sold and used in an international market, including the United States and *potentially* North Carolina;
>
> 17. The facts found above demonstrate that AHD delivered the Subject Helicopter *into the stream of commerce* with the expectation it would be purchased

and operated anywhere in the United States, specifically to include North Carolina;

19. In applying controlling law, this Court makes its Conclusions based, without limitation, the facts found that AHD at all times relevant to this action had

a) an international scope of operations;

b) chose to sell the Subject Helicopter (and similar models) via a nation-wide (sic) exclusive distributor agreement with A[irbus] H[elicopters] I[nc.] that included North Carolina;

c) made no attempt to limit sales to North Carolina;

d) had actual knowledge that the Subject Helicopter was being used as a medical services helicopter in North Carolina for more than seven (7) years prior to the loss complained of;

e) tracked ownership, operation, purpose and hours flown relating to the Subject Helicopter in part to derive benefit from future part sales and repairs;

f) participated in sufficient marketing and sales activity within North Carolina;

21. AHD had actual notice of potential exposure in the North Carolina courts arising from the sale and operation of the Subject Helicopter (and similar models) in North Carolina, and by providing ongoing guidance, instruction, and replacement parts for the continued operation of the Subject Helicopter in North Carolina, both individually and through its exclusive distributor A[irbus] H[elicopters] I[nc.];

(emphasis supplied). We will review these conclusions in our analysis of the underlying motion to dismiss.

¶ 54 The product at issue is a MB-BK117 C2 helicopter and its engines. AHD sells and delivers the helicopter in Germany to Airbus Helicopters Inc., who in turn imports the helicopters into the United States. Once imported into the United States, the helicopters are sold and delivered in

Texas to the new owner or end user by Airbus Helicopters, Inc., a wholly separate entity, and is not a party to this appeal.

¶ 55 Ford Motor Company sold the various vehicles involved in each accident directly to the public through an elaborate local dealer network. Ford Motor Company "advertised, sold, and serviced those two car models in both [forum] States for many years." *Ford Motor Co.*, 592 U.S. at __, 209 L. Ed. 2d at 238. Unlike in *Ford*, AHD does not import nor operate a dealer network within the United States, and only sells and delivers the units in Germany directly to Airbus Helicopters Inc., an exclusive importer.

¶ 56 AHD does provide operator access to a website portal, Keycopter. The data and technical support provided by AHD includes technical publications, maintenance manuals, and technical instructions. AHD provides answers to technical questions regarding the ongoing care and maintenance of their helicopters through Keycopter.

¶ 57 In *Havey v. Valentine*, 172 N.C. App. 812, 816-17, 616 S.E.2d 642, 647-48 (2005), our Court adopted the United States Court of Appeals for the Fourth Circuit's rule for determining whether an internet website can become the basis for the exercise of personal jurisdiction in the forum. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002). *ALS Scan, Inc.* adopted the analysis from *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997).

¶ 58 In *Havey*, this Court held:

> 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. *Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received.* Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in

> courts located in the State. *When a website is neither merely passive nor highly interactive, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs.*

Havey, 172 N.C. App. at 816-17, 616 S.E.2d at 647-48 (emphasis supplied) (internal citations, quotation marks, and alterations omitted).

¶ 59 AHD's website, Keycopter, is an interactive informational website. The website provides a technical library where subscribers can access instructions. Unlike the technical website present, in *Cohen*, the record does not disclose whether AHD charged a subscription for access or generated any revenue from any North Carolina customers' access. At oral argument counsel for AHD stated the aircraft owner's warranty card provided their access to Keycopter. Unlike the paid subscription service shown in *Cohen*, this Keycopter portal is not shown to contain a commercial nature from paid subscriptions. "A passive [w]eb site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction." *ALS Scan, Inc.*, 293 F.3d at 714.

¶ 60 When considering whether AHD's alleged contacts "related to" North Carolina, beyond mere "stream of commerce," AHD has not "purposefully availed" itself of our forum, and these contacts are not sufficient to support the trial court's assertion of specific personal jurisdiction. *Havey*, 172 N.C. App. at 817, 616 S.E.2d 648; N.C. Gen. Stat. § 1-75.4. No evidence tends to show AHD marketed, sold, or delivered its products to North Carolina. Even if true, as the trial court's "stream of commerce" "findings of fact" #2 and #3 assert, the mere manufacture and introduction of a product into the world's "stream of commerce" without "purposeful availment" is insufficient to establish personal jurisdiction in North Carolina. *Burger King Corp.*, 471 U.S. at 474-75, 85 L. Ed. 2d at 542; *Mucha*, 2021-NCSC-82 at ¶ 15, 378 N.C. at 173, 861 S.E.2d at 507-08. The order of the trial court finding and concluding personal jurisdiction exists in North Carolina over AHD is reversed.

2. SHE

¶ 61 Here, the product at issue is SHE's Arriel 1E2 engines, which powered the Helicopter. The engine is not a consumer product. It is manufactured, marketed, distributed, and sold solely as a component product for helicopters. Like in *Miller*, SHE has never sought nor served a market in North Carolina for standalone helicopter engines. *Miller*, 2022-NCCOA-55 at ¶ 36, 281 N.C. App. at 540, 868 S.E.2d at 903. SHE

never advertised, sold, or distributed any engines for sale to individual users or consumers in North Carolina.

¶ 62 Beyond worldwide "stream of commerce" SHE also has not "purposefully availed" itself of our forum. *Havey*, 172 N.C. App. at 817, 616 S.E.2d at 648; *see* N.C. Gen. Stat. § 1-75.4. These contacts are not sufficient to support the trial court's assertion of specific personal jurisdiction in North Carolina. *Id.* The mere introduction of a product into the "stream of commerce" without "purposeful availment" is insufficient to establish jurisdiction. *Burger King Corp.*, 471 U.S. at 474-75, 85 L. Ed. 2d at 542; *Mucha*, 2021-NCSC-82 at ¶ 15, 378 N.C. at 173, 861 S.E.2d at 507-08; *Miller*, 2022-NCCOA-55 at ¶ 19, 281 N.C. App. at 536, 868 S.E.2d at 901 (citation omitted). The order of the trial court concluding personal jurisdiction exists over SHE in North Carolina is reversed.

V. Conclusion

¶ 63 Plaintiffs bear the burden of proving jurisdiction. Plaintiffs have failed to show any of these activities by AHD or SHE sufficiently "arise out of *or relate to* the defendant's contacts with the forum." "In the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum." *Ford Motor Co.*, 592 U.S. at __, 209 L. Ed. 2d at 236.

¶ 64 As in *Goodyear*, a foreign entity cannot be haled into North Carolina's courts because of the presence of even an affiliated American company present in or doing business in the forum. *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 918, 180 L.Ed.2d at 802.

¶ 65 This holding is limited to the foreign entity appellants, SHE and AHD, the only entities who appealed. Plaintiff has failed to prove a "causal connection," "purposeful availment," or activities in the forum "related to" the Defendants before us in order to establish personal jurisdiction between North Carolina and AHD and North Carolina and SHE.

¶ 66 The trial court's orders denying AHD's and SHE's Rule12(b)(2) motions are reversed and this cause remanded for entry of dismissal of AHD and SHE. *It is so ordered.*

REVERSED AND REMANDED.

Judges COLLINS and GORE concur.

COASTAL CONSERVATION ASS'N v. STATE OF N.C.

[285 N.C. App. 267, 2022-NCCOA-589]

COASTAL CONSERVATION ASSOCIATION, D/B/A CCA NORTH CAROLINA; BRUCE C. ABBOTT; CHARLES P. ADAMS, JR.; CONSTANTINE A. ARETAKIS, II; FREDERICK L. BERRY; ANDREW R. BOYD; HARRY T. BRANCH; TROY D. BRANHAM; RUPERT D. BROWN; JUDITH C. BULLOCK; WILLIAM L. BYRD, JR.; JOHNNY L. CANUP; MICHAEL D. CARTER; WILLIE T. CLOSS, JR.; KENNETH D. COOPER, JR.; L. AVERY CORNING, IV; PAUL N. COX; BENJAMIN M. CURRIN; DANIEL E. DAWSON; MARY F. DAWSON; CHARLES B. EFIRD; FRANK K. EILER; CHRISTOPHER ELKINS; DAN E. ESTREM; ANDREW P. GILLIKIN; LELAN E. HALLER, JR.; JOHN M. HISLOP; RAYMOND Y. HOWELL; JOEY S. HUMPHREY; THOMAS G. HURT; CLARK W. HUTCHINSON, JR.; ANDREW G. JONES, JR.; GEORGE M. KIVETT, JR.; JOHN C. KNIGHT, JR.; BRADFORD A. KOURY; CHARLES H. LAUGHRIDGE; CASEY M. LLOYD; MARILYN R. LOWE; CHARLIE LOYA, JR.; NICKIE N. LUCAS; BRUCE D. MACLACHLAN; EULISS D. MADREN; WILLIAM W. MANDULAK; DARRELL G. MCCORMICK; TERESA A. D. MCCULLOUGH; SAMUEL B. MCLAMB, III; JAMES M. MCMANUS, JR.; JOHN W. MCQUAID; GEORGE R. MODE; JOHN V. MOON; DENNIS K. MOORE; KENNETH N. MOORE, JR.; WARREN S. MOORING; ELIJAH T. MORTON; DANIEL J. NIFONG; SADIE R. NIFONG; ROBERT B. NOWELL, JR.; ELBERT W. OWENS, JR.; WYATT E. PARCEL; VAN B. PARRISH; JAMES H. PARROTT; BRYAN C. PATE; ALEXANDRA S. PEYTON; HUNTER L. PEYTON; JEFFREY P. PICKERING; ROBERT R. RICE, II; ROBERT T. RICE; ORICE A. RITCH, JR.; MARK A. RUFFIN; PEARCE RUFFIN; ERIC J. SATO; SEAN P. SCULLY; LENNY T. SMATHERS; CARROLL W. SPENCER; JOHN R. SPRUILL; DAVID M. SUMMERS; JOHN B. TAGGART; JESSE H. WASHBURN, II; ANDREW J. WEBSTER; MELISSA N. WILLIAMS; VANDEXTER WILLIAMS; DONALD A. WILLIS, JR.; A. REXFORD WILLIS, III; JAN L. WILLIS; PHILLIP R. WOOD; RAYE P. WOODIN, III; JOSEPH G. YAGER, PLAINTIFFS

v.

STATE OF NORTH CAROLINA, DEFENDANT

No. COA21-654

Filed 6 September 2022

1. Appeal and Error—interlocutory order—denial of motions to dismiss—assertion of sovereign immunity—adverse ruling on personal jurisdiction

In an action for declaratory and injunctive relief—initiated by plaintiffs against the State for allegedly breaching the public trust doctrine—where the State filed motions to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), (2), and (6), based on the defense of sovereign immunity, the trial court's interlocutory order denying the State's motions was immediately appealable pursuant to N.C.G.S. § 1-277 with regard to Rules 12(b)(2) (which constituted an adverse ruling on personal jurisdiction) and 12(b)(6) (as affecting a substantial right), but not with regard to Rule 12(b)(1).

2. Waters and Adjoining Lands—public trust doctrine—coastal fisheries management—sovereign immunity doctrine

An action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the

State's alleged breach of the public trust doctrine for failing to adequately manage North Carolina's coastal fisheries was not barred by the doctrine of sovereign immunity where plaintiffs were not asserting rights of ownership or attempting to enforce public trust rights against a private party, but sought judicial review of the State's alleged obligations to manage public trust lands.

3. Constitutional Law—North Carolina—Art. XIV, sec. 5—conservation of coastal fisheries—applicability of immunity defenses—colorable claim

In an action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the State's alleged mismanagement of North Carolina's coastal fisheries, which plaintiffs asserted violated their constitutional right to harvest fish, the State was not entitled to the defenses of governmental or sovereign immunity where plaintiffs raised a colorable constitutional claim directly under Art. XIV, sec. 5 of the North Carolina Constitution (conservation of natural resources) for which no other adequate state remedy existed.

4. Constitutional Law—North Carolina—Art. I, sec. 38—right to harvest fish—applicability of immunity defenses—colorable claim

In an action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the State's alleged mismanagement of North Carolina's coastal fisheries, which plaintiffs asserted violated their constitutional right to harvest fish, the State was not entitled to the defenses of governmental or sovereign immunity where plaintiffs raised a colorable constitutional claim directly under Art. I, sec. 38 of the North Carolina Constitution (right to hunt, fish, and harvest wildlife) for which no other adequate state remedy existed.

Appeal by Defendant from Order entered 28 July 2021 by Judge Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 26 April 2022.

Poyner Spruill LLP, by Keith H. Johnson, Andrew H. Erteschik, John Michael Durnovich, and Stephanie L. Gumm, for plaintiffs-appellees.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin and Special Deputy Attorney General Marc Bernstein, for defendant-appellant.

Southern Environmental Law Center, *by Alex J. Hardee and Derb S. Carter*, *Jr.*, *for Amicus Curiae North Carolina Wildlife Federation and Sound Rivers.*

John J. Korzen for Amicus Curiae Professor Joseph J. Kalo.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 The State of North Carolina (the State) appeals from the trial court's Order denying its Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. The Record before us—including the factual allegations made in Plaintiffs' Complaint, which we treat as true solely for purposes of this appeal—reflects the following:

¶ 2 On 10 November 2020, Coastal Conservation Association, d/b/a CCA North Carolina, Inc., and the other named individuals who are citizens and residents of North Carolina, (collectively, Plaintiffs) filed a Complaint against the State, alleging breach of trust under the public trust doctrine, N.C. Const. art. I, § 38, and N.C. Const. art. XIV, § 5. Specifically, Plaintiffs alleged:

> The public-trust doctrine imposes a fiduciary duty on the State to manage and regulate the harvest of [coastal finfish and shellfish] in a way that protects the right of current and future generations of the public to use public waters to fish. As a result, the State may not allow the harvest of finfish or shellfish in public waters in quantities or by methods that cause unnecessary waste or impair the sustainability of fish stocks, which in turn threaten the right of current and future generations of the public to use such public waters to fish.

Plaintiffs alleged the State had breached this duty by permitting for-profit harvesting of finfish or shellfish in quantities or through methods that cause overexploitation or undue wastage to North Carolina's coastal fisheries resources. According to Plaintiffs' Complaint, the State:

> has continued to allow—and even facilitated—several commercial fishing practices that result in substantial wastage of coastal fish stocks or their prey species, or result in critical habitat destruction. Those

> commercial fishing practices include trawling in estuarine waters with significant populations of juvenile finfish, and using "unattended" gillnets. . . . As a result, stocks of multiple fish species . . . have declined precipitously—84 to 98 percent—since the last major fisheries management reform legislation was enacted in North Carolina in 1997.[1]

Plaintiffs requested that the Court: declare that the State breached its obligation under the public-trust doctrine, Article I, Section 38 of the North Carolina Constitution, and Article XIV, Section 5 of the North Carolina Constitution; enjoin the State from committing further breaches of its obligations and retain jurisdiction to enforce the State's compliance with that injunctive relief; tax the costs of the action to the State; and assign a Resident Superior Court Judge pursuant to Rule 2.2 of the Local Rules for Civil Superior Court of the Tenth Judicial District to preside over this action.

¶ 3 The State responded to Plaintiffs' Complaint by filing a Motion to Dismiss pursuant to Rules 12(b)(1), (2), and (6) of the Rules of Civil Procedure. Specifically, the State alleged:

> 1. The plaintiffs have not pleaded facts that show that the State has waived its sovereign immunity, and the State has not in fact or law waived its sovereign immunity. The Complaint should be dismissed under Rule 12(b)(1), (2) and (6).
>
> 2. The plaintiffs lack standing to make a claim under the public trust doctrine because only the State can enforce the public trust doctrine. The claim should be dismissed under Rule 12(b)(1) and (6).
>
> 3. The Complaint does not state a claim upon which relief can be granted because the public trust doctrine does not create the type of fiduciary obligations upon which the plaintiffs rely. The Complaint should be dismissed under Rule 12(b)(6).
>
> 4. The Complaint does not state a claim upon which relief can be granted because the remedy requested would violate the constitutional provision requiring

1. Plaintiffs' Complaint contains over 100 pages of allegations including data supporting Plaintiff's claim regarding the causal connection between these two commercial fishing practices and the decline in fish populations.

the separation of powers. N.C. Const. art. I, § 6. The Complaint should be dismissed under Rule 12 (b)(6).

5. To the extent that the plaintiffs are alleging an independent claim under article I, section 38 of the North Carolina Constitution, the Complaint does not state a claim upon which relief can be granted under that provision because the Complaint does not allege facts that show that the State has abridged any of the plaintiffs' rights that are protected by article I, section 38. Any such claim should therefore be dismissed under Rule 12(b)(6).

6. To the extent that the plaintiffs are alleging an independent claim under article XIV, section 5 of the North Carolina Constitution, the Complaint does not state a claim upon which relief can be granted under that provision because article XIV, section 5 does not articulate any enforceable individual right but instead clarifies state policies and functions regarding environmental protection and creates a land conservation program. Any such claim should therefore be dismissed under Rule 12(b)(6).

¶ 4 On 9 June 2021 the trial court held a hearing on the State's Motion to Dismiss, and on 28 July 2021 the trial court entered an Order Denying Motion to Dismiss. The State filed written Notice of Appeal on 26 August 2021.

Appellate Jurisdiction

¶ 5 **[1]** As an initial matter, we must first address whether we have appellate jurisdiction to review the trial court's Order. As the State acknowledges, the trial court's denial of the State's Motion to Dismiss is an interlocutory order. Generally, "a party has no right to immediate appellate review of an interlocutory order." *Veazey v. 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." *Id*. However, N.C. Gen. Stat. § 1-277 (2021) 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.

¶ 6 Here, the State moved to dismiss Plaintiffs' causes of action pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil

Procedure, based on the defense of sovereign immunity. "Our Courts generally recognize immunity as a defense that can be raised under Rules 12(b)(1), 12(b)(2), or 12(b)(6)." *Suarez v. Am. Ramp Co. (ARC)*, 266 N.C. App. 604, 610, 831 S.E.2d 885, 890 (2019).

> Although the federal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a Rule 12(b)(1) motion regarding subject matter jurisdiction or a Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction becomes crucial in North Carolina because G.S. 1-277(b) allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion.

Teachy v. Coble Dairies, Inc., 306 N.C. 324, 327-328, 293 S.E.2d 182, 184 (1982). *See also Davis v. Dibartolo*, 176 N.C. App. 142, 144–45, 625 S.E.2d 877, 880 (2006) (declining to review interlocutory appeal of denial of motion to dismiss for lack of subject matter jurisdiction due to sovereign immunity under Rule 12(b)(1), but reviewing denial of Rule 12(b)(6) motion based upon governmental immunity); *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245–46 (2001) (declining to review interlocutory appeal of denial of motion to dismiss due to sovereign immunity under Rule 12(b)(1), but reviewing denial of Rule 12(b)(2) motion for lack of personal jurisdiction based upon governmental immunity). Thus, for the purposes of this appeal, we only review the trial court's denial of the State's Rule 12(b)(2) and 12(b)(6) motions.

¶ 7 Our Court has held a "denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)." *Can Am South, LLC v. State*, 234 N.C. App. 119, 124, 759 S.E.2d 304, 308 (2014). Likewise, "a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable." *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010). Thus, the Order is immediately appealable, and this Court may assert appellate jurisdiction over this matter.

Issue

¶ 8 The dispositive issues on appeal are whether: (I) sovereign immunity bars Plaintiffs' claims for injunctive and declaratory relief seeking judicial review of the State's obligations and alleged breach of trust under the public trust doctrine; (II) Plaintiffs' Complaint states a claim for relief on state constitutional grounds under N.C. Const. Art. XIV, Sec. 5

—the Conservation of Natural Resources Clause—for enforcement of public trust doctrine rights; and (III) Plaintiffs' Complaint states a claim for relief on state constitutional grounds under N.C. Const. Art. I, Sec. 38—Right to Hunt, Fish, and Harvest Wildlife—for enforcement of public trust doctrine rights.

Analysis

I. Public-Trust Doctrine

¶ 9 **[2]** The State contends Plaintiffs' Complaint is barred by the defense of sovereign immunity. Specifically, the State asserts the public trust doctrine, as a common-law doctrine, is subject to sovereign immunity. Therefore, the State argues Plaintiffs' Complaint must be dismissed. "The doctrine of sovereign immunity—that the State cannot be sued without its consent—has long been the law in North Carolina." *Smith v. State*, 289 N.C. 303, 309–310, 222 S.E.2d 412, 417 (1976). "The doctrine of sovereign immunity is judge-made in North Carolina and was first adopted by the North Carolina Supreme Court in *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695 (1889)." *Corum v. Univ. of N.C.*, 330 N.C. 761, 785, 413 S.E.2d 276, 291 (1992).[2] Since *Moffitt*, our Courts have been hesitant to disturb the doctrine of sovereign immunity. *See Steelman v. New Bern, N.C.*, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971) ("It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted. However, . . . we feel that any further modification or the repeal of the doctrine of sovereign immunity should

2. We are cognizant of the United States Supreme Court's recent discussion summarizing its own history of the doctrine of sovereign immunity in *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1493–95, 203 L. Ed. 2d 768 (2019) and our application of its holding in *Farmer v. Troy Univ.*, 276 N.C. App. 53, 2021-NCCOA-36, ¶¶ 15–24, *appeal dismissed*, 379 N.C. 164, 863 S.E.2d 621 (2021), *and review allowed in part, denied in part*, 379 N.C. 127, 863 S.E.2d 775 (2021). However, while "[t]he Supreme Court of the United States is the final authority on federal constitutional questions[,]" the North Carolina Supreme Court remains the authority on our state law issues and the final voice on the history of the law and jurisprudence of North Carolina. *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749 (2006); *see also Bulova Watch Co., Inc. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974) ("[I]n the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court[.]"); *Unemployment Compensation Comm'n v. Jefferson Standard Life Ins. Co.*, 215 N.C. 479, 2 S.E.2d 584, 589 (1939) ("Accordingly, it would appear settled that the matter here involved is one of state law, to be interpreted finally by this Court."). Unless and until the North Carolina Supreme Court revisits its earlier determination that sovereign immunity in North Carolina is "judge-made" law, we are bound by its prior precedent. Moreover, we note this case does not involve another state's claim of sovereign immunity in North Carolina courts.

come from the General Assembly, not this Court."). Nevertheless, our Courts have identified instances where sovereign immunity does not apply—including specifically where the State enters into a valid contract and, subsequently, breaches the contract. *Smith*, 289 N.C. at 320, 222 S.E.2d at 423–24 ("[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.").

¶ 10 "[T]he following policy grounds are usually offered for immunity: a need to prevent the diversion of public funds to compensate for private purposes; a need to avoid disruption of public service and safety; a need to prevent governmental involvement in endless embarrassments, difficulties and losses subversive to the public interest; and the nonprofit nature of government should be reflected in non-liability." *Id.* at 312, 222 S.E.2d at 419 (quoting The National Association of Attorneys General, *Sovereign Immunity: The Liability of Government and its Officials*, Jan. 1975, at 17).

¶ 11 Here, Plaintiffs are seeking declaratory and injunctive relief against the State seeking a declaration the State has breached its alleged obligations under the public trust doctrine and enjoining the State from further violations of its alleged obligations under the public trust doctrine. "The public trust doctrine is a common law principle providing that certain land associated with bodies of water is held in trust by the State for the benefit of the public." *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 41, 621 S.E.2d 19, 27 (2005) (citing *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527–28, 369 S.E.2d 825, 828 (1988)). Although the doctrine arises from the common law, it is perhaps best understood as "an implied constitutional doctrine"—one that "springs from a fundamental notion of how government is to operate with regard to common heritage natural resources." Harrison C. Dunning, *The Public Trust: A fundamental Doctrine of American Property Law*, 19 Envtl. L. 515, 523 (1989). North Carolina first recognized the public trust doctrine in the case of *Shepard's Point Land Company* in 1903. There, our Supreme Court stated: the State "can no more abdicate its trust over property in which the whole people are interested, like navigable waters . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Shepard's Point Land Co. v. Atl. Hotel*, 132 N.C. 517, 528, 44 S.E. 39, 42 (1903), *overruled by Gwathmey v. State ex rel. Dep't. of Env't, Health, & Nat. Res.*, 342 N.C. 287, 464 S.E.2d 674 (1995); *see also*, *Stone v. Mississippi*, 101 U.S. 814, 820 (1879) ("[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away."). In the years following

Shepard's Point, our appellate courts had multiple occasions to examine the public trust doctrine and its application to navigable waters in North Carolina. Relevant to the case *sub judice*, three key principles have emerged.

¶ 12 First, "the public trust doctrine, established by the common law of this State, involves two concepts: (1) public trust lands, which are 'certain land[s] associated with bodies of water [and] held in trust by the State for the benefit of the public[;]' and (2) public trust rights, which are 'those rights held in trust by the State for the use and benefit of the people of the State in common.' " *Town of Nags Head v. Richardson*, 260 N.C. App. 325, 334, 817 S.E.2d 874, 882 (2018) (quoting *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27). "Public trust rights attach to the [public trust lands]" and " 'include, but are not limited to the right to navigate, swim, hunt, fish, and enjoy all recreational activities' offered by public trust lands." *Id.* (quoting N.C. Gen. Stat. § 1–45.1 (2017)).

¶ 13 However, the right to hunt and fish does not exist in the abstract. The public must have access to harvestable wildlife and fish to have a meaningful opportunity to exercise these rights. *See U.S. v. Washington*, 853 F.3d 946, 965 (9th Cir. 2017), *aff'd*, 138 S. Ct. 1832 (U.S. 2018) (per curiam) (stating in the context of a Native American treaty guaranteeing access to fisheries that a "right of access to . . . fishing places would be worthless without harvestable fish."). Indeed, "the State's *wildlife population* is a natural resource of the State held by it in trust for its citizens." *State v. Steward*, 40 N.C. App. 693, 695, 253 S.E.2d 638, 640 (1979) (emphasis added). *See also*, *Shepard's Point Land Co.*, 132 N.C. at 526, 44 S.E. at 41 (emphasis added) ("The principle has long been settled the States own the tidewaters themselves, *and the fish in them*, so far as they are capable of ownership while running . . . [but] [i]t is a title held in trust for the people of the State."); *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 534, 369 S.E.2d 825, 826 (1988) (emphasis added) ("History and the law bestow the title of these submerged land *and their oysters* upon the State to hold in trust for the people."); N.C. Gen. Stat. § 113–131(a) (2021) ("The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole.").

¶ 14 Second, there is a definite distinction between the State's interest in public trust lands and the State claiming title to property against a private party, as might give rise to an action under N.C. Gen. Stat. § 41–10.1. *See* N.C. Gen. Stat. § 41–10.1 (2021) ("Whenever the State of North Carolina . . . asserts a claim of title to land . . . [the land owner] may bring an action in the superior court of the county in which the land lies against the State . . . ."); *see also*, *State v. Taylor*, 322 N.C. 433, 435,

368 S.E.2d 601, 602 (1988) (holding the scope of the waiver of sovereign immunity in N.C. Gen. Stat. § 41–10.1 should be strictly construed). This principle is illustrated by *Fabrikant v. Currituck County*. There, the plaintiffs, who owned oceanfront property in Currituck County, brought suit against various defendants including the State, seeking a declaratory judgment that they had exclusive right of the portion of the beach between the high tide mark and the vegetation line, identified as the dry sand beach. 174 N.C. App. at 32, 621 S.E.2d at 22. Plaintiffs also sought injunctive relief to prevent the general public from trespassing over the dry sand beach areas surrounding their homes. *Id.*

¶ 15 The State filed a motion to dismiss based *inter alia* on sovereign immunity. *Id.* In response, the plaintiffs alleged since the public trust doctrine allowed the public access to their dry sand beaches, the State had effectively laid a claim of title to the land. *Id.* at 41, 621 S.E.2d at 27. Therefore, the plaintiffs contended their complaint's allegations fell within the scope of N.C. Gen. Stat. § 41–10.1, thereby establishing a waiver of sovereign immunity. *Id.* at 39, 621 S.E.2d at 26.

¶ 16 This Court stated "the public trust doctrine cannot give rise to an assertion of ownership that would be available to any 'private litigants in like circumstances.' " *Id.* at 42, 621 S.E.2d at 27 (quoting *Williams v. N.C. State Bd. of Educ.*, 266 N.C. 761, 765, 147 S.E.2d 381, 383 (1966). "Any party, public or private, can assert title to land on the strength of a deed, but only the State, acting in its sovereign capacity, may assert rights in land by means of the public trust doctrine." *Id.* (citing *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 118, 574 S.E.2d 48, 54 (2002)). This Court concluded the State's interest in public trust lands does not amount to a claim of title to land under N.C. Gen. Stat. § 41–10.1. *Id.* at 43, 621 S.E.2d at 25 ("Since the General Assembly chose to limit the waiver to an assertion of 'claim of title to land,' rather than use the broader 'interest in real property,' we must construe that language strictly and hold that a 'claim of title to land' requires more than just an interest in real property."). As such, because the plaintiffs' claims did not fall under the scope of N.C. Gen. Stat. § 41–10.1, that statute could also not be relied upon as a waiver of sovereign immunity. *Id.* Thus, this Court held the State had not waived sovereign immunity to plaintiffs' claims for declaratory and injunctive relief seeking exclusive rights to the property at issue. *Id.* Therefore, N.C. Gen. Stat. § 41–10.1 does not constitute an express waiver of sovereign immunity as a defense to a claim by a private citizen asserting rights of ownership or exclusive access to public trust lands under the public trust doctrine. *See Id.*

¶ 17 Third, only the State has standing to bring suit against a private corporation seeking "non-individualized, or public, remedies for alleged harm to public waters" under the public trust doctrine. *Neuse River Found.*, 155 N.C. App. at 118, 574 S.E.2d at 54. This Court set out this principle in the case of *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.* There, the plaintiffs filed suit against three hog farming companies alleging defendants improperly handled hog waste, resulting in massive pollution and contamination of the Neuse, New, and Cape Fear Rivers, and those rivers' tributaries and estuaries. *Id.* at 112, 574 S.E.2d at 50. The plaintiffs' claims were based in part on the public trust doctrine. *Id.* This Court held the plaintiffs did not have standing to bring a claim under the public trust doctrine against a private corporation as "only the [S]tate, through the Attorney General, is authorized to bring in a representative capacity for and on behalf of the using and consuming public of this State actions deemed to be advisable in the public interest." *Id.* at 117, 574 S.E.2d at 53 (citing *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 284, 138 L. Ed. 2d 438, 457 (1997)).[3]

¶ 18 Applying these three key principles to the case *sub judice* provides more context for Plaintiffs' claims. First, as Plaintiffs allege, protecting fisheries falls within the purview of the public trust doctrine,[4] and "the State can no more abdicate this duty than it can abdicate its police powers in the administration of government and the preservation of the peace." *Shepard's Point Land Co.*, 132 N.C. at 528, 44 S.E. at 42. Second, Plaintiffs here are not asserting rights of ownership or exclusive access to public trust lands. To the contrary, Plaintiffs' claims are broadly premised on the State's dominion over public trust property and obligation to enforce the public trust. Thus, the claims asserted here are distinguishable from the claims of property rights in *Fabrikant*. Third, and concomitantly, Plaintiffs are not attempting to enforce public trust rights against a private party—i.e. suing commercial fishermen for their role in the depletion of fish populations. Instead, Plaintiffs are bringing an action directly against the State for an alleged breach of its obligation to manage and protect fisheries for the benefit of the general public. Therefore, this case does not implicate the holding in *Neuse River*

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3. The public trust doctrine "uniquely implicate[s] sovereign interests[,]" and the Court will not interfere when the relief requested "would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect." *Coeur D'Alene Trib*e, 521 U.S. at 284, 138 L. Ed. 2d at 457.

4. *See Steward*, 40 N.C. App. at 695, 253 S.E.2d at 640; *Shepard's Point Land Co*., 132 N.C. at 526, 44 S.E. at 41.

Company. Given this particular context, it does not appear that our Courts have had opportunity to directly address whether sovereign immunity bars the type of claim brought by Plaintiffs seeking to compel the State to enforce alleged obligations under the public trust doctrine. Our review of the development of North Carolina law applicable to both sovereign immunity and the public trust doctrine leads us to conclude sovereign immunity does not bar Plaintiffs' claim implicating the public trust doctrine in this case.

¶ 19 In *Gwathmey v. State ex rel. Department of Environment, Health, & Natural Resources*, our Supreme Court recognized the State may sometimes act contrary to the public interest and stated "the 'public trust' doctrine [is] a tool for judicial review of state action affecting State-owned submerged land underlying navigable waters, including estuarine marshland . . . ." 342 N.C. at 293, 464 S.E.2d at 677. Indeed, even though *Gwathmey*, in part overruled *Shepard's Point*[5]—the original case adopting the public trust doctrine—the essential principle remains the same: the State owns tidal lands and waters for the benefit of the public, subject to "concomitant restraints." *Credle*, 322 N.C. at 525, 369 S.E.2d at 827.

¶ 20 Application of sovereign immunity in this case, however, would effectively reduce the public trust doctrine to nothing more than a "fanciful gesture" and prevent judicial review—contemplated by *Gwathmey*—as a plaintiff would never have the "opportunity to enter the courthouse doors and present his claims." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 340–41, 678 S.E.2d 351, 355 (2009). Moreover, the policy reasons usually offered for sovereign immunity such as the need to prevent the diversion of public funds to compensate for private purposes are inapplicable in this case. Plaintiffs are not requesting the State compensate a private individual/corporation for alleged damages but are seeking an injunction preventing the State from committing breaches of its alleged obligations under the public trust doctrine.

¶ 21 Thus, because of the nature of the public trust doctrine as a tool for judicial review of the State's actions as trustee of fisheries, we conclude sovereign immunity does not apply in this case. Therefore, Plaintiffs' claims for declaratory and injunctive relief against the State for breach

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5. "We reject . . . *Shepard's Point Land Co.* to the extent that it implies that the public trust doctrine completely prohibits the General Assembly from conveying lands beneath navigable waters to private parties without reserving public trust rights. That position is without authority in either our statutes or our Constitution." *Gwathmey*, 342 N.C. at 302, 464 S.E.2d at 683.

of its alleged duties under the public trust doctrine are not barred by sovereign immunity.

II. Conservation of Natural Resources Clause

¶ 22 **[3]** Alternatively, presuming arguendo a public trust doctrine claim is otherwise barred by sovereign immunity, Plaintiffs' Complaint also presents sufficient allegations of a claim arising directly under Article XIV, § 5 of our State Constitution.

¶ 23 Generally, sovereign immunity bars an action against the State unless the State has waived immunity or consented to the suit. *Taylor*, 322 N.C. at 435, 368 S.E.2d at 602. However, the doctrine of sovereign immunity will not stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed under the North Carolina Constitution. *Corum*, 330 N.C. at 785–86, 413 S.E.2d at 291. Thus, a direct constitutional claim will survive a Rule 12(b)(6) motion to dismiss, notwithstanding the doctrine of sovereign or governmental immunity. *Craig*, 363 N.C. at 340–41, 678 S.E.2d at 355–56.

¶ 24 Our Supreme Court has developed a three-part test to determine whether a plaintiff's complaint has sufficiently alleged a claim for relief under our State Constitution. "First, to allege a cause of action under the North Carolina Constitution, a state actor must have violated an individual's constitutional rights." *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 16.

¶ 25 "Second, the claim must be colorable." *Id.* "A 'colorable claim' is '[a] plausible claim that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)." *Id.* at ¶ 17 (quoting Colorable, Black's Law Dictionary (11th ed. 2019)). "In other words, the claim must present facts sufficient to support an alleged violation of a right protected by the State Constitution." *Id.*

¶ 26 "Lastly, there must be no adequate state remedy." *Id.* at ¶ 18. "No adequate state remedy exists when 'state law [does] not provide for the type of remedy sought by the plaintiff.' " *Id.* (quoting *Craig*, 363 N.C. at 340, 678 S.E.2d at 356). "[A] claim that is barred by sovereign or governmental immunity is not an adequate remedy." *Id.* "To be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.* (quoting *Craig*, 363 N.C. at 340–41, 678 S.E.2d at 355).

¶ 27 Here, Plaintiffs alleged the State, acting through two administrative agencies—the North Carolina Division of Marine Fisheries and the North

Carolina Marine Fisheries Commission—failed to protect Plaintiffs' constitutionally guaranteed right to harvest fish under Art. XIV, § 5.

¶ 28 Next, Plaintiffs have alleged a colorable constitutional claim. Article XIV, § 5 was added to our State Constitution in 1972 and states: "[i]t shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry . . . ." N.C. Const. art. XIV, § 5. Our Court interpreted this amendment in *Town of Nags Head v. Richardson* as tasking the State with a constitutional duty to not only protect the public lands, but also the public trust rights attached thereto. 260 N.C. App. 325, 334, 817 S.E.2d 874, 883 (2017) ("The State is tasked with protecting these rights pursuant to the North Carolina Constitution[.]"). *See also Credle*, 322 N.C. at 532, 369 S.E.2d at 831 (Art. XIV, § 5 "mandates the conservation and protection of public lands and waters for the benefit of the public.").

¶ 29 Plaintiffs alleged the State breached this constitutional duty by "mismanaging North Carolina's coastal fisheries resources." Specifically, Plaintiffs alleged the State has mismanaged the fisheries by "permitting, sanctioning, and even protecting two methods of harvesting coastal finfish and shrimp in State public waters"—shrimp trawling and "unattended" gillnetting—"that result in enormous resource wastage[;]" "refusing to address and remedy chronic overfishing of several species of fish[;]" and, "tolerating a lack of reporting of any harvest by the majority of commercial fishing license holders for more than a decade." Plaintiffs alleged "the State's mismanagement of coastal fisheries resources . . . has eliminated or, at a minimum, severely curtailed the public's right to fish for [popular fish species]." Indeed, Plaintiffs' Complaint contains extensive data points documenting the stock status and the stock population trends of certain fish species. Thus, the alleged facts here support Plaintiffs' contention the State did not protect the harvestable fish population "for the benefit of all its citizenry." N.C. Const. art. XIV, § 5. As such, Plaintiffs have alleged a colorable constitutional claim.

¶ 30 Finally, looking at whether an adequate state remedy exists, Plaintiffs seek declaratory and injunctive relief to remedy the State's breach of trust. Assuming arguendo the public trust doctrine claim is barred by sovereign immunity, this remedy cannot be redressed through other means, as an adequate "state law remedy [does] not apply to the facts alleged" by Plaintiffs. *Craig*, 363 N.C. at 342, 678 S.E.2d at 356. Thus, alternatively, Plaintiffs have alleged a colorable constitutional claim for which no other adequate state law remedy exists. Therefore, sovereign or governmental immunity cannot bar Plaintiffs' claim.

III. Right to Hunt, Fish, and Harvest Wildlife Clause

¶ 31 **[4]** Alternatively, Plaintiffs' Complaint also alleges a claim arising directly under Article I, § 38 of our state Constitution that the State has failed to protect Plaintiffs' constitutionally protected right to harvest fish.

¶ 32 To determine whether Plaintiffs' Complaint presents sufficient allegations of a claim arising directly under Article I, we employ the same three-part test set forth in the preceding section of this Opinion. "First, a state actor must have violated an individual's constitutional rights." *Deminski*, 2021-NCSC-58, ¶ 16. "Second, the claim must be colorable." *Id.* "Lastly, there must be no 'adequate state remedy.' " *Id.*

¶ 33 Section 38 was added to Article I of our State Constitution in 2018 by amendment proposed by legislative initiation and adopted by popular vote. *See* N.C. Const. Art. XIII, Sec. 4 (providing for constitutional amendment by legislative initiation). It states:

> The right of the people to hunt, fish, and harvest wildlife is a valued part of the State's heritage and shall be forever preserved for the public good. The people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly to (i) promote wildlife conservation and management and (ii) preserve the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. Nothing herein shall be construed to modify any provision of law relating to trespass, property rights, or eminent domain.

N.C. Const. Art. I, § 38.

¶ 34 The State contends the language of this provision places no affirmative constitutional mandate on the State to preserve the right of the people to hunt, fish, and harvest wildlife for the public good. We disagree. "In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004). "The plain meaning of words may be construed by reference to 'standard, nonlegal dictionaries.' " *Id.* (quoting *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 326 N.C. 133, 152, 388 S.E.2d 557, 568 (1990)).

¶ 35 It is first significant that this provision is found in Article I of our Constitution titled "Declaration of Rights." N.C. Const. art. I. In general, Article I recognizes and establishes "essential principles of liberty and free government." N.C. Const. art. I, preamble. "The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights." *Corum*, 330 N.C. at 782, 413 S.E.2d at 290. "Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State." *Id.* "[I]t is the judiciary's responsibility to guard and protect those rights." *Id.* at 785, 413 S.E.2d at 291.

¶ 36 The first sentence of Section 38 makes clear the right to fish belongs to the people. Moreover, its inclusion in Article I indicates the General Assembly intended for this right to be protected against encroachment by the State. Indeed, this right is "subject only to laws . . . and rules . . . to (i) promote wildlife conservation and management and (ii) preserve the future of . . . fishing." N.C. Const. art. I, § 38.

¶ 37 The plain meaning of the next phrase in the first sentence "shall be forever preserved" places an affirmative duty on the State to protect the people's right to fish. "Shall" means "has a duty to" or "must" and imposes "imperative or mandatory" obligations on the party to which "shall" applies. *Shall*, Black's Law Dictionary (11th ed. 2019); *Internet E., Inc. v. Duro Commc'ns, Inc.*, 146 N.C. App. 401, 405–06, 553 S.E.2d 84, 87 (2001). Forever, means "for a limitless time." *Forever*, Merriam-Webster's Collegiate Dictionary 328 (7th ed. 1970). "Preserve" means "to keep safe from injury, harm or destruction." *Preserve*, Merriam-Webster at 673. Thus, the plain meaning of this phrase indicates the General Assembly, when drafting the proposed amendment, intended to create an affirmative duty on the State to preserve the right of the people to fish and harvest fish. However, the right to fish and harvest fish would be rendered meaningless without access to fish. *See Washington*, 853 F.3d at 965; *Steward*, 40 N.C. App. at 695, 253 S.E.2d at 640. Therefore, the State's duty necessarily includes some concomitant duty to keep fisheries safe from injury, harm, or destruction for all time.

¶ 38 The history of Section 38 supports this conclusion. Section 38 was initiated by the North Carolina General Assembly after the National Rifle Association (NRA) "spearhead[ed] [a] campaign for Right to Hunt and Fish state constitutional amendments." *Why does NRA support Right to Hunt and Fish (RTHF) state constitutional amendments?*, NRA-ILA (last visited June 14, 2022), https://www.nraila.org/get-the-facts/hunting-and-conservation/why-does-nra-support-right-to-hunt-and-fish-rthf-state-constitutional-amendments). As part of this campaign, the NRA

released a model amendment, which closely resembles North Carolina's amendment in Article I, § 38. However, the NRA model amendment does not include the phrase "shall be forever preserved." *See Id.* In drafting the proposed amendment, which eventually became Section 38, the General Assembly could have used the NRA's model language, but instead it specifically chose to add an additional phrase imposing a mandatory duty on the State. "Under well-settled canons of statutory canons of statutory construction, we must conclude that this change had meaning." *Wells Fargo Bank, N.A. v. Am. Nat'l Bank and Trust Co.*, 250 N.C. App. 280, 281, 791 S.E.2d 906, 908 (2016); *see also N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)) ("[w]hen a legislative body 'includes particular language . . . it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion"); *Emerson v. Cape Fear Country Club, Inc.*, 259 N.C. App. 755, 761, 817 S.E.2d 402, 407 (2018) ("When the General Assembly adopts verbatim some provisions of a model code and rejects others, we assume that the General Assembly consciously chose to author its own alternate provisions.").

¶ 39 In sum, both the plain language and history of Article I, § 38 support the conclusion this provision imposes an affirmative duty on the State to preserve the people's right to fish and harvest fish. This includes some duty to preserve fisheries for the benefit of the public. In this case, Plaintiffs' have alleged facts, which if proven, may tend to show the State did not properly manage the fisheries so as to forever preserve the fish populations for the benefit of the public. *See* N.C. Const. art. I, § 38. As such, Plaintiffs have alleged a colorable constitutional claim under Article I, § 38.

¶ 40 Finally, looking at whether an adequate state remedy exists, here again, Plaintiffs seek declaratory and injunctive relief to remedy the State's breach of their duty to protect the right to fish and harvest fish. Again, presuming arguendo the public trust doctrine claim was to be barred by sovereign immunity, Plaintiffs' alleged wrong cannot be redressed through other means, as an adequate "state law remedy [does] not apply to the facts alleged" by Plaintiffs. *Craig*, 363 N.C. at 342, 678 S.E.2d at 356. Thus, Plaintiffs have alleged a colorable constitutional claim for which no other adequate state law remedy exists. Therefore, sovereign or governmental immunity cannot bar Plaintiffs' claim. Consequently, the trial court did not err in denying the State's Motion to Dismiss pursuant to Rules 12(b) (2) and (6) on the basis of sovereign immunity.

Conclusion

¶ 41 Accordingly, for the foregoing reasons, we affirm the trial court's Order Denying the State's Motion to Dismiss. "In so ruling, we express no opinion on the ultimate merits, if any, of plaintiffs' allegations and claims." *Locklear v. Lanuti*, 176 N.C. App. 380, 387, 626 S.E.2d 711, 716 (2006) (holding the allegations in the complaint were sufficient to survive a 12(b)(6) motion to dismiss).

AFFIRMED.

Judges MURPHY and WOOD concur.

IN THE MATTER OF B.W.C.

No. COA22-124

Filed 6 September 2022

Juveniles—delinquency—indirect contempt—prior adjudication of undisciplined—notice—allowable disposition

There was no error in the trial court's adjudication of delinquency for indirect contempt based on a juvenile's failure to meet various school attendance and performance conditions imposed by the court after a prior adjudication of undisciplined. The juvenile's due process and statutory rights were not violated where the juvenile was given several warnings regarding contempt prior to the delinquency petition being filed, and the disposition of delinquency for indirect contempt was expressly allowed by the applicable statutes.

Appeal by juvenile-appellant from order entered 19 October 2021 by Judge Angela G. Hoyle in Gaston County District Court. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.

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

IN RE B.W.C.

[285 N.C. App. 284, 2022-NCCOA-590]

ARROWOOD, Judge.

¶ 1 Juvenile-appellant "Brian"[1] appeals from an order adjudicating him as delinquent for indirect contempt and placing him on probation for six months. For the following reasons, we affirm the trial court.

I. Background

¶ 2 On 30 March 2021, a juvenile petition was filed in Gaston County District Court alleging that Brian, then fifteen years old, was an undisciplined juvenile for truancy in that he "was unlawfully absent" from high school, having accrued "a total of 58 absences[,] [i]n violation of 7B-1501(27)(a)[.]" Brian admitted to truancy.

¶ 3 The trial court entered an order adjudicating Brian as undisciplined on 15 April 2021 (the "adjudication order"). The adjudication order also provided that the matter would be continued for disposition until 7 June 2021 "under the following conditions: . . . contempt warning given in open court see attached AOC-J-209[.]"

¶ 4 The trial court filed an additional, separate order on the same day (the "second order"). In the second order, the trial court expressly required Brian to "attend school each and every day when it is in session and have no unexcused absences, tardies[,] or suspensions from school"; to "complete all classroom and homework assignments as issued by school officials"; to "sign up for in person school and start attending [M]onday 4/18/2021"; and to "log on for virtual school for 4/16/2021[.]" The second order also provided that Brian "verbally acknowledged [he] understand[s] that violation of the above conditions may result in him . . . being held in Contempt."

¶ 5 Following a hearing held on 7 June 2021, the trial court entered a juvenile disposition order on 8 June 2021 (the "disposition order"). The disposition order placed Brian under protective supervision of a court counselor for three months and required him to "[r]emain on good behavior and not violate any laws[,]" "[a]ttend school regularly[,]" "[m]aintain passing grades in at least 4 courses[,]" and "[r]eport to a court counselor as often as required by the court counselor." The disposition order also provided: "contempt warning order dated 04/15/2021 still remains."

¶ 6 On 26 August 2021, "a Motion for Review was filed alleging [Brian] [had] violated the conditions of protective supervision by 'refusing to attend school' on August 23rd, August 25th, and August 26th 2021." On

1. A pseudonym is used throughout to protect the identity of the juvenile.

27 August 2021, a juvenile petition was filed alleging that Brian was delinquent in that he "did violate a contempt warning set forth by District Court on June 7, 2021, instructing that the 'juvenile will attend school each and every day as outlined by the school'. The juvenile has accumulated 3 unexcused absences since the court date. In violation of 5A-12(b) Indirect Contempt[.]" The petition also alleged the offense in question was in violation of N.C. Gen. Stat. § 5A-31(c).

¶ 7 Brian filed a motion to dismiss on 18 October 2021, arguing that "[t]he current incarnation of N.C. Gen. Stat. § 7B-2505" read together with § 7B-2503 did not allow the trial court to pursue delinquency actions following an adjudication of undisciplined, and emphasizing the General Assembly's distinction between "children adjudicated undisciplined versus children adjudicated delinquent[.]" Thus, Brian argued the juvenile delinquency petition filed against him violated his due process and statutory rights.

¶ 8 The matter came on for adjudication, motion for review, and violation of protective supervision hearing on 18 October 2021 in Gaston County District Court, Judge Hoyle presiding. After hearing Brian's counsel's arguments to dismiss the delinquency petition and after reading the written motion to dismiss, the trial court denied the motion. Brian then admitted to indirect contempt and to violating his protective supervision.

¶ 9 The trial court ordered that Brian be placed on "probationary supervision of a court counselor for six months." The trial court also ordered, among other things, that Brian "attend school regularly, maintain passing grades in at least four courses, . . . meet with the court counselor to figure out how to do that, and the school representative[,] . . . [s]ubmit to random drug tests[,]" and abide by a 9:00 p.m. to 6:00 a.m. curfew. Brian filed notice of appeal on the same day.

II. Discussion

¶ 10 On appeal, Brian argues that the trial court erred in denying his motion to dismiss, and in doing so violated N.C. Gen. Stat. §§ 7B-2503 and 7B-2505, as well as Brian's due process rights. Specifically, Brian argues that "the State's procedure of seeking a delinquency adjudication for contempt in response to noncompliance with protective supervision or a court order that arises out of an undisciplined adjudication goes against what is contemplated by and authorized by dispositional provisions of Section 7B." "We review a trial court's denial of a [juvenile's] motion to dismiss *de novo*." *In re S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009) (citation omitted).

¶ 11 "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." *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted). Our General Statutes provide that a fifteen-year-old juvenile is delinquent if he "commits indirect contempt . . . as defined in G.S. 5A-31." N.C. Gen. Stat. § 7B-1501(7)(a) (2021). The behavior of a juvenile who engages in "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution" constitutes contempt. N.C. Gen. Stat. § 5A-31(a)(3) (2021). Such contempt is indirect when it is exercised outside of the presence of a court. *Compare* N.C. Gen. Stat. § 5A-31(b) *with* § 5A-31(c). "Indirect contempt by a juvenile may be adjudged and sanctioned only pursuant to the procedures in Subchapter II of Chapter 7B of the General Statutes." N.C. Gen. Stat. § 5A-33 (2021).

¶ 12 Brian's argument on appeal relies on N.C. Gen. Stat. §§ 7B-2503 and 7B-2505, addressing, respectively, dispositional alternatives for undisciplined juveniles and violation of protective supervisions by undisciplined juveniles. Though these statutes may have controlled the initial juvenile petition alleging that Brian was undisciplined, they ceased to control the moment Brian acted in violation of the trial court's disposition order requiring him to attend school regularly and do not take into consideration the trial court's multiple contempt warnings. *See In re Walker*, 282 N.C. 28, 38, 191 S.E.2d 702, 709 (1972) ("The fact that a child initially has been found to be undisciplined and placed on probation is merely incidental to a later petition and motion alleging delinquency based on violation of the terms of probation.").

¶ 13 Under a plain reading of N.C. Gen. Stat. §§ 7B-1501 and 5A-31, it is clear that fifteen-year-old Brian committed indirect contempt when he violated his disposition order by failing to attend school regularly, an action which was done outside of the direct presence of the trial court. N.C. Gen. Stat. §§ 5A-31, 7B-1501. Under N.C. Gen. Stat. § 5A-33, it was proper for the trial court to find Brian delinquent as a result of such contempt, as a juvenile's indirect contempt may be "adjudged and sanctioned *only* pursuant to the procedures in Subchapter II of Chapter 7B of the General Statutes[,]" which contains N.C. Gen. Stat. § 7B-1501. N.C. Gen. Stat. § 5A-33 (emphasis added). Furthermore, Brian was put on notice on multiple occasions—specifically, in the adjudication order, the second order, and the disposition order—that such failure on his part would result in his being held in contempt.

¶ 14 Accordingly, the trial court acted in accordance with controlling legislature and did not err by denying Brian's motion to dismiss.

III. Conclusion

¶ 15 For the foregoing reasons, we conclude that the trial court did not err by denying Brian's motion to dismiss.

AFFIRMED.

Chief Judge STROUD and Judge COLLINS concur.

IN THE MATTER OF THE PROPOSED FORECLOSURE OF A CLAIM OF LIEN FILED ON CALMORE GEORGE AND HYGIENA JENNIFER GEORGE BY THE CROSSINGS COMMUNITY ASSOCIATION, INC. DATED AUGUST 22, 2016, RECORDED IN DOCKET NO. 16-M-6465 IN THE OFFICE OF THE CLERK OF COURT OF SUPERIOR COURT FOR MECKLENBURG COUNTY REGISTRY BY SELLERS, AYERS, DORTCH & LYONS, P.A. TRUSTEE

No. COA22-33

Filed 6 September 2022

1. Attorney Fees—motion to set aside foreclosure sale of home—to collect homeowner's association fees—Planned Community Act

In a case where a homeowner's association sold petitioners' home in a foreclosure sale to collect petitioners' unpaid association fees, after which the trial court granted petitioners' motion under Civil Procedure Rule 60(c) to set aside the sale, the court erred in denying petitioners' subsequent request for attorney fees where petitioners qualified as the "prevailing party" in a "civil action relating to the collection of assessments" for purposes of the Planned Community Act.

2. Damages and Remedies—restitution—voided foreclosure sale of home—damage to home—ejection-related expenses

In a case where a homeowner's association sold petitioners' home in a foreclosure sale to collect petitioners' unpaid association fees, after which the trial court granted petitioners' motion under Civil Procedure Rule 60(c) to set aside the sale, the court abused its discretion in declining to award petitioners any restitution after their home had been partially demolished while in the buyer's possession and where plaintiffs were subjected to a variety of expenses following their ejection from the home.

3. Damages and Remedies—restitution—voided foreclosure sale of home—buyer—unclean hands—unjust enrichment

After the trial court granted petitioners' motion under Civil Procedure Rule 60(c) to set aside the foreclosure sale of their home for lack of proper notice, the court did not abuse its discretion in declining to award restitution to the buyer for the purchase price of the home. Specifically, the buyer was barred from recovering under the doctrine of unclean hands where the record showed the buyer knew about the defective notice of the sale, proceeded to buy the home for very little money, refused to allow petitioners to repurchase the home for the auction price, and then sold the home to a third party at a much higher price. Further, the buyer's unclean hands precluded it from recovering on a theory that the homeowner's association that sold petitioners' home was unjustly enriched by the voided sale.

Appeal by Petitioners, and cross-appeal by Intervenors, from order entered 20 August 2021 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 August 2022.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for Petitioners-Appellants Calmore and Hygiena George.

Sellers, Ayers, Dortch, & Lyons, P.A., by Michelle Massingale Dressler, for Respondent-Appellee/Cross-Appellee The Crossings Community Association.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, for Intervenor-Appellee/Cross-Appellant KPC Holdings.

DeVore, Acton & Stafford, P.A., by Derek P. Adler, for Intervenor-Appellee/Cross-Appellant National Indemnity Group.

GRIFFIN, Judge.

¶ 1 Petitioners Calmore George and Hygiena Jennifer George appeal from an order denying their request for restitution and attorneys' fees. The Georges assert that the trial court erred in finding that they did not qualify for recovery of attorneys' fees under N.C. Gen. Stat. § 47F-3-116, and further argue that the trial court abused its discretion in failing to award restitution under N.C. Gen. Stat. § 1-108. Intervenor KPC Holdings has filed a cross-appeal asserting that the trial court abused its discretion

in failing to award restitution for the cost of the invalidated foreclosure sale. We reverse the decision of the trial court which withheld attorneys' fees and restitution from the Georges. As to the cross-appeal, we affirm the trial court's decision not to award restitution to KPC.

I. Factual and Procedural History

¶ 2 This case is an appeal following remand of *In re George*, 377 N.C. 129, 2021-NCSC-35. A full statement of the facts from this case can be found in the prior appeal; however, "we limit our discussion in this opinion to the facts and procedural history relevant to the issues currently before us." *Premier, Inc. v. Peterson*, 255 N.C. App. 347, 348, 804 S.E.2d 599, 601 (2017).

¶ 3 The Georges owned a home in Charlotte located in the Crossings Community subdivision. On 22 August 2016, the Crossings Community Association, Inc. (the "Association"), filed a claim of lien in the amount of $204.75 against the Georges' property—the amount of unpaid homeowner's association fees.

¶ 4 On 11 October 2016, a notice of hearing was filed which stated that the Association intended to foreclose on the property to collect the unpaid fees. On 12 October 2016, Deputy Sheriff Shakita Barnes of the Mecklenburg County Sheriff's Office mistakenly served personal notice of foreclosure upon the Georges' daughter, Jeanine George.

¶ 5 The nonjudicial foreclosure sale was subsequently initiated, and on 12 January 2017, KPC purchased the property at auction for $2,650.22. On 21 March 2017, KPC conveyed the property to National Indemnity Group, with the sale secured by a promissory note and deed of trust in the amount of $150,000.

¶ 6 On 18 April 2017, the Georges filed a motion to set aside the foreclosure sale and the subsequent transactions pursuant to N.C. R. Civ. P. 60(c), claiming that notice had not been properly served. On 17 July 2017, National Indemnity was introduced as an intervening party by the trial court.

¶ 7 On 9 August 2017, the trial court entered an order concluding that the Georges had not been properly served with notice of foreclosure and invalidating the foreclosure sale and the subsequent conveyances for lack of personal jurisdiction.

¶ 8 On 3 November 2017, KPC and National Indemnity filed a motion for relief from judgment pursuant to N.C. R. Civ. P. 60(b)(6), requesting that the trial court vacate the previous order on the grounds that they

were good faith purchasers for value and that the Georges had received constitutionally sufficient service. On 15 March 2018, the trial court entered an order concluding that neither KPC nor National Indemnity qualified as a good faith purchaser for value for purposes of N.C. Gen. Stat. § 1-108 and denying their motion for relief.

¶ 9 On appeal, the Supreme Court of North Carolina determined that "the trial court did not abuse its discretion in determining that KPC Holdings and National Indemnity were not entitled to good faith purchaser for value status." *In re George*, 2021-NCSC-35, ¶ 29. The trial court "had a rational basis for concluding that KPC Holdings paid a grossly inadequate price to purchase the property from the trustee and . . . had ample reason to question the sufficiency of the notice of the pendency of the foreclosure proceeding." *Id.* ¶ 32. Further, the Court affirmed the trial court's determination that "proper service of process had not been effectuated." *Id.* "[G]iven [the trial court's] decision to invalidate the results of the foreclosure proceeding and the resulting property transfers[,]" this case was subsequently remanded "for consideration of the issue of whether an award of restitution as authorized by [N.C. Gen. Stat. § 1-108] would be appropriate." *Id.*

¶ 10 The Georges seek to recover restitution after their home had been partially demolished while in the possession of Respondent and Intervenors. During the time that the Georges were excluded from the property, demolition work had begun on the home and "all the appliances" and "every bit of flooring" had been removed. The Georges also request restitution for other expenses, including an outstanding property tax liability of $11,931.55, alternative living expenses incurred while displaced from the home, and lost rental income. The Georges further seek to recover attorneys' fees related to the Rule 60(c) motion which set aside the foreclosure. On cross-appeal, KPC seeks to recover the $2,650.22 payment made to the Association to purchase the home at auction.

¶ 11 On 20 August 2021, the trial court entered an order denying all motions for attorneys' fees and restitution. The Georges and KPC each timely filed notice of appeal from the order.

II. Analysis

A. Attorneys' Fees

¶ 12 **[1]** We first consider whether the trial court erred in failing to award any attorneys' fees to the Georges under N.C. Gen. Stat. § 47F-3-116. The Georges assert that they are entitled to an award of reasonable

attorneys' fees because they are the "prevailing party" in a "civil action relating to the collection of assessments." We agree.

¶ 13 The North Carolina Planned Community Act ("PCA") provides in part that "[a]ny judgment, decree, or order in any judicial foreclosure or civil action relating to the collection of assessments *shall* include an award of costs and reasonable attorneys' fees for the prevailing party[.]" N.C. Gen. Stat. § 47F-3-116(g) (2021) (emphasis added). "We review a trial court's decision whether to award mandatory attorney's fees *de novo*." *Willow Bend Homeowners Ass'n, Inc. v. Robinson*, 192 N.C. App. 405, 418, 665 S.E.2d 570, 573 (2008).

¶ 14 "[T]he action created by N.C.G.S. § 47F-3-116 is one in which a homeowners' association forecloses on a lien created under N.C.G.S. § 47F-3-116(a) for unpaid assessments." *Id.* Prior to 2013, N.C. Gen. Stat. § 47F-3-116(e) required an award of attorneys' fees for "[a] judgment, decree, or order in any action brought under this section." N.C. Gen. Stat. § 47F-3-116(e) (2011). In 2013, the statute was amended with broader and more inclusive language, now requiring an award of attorneys' fees in "*any* judgment, decree or order in *any* judicial foreclosure *or civil action relating to the collection of assessments*." N.C. Gen. Stat. § 47F-3-116(g) (2013) (emphasis added).

¶ 15 Here, in order for the Georges to recover under N.C. Gen. Stat. § 47F-3-116(g), they must establish: (1) that they were the prevailing party, and (2) that they prevailed in a civil action relating to the collection of assessments. *Id.*

¶ 16 The Georges have successfully challenged the order permitting foreclosure of the home. In granting the Georges' Rule 60 motion, the trial court set aside the foreclosure sale and the subsequent transfers of the deed for lack of proper service, thereby granting the relief sought by the Georges. *In re George*, 2021-NCSC-35, ¶ 32 ("[W]e hold . . . the Court of Appeals correctly affirmed the trial court's determination that proper service of process had not been effectuated upon Mr. George."). Accordingly, we hold that the Georges are a "prevailing party" under N.C. Gen. Stat. § 47F-3-116(g). We are confident that such a result fits within the broad reach of "prevailing" in "*any* judgment, decree, or order." N.C. Gen. Stat. § 47F-3-116(g) (emphasis added). Respondent's contention that the Georges must "prevail" in the underlying foreclosure action is an impermissibly narrow reading of the statute.

¶ 17 Further, it is clear to this Court that the Georges prevailed in a "civil action relating to the collection of assessments." *Id.* "The action created by [N.C. Gen. Stat. §] 47F-3-116 is one in which a homeowners'

association forecloses on a lien . . . for unpaid assessments," and the Rule 60 motion was necessary for the Georges to recover where the Association had foreclosed upon the home to collect the unpaid dues. *See Willow Bend*, 192 N.C. App. at 418, 665 S.E.2d at 578.

¶ 18 The broad nature of the statute's language convinces this Court that the Rule 60 motion is included within the meaning of "*any* . . . civil action *relating* to the collection of assessments." Denying recovery to the Georges here would run counter to the expansive protections afforded by this statute to homeowners, who in this case would be otherwise burdened with the cost of the Association's failure to notify. As such, the trial court erred in failing to award reasonable attorneys' fees as mandated by N.C. Gen. Stat. § 47F-3-116.

B. Restitution for the Georges

¶ 19 **[2]** We now consider whether the trial court abused its discretion in failing to award restitution to the Georges under N.C. Gen. Stat. § 1-108. The Georges assert that they are entitled to at least some restitution after their home was partially demolished while in the possession of Respondents and Intervenors, and they seek to recover for a variety of expenses that resulted from their ejection from the property. We agree.

¶ 20 N.C. R. Civ. P. 60(b) "allows a party to obtain relief from a final judgment or order . . . [where] the judgment is void or any other reason justifying relief from the operation of the judgment exists." *In re George*, 2021-NCSC-35, ¶ 23 (quoting N.C. R. Civ. P. 60(b)) (internal quotation marks omitted). The authority granted to a trial judge "is equitable in nature . . . [and] appellate review is limited to determining whether the court abused its discretion." *Id.* (citations omitted). An abuse of discretion occurs when the trial court's determinations are "manifestly unsupported by reason." *Id.* (citation omitted).

¶ 21 "If a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs." N.C. Gen. Stat. § 1-108 (2021).

¶ 22 This Court has found that a property owner may be entitled to restitution even where she has failed to set aside the deed pursuant to N.C. R. Civ. P. 60. *In re Ackah*, 255 N.C. App. 284, 293–94, 804 S.E.2d 794, 800 (2017) ("On remand, the superior court may enter an order not inconsistent with this opinion, which may include, for example, relief for Ms. Ackah in the form of restitution from the HOA, as authorized by N.C. Gen. Stat. § 1-108."); *see also County of Mecklenburg v. Ryan*, 281 N.C. App. 646, 2022-NCCOA-90, ¶ 42 (2022).

¶ 23 Here, we hold that the trial court abused its discretion in failing to award *any* restitution for the damages suffered by the Georges. While *In re Ackah* stands for the proposition that an owner who fails to recover her property may be entitled to restitution, it does not expressly limit the award of restitution to instances in which the property is lost. *See In re Ackah*, 255 N.C. App. at 293–94, 804 S.E.2d at 800.

¶ 24 The recovery of a partially demolished home is a strikingly insufficient remedy for the extensive damages that the Georges have suffered from the defective foreclosure proceeding and Respondent's and Intervenors' actions in bad faith. Refusal to award any form of restitution here is "manifestly unsupported by reason," and is thus an abuse of the trial court's discretion.

C. Cross-Appeal: Restitution for KPC

¶ 25 **[3]** KPC asserts that the trial court abused its discretion in denying restitution for the $2,650.22 purchase price of the voided foreclosure sale. KPC argues that despite its failure to qualify as a good faith purchaser for value entitled to the protection of N.C. Gen. Stat. § 1-108, it should still be able to recover the purchase price of the home. We disagree.

¶ 26 Our Supreme Court has held that "[o]ne who seeks equity must do equity." *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998). "When equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion. This discretion is normally invoked by considering an equitable defense, such as unclean hands or laches, or by balancing equities, hardships, and the interests of the public[.]" *Bartlett Milling Co., L.P. v. Walnut Grove Auction and Realty Co., Inc.*, 192 N.C. App. 74, 92–93, 665 S.E.2d 478, 492 (2008) (citations and quotation marks omitted).

¶ 27 "The doctrine of clean hands is an equitable defense which prevents recovery where the party seeking relief comes into court with unclean hands." *Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985). "[T]his Court has stated the clean hands doctrine denies equitable relief only to litigants who have acted in bad faith, or whose conduct has been dishonest, deceitful, fraudulent, unfair, or overreaching in regard to the transaction in controversy." *Brissett v. First Mount Vernon Indus. Loan Ass'n*, 233 N.C. App. 241, 255, 756 S.E.2d 798, 810 (2014) (citation and internal quotation marks omitted).

¶ 28 In the prior appeal, our Supreme Court affirmed that "[there is] a rational basis for concluding that KPC Holdings paid a grossly inadequate price to purchase the property from the trustee and . . . had ample reason

to question the sufficiency of the notice of the pendency of the foreclosure proceeding[.]" *In re George*, 2021-NCSC-35, ¶ 32. More specifically, the record reveals that KPC was made aware of the notice defect after discussions with the Georges' counsel. After KPC was informed of the potential defect, it declined to allow the Georges to repurchase the property for the auction price. KPC instead demanded that the Georges pay $150,000 to have the property returned and "almost immediately . . . [deeded the property] to National Indemnity Group for $150,000."

¶ 29 Though the trial court lacked a rational basis for withholding restitution to the Georges, we do hold that the trial court acted within its discretion in denying restitution to KPC. Such an abuse of discretion would occur "only when the trial court's determinations are manifestly unsupported by reason." *In re George*, 2021-NCSC-35, ¶ 23 (internal quotation marks omitted). In this Court's view, it is reasonable for the trial court to have determined that KPC's actions in bad faith bar its recovery.

¶ 30 Nor are we convinced that KPC should recover on a theory of unjust enrichment. "The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated." *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761 (1984). However, it is fundamental that "[o]ne who seeks equity must do equity." *Creech*, 347 N.C. at 529, 495 S.E.2d at 913. KPC's unclean hands provided the trial court with a rational basis for declining to disgorge the Association of this benefit.

¶ 31 Therefore, we hold that the trial court acted within its discretion in denying restitution to KPC for the sale price of the home.

III. Conclusion

¶ 32 For the reasons stated herein, the decision of the trial court is affirmed, in part, and reversed, in part, and this case is remanded for consideration of the issue of what constitutes a reasonable award of attorneys' fees and restitution for the Georges.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ZACHARY and WOOD concur.

IN RE EST. OF GERRINGER

[285 N.C. App. 296, 2022-NCCOA-592]

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

No. COA21-556-2

Filed 6 September 2022

Estates—elective share—statute amended during appeal to superior court—remand for application of new statute

In an estate proceeding, where the portion of the clerk of court's order awarding an elective share of the estate to decedent's wife was appealed to the superior court, the superior court erred by sua sponte raising the issue of whether the clerk had used the correct values in its calculation and issuing a new order awarding a different elective share. Because a new version of the applicable statute went into effect while the matter was on appeal to the superior court (and the estate proceeding was not final), the clerk's order was no longer based on good law and the superior court should have remanded the matter to the clerk for application of the amended statute.

Appeal by Petitioner from order entered 21 April 2021 by Judge Lora C. Cubbage in Guilford County Superior Court. Originally heard in the Court of Appeals 23 March 2022. An opinion vacating the superior court's order and remanding to the superior court with instructions to remand to the clerk of court for further proceedings was filed by this Court on 21 June 2022. Petition for Rehearing was filed by Petitioner on 26 July 2022, granted on 3 August 2022, and heard without additional briefs or oral argument. This opinion supersedes the previous opinion filed on 21 June 2022.

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 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

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).

> 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 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).

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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.

¶ 21 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

¶ 22 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.

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 M.T.

[285 N.C. App. 305, 2022-NCCOA-593]

IN THE MATTER OF M.T. AND K.T.

No. COA21-755

Filed 6 September 2022

1. Child Abuse, Dependency, and Neglect—permanency planning—cessation of reunification efforts—non-accidental injuries to one child—lack of progress on case plan

The trial court did not abuse its discretion by directing DSS to cease reunification efforts between a mother and her two children where the children had been removed from the home as a result of unexplained non-accidental injuries to one of the children when he was less than six months old, including multiple fractures, other internal injuries, and retinal hemorrhages in both eyes. Sufficient competent evidence supported the trial court's unchallenged findings of fact addressing each of the factors in N.C.G.S. § 7B-906.2(d), and the court made a reasoned decision based on the mother's lack of an adequate explanation for all of the child's injuries and on the mother's incomplete progress on her case plan.

2. Termination of Parental Rights—grounds for termination—abuse or neglect—non-accidental injuries to one child—likelihood of future neglect

The trial court properly terminated a mother's parental rights to her two children on the grounds of abuse (one child) and neglect (both children) where the children had been removed from the home due to unexplained non-accidental injuries to one of the children when he was less than six months old, including multiple fractures, other internal injuries, and retinal hemorrhages in both eyes. Competent evidence supported the court's findings of fact, which in turn supported its conclusions of law that there would be a repetition of neglect if the children were returned to the mother's care based on the mother's lack of a reasonable explanation for all of her son's injuries and on her lack of progress in addressing the issues that led to the children's removal.

3. Termination of Parental Rights—disposition phase—parent's expert witness—exclusion of testimony

In the disposition phase of a termination of parental rights proceeding, the trial court did not abuse its discretion by excluding testimony from one of the mother's expert witnesses where it made a reasoned decision that the expert's opinion would not be helpful or

relevant because she lacked information about the mother or the specific facts of the case, she did not know how social services operated in North Carolina, and her data on families and child welfare was not based on research from North Carolina.

Appeal by respondent-mother from orders entered on or about 13 October 2020 and 5 July 2021 by Judge Shamieka L. Rhinehart in District Court, Durham County. Heard in the Court of Appeals 9 August 2022.

Miller & Audino, LLP, by Jeffrey L. Miller, and Elizabeth Simpson, for appellant-respondent mother.

Michelle FormyDuval Lynch and Matthew D. Wunsche, for appellee guardian ad litem.

The Law Office of Derrick J. Hensley, PLLC, by Derrick J. Hensley, and Elizabeth P. Kennedy-Gurnee for appellee-petitioner Durham County Department of Social Services.

Jaclyn Maffetore, for Amicus Curiae The ACLU of North Carolina Legal Foundation.

Kathleen Lockwood and Nisha Williams, for Amicus Curiae North Carolina Coalition Against Domestic Violence.

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STROUD, Chief Judge.

¶ 1 All cases involving abuse, neglect, and dependency of children or termination of parental rights arising from physical abuse of a baby are tragic; cases arising from serious and life-threatening non-accidental injuries to a baby are perhaps the most challenging and tragic of all. Here, as in most cases involving life-threatening non-accidental injuries to a baby, there is no direct evidence of exactly what happened. A baby cannot tell anyone what happened, and no one, other than someone who

hurt the baby, saw what happened. Trial courts must often make these difficult and momentous decisions based upon circumstantial evidence and evaluation of credibility and weight of the evidence. In this case, the trial court carefully considered evidence from many witnesses and hundreds of pages of exhibits and reports, including medical records, presented at hearings held over many days. The trial court entered several orders over four years and ultimately entered an order of termination of parental rights, setting out the facts about the abuse, the parents, and the children in thoughtful and careful detail. The trial court also painstakingly considered the best interests of the children before deciding that under the law, Mother's parental rights must be terminated.

¶ 2 In addition to the difficult issues regarding the abuse of the baby, we note several organizations have filed amicus, or "friend of the court," briefs to present arguments regarding larger issues they contend this case presents. Those briefs address issues including: the "disproportionate and negative impact of the child welfare system on marginalized racial groups;" the "role of race in the proceeding;" the concern that "responses to domestic violence in the child welfare system" may create greater trauma for the children; and the effects of "wealth-based pre-trial incarceration" on families. We do not discount any of the concerns presented by Amici, but as an appellate court, we can address only the issues presented by the facts of this case and the law as established by the General Assembly and prior caselaw. The trial court's job, ultimately, is to make hard decisions based upon the evidence presented, with the best interests of these two young children, Mark and Ken,[1] as its primary consideration. And our job, as an appellate court, is to determine if the trial court did that job correctly, in accord with the law. Because the trial court did that difficult job correctly, we affirm the trial court's order.

¶ 3 Respondent Mother appeals from the trial court's order ceasing reunification in an abuse, neglect, and dependency proceeding and from its order terminating parental rights as to both her children Ken and Mark.[2] After granting Mother's Petition for Writ of Certiorari ("PWC") to review the trial court's order ceasing reunification, we determine the trial court did not abuse its discretion because it made a reasoned decision based on its Findings regarding Mother's progress on her case plan and the still unexplained nature of some of Ken's injuries and conditions that led

1. We use stipulated pseudonyms to protect the identity of the minor children.

2. The same orders ceased reunification efforts with Father and terminated his parental rights, but Father does not appeal.

to the abuse and neglect proceeding. Because competent evidence supports the trial court's Findings of Fact and those Findings support the trial court's Conclusions of Law, the trial court properly adjudicated termination of Mother's parental rights on the grounds of neglect as to both Mark and Ken and on the grounds of abuse as to Ken pursuant to North Carolina General Statute § 7B-1111(a)(1) (2019). Because we conclude the abuse and neglect grounds were proper, we do not address the other ground for termination, willful failure to make reasonable progress under North Carolina General Statute § 7B-1111(a)(2). Finally, because the trial court made a reasoned decision in excluding testimony from one of Mother's experts at the dispositional phase of the termination proceeding, the trial court did not err on those grounds. We therefore affirm.

I. Background

¶ 4 On or about 5 January 2018, Durham County Department of Social Services ("DSS") filed a juvenile petition alleging Ken and Mark were neglected and dependent and that Ken was abused. The petition arose from a report of medical neglect in early December 2017 after Ken, who at that time was under six months old and had only been home from the hospital a short time following his premature birth, was taken to the emergency room and diagnosed with "a head bleed, seizures and possible blood loss in the abdomen." At the time, Ken's "prognosis was unclear." According to the petition, further testing revealed Ken had "skull fractures, rib fractures in various stages of healing and retinal hemorrhages in both eyes" that "[a]ccording to the medical team" were "significant head injuries from non-accidental trauma consistent with physical abuse." As a result of those injuries, at the time the petition was filed, Ken still "require[d] twenty-four hour care, three medications, numerous follow-up medical appointment[s,] . . . therapies," and "monitoring for a blood clot in his leg." Finally, the petition noted while the perpetrator of the abuse had not been identified "[t]he parents were the sole care providers of the children and could not offer any explanation" for Ken's injuries such that his "risk of further injury . . . [was] too great."

¶ 5 While the petition noted Mark had "no special needs or identified injuries," it alleged he was neglected because he "live[d] in an injurious environment due to the abuse and neglect of his sibling" Ken. As a result, DSS sought nonsecure custody of both children, which the trial court granted the same day.

¶ 6 On 25 June 2018, following a hearing held the same day, the trial court entered an order adjudicating Ken abused, dependent, and neglected and adjudicating Mark neglected based on stipulated Findings

of Fact made with clear and convincing evidence. The trial court found Ken had been born prematurely, was released from the hospital in early November 2017 and twice had medical appointments in November where no one noted concerns for unexplained injuries. The trial court also recounted the parents taking Ken to the ER for "changed behavior" including "lack of crying, and voiding for two days, and foot jumping, and twitching, cranky and decreased eating for one day." The Findings then expanded upon the extent and "life-threatening" nature of Ken's injuries and conditions when presented at the hospital on 3 December 2017 that led to the DSS report:

> 12. The Emergency Department sought a CANMEC [a child abuse evaluation] consult for initial concerns for medical neglect due to the delay in seeking treatment, concern for malnutrition, and possible head trauma. The child, [Ken], received immediate critical care treatment for imminent or life-threatening deterioration of the following conditions: endocrine crisis, metabolic crisis, shock, trauma, central nervous system failure or compromise and respiratory failure for status epilepticus, profound anemia and profound hypoglycemia. His body temperature was 94 degrees. He was intubated. He was admitted to the hospital where he remained until December 30, 2017.

The trial court also found diagnostic testing revealed Ken's additional injuries listed in DSS's initial petition as well as "brain injuries due to trauma and oxygen loss." The trial court further found, consistent with the petition, Ken required twenty-four hour care and multiple medications with "[t]he long term consequences of his injuries . . . unknown."

¶ 7 After recounting Ken's injuries, the trial court made Findings related to possible causes. Ken's medical providers ruled out "genetic or medical causes for the injuries" and determined they were "consistent with non-accidental or inflicted trauma on one or multiple occasions with at least the occurring [sic] between" the period when Ken had his last medical appointment and when he was taken to the hospital. A child abuse expert not affiliated with the hospital reviewed and "concur[red]" with the findings Ken "clear[ly]" suffered abuse and "probabl[y] experienced neglect and medical neglect." The trial court found—again in a Finding stipulated to by both parents—during this period of time when Ken's injuries were caused, "[t]he parents were the sole care providers," and, despite being "informed of the medical findings on several occasions," they "could not or would not offer any explanation for the child's injuries."

Specifically, the parents "both den[ied] inflicting any non-accidental trauma and [were] unaware of any event that may have caused the injuries alleged," but they "reviewed the medical evidence" and consented to the Findings to show "their willingness to cooperate with" DSS and the court.

¶ 8 Beyond the Findings on Ken's injuries and potential causes, the trial court noted Mark "has no special needs or identified injuries" although "due to back and forth over consent from the parents" a diagnostic test for injuries was not "timely . . . completed." Following Ken's admission to the hospital and DSS's subsequent involvement, Mark was placed with his maternal grandparents, but that placement only lasted about a month before Father's "disruptive behavior" and the grandmother's health made it "no longer viable." As such, no relative placement was available for the children.

¶ 9 Based on these Findings, the trial court concluded Ken was abused, neglected, and dependent and Mark was neglected. The trial court then entered an order adjudicating the same.

¶ 10 After a hearing that immediately followed the abuse, neglect, and dependency adjudication, the trial court entered a disposition order on 28 August 2018. After incorporating its adjudication order Findings, the trial court noted how still "[n]o one ha[d] come forth and provided an explanation as to how [Ken] was injured." The trial court also found Mother did not believe the grandparents had injured Ken when they had cared for him previously. The parents told the social worker they believed Ken was injured while at the hospital following his premature birth, but Mother had taken Ken for doctor appointments after his initial discharge and "no medical concerns" were noted either time. The trial court further found the parents' belief the hospital caused the injuries was "unreasonable" and "perplex[ing]" since two separate experts in child abuse, including an expert retained by the parents for a second opinion, opined the injuries were "non-accidental" and sustained during a period of time when the parents were sole caretakers.

¶ 11 In its remaining Findings in the disposition order, the trial court addressed: Mother's care for Ken in the relevant time period, parents' "pattern of refusing medical treatment for both" Mark and Ken, the lack of viability of potential relative placements, a text message Father sent while high saying "When I'm not high I'm a very negative, abusive and ugly person," parents' employment and engagement with services, and DSS's recommendations and reasonable efforts. The trial court then made ultimate Findings that it was contrary to the children's best interests to be

returned home because of (1) the lack of explanation as to how Ken sustained his multiple injuries and (2) the risk from "[t]he parents' pattern of refusing medical treatment."

¶ 12 Based on these Findings, the trial court concluded DSS made reasonable efforts; it was in the children's best interests that DSS have legal custody and placement authority; and the parents should engage in services to remediate the cause of the adjudication and have only supervised visitation. The trial court then granted DSS legal custody and placement authority with supervised visitation for the parents; DSS also would "continue to explore potential kinship placements and continue to make reasonable efforts to reunify the family." The trial court also ordered both Mother and Father to engage in the following services: "[a)] submit to a comprehensive Parenting Capacity Assessment, follow the recommendations of the assessment; [b)] complete a parenting class and demonstrate that the children will be physically safe in [their] care; [c)] demonstrate during visitation what is learned in parenting classes; [d)] submit to random drug screens." As part of these services, the trial court ordered their "therapy is not to be solely about their feelings related to the loss of the children. The Court has questions about what happened to [Ken] which should be explored in therapy."

¶ 13 Over the following two years, the trial court held three review and permanency planning hearings that produced three orders. We only recount the relevant portions from the first two orders because they are not at issue in this appeal. In the final of the three permanency planning orders, the trial court ceased reunification efforts. Since Mother challenges the trial court's decision to cease reunification efforts in her appeal, we review that order in more detail.

¶ 14 The trial court entered its first review and permanency planning order on 12 April 2019 following hearings on 19 February and 21 March of that year. In relevant part, the trial court first found both parents had been in jail since November 2018 "on charges arising from the injuries [Ken] received" and had "been unable to post bond or to engage in services." The trial court also made Findings about a new explanation Mother gave for Ken's injuries. Specifically, Mother testified her stepfather had abused her and he had access to Ken. The trial court rejected this explanation, finding the stepfather causing Ken's injuries was "contrary to what [Mother] stipulated to" in the adjudication order and contrary "to the established window of the occurrence of the injuries." The trial court also "question[ed]" why Mother had previously suggested her stepfather and mother (i.e. the maternal grandparents) to DSS as people who could take the children pursuant to a safety plan. As a result,

the trial court expressed its "continue[d] . . . concern[] that there is no plausible explanation for the injuries" because the parents were the only caretakers during the time period the court had found the injury was sustained. The trial court then found the children could not be returned to either parent "as there [was] still no credible explanation for how [Ken] was injured and the parents remain[ed] incarcerated."

¶ 15 After making Conclusions of Law about DSS's reasonable efforts and the children's best interests, the trial court ordered DSS would retain custody and placement authority and the parents would have visitation with Mark "as long as it [was] not contraindicated by his behavior" and no visitation with Ken while incarcerated, with supervised visitation to resume if they were released from jail. The trial court set the permanent plan as adoption with a secondary plan of reunification and tertiary plan of guardianship. The trial court finally ordered the parents engage in the same services as in its initial disposition order with DSS to "determine what, if any, services can be accessed in the jail and make referrals, if possible."

¶ 16 The trial court entered its second review and permanency planning order on 22 November 2019 following a hearing on 11 September 2019. In relevant part, the trial court first found the parents "were recently released" from jail on the charges related to Ken's injuries. Specifically, Mother had been released in July 2019. The trial court expressed its "continue[d] . . . concern[] that there is no plausible explanation for [Ken's] injuries" and that neither Mother nor Father knew "how and why [Ken] sustained his injuries." Finally, the trial court found the parents had stopped visiting with Mark while incarcerated because they did not want him "to see them behind the glass." In this regard, the trial court also noted Mark "act[ed] out in daycare" following a visit with Mother at the jail. His "concerning and disruptive . . . behavior" continued following visits after Mother's release from jail.

¶ 17 After entering Conclusions of Law on DSS's reasonable efforts and the best interests of the children, the trial court ordered DSS would continue to have legal custody and placement authority. The trial court also suspended visitation for both parents and would reevaluate visitation based on "medical and mental health records . . . as well as updated information as would normally be available in [a] full permanency planning review hearing." Finally, "[a]ny and all provisions of the previous order not inconsistent with" the instant order would remain in effect, including that the parents engage in the previously-ordered services.

¶ 18 On or about 13 October 2020, the trial court filed the third and final permanency planning review order following hearings held on

10 February and 6–7 July 2020; the hearing was not completed until July 2020 because of an extended adjournment due to the COVID-19 pandemic.[3] To separate this order from the prior permanency planning orders, as relevant to Mother's appeal of this order, we refer to this order as the October 2020 Order.

¶ 19 In the October 2020 Order, the trial court made numerous Findings of Fact based on clear, cogent, and convincing evidence. First, the trial court recounted the evidence and testimony it reviewed, DSS's "reasonable efforts" at relative placement, and the current well-being of the two children with their current placement determining it was in their best interest to remain in that placement. The trial court then addressed the history of the children's adjudication, incorporating and "re-iterat[ing]" some Findings from that order. Further, the trial court made updated Findings about the still-pending felony charges both parents faced as a result of Ken's injuries, Mother's release from jail, and how Mother believed her criminal charges were in the "process of being deferred." As part of this summary of pending charges, the trial court found Father had a pending assault by strangulation charge, in which Mother was the victim. Related to that incident, the trial court made Findings on the history of domestic violence Father perpetrated against Mother including that Mother "desire[d] to file a permanent domestic protective order but" had not done so and that Father had not threatened or physically abused Mother prior to the children coming into DSS care.

¶ 20 As part of recounting the case history, the trial court reiterated the four services Mother was ordered to undertake:

> a) submit to a comprehensive Parenting Capacity Assessment, follow the recommendations of the assessment;
>
> b) complete a parenting class and demonstrate that the children will be physically safe in her care;
>
> c) demonstrate during visitation what is learned in parenting classes;
>
> d) submit to random drug screens

3. Orders of the Chief Justice of the North Carolina Supreme Court postponed most in-person court proceedings between 13 March and 1 June 2020. *See* Order of the Chief Justice Emergency Directives 1 to 2 (13 Mar. 2020) (postponing for 30 days); Order of the Chief Justice Emergency Directives 1 to 7 Postponing Court Proceedings Until June 1 (2 April 2020).

It then made a Finding about Mother's progress on the services explaining Mother completed some parenting programs, tested negative on a random drug screen, and completed a parental capacity assessment. Mother had a no-contact order with Ken, and the trial court suspended her visitation in the previous order. Later, the trial court found the parenting class's "safety information was limited to childproofing the home and discussion of child health as in what to do if the child is sick or injured." The trial court also found the parental capacity evaluation failed to adequately address a referred question relating to the continued lack of explanation for Ken's injuries.

¶ 21 The trial court made extensive findings regarding the continued lack of explanation for Ken's injuries. First, the trial court noted an email from Father to the social worker in May 2020 in which Father said "When [Ken] came home I actually dropped him on accident. He landed very hard on the floor and immediately started seizing. I was so scared I didn't know what to do. [Mother] wasn't home. I had been smoking and drinking . . . and yea, that's what happened." (Ellipses in original.) The trial court then made findings about how Mother had learned about the email and noted she "believes" Father caused Ken's injuries but "did not ask any further questions" such that "the court observed no curiosity from the [M]other to find out what happened or more about the [F]ather's disclosure." The trial court also found the social worker told the original hospital evaluators about Father's statement and they did not change their original opinion of abuse because "this new information does not explain all of [Ken]'s symptoms and injuries."

¶ 22 As a result of this evidence and the trial court's credibility determination about Father's email, the court made numerous Findings on its continuing concerns about the lack of explanation for Ken's injuries and conditions. For example, the trial court explained none of the versions of events presented to it "explain [Ken]'s poor state of health at the time he was presented . . . to include being malnourished and having skull fractures, retinal hemorrhages and other fractures of differing ages."

¶ 23 In its final relevant Findings, the trial court determined reunification efforts "would clearly be unsuccessful and inconsistent with the minor children's health or safety" in part because of the continued lack of explanation of Ken's injuries and the varied explanations over time. The trial court also found DSS made reasonable efforts and visitation was not in the children's best interests.

¶ 24 Based on these Findings, the trial court concluded it was in the children's best interests for DSS to retain legal custody and placement

authority, visitation to be suspended, and Mother to complete the services previously ordered. It also concluded reunification efforts with Mother and Father "would be clearly unsuccessful and inconsistent with the minor children's health or safety" such that DSS was relieved of further reunification efforts and the primary permanent plan would be adoption with a secondary plan of guardianship. Finally, the court concluded it was "in the children's best interests that . . . DSS file a proceeding to terminate parental rights within sixty (60) days of this hearing." The court entered an order that aligned with its Conclusions of Law and specifically restated the services Mother needed to undertake to "correct the conditions" that led to the children's adjudication.

¶ 25 As ordered to by the later filed written order entered on or about 13 October 2020, DSS filed a "Motion and Petition for Termination of Parental Rights" on 13 July 2020. (Capitalization altered.) After recounting the past proceedings as laid out above, DSS alleged the following as grounds for terminating Mother's parental rights:

> a. The [M]other has abused and/or neglected the children, and the children are neglected and abused children within the meaning of G.S. 7B-101 (1) and (15). The children have been previously adjudicated neglected and/abused, have been previously neglected and/or abused, and there is a reasonable likelihood of neglect if they were returned to the [M]other.
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> b. The [M]other has willfully left the children in foster care for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made within twelve (12) months in correcting those conditions which led to the removal of the children.
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> c. The children have been placed in the custody of . . . DSS and the [M]other, for a continuous period of six (6) months next preceding the filing of the petition, has willfully failed for such period to pay a reasonable portion of the cost of care for the children although physically and financially able to do so.
>
> d. The [M]other has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted or voluntarily solicited to commit murder or voluntary manslaughter of the child, another child of the

> parent, or other child residing in the home; has committed felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home, or has committed murder or voluntary manslaughter of the other parent of the child.

Mother filed an answer 11 August 2020.

¶ 26 The trial court held hearings on the termination of parental rights in May 2021. It heard extensive testimony, over five days, during both the adjudication and disposition stages of the proceedings. As relevant to the issues on appeal, Mother called Dr. Jessica Pryce as a witness during the disposition phase; she was "tendered and accepted as an expert in child welfare policy and practice." According to her proffered report, Dr. Pryce sought to testify about racial disparity and disproportionality in child welfare systems, domestic violence and such systems, and evidence about the importance of avoiding family separation based upon research about the long term impact of foster care versus kin placement. During some foundational testimony, both DSS and the Guardian ad Litem ("GAL") objected to Dr. Pryce's testimony on grounds including lack of foundation and relevance. After extended voir dire and arguments from the parties on whether the expert should be allowed to testify, the trial court excluded the testimony because it was "irrelevant." Mother's counsel then submitted the expert's report as an offer of proof.

¶ 27 Following these hearings, on or about 5 July 2021, the trial court entered an order terminating parental rights. Within the order, the trial court included sections on both adjudication and disposition.

¶ 28 For the adjudication order, the trial court made Findings of Fact by clear, cogent, and convincing evidence. First, the trial court took judicial notice of its prior orders and made a number of Findings related to jurisdiction and procedural matters. It then recounted the original removal of Mark and Ken from their home, incorporating most of the Findings stipulated to in the abuse, neglect, and dependency adjudication order. The trial court further recounted its initial disposition order Findings as well as the four services it ordered Mother to undertake "to remediate or remedy behaviors or conditions which led or contributed to the children's adjudication or the Court's decision to remove custody of the children" from her. Lastly as to the pure procedural history, the trial court recounted relevant parts of its first two review and permanency planning orders including the parents' changing explanations, the

court's continued concern about the lack of explanation for Ken's injuries, and the need for services to redress that lack of explanation.

¶ 29 The trial court then made updated Findings on Mother's compliance with the services it had previously ordered. After incorporating its Findings from the October 2020 Order, the trial court determined "there [was] no change of circumstances" as to the parental capacity evaluation and reiterated the initial evaluation "failed to fully, objectively and adequately address the conditions that led to the removal of the children from the home." Similarly, the trial court found Mother still had not "engaged in any parenting class which fully and completely addressed the medical and safety reasons that the child [Ken] came into care." Overall, the trial court determined Mother "participated in services that do not address the reason the children came into care."

¶ 30 The trial court also made numerous Findings on the continued lack of explanation for Ken's injuries and its attempts to receive one. First, the trial court incorporated many of its Findings from the October 2020 Order. Then, the trial court explained how Father's email explanation "has no weight and there is no credibility to it," although in the wake of the email, Father pleaded guilty to child abuse charges and the prosecutor voluntarily dismissed Mother's charges. The court found, though, Mother believed Father's email and had no explanation "for each of [Ken]'s conditions" when he arrived at the hospital. After noting that the parents were Ken's sole caretakers in the relevant period, the trial court addressed testimony from two medical experts in child abuse pediatrics, including one who was Mother's expert; both experts determined Ken's injuries were the result of non-accidental trauma and were not explained by the events described in Father's email. The trial court noted it had "pleaded and begged for information as to what happened to" Ken but it remained unexplained.

¶ 31 Finally, the trial court made Findings on the history of domestic violence perpetrated by Father against Mother, finding there was no domestic violence before the removal of the children from the home, and a series of ultimate Findings as to the grounds for termination alleged in the petition. As to the neglect ground, the trial court found a "likelihood of repetition of neglect and abuse" because of the continued lack of explanation for Ken's injuries and Mother and Father's "failure to adequately and timely address the issues that led to the removal of the juveniles from the home." As to the willfully leaving the children in foster care ground, the trial court found the children had been in foster care for over twelve months and Mother and Father "willfully failed or refused" to "complete court ordered services" in that neither had made

"reasonable progress under the circumstances to correct the conditions that led to the juveniles' removal."

¶ 32 Based on those Findings, the trial court entered adjudication Conclusions of Law, determining grounds existed to terminate Mother and Father's parental rights for abuse as to Ken and neglect as to Ken and Mark under North Carolina General Statute § 7B-1111(a)(1) and for willfully leaving the juveniles with DSS for over 12 months and willfully failing to make reasonable progress in correcting the conditions that led to the children's removal from the home under North Carolina General Statute § 7B-1111(a)(2). The trial court also concluded the additional ground of committing a felony assault inflicting serious injury applied only to Father, not Mother. DSS chose not to proceed on the other ground in the petition, so the trial court concluded it was not established.

¶ 33 Having found grounds to terminate parental rights, the trial court proceeded to the dispositional phase. After incorporating all the adjudication Findings, the trial court made additional Findings on the children's current placement, the "strong likelihood of adoption" in that placement, the bond with the parents, and the bond with the "potential adoptive parents." The trial court then concluded it was in the best interest of the children that the parents' rights be terminated. The trial court then entered an order terminating Mother and Father's parental rights, giving legal and physical custody with placement authority to DSS, and directing DSS to "continue to follow through with the adoption process."

¶ 34 Mother filed written notice of appeal from the order terminating parental rights to our Supreme Court, with appeal to this Court as an alternative given a then-recent change in law, on 14 July 2021. She filed an amended notice of appeal of the same order to this Court on 23 July 2021.

II. Legal Background and Issues Presented

¶ 35 To help better situate Mother's arguments, we start by giving a brief background of juvenile proceedings around abuse, neglect, and dependency as well as termination of parental rights.

¶ 36 Parents have a constitutional right to "custody of their child and to determine the care and supervision suitable for their child." *In re Montgomery*, 311 N.C. 101, 106, 316 S.E.2d 246, 250 (1984) (citing *Santosky v. Kramer*, 455 U.S. 745, 758–59, 71 L.Ed.2d 599, 610 (1982)). "The constitutional parental right is, of course, not absolute." *In re E.B.*, 375 N.C. 310, 315–16, 847 S.E.2d 666, 671 (2020) (citing *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019)). But it is a "fundamental liberty

interest which warrants due process protection." *Id.*, 375 N.C. at 316, 847 S.E.2d at 671 (quoting *In re Montgomery*, 311 N.C. at 106, 316 S.E.2d at 250 (internal quotations and citations omitted)).

¶ 37 Juvenile abuse, neglect, and dependency proceedings and termination of parental rights proceedings include specific statutory procedures to provide such due process protections. *See* N.C. Gen. Stat. § 7B-100 (2021) (directing courts to interpret and construe abuse, neglect, and dependency and termination of parental rights statutes "[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents"); *see also*, *e.g.*, *In re Montgomery*, 311 N.C. at 114–15, 316 S.E.2d at 255 (summarizing statutory protections under termination of parental rights statutes and how they "adequately assure" parents receive "procedural due process protection"); *In re J.C.*, 380 N.C. 738, 2022-NCSC-37, ¶ 6 (explaining "statutory burden of proof by clear cogent, and convincing evidence" provided for in North Carolina General Statute § 7B-1109(f) (on adjudication hearings for terminations of parental rights) "protects a parent's constitutional due process rights as enunciated by" *Santosky*); *In re K.W.*, 272 N.C. App. 487, 491, 846 S.E.2d 584, 589 (2020) (addressing how same statutory burden of proof in abuse, neglect, and dependency proceedings "assure[s] due process of law" (quoting N.C. Gen. Stat. § 7B-802 (2019))); *In re Eckard*, 148 N.C. App. 541, 547, 559 S.E.2d 233, 236 (2002) (discussing parents' constitutional rights in context of abuse, neglect, and dependency hearings).

¶ 38 Turning to the specific statutory procedures that protect parents' constitutional rights, both abuse, neglect, and dependency proceedings and termination of parental rights proceedings follow a two-step process. *See In re K.W.*, 272 N.C. App. at 491, 846 S.E.2d at 589 ("A proceeding to protect an allegedly abused, neglected, or dependent juvenile requires two hearings."); *In re A.W.*, 377 N.C. 238, 2021-NCSC-44, ¶ 34 ("Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." (quoting *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796–97 (2020) (in turn citing N.C. Gen. Stat. §§ 7B-1109, 1110 (2019)))).

¶ 39 Focusing on abuse, neglect, and dependency proceedings first, this Court has recently explained the two steps as follows:

> First, the trial court holds an adjudicatory hearing to determine if a child is abused, neglected, or dependent. [*In re O.W.*, 164 N.C. App. 699, 701, 596 S.E.2d 851, 853 (2003).] At this stage, heightened

> requirements are in place to "protect the rights of . . . the juvenile's parent" and "assure due process of law." N.C. Gen. Stat. § 7B-802 (2019). The trial court must apply the Rules of Evidence, N.C. Gen. Stat. § 7B-804 (2019), and can find a child abused, neglected, or dependent only if that status is proven "by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2019).
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> If the trial court finds at adjudication that the allegations in a petition have been proven by clear and convincing evidence and concludes based on those findings that a juvenile is abused, neglected, or dependent, the court then moves on to an initial disposition hearing. N.C. Gen. Stat. § 7B-901 (2019). At this stage, the trial court, in its discretion, determines the child's placement based on the best interests of the child. *O.W.*, 164 N.C. App. at 701, 596 S.E.2d at 853.

In re K.W., 272 N.C. App. at 491, 846 S.E.2d at 589 (alterations in original). Following the initial disposition hearing and order, the trial court continues to conduct review or permanency planning hearings. *See* N.C. Gen. Stat. § 7B-906.1 (eff. 1 Oct. 2021) (mandating court conduct such hearings with certain required components).[4] At permanency planning hearings, the trial court must adopt one or more of the listed statutory permanent plans including, as relevant here, reunification, adoption, and guardianship. N.C. Gen. Stat. § 7B-906.2(a) (eff. 1 Oct. 2021); *see also* N.C. Gen. Stat. § 7B-906.2(a) (2019) (including same provisions in previous version). This concurrent planning "shall continue until a permanent plan is or has been achieved." N.C. Gen. Stat. § 7B-906.2(a1) (eff. 1 Oct. 2021); *see also* N.C. Gen. Stat. § 7B-906.2(a1) (2019) (including same provisions in previous version).

¶ 40 The two-step process for termination of parental rights resembles that of abuse, neglect, and dependency proceedings:

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4. Section 7B-906.1 had changes go into effect 1 October 2021, which was after the trial court entered the order terminating parental rights on appeal here, but the changes relevant to our discussion here merely added new language clarifying the difference between permanency planning hearings and review hearings. *See* 2021 North Carolina Laws S.L. 2021-132, § 1(h) (1 Sept. 2021) (indicating changes to language of § 7B-906.1(a) and then changes to other sub-sections); *see also* 2021 North Carolina Laws S.L. 2021-100, § 10 (6 Aug. 2021) (updating language to reflect difference between permanency planning and review hearings in additional parts of § 7B-906.1).

> In conducting a termination of parental rights proceeding, the trial court begins by determining whether any of the grounds for termination delineated in N.C.G.S. § 7B-1111(a) exist. *See* N.C.G.S. § 7B-1109 (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 (2019) (quoting N.C.G.S. § 7B-1109(f)). "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage," *id.* at 6, 832 S.E.2d 698, at which it "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019).

In re A.E., 379 N.C. 177, 2021-NCSC-130, ¶ 13 (alterations in original). Unlike an abuse, neglect, and dependency proceeding, once the termination of parental rights proceeding reaches a disposition terminating rights, the trial court does not undertake further actions. *See* N.C. Gen. Stat. § 7B-1112 (2021) ("An order terminating the parental rights *completely and permanently terminates* all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship . . . ." (emphasis added)).

¶ 41 Turning to Mother's arguments, they fit within three of the four possible stages between abuse, neglect, and dependency and termination of parental rights proceedings. She does not present any arguments as to the abuse, neglect and dependency adjudication order, to which she consented. Within the abuse, neglect and dependency disposition stage, Mother argues "[t]he trial court erred in eliminating reunification as a permanent plan." Turning to the termination of parental rights adjudication stage, Mother makes three arguments: (1) Findings of Fact 82–83 and 85–88 are "not supported by the evidence" and the Findings present other issues; (2) "[t]he trial court erred in terminating Mother's parental rights to each of her two children based on abuse or neglect"; and (3) "[t]he trial court erred in terminating Mother's parental rights on the ground she willfully failed to make reasonable progress." Finally, on the termination of parental rights disposition stage, Mother contends "[t]he trial court erred as a matter of law by excluding relevant evidence mandated for consideration" as to "best interest." We review each of Mother's arguments in turn.

III. Elimination of Reunification as a Permanent Plan

¶ 42 **[1]** Mother first argues the trial court "erred in eliminating reunification as a permanent plan for Mother." Specifically, she asserts the order eliminating reunification, which we are calling the October 2020 Order, "was not based on sufficient evidence and was not supported by the evidence or findings sufficient to support the conclusion." Then, she contends the court erred for the reasons stated in *In re J.M.*, *N.M.*, 276 N.C. App. 291, 2021-NCCOA-92.

A. Preservation of Issue for Appeal

¶ 43 Before reaching the merits, we address whether this issue is properly before us. Both GAL and DSS argue Mother failed to preserve her appeal of the October 2020 Order eliminating reunification as a permanent plan. In recognition of her failure to "timely and properly appeal" the October 2020 Order, Mother has filed a petition for writ of certiorari ("PWC") as to the Order and, in the alternative, asks us to use our power under Rule of Appellate Procedure 2 to suspend the Rules of Appellate Procedure as to proper filing of an appeal.

¶ 44 In our discretion, we grant Mother's PWC to allow us to "review the order eliminating reunification together with an appeal of the order terminating parental rights." *See In re C.H.*, 2022-NCSC-84, ¶ 18 (quoting N.C. Gen. Stat. § 7B-1001(a2)) (granting PWC as to orders ceasing reunification and recognizing statute directing this Court to hear such appeals, when properly filed, with order terminating parental rights). Granting a PWC in this situation is appropriate since there is a statutory mandate to vacate an order terminating parental rights "[i]f the order eliminating reunification is vacated or reversed." N.C. Gen. Stat. § 7B-1001(a2) (eff. 1 Oct. 2021). Further, Mother filed a "Notice to Preserve Right of Appeal" of the October 2020 Order; it was merely untimely. (Capitalization altered.) For these reasons and in the exercise of our discretion, we grant Mother's PWC. Because we grant the PWC, we decline to invoke Rule 2.

B. Standard of Review

¶ 45 "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 273 N.C. App. 427, 429, 848 S.E.2d 749, 751 (2020) (quoting *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007)); *see also In re J.H.*, 373 N.C. 264, 267–268, 837 S.E.2d 847, 850 (2020) (listing same standard

of review in part relying on *In re C.M.*, 183 N.C. App. at 213, 644 S.E.2d at 594). "At the disposition stage, the trial court solely considers the best interests of the child." *In re J.H.*, 373 N.C. at 268, 837 S.E.2d at 850 (quotations and citations omitted). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *Id.*, 373 N.C. at 267, 837 S.E.2d at 850 (quotations and citations omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Id.*, 373 N.C. at 268, 837 S.E.2d at 850 (quotations and citations omitted).

C. Analysis

¶ 46 Mother asserts the October 2020 Order "was not based on sufficient evidence and was not supported by the evidence or findings sufficient to support the conclusion" and the trial court erred for the reasons stated in *In re J.M.* Specifically as to *In re J.M.*, Mother argues the October 2020 Order included "numerous findings which confirmed Mother's continuing suitability as a parent entitled to reunification" including her completion of her case plan, "glowing reports" from the "parental capacity expert and the parenting instructor," employment, a new residence, ending her relationship with Father, and "believe[ing] Father's confession that he injured Ken." Mother contends her "only failure was being unable to explain Ken's 2017 injuries to the personal satisfaction of the Judge, which is an insufficient basis to eliminate reunification" under *In re J.M.*

¶ 47 As to the first argument, Mother fails to identify any specific Findings of Fact not supported by the evidence, so she has failed to preserve any challenges to the Findings. *See Dalenko v. Collier*, 191 N.C. App. 713, 719, 664 S.E.2d 425, 429 (2008) (concluding party failed to preserve challenge to findings of fact because she "failed to assign error to specific findings of fact by the trial court, and instead resort[ed] to a broadside attack on the order 'that its finding are not support by pleadings, submissions, evidence of record and arguments of the parties . . .' " (ellipses in original)); *In re Y.I.*, 262 N.C. App. 575, 579, 822 S.E.2d 501, 504 (2018) (determining mother abandoned her challenge to three specifically named findings of fact because she "wholly fail[ed] to support her contention with explanation or citation to the record").

¶ 48 As a result, we only consider Mother's argument the trial court erred based on *In re J.M.* For that argument, we must decide whether the trial court abused its discretion in ceasing reunification efforts based on the best interest of the children. *See In re J.H.*, 373 N.C. at 267–68, 837 S.E.2d at 850 (explaining our courts review orders ceasing reunification

for abuse of discretion and that, as with any order at the disposition stage, the trial court only considers the child's best interests).

¶ 49 "At a permanency planning hearing, 'reunification shall be a primary or secondary plan unless,' *inter alia*, 'the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.' " *Id.*, 373 N.C. at 268, 837 S.E.2d at 850 (alterations from original omitted) (quoting N.C. Gen. Stat. § 7B-906.2(b) (2019)). The court also "must make findings 'which shall demonstrate the degree of success or failure toward reunification' including:

> '(1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.' "

Id., 373 N.C. at 268, 837 S.E.2d at 850–51 (quoting N.C. Gen. Stat. § 7B-906.2(d)).

¶ 50 Mother does not argue the trial court failed to make these required Findings, nor could she. As to Mother's case plan and her progress thereon (requirements (1) and (2) above), the trial court recounted the four elements of the case plan including:

> a) submit to a comprehensive Parenting Capacity Assessment, follow the recommendations of the assessment;
>
> b) complete a parenting class and demonstrate that the children will be physically safe in her care;
>
> c) demonstrate during visitation what is learned in parenting classes;
>
> d) submit to random drug screens

The trial court then made findings that Mother completed parenting programs in 2018 and 2019 and submitted to a random drug screen in 2018. In a later Finding, the trial court noted the program's "safety information was limited to childproofing the home and discussion of child health

as in what to do if the child is sick or injured." As to visitation, the trial court noted both parents were subject to a no-contact order with Ken and visitation as to Mark was suspended in September 2019. The trial court specifically found the suspension of visitation "was providently entered and continues to be in the best interest of the children" based on a recommendation from Mark's therapist, since adoption was the primary plan. Further, the trial court noted the parenting coach "ha[d] not observed the parents interacting with their children" since the parenting class. Finally, the trial court found Mother "completed a Parenting Capacity Evaluation," and we will address the court's additional, more specific Findings on the parenting capacity evaluation below when we address Mother's main argument.

¶ 51 As to Mother's availability to the court, DSS, and GAL (requirement (3)), the trial court recounted in numerous Findings Mother's contact with it, DSS, and the GAL. For example, the trial court noted how Mother had attended a previous hearing in April 2020, "maintained sporadic communication with" DSS, and "text[ed] the Social Worker monthly to get updates on the children and to see photos."

¶ 52 As to the final § 7B-906.2(d) factor, the trial court made multiple Findings regarding Mother acting "in a manner inconsistent with the health or safety of the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(4). For example, the trial court found:

> 63. Reunification efforts with the [M]other and [F]ather would clearly be unsuccessful and inconsistent with the minor children's health or safety, because: there is still no explanation as to how [Ken] was injured and how he came to be in the state of health as presented on December 3, 2017 despite the various accounts and the case pending for more than two (2) years. The [F]ather's account of one sole incident is inconsistent with the injuries which were of different ages according to the medical evidence previously adduced by this court. Further reunification efforts with [M]other or [F]ather would be unsuccessful and inconsistent with the health and safety of both children based on the parents' inability to provide a safe, stable and secure home free of domestic violence and substance use. The Court finds that the safety risk to [Mark], as a child in the home of the abused sibling, continues to be great based on the lack of forthright explanation by the parents, as

> well as the minimized domestic violence and substance abuse issues.

The trial court's previous Findings made clear it was referring to Father when discussing the substance abuse issues and perpetration of the domestic violence, at least as against Mother.

¶ 53 Mother argues the trial court erred in eliminating reunification because she "completed her case plan," received "glowing reports" from her parental capacity expert and parenting instructor, and only failed "to explain Ken's 2017 injuries to the personal satisfaction of the Judge, which is an insufficient basis to eliminate reunification" under *In re J.M.* We conclude the trial court did not abuse its discretion in ceasing reunification efforts because it made a "reasoned decision" that Mother had not completed her case plan and it properly considered Mother's lack of explanation as to Ken's 2017 injuries. *See In re J.H.*, 373 N.C. at 268, 837 S.E.2d at 850 (explaining an abuse of discretion only occurs when trial court's ruling "could not have been the result of a reasoned decision").

¶ 54 First, Mother's summary of her case plan progress does not align with the trial court's unchallenged Findings of Fact. Specifically, while Mother emphasizes the parental capacity expert's evaluation and the parenting instructor's feedback, the trial court made numerous Findings explaining why it gave reduced weight to this evidence.

¶ 55 As to the parental capacity evaluation, the trial court explained:

> 58. Both parents underwent a Parenting Capacity Evaluation by April Harris Britt and Dr. Harris Britt testified in this matter as to her findings on February 10, 2020.
>
> 59. The court thoroughly reviewed the Parenting Capacity Evaluations. *There were three referral questions as follows: First, " [parents] [have] some parenting capacity; however, it is concerning that [they] [are] not willing to disclose what happened to [Ken]. Can [they] parent effectively and meet his* [sic] *child's needs?*" Second, "Is [parent] willing and able to keep [his/her] children safe from harm" and third, "Is [parent] able to provide and care for [his/her] children without relying on significant others for support".
>
> 60. The complete medical records from [the hospital] were provided for [Mark] and [Ken] by DSS to Dr. Harris-Britt but her report states that they "could

> not be reviewed as the disc was password protected". On the other hand, Dr. Harris Britt did review medical records of Dr. Michael Holick and Dr. Daniel Ostrovsky as to causation of [Ken]'s injuries. In fact, she did review Petitioner's Exhibit #6 which is the letter that summarizes the care and condition of [Ken]. This letter is clear that [Ken] was in poor health when he was presented to Duke Hospital. He was malnourished, had bleeding on the brain and had numerous fractures of different ages, both old and newer. Dr. April Harris-Britt reviewed the court orders in this case. *The Court has a continued concern about what happened to [Ken] because the Court does not have any explanations from either parent at the time of the completion of the PCE. Although Dr. Harris-Britt did not have the entire medical record for [Ken], she formed an opinion that [Mother] can provide safety to her children. Dr. Harris-Britt looked at the previous court orders and the Court has been consistent in articulating its concern of what caused [Ken]'s injuries. This Court is perplexed in how Dr. Harris-Britt didn't believe it was important as to what happened to [Ken] to be factored in her formulating her opinion that [M]other could parent [Ken] and [Mark] safely*. She didn't think she needed to review the Duke medical records in order to assess the parenting capacity of the parents.
>
> 61. As for reviewing and considering the orders of this court, Dr. Harris Britt considered the initial Disposition order #11, 12 (Finding of Fact) 13 and 14 most of which were not the salient causation findings regarding the abuse and lack of explanation for the abuse. *This court has been consistently concerned with how [Ken] was injured and the court orders reflect this concern. The first question in the PCE reflects this concern as well*. Dr. Harris Britt concluded that [M]other and [F]ather would be safe parents. This court is perplexed as to how the Duke medical records were not relevant to that assessment.

(Emphasis added; all other alterations in original except changes to names of children, removal of names to protect the children's identity, and "[sic].")

¶ 56 Throughout its Findings on the parental capacity evaluation, the trial court repeatedly emphasized the importance of receiving an explanation for Ken's injuries. The Findings indicate the trial court did not fully credit the evaluation because the evaluation failed to address that important question and did not include a review of records of Ken's injuries. These concerns about the parental capacity evaluations then link directly to the court's ultimate Findings reunification efforts would be unsuccessful and inconsistent with the children's health, safety, and welfare. For example, the trial court emphasized "there is still no explanation as to how [Ken] was injured and how he came to be in the state of health" in December 2017. Thus, the trial court determined the parenting capacity evaluation Mother received did not address one of the questions the trial court noted as a reason for the referral and therefore did not credit the evaluation.

¶ 57 In addition to its concerns about the parenting capacity evaluation, the trial court questioned whether the parenting class adequately addressed the reasons the children were removed from the home as required by the case plan. Specifically, the trial court found the parenting class's "safety information was *limited* to childproofing the home and discussion of child health as in what to do if the child is sick or injured." (Emphasis added.)

¶ 58 The trial court's questioning of the parental capacity evaluation and parenting class is important because it undermines Mother's argument she completed her case plan and thus the only reason for the cessation of reunification efforts was her failure to explain the injuries. A trial court can consider failure to make adequate progress on a case plan when determining whether to cease reunification efforts. *See* N.C. Gen. Stat. § 7B-906.2(d)(1) (requiring a trial court to make Findings on whether the parent is making "adequate progress within a reasonable period of time under the plan" at permanency planning hearings); *see also In re J.R.*, 279 N.C. App. 352, 2021-NCCOA-491, ¶¶ 33, 37 (finding credible evidence the mother was "not making adequate progress within a reasonable time under case plan" and then determining that finding and others "support the trial court's cessation of reunification efforts"). As long as the trial court's view of the evidence is reasonable, it is binding on appeal even if that view is contrary to a party's characterization of the evidence on appeal. *See In re L.R.L.B.*, 377 N.C. 311, 2021-NCSC-49, ¶ 26 (finding binding on appeal a trial court's "contrary evaluation" of whether a mother made adequate progress by engaging with certain services because the trial court's view was reasonable based on the evidence). Thus, the trial court's questions about the evaluation and parenting class

help demonstrate it made a reasoned decision, and thus did not abuse its discretion, in ceasing reunification efforts.

¶ 59 Turning to the trial court's emphasis on the lack of explanation for Ken's injuries directly, the trial court did not abuse its discretion in ceasing reunification efforts on those grounds. As an initial matter, we note Mother relies on *In re JM*, 276 N.C. App. 291, 2021-NCCOA-92, and our Supreme Court granted discretionary review of that decision after the parties (and Amici) completed briefing in this appeal. GAL, with support of DSS, filed a motion to "continue oral argument and hold [the] case in abeyance" as a result of the Supreme Court's action, but we denied that motion. (Capitalization altered.) Further, we note Mother's response in objection to GAL's motion argued "the logic and reason and precedent supporting the principles involved in the issues before this Court remain valid and appropriate for arguments" even though *In re J.M.* itself is "stayed by supersedeas pending the Supreme Court's decision."

¶ 60 The trial court made numerous unchallenged Findings of Fact regarding the failure of the parents, and specifically Mother, to explain Ken's injuries "and condition at the time he was presented for treatment," which was key to its ultimate Finding required to cease reunification efforts. Specifically, even after receiving Father's emailed statement from 13 May 2020 that he dropped Ken and Ken "immediately started seizing," the trial court remained "baffled" because "[c]onsidering [Ken]'s numerous injuries . . . the [F]ather's statement does not explain [Ken]'s other conditions (his low temperature, low blood sugar, hypoglycemia and other conditions)." The trial court made that Finding based in part on the unchanged opinions of the doctors who originally evaluated Ken for child abuse: "The Social Worker apprised Dr. Lyndsay Terrell and Dr. Karen St. Claire at [the hospital] about the [F]ather's statement. The original opinions and diagnosis still stand as this new information does not explain all of [Ken]'s symptoms and injuries."

¶ 61 The trial court also explained how none of the parents' previous explanations fully explained Ken's injuries either:

> The Court has been given different versions of events from the parents throughout the case to explain [Ken]'s injuries and condition when he was presented to [the hospital] on December 3, 2017 at the time of the filing of the petition. At first, the parents said it was the fault of [hospital] providers, as a malpractice allegation. Then, they alleged it was the stepfather who caused the injuries. Now there is

> the [F]ather's statement as to a one-time fall occurring while the [F]ather was under the influence. None of these accounts explain [Ken]'s poor state of health at the time he was presented on December 3, 2017, to include being malnourished and having skull fractures, retinal hemorrhages and other fractures of differing ages. It is notable that [Ken] was examined at [the hospital] prior to that date, on November 9, 2017, and was found to be at a healthy baseline without injury, retinal hemorrhages, malnutrition or fractures as demonstrated by the medical records in evidence."

Thus, the trial court had ample support for its ultimate Finding about the continued lack of explanation of Ken's injuries.

¶ 62 The trial court also made certain Findings specific to Mother and her lack of explanation. While the trial court found Mother "believes that the [F]ather injured" Ken, the trial court also noted certain inconsistencies with Mother's view of the events. For example, while Father's email explained Mother was not home when Father dropped Ken on the floor and Ken immediately started seizing, the trial court noted:

> The [M]other also claims that the [F]ather was rarely left in the home with the children and they were there together with the children. The [M]other continues to report that she noticed that when she was changing [Ken]'s diaper and his upper body was twitching, and he was looking in one spot and that is when she decided to take him to the hospital. This is at the point where she noticed something was not right with [Ken].

The trial court also repeatedly highlighted instances when Mother could have sought to gain more information but did not. For example, the trial court found:

> The [M]other gave testimony about her knowledge of the [F]ather's emails to the social worker. According [to] the [M]other, she was informed by her cousin about the [F]ather's emails. *The [M]other did not ask any further questions and the court observed no curiosity from the [M]other to find out what happened or more about the [F]ather's disclosure.* The [M]other contacted her attorney.

(Emphasis added.)

¶ 63 These Findings explain why the trial court "remain[ed] gravely concerned that *neither parent* is providing the *full picture* on [Ken]'s injuries." (Emphasis added.) They also clarify what the trial court believed Mother needed to do to satisfy its concerns, namely better understand the cause of *all* of Ken's injuries, not just the ones potentially explained by Father's email admission.

¶ 64 These Findings regarding the lack of explanation for the injuries are a valid ground on which to cease reunification efforts. In the similar context of termination of parental rights adjudications, which Mother's favored case of *In re J.M.* relies upon, *see In re J.M.*, ¶¶ 29–30 (citing to *In re Y.Y.E.T.*, 205 N.C. App. 120, 695 S.E.2d 517 (2010), before contrasting the facts there to *Y.Y.E.T.)*; *Y.Y.E.T.*, 205 N.C. App. at 127–28, 695 S.E.2d at 521–22 (discussing the trial court's attempt to discover the cause of the child's non-accidental injuries under a heading on terminating parental rights), our Courts have found a continued failure to explain children's injuries adequate grounds to find a likelihood of future neglect of the child by a parent.[5] *E.g.*, *In re D.W.P.* 373 N.C. 327, 339–40, 838 S.E.2d 396, 405–06 (2020) (discussing Mother's lack of explanation for her child David's injuries before concluding "Respondent-mother acknowledges her responsibility to keep David safe, but she refuses to make a realistic attempt to understand how he was injured or to acknowledge how her relationships affect her children's wellbeing. These facts support the trial court's conclusion that the neglect is likely to reoccur if the children are returned to respondent-mother's care.").

¶ 65 For example, in *In re Y.Y.E.T.*, this Court found the parents "refusal to accept responsibility for the child's injury indicate[d] that the conditions which led to the child's initial removal from [their] home ha[d] not been corrected." 205 N.C. App. at 129, 695 S.E.2d at 523. In that case, the trial court had been unable to "conclusively determine who was the perpetrator of the injury" but knew the child's injury "was not accidental" and was indicative of child abuse such that "[a]s the child's sole care providers, it necessarily follow[ed] that [the parents] were jointly and individually responsible for the child's injury. Whether each [parent] directly caused the injury by inflicting the abuse or indirectly caused the injury by failing to prevent it, each [parent] is responsible." *Id.*, 205 N.C. App. at 128–29, 695 S.E.2d at 523–24. Based on those facts and a finding the parents were protecting each other, this Court held the trial court

5. We also do not have precedent on cessation of reunification efforts in the context of unexplained injuries that must have been caused by at least one of the two parents given *In re J.M.* is subject to a stay.

"properly determined that the repetition of abuse or neglect [was] probable." *Id.*, 205 N.C. App. at 129, 695 S.E.2d at 523.

¶ 66 Here, similar to *In re Y.Y.E.T.*, the trial court found Ken's injuries were non-accidental and indicative of child abuse. The trial court had already previously found in the stipulated-to adjudication order that Mother and Father "were the sole care providers of the children during the time of the injuries to" Ken. Further, even accepting Father's explanation that he dropped Ken one time, the trial court found numerous other aspects of Ken's condition when he was taken to the hospital remained unexplained. Thus, the trial court could not "conclusively determine" who caused all of Ken's conditions but could still permissibly determine both parents were responsible for Ken's condition either directly or indirectly. *In re Y.Y.E.T.*, 205 N.C. App. at 128–29, 695 S.E.2d at 522–23. While the trial court here did not specifically find Mother was protecting Father, it had concerns about the plausibility of Mother's explanations of events and her lack of interest in trying to learn more information about what happened to Ken. Therefore, we conclude the trial court properly determined reunification efforts would be inconsistent with the children's health or safety based on Mother's failure to fully explain Ken's injuries and condition when admitted to the hospital.

¶ 67 Mother's progress on her case plan does not change our determination. Parental compliance with a case plan alone is not always sufficient to preserve parental rights. *See In re L.G.G.*, 379 N.C. 258, 2021-NCSC-139, ¶ 34 (explaining parental compliance with a case plan "does not preclude a finding of neglect" (citations and quotations omitted)). In the similar best interest context for termination of parental rights, this Court explained, "[P]arents must demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors." *In re Y.Y.E.T.*, 205 N.C. App. at 131, 695 S.E.2d at 524. For example, in *In re L.G.G.*, the parents "completed substantially all of their case plan but, despite their participation, they have shown that they have not gleaned sufficient insight into why their . . . children came into DSS custody." *In re L.G.G.*, ¶ 34. Here, we have addressed how the trial court did not believe the parenting capacity evaluation or the parenting class Mother took part in adequately addressed the reasons for her children being in DSS custody because they failed to explain or teach Mother to prevent the injuries and conditions Ken had when presented at the hospital. Thus, even with Mother's progress on her case plan, the trial court's reasons for its decision still withstand our scrutiny.

¶ 68 Mother first argues *In re J.M.* supports her positions, but even assuming *arguendo* the case was not subject to a pending appeal to our

Supreme Court, we are not persuaded. First, *In re J.M.* is distinguishable from this case for several reasons. The facts regarding the specific injuries to the child in *In re J.M.* are similar in that the child, Nellie, was about four months old when her parents took her to the hospital after she "became completely silent and limp." *In re J.M.*, ¶ 2. At the hospital, a "CAT scan showed an acute subdural hematoma" and additional testing revealed "severe multilayer retinal hemorrhages to both eyes and rib fractures that appeared to be several days old." *Id.*, ¶¶ 2–3. Nellie's doctor determined her injuries "were highly specific for child abuse." *Id.*, ¶ 3.

¶ 69 But aside from the types of tragic injuries involved, *In re J.M.* then proceeds quite differently from this case both procedurally and factually. For example, neither parent was charged with any criminal offense arising from Nellie's injuries, nor did either parent plead guilty to any crime. As relevant to the evidence regarding how the injuries may have occurred and the trial court's evaluation of that evidence, this Court noted in *In re J.M.* that DSS had not conducted a proper investigation of the injuries, leaving open a question as to whether either parent actually caused the injuries. *Id.*, ¶ 51. Specifically, two older step-siblings, ages 10 and 14, lived in the home with Nellie and her parents, but

> DSS did not interview Respondent-Mother's older two children in the home during their investigation of Nellie's injuries.
>
> DSS offers no reason why it failed to interview Respondent-Mother's older children. The trial court found, in the adjudication order, Jon and Nellie were under Respondents' exclusive custody and care based on the statements made by the Respondents to social workers and police regarding their care of Nellie. It is unreasonable to presume, however, that parents have eyes on their children at all times. Parents and children must sleep at some point, and presumably, parents must tend to other children or to household needs, allowing for children to be left without eyes-on supervision for some periods of time, no matter how short.
>
> Pursuant to N.C. Gen. Stat. § 7B-300, DSS is required "to establish protective services for juveniles alleged to be abused, neglected, or dependent. [The p]rotective services shall include the screening of reports, the performance of an assessment using either a family assessment response or an investigative

> assessment response . . . ." N.C. Gen. Stat. § 7B-300 (2019). This Court in its discretion takes judicial notice that the policies and protocols that guide and govern family assessments and investigative assessments, "CPS Family and Investigative Assessments, Policy, Protocol, and Guidance," ("DSS's Assessment Manual"), are found in North Carolina's Child Welfare Manual published by the North Carolina Department of Health and Human Services. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2019).
>
> The "purpose of the [Child Protective Services] Assessment is to . . . determine if . . . [t]he child is safe within the home and, if not, what interventions can be implemented that will ensure the child's protection and maintain the family unit intact if reasonably possible." N.C. Dep't of Health & Hum. Servs., *CPS Family and Investigative Assessments Policy*, *Protocol*, *and Guidance*, 1 (July 2019), https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policymanuals/modified-manual-1/assessments.pdf.
>
> DSS can approach an instance of alleged neglect, abuse, and dependency through a "Family Assessment," or "Investigative Assessment. [Footnote]" Both methods require face-to-face interviews with *all children residing in the home*. N.C. Dep't of Health & Hum. Servs., *CPS Family and Investigative Assessments Policy*, *Protocol*, *and Guidance*, 64, 69 (July 2019), https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policy-manuals/modified-manual-1/assessments.pdf. (emphasis added).

Id., ¶¶ 46–51 (alterations in original except for footnote removal).

¶ 70 Aside from these factual differences, *In re J.M.* turned on two key facts: (1) the mother there "engaged in all services required of her in order to correct the conditions that led to the removal of the children and that she had objectively learned from and benefitted from the services"; and (2) the mother acknowledged the child's injuries were "nonaccidental" but could not explain the cause of the injuries because she was not present for them. *Id.*, ¶¶ 30–31. As to the first fact, the trial court here found, in a series of unchallenged Findings of Fact, Mother's parental capacity evaluation and parenting class did not correct the conditions of removal because they failed to fully address the still unexplained nature

of *all* of Ken's injuries. As to the second fact, while Mother acknowledged Father's email and believed it, the trial court still had concerns about the plausibility of Mother's explanations of events and her lack of interest in trying to learn more information about what happened to Ken. Given these factual differences from the situation in *In re JM*, the trial court made a reasoned decision in ceasing reunification efforts and thus did not abuse its discretion even when considering that case.

¶ 71 Mother also argues, in her reply brief, the cases on which we rely are distinguishable, albeit in the context of her argument about termination of parental rights adjudication on abuse or neglect grounds. We reject each of her attempts to distinguish the cases. First, Mother argues *In re L.G.G.* is distinguishable because there neither parent would acknowledge the source of the children's "significant sexualized behaviors." Here, the trial court found Mother failed to acknowledge the "full picture" of the extensive injuries and ailments Ken presented when admitted to the hospital could not be explained by Father's admission he dropped Ken once. While the factual scenarios were different, the lack of acknowledgement of all the reasons for DSS involvements were similar. Second, Mother argues *In re Y.Y.E.T.* is distinguishable because here there was "a valid and positive" parental capacity evaluation. As we have laid out above, the trial court made unchallenged Findings of Fact recounting its misgivings about the evaluation here, particularly that the evaluation failed to fully address the still-unexplained nature of *all* of Ken's injuries.

¶ 72 After our review, we conclude the trial court did not abuse its discretion in ceasing reunification efforts. The trial court made the required Findings of Fact, and it made a reasoned decision in ceasing reunification efforts based on its Findings on Mother's case plan progress and the still unexplained nature of some of Ken's injuries and ailments.

IV. Termination of Mother's Parental Rights-Adjudication Issues

¶ 73 **[2]** Beyond her argument about ceasing reunification at the disposition stage of the abuse, neglect, and dependency proceeding, Mother also argues the trial court erred "in terminating [her] parental rights [as] to each of her two children." As to the adjudication stage of the termination of parental rights proceeding, Mother makes three arguments: (1) Findings of Fact 82–83 and 85–88 are "not supported by the evidence" and present other issues; (2) "[t]he trial court erred in terminating Mother's parental rights to each of her two children based on abuse or neglect"; and (3) "[t]he trial court erred in terminating Mother's parental rights on the ground she willfully failed to make reasonable progress." After

addressing the standard of review at the termination of parental rights adjudication stage, we address each argument in turn.

A. Standard of Review

¶ 74 Our Supreme Court has recently described the standard of review for the adjudication stage of termination of parental rights proceedings as follows:

> "We review a district court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re J.S.*, 374 N.C. 811, 814[, 845 S.E.2d 66] (2020) (cleaned up) (quoting *In re N.P.*, 374 N.C. 61, 62–63[, 839 S.E.2d 801] (2020)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re B.R.L.*, 379 N.C. 15, 2021-NCSC-119, ¶ 11, (quoting *In re T.N.H.*, 372 N.C. 403, 407[, 831 S.E.2d 54] (2019)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re A.L.*, 378 N.C. 396, 2021-NCSC-92, ¶ 16 (quoting *In re B.O.A.*, 372 N.C. 372, 379[, 831 S.E.2d 305] (2019)). " '[T]he issue of whether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)' is reviewed de novo by the appellate court." *In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 7 (alteration in original) (quoting *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15 (cleaned up) (quoting *In re C.V.D.C.*, 374 N.C. 525, 530 (2020)).

In re M.K., 2022-NCSC-71, ¶ 12.

B. Challenged Findings of Fact

¶ 75 Mother first argues Findings of Fact 82–83 and 85–88 are "not supported by the evidence" and present other issues. We review each Finding in turn and determine whether they are supported by clear, cogent, and convincing evidence. *In re M.K.*, ¶ 12.

¶ 76 Mother argues Finding of Fact 82 "is a conclusion of law and not supported by the evidence as to" her. Finding 82 recounts:

> At the time of this termination hearing, the Petitioner demonstrated by and through the evidence presented that the conditions rising to the level of neglect existed during the pendency of the termination action. There is no change in the safety risk to the children. There continues to be no explanation for [Ken]'s injury and medical condition as it existed on December 3, 2017. This continues to present a significant safety risk for [Mark] and [Ken] should they be returned to the care of either parent. Returning these children to their parents is a risk that this court cannot afford to take. There is a likelihood of repetition of neglect and abuse if the juveniles were returned to the home of the Respondents based upon the findings of fact herein.

¶ 77 Mother attempts to argue both this is a Conclusion of Law and is not supported by the evidence, which is the standard of review we apply to Findings of Fact. *In re M.K.*, ¶ 12. But we "are obliged to apply the appropriate standard of review to a finding of fact or conclusion of law, regardless of the label which it is given by the trial court," *In re J.S.*, 374 N.C. at 818, 845 S.E.2d at 73, so we must determine whether this is a Finding or Conclusion. While in the past this Court and our Supreme Court have "characterized . . . grounds for termination as both an 'ultimate finding' and a 'conclusion' of law," we treat discussions of the grounds for termination as conclusions of law. *See In re D.A.A.R.*, 377 N.C. 258, 2021-NCSC-45, ¶ 38 (applying conclusion of law standard of review to a ground for termination). The evidence of neglect and the likelihood of repetition of neglect and abuse relate directly to the ground for termination in North Carolina General Statute § 7B-1111(a)(1). *See* N.C. Gen. Stat. § 7B-1111(a)(1) (2019) (permitting termination of parental rights on the ground the parent "has abused or neglected the juvenile"); *In re L.G.G.*, ¶ 20 ("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." (quoting *In re R.L.D.*, 375 N.C. 838, 841, 851 S.E.2d 17 (2020)). Therefore, we treat Finding 82 as a Conclusion of Law. *See In re D.A.A.R.*, ¶ 38 (treating grounds for termination as conclusions of law for purposes of review). Since Mother already separately argues "[t]he trial court erred in terminating [her] parental rights to each of her

two children based on abuse or neglect," we will review Finding 82 below when we discuss that argument.

¶ 78 Although Mother does not include similar statements about the remaining Findings of Facts she challenges being Conclusions of Law, Findings 83, 85, and 86 are also Conclusions of Law. Finding 83 focuses on the "probability neglect will be repeated" and Findings 85 and 86 concern Mother and Father "willfully" leaving Ken and Mark in placement outside the home and "willfully fail[ing] or refus[ing]" to "complete court ordered services and services on the case plan" such that they did not make "reasonable progress under the circumstances to correct the conditions that led to the juveniles' removal." Finding 83 thus addresses the same legal question as Finding 82, which was in reality a Conclusion of Law on the ground for adjudication in § 7B-1111(a)(1). Similarly, Findings 85 and 86 use language that mirrors the ground for termination in § 7B-1111(a)(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." N.C. Gen. Stat. § 7B-1111(a)(2). Therefore, they are Conclusions of Law as well under *In re D.A.A.R.*, ¶ 38. As with Finding 82, we address these Findings below when discussing Mother's challenges to the trial court's adjudication on the grounds of abuse or neglect and of willful failure to make reasonable progress.

¶ 79 Finding of Fact 87 states:

> The court has pleaded and begged for information as to what happened to [Ken]. It remains unexplained. The [M]other has participated in services that do not address the reason the children came into care. Presented with the risk of substantial death, with these two children, the parents were supposed to protect them, and they did not protect these children. At this time, the environment the children lived in on or about November 7, 2017 through December 3, 2017 still exists. After the children have been in the care of the agency for the last three (3) years, neither the [F]ather nor the [M]other have explained the injuries.

Mother's only argument about the Finding is that it "reveal[s] the court's improper shifting of the burden of proof to Mother. Mother could not explain what she did not know," always appeared in court, and "answered every question about Ken's injuries." Mother thus only challenges the

last sentence of the Finding about neither Father nor Mother explaining the injuries.

¶ 80 Mother does not point to any place where she explained the injuries, nor could she as she acknowledges, so the trial court had competent evidence to make this Finding. The trial court also made other Findings recounting how it did not have an explanation of all of Ken's injures. For example, it incorporated its Findings of Fact from the October 2020 Order ceasing reunification efforts that we recounted above. The trial court also explicitly found Mother gave sworn testimony that she could not explain the injuries but believed Father caused them:

> At the termination hearing, the Mother . . . gave sworn testimony and was asked specifically if she had any explanation for each of [Ken]'s conditions as he was presented to the hospital on December 3, 2017. Mother testified that she had no explanation for any of the injuries except that she believed the Father was the cause and she believed his explanation in his email on May 13, 2020.

¶ 81 But we appreciate Mother's argument is not that Finding 87 is unsupported by the evidence, as a traditional challenge to a finding of fact would be, but rather she challenges how the trial court used her lack of explanation of Ken's injuries. Essentially, she argues she was required to prove a negative, and "[t]he law generally does not require a party to prove a negative . . . ." *Ochsner v. N.C. Department of Revenue*, 268 N.C. App. 391, 410, 835 S.E.2d 491, 504 (2019). And in cases involving this type of non-accidental injuries to a baby, there is often no direct evidence of what happened. The baby cannot tell what happened, and there was no witness to the events causing the injuries. Trial courts must often make these very difficult and momentous decisions based upon circumstantial evidence and evaluation of credibility and weight of the evidence available.

¶ 82 While Mother is correct DSS has the burden of proof in the adjudication proceeding, *see*, *e.g.*, *In re A.E.*, ¶ 13 (noting petitioner bears burden of proof at adjudication stage of termination of parental rights proceeding); N.C. Gen. Stat. § 7B-1111(b) ("The burden in these proceedings is on the petitioner or movant to prove the facts justifying termination by clear and convincing evidence."), the trial court here did not shift that ultimate burden to Mother. Rather, the trial court addressed Mother's lack of explanation here because it was relevant to its consideration of two grounds for terminating parental rights DSS alleged, namely Mother's

abuse or neglect of the children and her willful failure to make "reasonable progress . . . in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(1)–(2). As we discuss more below when we address the abuse or neglect termination ground, the lack of explanation relates to neglect or abuse because it speaks to the likelihood of future neglect or abuse. *See In re D.W.P.*, 373 N.C. at 339–40, 838 S.E.2d at 405–06 (explaining a failure to understand how child was injured helped support "the trial court's conclusion that the neglect is likely to reoccur"). The lack of explanation also touches Mother's reasonable progress, or lack thereof, because the trial court repeated its explanations, as recounted above, of how her parental capacity evaluation did not address its referral questions and added the evaluation "failed to fully, objectively and adequately address the conditions that led to the removal of the children from the home." Thus, the trial court's focus on Mother's lack of explanation did not shift the burden to her but rather helped it evaluate whether DSS had met its burden as to the grounds for adjudication.

¶ 83 Mother's final challenge to a Finding of Fact is to Finding 88, which states:

> That on or about July 7, 2020 the court entered an order eliminating reunification as a permanent plan and ceasing further reunification efforts with the Respondent Parents. The court finds the following facts would continue to support a finding that further reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health or safety:
>
> > a. Mother . . . continues to have no explanation for [Ken]'s injuries which is a risk to their health and safety.
> >
> > b. The parents have not participated in any other services since the July 7, 2020 hearing which directly address the reasons the children were removed, their safety or her accountability for [Ken]'s condition as he was presented on December 3, 2017.
> >
> > c. There has been no substantial change in circumstances since the entry of the July 7, 2020 permanency planning order and the court re-adopts the findings of fact from that order and finds that

> they were providently entered with regard to the issue of elimination of reunification.
>
> d. Respondent Father was convicted of a felony assault that resulted in a serious bodily injury of [Ken] and as a condition of his conviction, he is prevented from having contact with his children.

Within this long Finding, Mother specifically argues she "accepted and believed Father was responsible for Ken's injuries." She also contests the court's determination of no substantial change in circumstances since entry of the 7 July 2020 permanency planning order. We address each contention in turn.

¶ 84 As to her first contention, Mother is correct she testified she believed Father's explanation that he dropped Ken. The trial court found as much in unchallenged Finding 46. But the trial court also made other Findings indicating Mother's belief of Father's explanation was not sufficient. First, the trial court made an unchallenged Finding Father's email "ha[d] no weight and there [was] no credibility to it." Second, the trial court made unchallenged Findings that Father's explanation could not explain the full extent of the injuries. In fact, Mother's own medical expert even rejected the idea Father accidentally dropping Ken once could explain any condition beyond the skull fractures. The trial court's Finding 88(a)—its last adjudicatory Finding—took into account all of these previous, unchallenged and therefore binding, Findings of Fact. Thus, when the trial court found Mother continues to have no explanation, it in essence found Mother had no *reasonable* or even *medically defensible* explanation for Ken's injuries, and Mother could not credibly believe Father's explanation since his email did not account for the full extent of the injuries. That sort of credibility determination is within the trial court's purview, and we cannot disturb it on appeal. *See In re A.R.A.*, 373 N.C. 190, 196, 835 S.E.2d 417, 422 (2019) (explaining "it is well-established that a district court has the responsibility to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom" (quotations, citations, and alterations omitted)).

¶ 85 Mother's belief in Father's emailed explanation also contradicts her own explanation of events. Specifically, Father's email said he dropped Ken at a time when Mother was not home. But, as the trial court found in an unchallenged Finding of Fact, Mother repeatedly testified from the initial disposition hearing to the termination hearing that she was "in the home caring for" Ken and Mark "*continuously*" from when Ken initially

came home from the hospital to when he was admitted in December 2017 with the serious injuries and conditions at issue here. (Emphasis added.) Mother could not have been both at home continuously as she testified and also not home when Father dropped Ken as Father's email she believed explained. This discrepancy again further reinforces the trial court's determination Mother's understanding of the harm that came to Ken was not *reasonable*.

¶ 86 Mother also argues "[t]he findings in the July 7 permanency planning order show changed circumstances in favor of Mother" and otherwise contests Finding 88's statement there has not been a substantial change in circumstances since that order such that the trial court "providently" ceased reunification efforts. To a large extent we have already rejected this argument above when we addressed why the trial court did not believe, in the October 2020 Order ceasing reunification, that circumstances changed in favor of Mother to the extent she now argues. To the extent it was unclear before, the trial court also made further unchallenged Findings on why it discounted the parental capacity evaluation and Mother's parenting classes. The trial court found:

> 37. As to the parenting capacity evaluation, there is no change of circumstances presented at the termination hearing and no new evidence presented as to any updated opinion of Dr. Harris Britt. Because Dr. April Harris-Britt did not take into consideration the Duke medical records (8,000 pages of medical records on disc – Petitioner's Ex. 3) or this court's prior adjudicatory findings pertaining to [Ken]'s injuries set forth in the June 25, 2018 Adjudication Order, *her original evaluation failed to fully, objectively and adequately address the conditions that led to the removal of the children from the home.*
>
> . . . .
>
> 40. *At the time of the termination hearing, neither the Mother . . . or the Father . . . had engaged in any parenting class which fully and completely addressed the medical and safety reasons that the child [Ken] came into care, especially the facts that were of the most concern to this court to include [Ken]'s low blood sugar/hypoglycemia, low body temperature and cachectic (wasted away) appearance at the time of his admission in*

> *addition to [Ken]'s other brain injuries, fractures and retinal hemorrhages*. The court's concern for the physical safety of [Ken], and [Mark] as a sibling in the home, was not alleviated by the testimony or the letter submitted by Ms. Lea Ray [the parenting class witness] because this was not covered in her courses and there was not any other evidence of any other services which addressed this concern.

(Emphasis added.) While Mother correctly states the court did not require any other services since July 2020, Mother also failed to address the trial court's concerns about the services she had undertaken and their inadequacy.

¶ 87 Mother's other two changed circumstances also do not convince us the trial court's Finding of no *substantial* changed circumstances was unsupported by the evidence. First, Mother indicates she "pursued restoration of her visitation." While true, she did that before the trial court entered its October 2020 Order ceasing reunification efforts, so no change happened between the October 2020 Order and the termination of parental rights, especially considering the October 2020 Order ordered visitation remain suspended. Second, while Mother correctly points out the criminal charges against her were dismissed, the trial court could still reasonably decide how much weight to give that and determine if it was a substantial change in circumstances within the leeway provided by the abuse of discretion standard of review for cessation of reunification efforts that Finding 88 addresses. *See In re J.H.*, 373 N.C. at 267–68, 837 S.E.2d at 850 (explaining a dispositional order of an abuse, neglect, and dependency proceeding is reviewed for abuse of discretion and an abuse of discretion only occurs when the trial court has failed to make a reasoned decision). As such, we reject Mother's challenges to Finding 88.

¶ 88 We have now addressed all of Mother's challenges to Findings of Fact. We determine Findings 82–83 and 85–86 were in reality Conclusions of Law on the grounds for termination of parental rights, so we discuss those challenges below with our review of those grounds. We also find clear, cogent, and convincing evidence supports Findings 87 and 88, so we reject Mother's challenges to those Findings.

C. Termination on Abuse or Neglect Ground

¶ 89 Turning to the legal grounds for termination, Mother argues "[t]he trial court erred in terminating [her] parental rights to each of her two children based on abuse or neglect." Specifically, Mother contends

"[t]he evidence and findings were insufficient to show a reasonable likelihood Mother would neglect or abuse Ken if he was returned to her custody" because she "fully complied with and completed her case plan" and because the trial court failed to "address any clear and convincing evidence of changed circumstances of a substantial risk of abuse or neglect by Mother at the time of the termination hearing." As to Mark, Mother specifically asserts the neglect adjudication "is based on the circumstances relating to Ken's abuse or neglect in 2017" and "[t]here are no supported findings establishing the presence of other factors with a nexus to Mark or to the likelihood he would be neglected by Mother if his custody was returned to her." We provide a general overview of the relevant law and then address the adjudication of each child.

¶ 90 Relevant to these arguments by Mother, the trial court determined grounds exist to terminate Mother's parental rights under North Carolina General Statute § 7B-1111(a)(1). Under § 7B-1111(a)(1):

> The court may terminate the parental rights upon a finding of one or more of the following:
>
> > (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.

N.C. Gen. Stat. § 7B-1111(a)(1). The trial court specifically determined both parents "have abused [Ken] and neglected both the juveniles."

¶ 91 Under North Carolina General Statute § 7B-101, the definitions of abused juvenile and neglected juvenile in effect at the time the trial court terminated parental rights were, in relevant part:

> (1) Abused juveniles.–Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker:
>
> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
>
> . . . .

> (15) Neglected juvenile.--Any juvenile less than 18 years of age . . . (ii) 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 . . . . In determining whether a juvenile is a neglected juvenile, it is relevant 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.

N.C. Gen. Stat. § 7B-101(1), (15) (eff. 1 Dec. 2019 to 30 Sept. 2021).[6]

¶ 92 As our Supreme Court has recently explained,

> Generally, "[t]ermination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). However, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *Id*. at 843, 788 S.E.2d at 167.

In re J.J.H., 376 N.C. 161, 167, 851 S.E.2d 336, 341–42 (2020) (block quoting *In re J.O.D.*, 374 N.C. 797, 801–02, 844 S.E.2d 570, 575 (2020)). The trial court is required "to evaluate the likelihood of future neglect on the basis of an analysis of any 'evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.' " *In re N.B.*, 377 N.C. 349, 2021-NCSC-53, ¶ 12 (quoting *In re Z.V.A.*,

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6. The definition of neglect changed shortly after the trial court entered its order terminating parental rights. *See In re M.K.*, ¶ 32 n.4 (summarizing changes). The trial court here found Mother and Father neglected Mark and Ken "by creating an environment which was injurious to the juveniles' welfare and by failing to provide proper care and supervision of the juveniles" which tracks with the new statutory language:

"(15) Neglected juvenile.–Any juvenile less than 18 years of age . . . (ii) whose parent, guardian, custodian, or caretaker does any of the following: a. Does not provide proper care, supervision, or discipline. . . . . e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (eff. 1 Dec. 2021); *see also* N.C. Gen. Stat. § 7B-101(15) (eff. 1 Oct. 2021 to 30 Nov. 2021) (including same relevant language with different subsection numbering).

373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019)). "Thus, when a child has been separated from their parent for a long period of time, the petitioner must prove (1) prior neglect of the child by the parent and (2) a likelihood of future neglect of the child by the parent," *In re D.W.P.*, 373 N.C. at 339, 838 S.E.2d at 405, based on an analysis of any evidence of changed circumstances between the time of neglect and the termination hearing.

¶ 93 Here, Mother's arguments only focus on the likelihood of future neglect as to both Ken and Mark. We also note the trial court made an unchallenged Finding of Fact that Mother had previously consented to all the facts that led to an adjudication in an abuse, neglect, and dependency proceeding of Ken as abused and both Ken and Mark as neglected. *See In re J.J.H.*, 376 N.C. at 167, 851 S.E.2d at 341–42 (noting trial court finding children had previously been adjudicated neglected immediately after setting out the two required steps when children have been separated from their parents for a time before the termination proceeding). Thus, we examine only the likelihood of future neglect.

¶ 94 The trial court's Conclusion of Law for § 7B-1111(a)(1) states:

> That grounds exist to terminate the parental rights of the Respondents [Mother] and [Father] as to the juveniles [Mark] and [Ken] pursuant to N.C. Gen. Stat. § 7B-1111(a)(l) in that both the Respondents have abused [Ken] and neglected both the juveniles by creating an environment which was injurious to the juveniles' welfare and by failing to provide proper care and supervision of the juveniles. There is a reasonable probability that such abuse and neglect would be continued and would be repeated if the juveniles were to be returned to the care, custody, or control of the Respondents [Mother] and [Father], jointly and severally.

¶ 95 As explained above, some of the trial court's ultimate Findings of Fact, which we treat as Conclusions of Law, explain its reasoning for this Conclusion in more detail. *See In re K.L.T.*, 374 N.C. 826, 845, 845 S.E.2d 28, 42 (2020) (treating ultimate findings made in support of conclusion of law under § 7B-1111(a)(1) as conclusions of law that need to be supported by findings of fact). Specifically, Findings 82 and 83 explain why the trial court determined "[t]here is a reasonable probability that such abuse and neglect would be continued and would be repeated if the juveniles were to be returned to the care, custody, or control" of Mother and Father. Findings 82 and 83 provide:

> 82. At the time of this termination hearing, the Petitioner demonstrated by and through the evidence presented that the conditions rising to the level of neglect existed during the pendency of the termination action. There is no change in the safety risk to the children. There continues to be no explanation for [Ken]'s injury and medical condition as it existed on December 3, 2017. This continues to present a significant safety risk for [Mark] and [Ken] should they be returned to the care of either parent. Returning these children to their parents is a risk that this court cannot afford to take. There is a likelihood of repetition of neglect and abuse if the juveniles were returned to the home of the Respondents based upon the findings of fact herein.
>
> 83. Respondent Mother[']s] . . . and Respondent Father [']s] . . . failure to adequately and timely address the issues that led to the removal of the juveniles from the home constitutes neglect. That failure to adequately and timely address the neglectful behaviors, renders the Respondents incapable of providing adequate care and supervision of the juveniles. The probability that the neglect will be repeated and said incapability will continue in the future is high given the failure of the Respondents to address and alleviate the issues.

¶ 96 The trial court's unchallenged, and therefore binding, Findings of Fact support the challenged ultimate Findings 82 and 83. As to Finding 82, the trial court repeatedly emphasized the lack of complete explanation for Ken's injuries and condition when he was admitted to the hospital as well as the trial court's concern about such lack of explanation. First, the trial court specifically incorporated Findings of Fact 33–39 and 53–57 from its October 2020 Order ceasing reunification efforts, and those Findings, as we have already explained, recount how the trial court was concerned the parents had not been able to explain *all* of Ken's conditions when admitted because the Father's admission he dropped Ken only explained some of the injuries.

¶ 97 The trial court then expanded upon its previous Findings and noted additional testimony received at the termination hearing. As to Father's emailed explanation, the trial court specifically found Father was being "untruthful" and "his email ha[d] no weight and there [was]

no credibility to it." The trial court also noted how both medical experts who testified, including Mother's expert, determined most or all of Ken's injuries were non-accidental and Father's email explanation of accidentally dropping Ken did not change their opinions because it could only explain one of the head injuries, not the full spectrum of injuries and conditions Ken presented with when admitted to the hospital. The trial court again noted Mother believed Father's email about dropping Ken and came to believe Father intentionally hurt Ken, but the trial court explained Father's explanation for how he hurt Ken, i.e. a single drop, whether intentional or not could not explain all Ken's brain and head injuries based on testimony from Mother's own expert. Further, as we explained above, Mother's own testimony she was constantly present with the children contradicted Father's email in which he said Mother was not home. Combined with the trial court's rejection of Mother and Father's prior explanations from its October 2020 Order, the trial court made clear in these unchallenged Findings of Fact why it did not credit any of the explanations proffered for Ken's injuries. As a result, the trial court had still received no explanation for Ken's injuries, thereby supporting that part of Finding 82.

¶ 98 As to the other part of Finding 82, the trial court's Findings linked the injuries and conditions to a period of time when Mother and Father were the sole caretakers. Specifically as to Mother, the trial court noted she cared for Ken and Mark "continuously from the time [Ken] came home from the hospital on November 7, 2017 through December 3, 2017," when Ken was admitted to the hospital again. The trial court also explained how the injuries most likely occurred during a period of time between 30 November and 3 December because Ken had an doctor's appointment on 30 November where he did not have any of the injuries. As such, at least one of the parents must have been the cause of the injuries and conditions, leading to the safety risk of returning the children to the parents discussed in Finding 82. The trial court's Findings on the continued lack of explanation of the injuries support its determination the safety risk has not changed since that time when Ken's injuries and conditions were caused.

¶ 99 Mother makes several arguments against Finding 82. First, she argues the trial court had no evidence of neglect toward Mark specifically, which we address below when discussing whether the trial court's overall Conclusion of Law was properly supported. Mother next contends "[t]here was a positive change in the safety risk based on the parenting evaluations and the completion of her case plan." We address this argument below too because Finding 83—and Mother's challenge to

it—concerns Mother's compliance with her case plan, or lack thereof, as evidence of neglect.

¶ 100 Mother's only other argument against Finding 82 specifically is that Ken's premature birth and "Father's admitted guilt" explain Ken's condition. The other unchallenged Findings of Fact reject Mother's proffered explanations. As we already explained, medical experts, including Mother's own expert, testified Father dropping Ken, as he admitted to, could not explain the full spectrum of Ken's injuries and conditions. The trial court also made unchallenged Findings that implicitly ruled out premature birth as a cause. For example, the trial court found providers ruled out "other possible medical explanations" for Ken's conditions, and experts from both sides explained Ken's injuries were caused by "non-accidental trauma."

¶ 101 Amicus North Carolina Coalition Against Domestic Violence ("the Coalition") also argues the trial court was wrong in Finding 82 to "rel[y] heavily on a finding that [Mother] has no clear explanation for [Ken]'s injuries leading to the removal of the children." Specifically, the Coalition contends Finding 82 "conflate[s] an explanation of the events leading to [Ken]'s injuries with a reduction in safety risk for the children" and "relies heavily on an inference that [Mother] either participated in or condoned any abuse leading to [Ken]'s injuries." This argument is part of the Coalition's broader argument "the trial court's errors may retraumatize domestic violence survivor-parents and children in the child welfare system," which comes after its more general point "effective responses to domestic violence in the child welfare system are necessary to ensure the health and safety of children." (Capitalization altered.)

¶ 102 We agree with the Coalition's first overarching point that "effective responses to domestic violence in the child welfare system are necessary to ensure the health and safety of children," (capitalization altered), but we do not agree with its interpretation of the trial court's repeated emphasis on the failure to explain Ken's injuries. As to the connection between the lack of explanation for Ken's injuries and conditions and the safety risk to the children, we have explained above how the trial court included numerous Findings about its concern with the lack of explanation of Ken's injuries and condition. Caselaw also demonstrates why the lack of explanation can be so important. In a case the Coalition acknowledges is relevant to this consideration, our Supreme Court explained a parent's "refus[al] to make a realistic attempt to understand how [her child] was injured" can help support a "trial court's conclusion that the neglect is likely to reoccur." *In re D.W.P.*, 373 N.C. at 340, 838 S.E.2d at 406. The *In re D.W.P.* Court inferred if a parent is not able

to explain how their children were harmed before, there is a risk the children will be harmed the same way again if returned to the parent's custody, and that is a risk our courts are not required to take. *See id.*, 373 N.C. at 339–40, 838 S.E.2d at 406 (explaining the paramount importance of child safety before drawing the conclusion in the previous sentence). The trial court here permissibly drew the same inference explaining in Findings 87 and 88, which we have found support for above, the lack of explanation of Ken's injuries means there is a continued "risk to [both children's] health and safety."

¶ 103 As to the Coalition's other contention, the trial court was not inferring Mother participated in or condoned abuse and it need not have. The trial court made clear it understood Mother "believes the Father intentionally hurt" Ken. The Findings regarding a lack of explanation instead turned on Mother's lack of recognition of the medical impossibility of Father's proffered explanation causing all the conditions Ken presented with at the hospital. The trial court also did not need to draw such an inference because the definition of neglect includes "liv[ing] in an environment injurious to the juvenile's welfare," and neglect can include failing to prevent injuries like the ones here. N.C. Gen. Stat. § 7B-101(15) (eff. 1 Dec. 2019 to 30 Sept. 2021); *see In re Y.Y.E.T.*, 205 N.C. App. at 127–29, 695 S.E.2d at 522–23 (explaining, in a case where the trial court could not determine who caused a child's non-accidental injuries and terminated parental rights on the grounds of abuse and neglect, the trial court permissibly found both parents responsible because they either "directly caused the injury by inflicting the abuse or *indirectly caused the injury by failing to prevent it*" (emphasis added)). This reflects the broader recognition "[t]ermination of parental rights proceedings are not meant to be punitive against the parent,"— which might lead to an increased focused on individual culpability—"but to ensure the safety and wellbeing of the child." *In re D.W.P.*, 373 N.C. at 340, 838 S.E.2d at 406 (citing *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252). As a result, we reject the Coalition's challenge to Finding 82.

¶ 104 We also note the trial court made twelve unchallenged Findings of Fact in its adjudication order in the termination of parental rights proceeding that addressed domestic violence, and most notably made an unchallenged Finding there was "no evidence of domestic violence occurring between the parents before the filing of the petition" for abuse, neglect, and dependency. Mother testified to as much; in an unchallenged and therefore binding Finding, the court noted during the termination hearing, "[M]other testified that there was no domestic violence between her and the [F]ather prior to their DSS involvement." And the

first mention of domestic violence between the parents in the record before us, namely the strangulation incident from Fall of 2018, does not appear until the 10 February 2020 hearing that led to the October 2020 Order, which is over two years after the incident that led to the children's removal from the home.[7]

¶ 105 We also reject Mother's argument the trial court erred "in refusing to allow testimony or reports from Dr. Parker and Attorney McCool as expert witnesses related to domestic violence." First, we note the trial court heard testimony from both witnesses as described in its unchallenged Findings of Fact. The trial court, in unchallenged Findings, explained it allowed Dr. Parker to testify as a "fact witness" rather than an expert because of her lack of full licensure and summarized her testimony. As to McCool, the trial court, again in an unchallenged Finding, explained it "accepted her as an expert in" the field of "victimology and domestic violence advocacy in the law." The trial court only excluded testimony from McCool because "intimate partner violence [was] not a fact in issue because it [was] not a reason or condition which caused the removal of the children." It also found Mother's therapy with Dr. Parker did not assist Mother "in alleviating the conditions or reasons for removal of the children" for the same reason.

¶ 106 This case is not one where there was a history, report, or even suspicion of domestic violence before DSS removed the children from the home, so, as the trial court found, domestic violence did not play a role in the removal of the children from the home. As a result, we reject both Mother's and Amicus Coalition's arguments about domestic violence as they relate to the specific facts in this specific case.

¶ 107 Turning to Finding 83, the trial court's unchallenged Findings of Fact provided ample support for its conclusion the parents, and Mother specifically, had failed to "address and alleviate" the conditions that brought Mark and Ken into DSS custody. The court again recounted Mother's case plan from the original abuse, neglect, and dependency proceeding, as we addressed in detail above in Mother's challenge to the October 2020 Order. The trial court then incorporated its Findings 58–62 from the October 2020 Order that recounted Mother's efforts up to the time

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7. In the June 2018 hearings that led to the August 2018 initial disposition order, the trial court received into evidence a text in which Father said when not high on marijuana he was "a very negative, abusive and ugly person." Aside from generically using the word "abusive," this does not give any insight into the nature, extent, or timeline of the abuse. Notably, the trial court did not make any additional Findings on domestic violence in the two subsequent permanency planning and review orders and only discussed the subject again in the October 2020 Order.

of that order. Those Findings from the October 2020 Order explained how the trial court did not credit Mother's parental capacity evaluation because it did not address the lack of explanation for Ken's injuries and how the trial court did not find Mother's parenting class sufficient because it was "limited to childproofing the home and discussion of child health as in what to do if the child is sick or injured."

¶ 108 In the order terminating parental rights, the trial court made additional Findings updating Mother's efforts, or lack thereof, on those two fronts and further explained why it did not find her previous efforts sufficient. On the parenting capacity evaluation, the trial court noted "there is no change of circumstances" because the evaluator did not give an updated opinion and the "original evaluation failed to fully, objectively and adequately address the conditions that led to the removal of the children from the home." As to the parenting class, the trial court also found no change because the parenting class teacher offered no updated opinion and neither parent took additional parenting classes. The trial court then further explained its determination the previous parenting class was inadequate for the purpose of showing the parents were making progress towards addressing the conditions that led to DSS involvement:

> At the time of the termination hearing, neither the Mother . . . or the Father . . . had engaged in any parenting class which fully and completely addressed the medical and safety reasons that the child [Ken] came into care, especially the facts that were of the most concern to this court to include [Ken]'s low blood sugar/hypoglycemia, low body temperature and cachectic (wasted away) appearance at the time of his admission in addition to [Ken]'s other brain injuries, fractures and retinal hemorrhages. The court's concern for the physical safety of [Ken], and [Mark] as a sibling in the home, was not alleviated by the testimony or the letter submitted by [the parenting class teacher] because this was not covered in her courses and there was not any other evidence of any other services which addressed this concern.

These Findings thus provide ample support for ultimate Finding 83 that parents had not addressed the issues that led to the juveniles' removal from the home, thereby constituting neglect.

¶ 109 Mother argues she completed her case plan and thereby showed the progress she needed to show. As we have explained when rejecting

Mother's argument that the trial court erred in ceasing reunification efforts, the trial court took a different view of Mother's efforts than Mother takes. The trial court explained extensively—even more so in this termination order than in the October 2020 Order ceasing reunification—why Mother did not adequately address its concerns, and given we only review whether the Findings of Fact support ultimate Findings we treat as Conclusions of Law, we reject her arguments. *See In re M.K.*, ¶ 12 (explaining standard of review for Conclusions of Law). Mother's arguments about compliance with her case plan as of the date of the termination proceeding are also particularly poorly received because she already had the benefit of the trial court's order ceasing reunification efforts from October 2020 where it specifically told her why and how it did not think her parental capacity evaluation and parenting class sufficiently addressed the reasons for DSS involvement. Even if Mother had previously believed her parental capacity evaluation and parenting class were sufficient, she was on notice the trial court believed she needed to undertake additional efforts by the time of the termination proceeding.

¶ 110 Finally, based upon these ultimate Findings, the trial court also had a legally sufficient basis for its conclusion this amounted to a likelihood of future neglect, as it was required to find since Mother had been separated from Mark and Ken prior to the termination proceeding. *In re D.W.P.*, 373 N.C. at 339, 838 S.E.2d at 405. As we explained above when analogizing to termination of parental rights cases when discussing cessation of reunification efforts, our courts have repeatedly upheld trial court orders terminating parental rights on the grounds of the likelihood of future neglect when parents have been unable to explain children's past injuries. *E.g.*, *In re D.W.P.* 373 N.C. at 339–40, 838 S.E.2d at 405–06 (summarizing facts and then explaining, "Respondent-mother acknowledges her responsibility to keep David safe, but she refuses to make a realistic attempt to understand how he was injured or to acknowledge how her relationships affect her children's wellbeing. These facts support the trial court's conclusion that the neglect is likely to reoccur if the children are returned to respondent-mother's care."). For example, in *In re Y.Y.E.T.*, this Court found the parents' "refusal to accept responsibility for the child's injury indicate[d] that the conditions which led to the child's initial removal from [their] home ha[d] not been corrected" and thus "repetition of abuse or neglect [was] probable." *Id.*, 205 N.C. App. at 129, 695 S.E.2d at 523.

¶ 111 In the above section on cessation of reunification efforts, we explained how the trial court's Findings of Fact in that order aligned with the facts of *In re Y.Y.E.T.* and we find similar alignment here. First, the trial court incorporated its key Findings on the lack of explanation from

its October 2020 Order ceasing reunification efforts in its order terminating parental rights. Second, the trial court made additional Findings on the continued lack of explanation and medical impossibility of Father's explanation for Ken's injuries and condition when Ken was admitted to the hospital. As such, the trial court had ample support for its Conclusion there was a likelihood of future neglect because of Mother's lack of explanation of Ken's injuries.

¶ 112 The trial court's Conclusion further properly determines both Ken and Mark can be considered neglected, via the likelihood of future neglect and abuse, based on Ken's injuries alone. The definition of neglected juvenile explains abuse or neglect of any juvenile in the home is relevant to determining whether any other juvenile in the home is neglected:

> In determining whether a juvenile is a neglected juvenile, it is relevant 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.

N.C. Gen. Stat. § 7B-101(15) (eff. 1 Dec. 2019 to 30 Sept. 2021). This link reflects "the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re D.B.J.*, 197 N.C. App. 752, 755, 678 S.E.2d 778, 780–81 (2009) (quoting *In re T.S.*, *III & S.M.*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006)). While the fact of prior abuse alone is not enough, this Court has recognized that a "parent's lack of acceptance of responsibility" can be a required additional factor "to suggest that the neglect or abuse will be repeated." *See In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014) (summarizing *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) as indicating a "parent's lack of acceptance of responsibility" is a sufficient additional factor). Similarly here, the trial court could rely on the prior abuse and neglect of Ken plus Mother's lack of explanation for Ken's injuries and condition when he arrived at the hospital to determine Mark was also a neglected juvenile because of the likelihood of future neglect or abuse.

¶ 113 As a result, we reject Mother's argument the adjudication as to Mark "is based on the circumstances relating to Ken's abuse or neglect in 2017" and "[t]here are no supported findings establishing the presence of other factors with a nexus to Mark or to the likelihood he would be neglected by Mother if his custody was returned to her." Mother's lack of explanation for Ken's injuries is the other factor with a nexus to Mark

because he was—and would be if returned to Mother's custody—in the same environment where Ken's injuries occurred, as the trial court recognized in ultimate Finding 82.

¶ 114 Beyond the relevance of Ken's injuries as to the neglect ground of termination for Mark, the trial court also recounted, throughout the proceedings in this case, various concerns about Mark, which the trial court took notice of when entering the adjudication order in the termination proceeding. Specifically, in both the abuse, neglect, and dependency adjudication order, to which Mother consented, and the initial disposition order, the trial court noted the parents did not agree to have a skeletal survey done on Mark, which DSS ordered as part of a child abuse evaluation, such that one was not done. A skeletal survey on Ken had revealed skull fractures and "rib fractures in various stages of healing" that led to the initial conclusion Ken's injuries indicated "non-accidental or inflicted trauma."

¶ 115 In addition to Mother refusing to allow a skeletal survey on Mark as part of a child abuse evaluation, the trial court also noted a series of concerns around immunizations in its initial disposition order. Initially, Mark's foster parents signed him up for daycare, necessitating immunizations, but the parents contacted DSS "and requested they cancel" the immunization appointment.[8] Another time, shortly after Ken was born, the parents wanted Mark to be able to visit him and they lied to hospital staff that Mark had been immunized. In the same section of the initial disposition order, the trial court also found "the parents have a pattern of refusing medical treatment for both" Mark and Ken. While these Findings were not specifically repeated in the termination proceeding adjudication order, the court took judicial notice of them, and they demonstrate the trial court had additional concerns specific to Mark.

¶ 116 We also reject Mother's arguments as to Ken's adjudication. Mother argues "[t]he evidence and findings were insufficient to show a reasonable likelihood Mother would neglect or abuse Ken if he was returned to her custody" because she "fully complied with and completed her case plan" and because the trial court failed to "address any clear and convincing evidence of changed circumstances of a substantial risk of abuse or neglect by Mother at the time of the termination hearing." We have repeatedly explained how Mother did not fully comply with and complete her case plan to the trial court's satisfaction, most recently when addressing her challenge to ultimate Finding 83. We also note

8. These immunizations were standard childhood immunizations normally required for children in school or daycare in North Carolina well before the COVID-19 pandemic.

completing a case plan alone does not preclude terminating parental rights on the grounds of abuse or neglect. *See In re L.G.G.*, ¶ 34 ("[A] parent's compliance with his or her case plan does not preclude a finding of neglect." (quoting *In re J.J.H.*, 376 N.C. at 185, 851 S.E.2d 336)). As to changed circumstances, the trial court made unchallenged Findings indicating no circumstances changed with respect to Mother's parental capacity evaluation and parenting classes, which it had previously found were insufficient. The trial court even directly used the language of changed circumstances at one point explaining: "As to the parenting capacity evaluation, *there is no change of circumstances* presented at the termination hearing . . . ."

¶ 117 Therefore, after de novo review, we determine the trial court's Findings of Fact support its ultimate Findings and Conclusion Mother's parental rights should be terminated on the grounds of neglect as to both Mark and Ken and on the grounds of abuse as to Ken pursuant to North Carolina General Statute § 7B-1111(a)(1).

D. Termination on Willful Failure to Make Reasonable Progress Ground

¶ 118 Mother also argues "[t]he trial court erred in terminating [her] parental rights on the ground she willfully failed to make reasonable progress" under North Carolina General Statute § 7B-1111(a)(2). Her previous challenges to Findings of Fact 85 and 86 also fit within this ground because they were in practice Conclusions of Law that mirror the language of § 7B-1111(a)(2). "Because the trial court properly terminated [her] parental rights based upon" abuse and neglect under North Carolina General Statute § 7B-1111(a)(1), "we need not address this argument." *In re L.M.M.*, 379 N.C. 431, 2021-NCSC-153, ¶ 29 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) and summarizing the case as follows "holding that an appealed order should be affirmed when any one of the grounds found by the trial court is supported by findings of fact based on clear, cogent, and convincing evidence"); *see also* N.C. Gen. Stat. § 7B-1111(a) ("The court may terminate the parental rights upon a finding of one or more of the following" grounds for termination.).

¶ 119 We note in addition to Mother's arguments, some Amici contend termination on this ground was not proper. Amicus The ACLU of North Carolina Legal Foundation argues "the trial court's failure to properly weigh the Mother's successful efforts to remedy the issues leading to the children's removal . . . raised serious due process concerns." (Capitalization altered.) The ACLU of North Carolina later clarified this

fit with § 7B-1111(a)(2) by arguing applicable law only requires reasonable progress, which invokes the language of that sub-section. N.C. Gen. Stat. § 7B-1111(a)(2). Amici North Carolina Justice Center and North Carolina Community Bail Fund of Durham argue "[t]he trial court did not adequately consider the impact of wealth-based pre-trial incarceration when it evaluated this case for the termination of parental rights" and then specifically indicated their arguments are under § 7B-1111(a)(2). Amicus North Carolina Coalition Against Domestic Violence also challenges Finding of Fact 86, which we have already explained fits under this ground for termination.

¶ 120 Because we have already found the trial court properly terminated Mother's parental rights based on § 7B-1111(a)(1), we do not respond to these arguments other than to make the following observations. First, while The ACLU of North Carolina uses constitutional rather than statutory language, the argument is essentially the same because our statutory procedures exist to protect parents' constitutional due process rights as we explained at the outset of our analysis. *E.g.*, N.C. Gen. Stat. § 7B-100 (2021) (directing courts to interpret and construe abuse, neglect, and dependency and termination of parental rights statutes "[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents") In addition, we cannot address constitutional arguments which were not raised before the trial court, *see In re J.N.S.*, 207 N.C. App. 670, 678, 704 S.E.2d 511, 517 (2010) ("[I]t is well settled that a constitutional issue not raised in the lower court will not be considered for the first time on appeal." (quotations and citation omitted)), and neither Mother nor Father raised constitutional arguments as discussed by Amicus before the trial court.

¶ 121 Second, the "wealth-based pre-trial incarceration" argument advanced by Amici North Carolina Justice Center and Community Bail Fund of Durham were not raised by Mother in her briefing as reasons for the trial court's errors. In fact, Amici's argument directly contradicts Mother's argument. Amici argue the trial court failed to (properly) consider Mother's "incarceration and the subsequent impact it had on her ability to comply with the case plan and parent her children," specifically around the issue of demonstrating what she learned in parenting class by applying it in visitation. But Mother argues under § 7B-1111(a)(2) she "complied with and fully completed the case plan established by the court to address the removal conditions," which would necessarily include demonstrating what she learned from parenting class in

visitation. Mother also does not argue on appeal that her incarceration impacted her ability to comply with the ordered services.

¶ 122 Even without that contradiction, we note the trial court recognized Mother and Father were incarcerated and could not post bond, which prevented them from being able to engage in services. In response, the trial court ordered DSS to "determine what, if any, services can be accessed in the jail and make referrals, if possible." Finally, as to this argument, we note Mother had a period of time after she was released in which she had visitation with Mark regularly, and thus to demonstrate the skills she learned in parenting class. Beyond these notes, we need not respond to Amici's arguments on the willful failure ground because we have already found the trial court properly terminated Mother's parental rights based on § 7B-1111(a)(1).

V. Termination of Mother's Parental Rights- Disposition Phase Exclusion of Evidence as to Best Interests

¶ 123 **[3]** Mother finally argues the trial court erred when it "exclude[ed] relevant evidence mandated for consideration" at the dispositional stage of the termination proceeding. Specifically, she argues the trial court erred in excluding testimony from one of her expert witnesses, Dr. Pryce, on the following topics:

> 1. Mother's bond with and sacrifices for her children, placing their needs above her own.
>
> 2. Mother's proactive parenting serving the best interests of her children.
>
> 3. The measured data indicating the potential harm, negative outcomes, and lack of benefit to children from separation from their biological parent and involvement in foster care systems; placement with kin provides better stability, fewer emotional and behavior problems, and lower reactive attachment disorders.
>
> 4. The measured importance of maintaining biological family relationships and connections, especially of African American families,
>
> 5. Data establishing that diminished bonds between juveniles and parents can be enhanced sufficiently to support reunification of the family.

We review the relevant legal background and standard of review before addressing Mother's argument.

A. Legal Background and Standard of Review

¶ 124 Our Supreme Court has described the trial court's task at the dispositional stage of a termination proceeding as follows:

> At the dispositional stage of a termination proceeding, the trial court must "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019). In doing so, the trial court
>
> > may consider any evidence, including hearsay evidence as defined in [N.C.G.S. §] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. 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.*

In re G.G.M., 377 N.C. 29, 2021-NCSC-25, ¶ 22. On appeal, "[t]he trial court's determination of a child's best interests under N.C.G.S. § 7B-1110(a) is reviewed only for abuse of discretion." *Id.*, ¶ 23 (quoting *In re J.S.*, 374 N.C. at 822, 845 S.E.2d 66). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quoting *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735 (2020)).

¶ 125 When considering the specific question raised by Mother's argument—the admissibility of evidence at the dispositional stage—the trial court operates within the bounds of § 7B-1110(a), which states: "The court may consider any evidence, including hearsay evidence as defined

in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile." N.C. Gen. Stat. § 7B-1110(a). Appellate courts review the trial court's decision to admit or deny evidence at the dispositional phase of a termination of parental rights proceeding for abuse of discretion. *See In re M.Y.P.*, 378 N.C. 667, 2021-NCSC-113, ¶ 27 ("Given the wide discretion afforded the trial court in making evidentiary rulings during the dispositional hearing, even assuming that the issue had been preserved for appellate review, we would conclude the trial court did not abuse its discretion by excluding further testimony from respondent on this issue."); *see also In re R.D.*, 376 N.C. 244, 250–51, 852 S.E.2d 117, 124 (2020) ("During the dispositional stage, conversely [to the adjudication stage], the trial court retains significantly more *discretion in its receipt of evidence* and may admit any evidence that it considers to be relevant, reliable, and necessary in its inquiry into the child's best interests—even if such evidence would be inadmissible under the Rules of Evidence." (emphasis from original removed and own emphasis added)).

¶ 126 In her opening brief, Mother argues the standard of review is de novo instead of abuse of discretion because the relevancy of evidence is a question of law. First, Mother relies on *Hill v. Boone*, 279 N.C. App. 335, 2021-NCCOA-490, which is a medical malpractice case not subject to the special evidentiary rule set out in § 7B-1110(a). *Hill*, ¶ 2 (noting case is a medical malpractice action). Thus, *In re M.Y.P.* and *In re R.D.* are controlling with their abuse of discretion standard. *In re M.Y.P.*, ¶ 27, *In re R.D.*, 376 N.C. at 251, 852 S.E.2d at 124. Further, we note by her reply briefing Mother argued excluding this evidence was an abuse of discretion, stating, "Excluding it because it was not based on North Carolina research was an abuse of discretion," although at oral argument she again switched and argued the issue should be reviewed de novo. Because prior precedent dictates abuse of discretion as the standard of review in this context, we review the trial court's exclusion of evidence from one of Mother's experts for abuse of discretion.

B. Analysis

¶ 127 Reviewing for abuse of discretion, we must decide whether the trial court's decision to exclude testimony from Mother's expert was "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re G.G.M.*, ¶ 23. After some foundational testimony, certifying the witness, Dr. Pryce, as an expert in "[c]hild welfare policy and practice," extensive voir dire of Mother's expert, and arguments from the parties on whether the expert should be

allowed to testify, the trial court excluded the testimony from Mother's expert because it "deem[ed] that her testimony is irrelevant":

> THE COURT: All right. Thank you. Well, the court has heard these questions, and this court follows the law. The court heard, as relates to Dr. Pryce, certainly Dr. Pryce is well-educated, and this court is not saying that she is not. However, the court finds it concerning that she was given not -- even from her own testimony, she did not think she had all the documentation on which she is premising an expert opinion. She did not ask for the court orders. She does not know about the DHHS practices in North Carolina where this incident involving the children took place. None of the research that she is relying on is from North Carolina. And so because of that, this court is going to deem that her testimony is irrelevant.

The trial court thus made a reasoned decision to exclude testimony from Mother's expert.

¶ 128 More specifically, we can break down the trial court's reasoning into two portions to respond to the five categories about which Mother complains. First, as to Mother's categories about her bond with her children and proactive parenting serving the children's best interests, the court explained it was concerned Dr. Pryce "even from her own testimony, she did not think she had all the documentation on which she [was] premising an expert opinion" and "did not ask for the court orders." The trial court thus explained it was not accepting the expert's testimony because it did not think her opinion could help it make the best interest determination before it.

¶ 129 In *In re K.G.W.*, this Court found a trial court did not abuse its discretion when it decided to exclude, from the dispositional phase of a termination proceeding, testimony from an expert witness who did not have sufficient information on the relevant case. *See* 250 N.C. App. 62, 63, 66–67, 791 S.E.2d 540, 541, 543 (2016) (excluding testimony by psychologist expert "who had not worked with the juvenile and who lacked experience in juvenile court matters" because it "was not helpful to" the trial judge as "trier of fact"). In so ruling, the *In re K.G.W.* Court explained this aspect of a trial court's discretion rests on the trial court's ability to weigh evidence and "as an appellate court, it is not our role to determine the weight to give to the evidence." *Id.*, 250 N.C. App. at 67, 791 S.E.2d at 543; *see also* N.C. Gen. Stat. § 7B-1110(a) (permitting trial

court to consider evidence a trial court "finds to be relevant, *reliable*, and *necessary*" (emphasis added)). Here, similarly, we will not upset the trial court's discretionary decision to determine the expert's testimony would not be helpful because the expert did not have sufficient information regarding Mother or the specific facts of this case, including the trial court's orders entered prior to Dr. Pryce's review and testimony.

¶ 130 Mother's other three categories all focus on the expert's proffered testimony regarding data on the better outcomes from family placements over foster care, the importance of maintaining family bonds, "especially [in] African American families," and the ability to "enhance[]" otherwise "diminished bonds" between children and parents to allow for reunification. Amicus The ACLU of North Carolina also argues data regarding enhancing bonds to allow for reunification was relevant. And within this broad category of data, Amicus North Carolina NAACP contends Mother's expert would have provided relevant evidence of "racial disproportionality and racial bias in the child welfare system" in addition to the types of data Mother highlights in her brief.[9]

¶ 131 The broad and general points noted by Amici are certainly worthy of note, and in fact, these points are already addressed as factors in North Carolina General Statute § 7B-1110(a). *See* N.C. Gen. Stat. § 7B-1110(a) (listing factors relevant to best interest of the child at the termination disposition stage including "bond between the juvenile and the parent" and a catch-all provision for "[a]ny relevant consideration"); *see also In re N.C.E.*, 379 N.C. 283, 2021-NCSC-141, ¶ 19 ("[T]he trial court may treat the availability of a relative placement as a relevant consideration under N.C.G.S. § 7B-1110(a)(6)." (quotations and citation omitted)).

¶ 132 The General Assembly has also identified the "purposes and policies" for implementation of Chapter 7B, Subchapter I, N.C. Gen. Stat. § 7B-100 (2021), which includes termination of parental rights. *See* N.C. Gen. Stat. Chapter 7B, Subchapter I, Article 11 (on termination of parental rights). Each of the "purposes and policies" seeks to strike a balance, based on the facts of each case, between "the right to family autonomy" and the needs of the children for both protection and a "safe, permanent home:"

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9. Amicus NAACP also argues Mother was improperly "prevented from testifying about the role of race in the proceeding." (Capitalization altered.) We first note Mother did not raise this issue on appeal. Second, Mother made no offer of proof when the trial court ultimately ruled she could not testify about the role "race has played" in her "interactions" with DSS. "[A] party is required to make an offer of proof" when seeking "to preserve an argument concerning the exclusion of evidence." *In re M.Y.P.*, ¶ 25. Therefore, the argument has not been properly preserved for our review and we decline to address it.

> This Subchapter shall be interpreted and construed so as to implement the following purposes and policies:
>
> > (1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;
> >
> > (2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family.
> >
> > (3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; and
> >
> > (4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.
> >
> > (5) To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time.

N.C. Gen. Stat. § 7B-100.

¶ 133 The law favors family placements over foster care—*if* a family placement is available and can be done safely. *See In re N.C.E.*, ¶ 19 (stating the "extent to which" the availability of a relative placement at termination dispositional stage is relevant depends "upon the extent to which the record contains evidence tending to show whether such a relative placement is, in fact, available" (quotations and citations omitted)); *see also* N.C. Gen. Stat. § 7B-903(a1) (2021) (stating, in context of abuse, neglect, and dependency dispositions trial courts "shall" order placement with a relative who is "willing and able to provide proper care and supervision [of the juvenile] in a safe home" unless contrary to the child's best interests before discussing out of home placements). The law recognizes the importance of maintaining family bonds for the benefit of both

parent and child, if possible. Parents have a constitutionally-protected right to the care, custody, and control of their children—*if* the parents are not unfit or have not acted inconsistently with their constitutionally protected rights as a parent. *See In re E.B.*, 375 N.C. at 315, 847 S.E.2d at 670–71 ("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." (quoting *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (alteration omitted))). But here, the trial court's responsibility was to find the facts based upon the evidence presented as to these specific children and parents and to determine the best interests of these specific children based upon those facts and the law.

¶ 134 Relevant to these data grounds, the trial court explained it did not find the expert's testimony relevant because she did "not know about the DHHS practices in North Carolina where this incident . . . took place" and "[n]one of the research" the expert relied upon "is from North Carolina." Again, these explanations represent a reasoned decision, which is the standard the trial court's exclusion must meet. *In re G.G.M.*, ¶ 23. Neither Mother nor Amici have demonstrated how research from another state and expert testimony which is not based upon in-state DHHS practices would be relevant to any determination made in this particular case. The trial judge here did not abuse her discretion by excluding the evidence on those same grounds. *In re K.G.W.*, 250 N.C. App. at 67, 791 S.E.2d at 543.

¶ 135 Both Mother and Amicus NAACP argue the excluded data—in Mother's argument the data on outcomes in "non-kinship homes" and in NAACP's argument the research on "[t]he disproportionate and negative impact of the child welfare system on marginalized racial groups"—can still apply to North Carolina because North Carolina is not different from other states. But even if we assume the proffered data about outcomes from "non-kinship homes" and regarding the "disproportionate and negative impact of the child welfare system on marginalized racial groups" are true, neither Mother nor Amicus have demonstrated this information has any direct relevance to this case. Ken suffered serious, life-threatening abuse while in the sole care of his parents, and we have already addressed the adjudications of abuse and neglect. Statistics or studies regarding outcomes for children in non-kinship homes or disproportionate impacts on "marginalized racial groups" may be of great assistance to the policy-making branches of government when establishing the laws and procedures in child welfare cases generally, but may have no direct relevance to a particular child or family. The trial

court also considered whether these studies were useful in this case, as Mother's trial counsel argued familiarity with North Carolina was not necessary because the expert's knowledge covered the whole country.[10] We cannot say the trial court made an unreasoned decision or a "manifestly unsupported" one in determining otherwise, and thus we reject Mother and Amicus NAACP's arguments. *In re G.G.M.*, ¶ 23.

¶ 136 The trial court did not abuse its discretion in excluding the testimony of Mother's expert during the dispositional phase of the termination proceeding.

VI. Conclusion

¶ 137 We reject all Mother's arguments on appeal and therefore affirm the trial court's orders. After granting her PWC to review the issue, we conclude the trial court did not abuse its discretion in ceasing reunification efforts because it made the required Findings of Fact and a reasoned decision based on its Findings on Mother's case plan progress and the still-unexplained nature of some of Ken's injuries and ailments. We also conclude the trial court properly determined parental rights should be terminated on the grounds of neglect as to both Mark and Ken and on the grounds of abuse as to Ken pursuant to North Carolina General Statute § 7B-1111(a)(1) because competent evidence supports the trial court's Findings of Fact and, based on our de novo review, those Findings of Fact support its ultimate Findings and Conclusions of Law. Because the trial court only requires one ground to terminate parental rights and we found that already, we do not address the trial court's other ground of willful failure to make reasonable progress under North Carolina General Statute § 7B-1111(a)(2). Finally, the trial court did not abuse its discretion in excluding testimony from Mother's expert.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

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10. As part of this argument, Mother's counsel said the expert had "seen research coming out of North Carolina," but the expert's testimony to that effect was struck following an objection.

LOVETT v. UNIV. PLACE OWNER'S ASS'N

[285 N.C. App. 366, 2022-NCCOA-594]

MARY LOVETT, ADMINISTRATOR OF THE ESTATE OF GREGORY DWAYNE LOVETT, PLAINTIFF
v.
UNIVERSITY PLACE OWNER'S ASSOCIATION, INC. F/K/A UNIVERSITY PLACE PROPERTY OWNERS ASSOCIATION, TRICOR INTERNATIONAL, LLC, AND EBA CRYSTAL REAL ESTATE LLC, D/B/A SHOPPES AT UNIVERSITY PLACE, DEFENDANTS

No. COA22-28

Filed 6 September 2022

Negligence—gross contributory negligence—voluntary intoxication

The trial court properly dismissed—pursuant to Civil Procedure Rule 12(b)(6)—a wrongful death action against a retail, dining, and recreational complex where, one night, the decedent arrived at the complex already drunk, consumed more alcohol on the premises until his blood alcohol concentration was nearly five times the legal limit, and then drowned after jumping into a nearby lake. The decedent's voluntary intoxication amounted to gross contributory negligence barring his estate's recovery from any negligence by the complex.

Appeal by plaintiff from order entered 13 October 2021 by Judge Gregory Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2022.

Mauney PLLC, by Gary V. Mauney for plaintiff-appellant.

McAngus, Goudelock & Courie, PLLC, by Zachary D. Walton and Heather G. Connor for defendants-appellees Tricor International, LLC and University Place Owner's Association, Inc.

Raynor Law Firm, PLLC, by Kenneth R. Raynor for defendant-appellee Crystal Real Estate, LLC.

TYSON, Judge.

¶ 1 Mary Lovett ("Plaintiff"), in her representative capacity as Administrator of the Estate of Gregory Dwayne Lovett ("Decedent"), appeals from the trial court's order granting University Place Owner's Association, Inc., Tricor International, LLC, and EBA Crystal Real Estate LLC's (collectively "Defendants") motions to dismiss with prejudice. We affirm.

I. Background

¶ 2 On the evening of 14 September 2020, Decedent joined friends at the Shoppes at University Place, a retail, dining, and recreational complex located in Charlotte. Decedent was intoxicated upon arrival at the Shoppes. Decedent met his friends at Boardwalk Billy's Raw Bar & Ribs restaurant and bar and consumed more alcohol. Decedent allegedly suffered from alcoholism.

¶ 3 After leaving Boardwalk Billy's, Decedent and his friends walked around the lake adjoining the Shoppes. No fence, warning signs, or "no swimming" signs were posted around the lake, nor was any security personnel present to prohibit Decedent from jumping in the lake. Decedent walked to the edge of the lake and jumped in. Several by-standers rendered aid and pulled Decedent from out of the lake.

¶ 4 Shortly after being pulled out of the lake, Decedent jumped into the lake a second time. Decedent's friends became concerned when they could no longer see him above the surface of the water, but did not enter the lake and attempt to pull him again out of the water. Decedent's friends called the Charlotte-Mecklenburg Police Department for assistance. The police arrived and summoned divers to search for Decedent. Decedent could not be located. Police issued a "missing persons" report.

¶ 5 On 15 September 2020, the police returned with divers. Divers found and retrieved Decedent's body from under the surface of the water. The Mecklenburg County Medical Examiner's Office conducted an autopsy and concluded Decedent had drowned. The toxicological profile revealed Decedent's blood alcohol concentration ("BAC") level at the time of death was 0.37 grams per milliliter (0.37 g/100 mL).

¶ 6 Plaintiff qualified as administrator of Decedent's estate and filed a complaint alleging Decedent's death was wrongful and directly and proximately caused by Defendants' negligence and gross negligence. Defendants moved to dismiss Plaintiff's complaint with prejudice. The trial court heard arguments on Defendants' motions to dismiss on 14 September 2021 and entered an order dismissing Plaintiff's complaint with prejudice on 4 October 2021. Plaintiff appeals.

II. Jurisdiction

¶ 7 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

¶ 8 Plaintiff asserts the trial court erred by allowing Defendants' motions to dismiss.

IV. Motion to Dismiss

A. Standard of Review

¶ 9 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).

¶ 10 "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).

¶ 11 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. Analysis

¶ 12 In North Carolina, "a plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 73-74 (1992) (citation omitted). Plaintiff correctly asserts Decedent's contributory negligence does not bar recovery from a defendant's gross negligence. "Only gross contributory negligence by a plaintiff precludes recovery by the plaintiff from a defendant who was grossly negligent." *McCauley v. Thomas*, 242 N.C. App. 82, 89, 774 S.E.2d 421, 426 (2015) (citations omitted). "Gross negligence is willful and wanton negligence." *Id.*

¶ 13 Our Court has held:

> An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others. An act is wilful (sic) when there exists a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, a duty assumed by contract or imposed by law.

Boyd v. L.G. DeWitt Trucking Co., 103 N.C. App. 396, 402, 405 S.E.2d 914, 918 (1991) (internal citations and quotation marks omitted).

¶ 14 In *Sorrells*, our Supreme Court held the trial court properly granted defendant's motion to dismiss where decedent was voluntarily intoxicated, lost control of his vehicle, and struck a bridge. *Sorrells*, 332 N.C. at 649, 423 S.E.2d at 74. The Court found the facts established a similar degree of contributory negligence on part of the decedent, and plaintiff could not prevail. *Id.*

¶ 15 In *Davis v. Hulsing Enters., LLC*, 370 N.C. 455, 457, 810 S.E.2d 203, 205 (2018) our Supreme Court affirmed *Sorrells*' analysis. Our Supreme Court held the decedent's voluntary intoxication established contributory negligence, barring recovery from defendant's ordinary negligence. *Id.* at 458, 810 S.E.2d at 206. It held, regardless of defendant's negligence in continuing to serve decedent alcohol after she was visibly intoxicated, the decedent's contributory negligence prevented recovery. *Id.*

¶ 16 Here, Decedent was voluntarily intoxicated upon arrival and when he twice jumped into the lake. Decedent's BAC was nearly five times the legal intoxication threshold of 0.08 grams per milliliter (0.08 g/100 mL). We conclude, as did our Supreme Court in *Sorrells*, Decedent's voluntary intoxication level equaled, if not exceeded, any alleged negligence on Defendants' part. The trial court properly concluded these uncontested facts, reviewed in the light most favorable to Plaintiff, established such a degree of Decedent's contributory negligence to prevent Plaintiff from prevailing as a matter of law.

¶ 17 Plaintiff's argument fails because Decedent was grossly contributorily negligent, and his actions bar any negligence claim against Defendants. *Id.* Plaintiff's arguments are without merit.

V. Conclusion

¶ 18 Our case law demonstrates voluntary intoxication is a circumstance which establishes gross contributory negligence. Decedent was

voluntarily intoxicated nearly five times the legal limit when he twice jumped into the lake. Decedent's gross contributorily negligence bars any recovery for negligence from Defendants.

¶ 19 Upon *de novo* review, taking Plaintiff's allegation as true and in the light most favorable to her, the trial court properly granted Defendants' motions to dismiss Plaintiff's complaint. The trial court's order dismissing Plaintiff's complaint is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and GORE concur.

CLARENCE RICHARDS, Employee, Plaintiff
v.
HARRIS TEETER, INC., Employer, SELF-INSURED (SEDGWICK CLAIMS MANAGEMENT SERVICES, Third-Party Administrator), Defendants

No. COA21-804

Filed 6 September 2022

Workers' Compensation—termination of benefits—misconduct related to compensable injury—constructive refusal of suitable employment—inapplicable

An opinion and award ordering an employer (defendant) to pay temporary total disability benefits to one of its truck drivers (plaintiff) was affirmed where, after plaintiff initially received benefits for a back injury he sustained on the job in a single-vehicle accident, defendant fired plaintiff for cause and then terminated his benefits on grounds that, because he was fired for misconduct (falling asleep at the wheel during the accident), plaintiff had made himself ineligible for rehire through defendant's return-to-work program and therefore had constructively refused suitable post-injury employment. The Industrial Commission properly declined to apply the test for constructive refusal of suitable employment articulated in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228 (1996), which only applies to employees who are fired for misconduct that is unrelated to their work-related injury, where applying the test to plaintiff would have created a fault-based bar to workers' compensation, which would cut against the underlying principles of the workers' compensation system.

Appeal by defendants from opinion and award entered 26 August 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 August 2022.

Hunter & Everage, by S. Camille Payton, for plaintiff-appellee.

Pope Aylward Sweeney & Santaniello, LLP, by Alexander J. Elmes and Edward A. Sweeney, for defendants-appellants.

ZACHARY, Judge.

¶ 1 Defendants Harris Teeter, Inc., ("Defendant") and Sedgwick Claims Management Services (collectively, "Defendants") appeal from an Opinion and Award entered by the North Carolina Industrial Commission in which the Full Commission concluded that the *Seagraves* test did not apply in this case. After careful review, we affirm.

I. Background

¶ 2 Plaintiff Clarence Richards began working as a truck driver for Defendant in 2016. On 3 August 2019, Plaintiff was injured in a single-vehicle accident on Interstate 85 when his truck "ran off the road returning from Virginia." Vance County EMS transported Plaintiff to Maria Parham Health's emergency department. The EMS record reports that Plaintiff "said he didn't know he was listening to the radio and then the accident . . . says he may have just drifted thinking about something." The hospital record states that Plaintiff "lost control of his vehicle this morning just after taking a sip of Gatorade and wound up wrecking into a grassy field."

¶ 3 Plaintiff's physician wrote Plaintiff out of work while he received medical treatment. On 13 August 2019, Plaintiff filed a Form 18 Notice of Accident to Employer and Claim of Employee, Representative, or Dependent with the Industrial Commission. On 30 August 2019, Defendants filed a Form 63 Notice of Payment of Compensation Without Prejudice, accepting Plaintiff's claim for workers' compensation benefits for a "low back" injury as a result of the 3 August accident. Defendants began paying indemnity benefits and medical compensation to Plaintiff, and did not contest the compensability of Plaintiff's claim within the statutory deadline, thereby accepting the compensability of his "low back" injury. *See* N.C. Gen. Stat. § 97-18(d) (2021).

¶ 4 Shortly after the accident, Defendant terminated Plaintiff's employment, effective 29 August 2019. Brian Barnhardt, a workers'

compensation claims manager for Defendant, testified before the Deputy Commissioner that Defendant's "review committee" determined that Plaintiff's "accident was preventable." Defendant's personnel records indicate that Plaintiff was terminated for a "Violation of Established Safety Procedures"—namely, that Defendant's camera in the cab of the truck showed that Plaintiff closed his eyes for approximately seven to ten seconds, which led to the single-vehicle accident—and that therefore Plaintiff was "Not Eligible for Rehire."

¶ 5 Barnhardt also testified regarding Defendant's "mandatory return-to-work program for a workers' comp injury[,]" and the availability of "numerous temporary positions an associate can do if they have restrictions." However, Barnhart testified that because Plaintiff was "not eligible for rehire[,]" Defendant would not offer Plaintiff any job, including positions "that [Defendant] claim[ed] [Plaintiff] could do." Defendant also declined to provide "any vocational rehabilitative services to assist Plaintiff in locating suitable employment."

¶ 6 Meanwhile, Plaintiff was released to return to "sedentary work only" on 15 August 2019, but he was prohibited from driving a truck professionally "due to functional limitations." From 23 September 2019 through 3 February 2020, Plaintiff received treatment for his lower back and right knee from Dr. Ronald Gioffre, a board-certified orthopedic surgeon. Plaintiff also attended physical therapy, which Dr. Gioffre reported "seem[ed] to be helping greatly[,]" although Dr. Gioffre noted that Plaintiff "still cannot stand more than thirty minutes and sit about 1 hour, before he starts to have pain."

¶ 7 Later, in his deposition, Dr. Gioffre elaborated on his decision regarding Plaintiff's work restrictions:

> So I basically didn't feel in the few times that I saw him that even if he had a job that I would have let him go back to work with his back and hip, because I couldn't see how he could possibly get up – step up into one of those trucks with the hip the way it was, and his back was an issue.
>
> . . . .
>
> I know what he had to do as a truck driver, and I said, No, you can't go back to work. I didn't know what else they wanted me to do with restrictions. If they would have had a sedentary type job, I'd have sent him back. There was no reason he couldn't do sedentary work.

When presented with Defendant's job descriptions for two positions—Cashier and Self-Checkout Cashier (also referred to as a "U-Scan Cashier")—Dr. Gioffre testified that he thought Plaintiff would "have a hard time all day doing [the Cashier] work eight hours a day"; nonetheless, it was his opinion that Plaintiff would be able to perform the work of a U-Scan Cashier if he were permitted to sit periodically.

¶ 8 After being released from Dr. Gioffre's care on 3 February 2020, Plaintiff sought employment through various job search websites, across various industries. Plaintiff testified before the Deputy Commissioner that he looked for jobs that do not require constant sitting or standing, consistent with his restrictions, but that he had not received any replies from prospective employers. With regard to his resume, Plaintiff testified that he was 64 years old at the time of the hearing before the Deputy Commissioner, with three years of college education. He was employed for 12 years as a corrections officer, and for 27 years as a truck driver; he has never worked in an office and is "computer illiterate."

¶ 9 On 30 April 2020, Plaintiff's counsel filed a Form 33 Request that Claim be Assigned for Hearing, alleging that "Defendants have failed and refused to pay past due [temporary total disability] benefit underpayment." On 15 June 2020, Defendants filed a Form 33R Response to Request that Claim be Assigned for Hearing, replying, *inter alia*, that "Plaintiff has received all benefits to which he is entitled." The matter came on for hearing before the Deputy Commissioner on 8 July 2020, and by Opinion and Award entered 12 January 2021, the Deputy Commissioner ordered that Defendants pay temporary total disability "until Plaintiff returns to work, until further order of the Industrial Commission, or until compensation is otherwise legally terminated."

¶ 10 Defendants timely filed notice of appeal to the Full Commission of the North Carolina Industrial Commission, which heard this matter on 9 June 2021. By Opinion and Award entered 26 August 2021, the Full Commission awarded Plaintiff the same payment of temporary total disability and attorneys' fees, and added that "[s]ubject to the provisions of N.C. Gen. Stat. § 97-25.1, Defendant shall pay medical expenses incurred or to be incurred as a result of Plaintiff's admittedly compensable injury as may reasonably be required to effect a cure, provide relief, or lessen the period of disability."

¶ 11 Defendants timely filed notice of appeal to this Court.

II. Discussion

¶ 12 On appeal, Defendants first argue that the Full Commission erred by failing to find that Plaintiff constructively refused suitable employment,

and by failing to apply the test for constructive refusal of suitable employment first articulated by this Court in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 399 (1996), and subsequently adopted by our Supreme Court in *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 597 S.E.2d 695 (2004). Assuming application of the *Seagraves* test, Defendants also argue that the Full Commission erred by failing to find that Defendants had not shown that Plaintiff's termination was unrelated to his compensable injury, and by concluding that Plaintiff remains disabled or that he conducted a reasonable job search.

A. Standard of Review

¶ 13 "Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006), *reh'g denied*, 361 N.C. 227, 641 S.E.2d 801 (2007). Because the Commission "is the sole judge of the weight and credibility of the evidence," its "findings of fact are conclusive on appeal if supported by competent evidence[.]" *Blackwell v. N.C. Dep't of Pub. Instruction*, 2022-NCCOA-123, ¶ 5 (citations omitted).

¶ 14 "Findings not supported by competent evidence are not conclusive and will be set aside on appeal. But findings supported by competent evidence are conclusive, even when there is evidence to support contrary findings." *Johnson v. Covil Corp.*, 212 N.C. App. 407, 408–09, 711 S.E.2d 500, 502 (2011) (citations and internal quotation marks omitted). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Fields v. H&E Equip. Servs., LLC*, 240 N.C. App. 483, 485–86, 771 S.E.2d 791, 793–94 (2015) (citation omitted).

¶ 15 The Commission's conclusions of law are reviewed de novo. *Blackwell*, 2022-NCCOA-123, ¶ 5. Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Fields*, 240 N.C. App. at 486, 771 S.E.2d at 793–94 (citation omitted).

B. Constructive Refusal of Suitable Employment

¶ 16 The parties stipulated that "Plaintiff was injured during the scope of his employment" with Defendant. The initial compensability of Plaintiff's lower back injury resulting from the accident is also undisputed. Rather, this appeal concerns whether Plaintiff constructively refused suitable employment where Defendant deemed him ineligible for participation in Defendant's "return-to-work" program.

¶ 17 Before the Full Commission, Defendants argued that "Plaintiff constructively refused suitable employment because he was terminated for cause, and that but for the termination for cause, Plaintiff would have remained employed at his preinjury wages because Defendant would have accommodated Plaintiff's post-injury restrictions." On appeal, Defendants argue that the Full Commission erred by failing to extend the *Seagraves* test for constructive refusal of suitable employment. We disagree.

¶ 18 Under our Workers' Compensation Act, "[i]f an injured employee refuses suitable employment as defined by G.S. 97-2(22), the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. § 97-32. "In *Seagraves*, the Court of Appeals examined the question of whether an employee can be deemed to have refused suitable employment, thereby precluding injury-related benefits, if she is terminated for misconduct that is unrelated to her workplace injuries." *McRae*, 358 N.C. at 493, 597 S.E.2d at 698.

> In lieu of an employee's termination for misconduct serving as an automatic bar to benefits, the court in *Seagraves* adopted a test that measures whether the employee's loss of earning capacity is attributable to the wrongful act that caused the employee's termination from employment, in which case benefits would be barred, or whether such loss of earning capacity is due to the employee's work-related disability, in which case the employee would be entitled to benefits intended for such disability.

Id. at 493, 597 S.E.2d at 699.

¶ 19 The *McRae* Court adopted the *Seagraves* test: "to bar payment of benefits, an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury." *Id.* "An employer's successful demonstration of such evidence is deemed to constitute a constructive refusal by the employee to perform suitable work . . . ." *Id.* at 493, 597 S.E.2d at 699 (citation and internal quotation marks omitted). The employee's constructive refusal "would bar benefits for lost earnings, *unless* the employee is then able to show that his or her inability to find or hold other employment at a wage comparable

to that earned prior to the injury is due to the work-related disability." *Id.* at 493–94, 597 S.E.2d at 699 (citation and internal quotation marks omitted).

¶ 20 Further, our Supreme Court reiterated that, under the *Seagraves* test, the employer bears the burden "to show, by the greater weight of the evidence, that a plaintiff's termination was unrelated to his or her work-related injuries; the burden is not on a plaintiff to show that the termination was so related." *Id.* at 499, 597 S.E.2d at 702.

¶ 21 Importantly for the present case, the Full Commission noted in its Opinion and Award that the injured employee in *Seagraves* "had been provided light-duty, rehabilitative employment after contracting a compensable occupational disease[,]" *see Seagraves*, 123 N.C. App. at 229, 472 S.E.2d at 398, while the injured employee in *McRae* "was terminated for inadvertent errors she committed while performing a job to which she was reassigned subsequent to undergoing surgery for a compensable occupational disease[,]" *see McRae*, 358 N.C. at 491, 597 S.E.2d at 697–98. That the injured employees in *Seagraves* and *McRae* were terminated from rehabilitative employment was a significant factor to the Full Commission, which observed that Plaintiff "was not terminated from rehabilitative employment for misconduct unrelated to his admittedly compensable injury. Rather, Plaintiff in this case was terminated from his regular job for his role in the very accident that caused his admittedly compensable injury." Accordingly, the Full Commission concluded that "[t]he operative facts in the case before us are substantially different than those in *Seagraves* and *McRae*" and therefore, "[g]iven these fundamental factual differences, the *Seagraves* test is not applicable in this case."

¶ 22 Defendants argue that the Full Commission erred by distinguishing the case at bar from *Seagraves* and *McRae* on the basis of those injured employees' termination from rehabilitative employment, asserting that "[i]t is unclear why the Commission believes the temporal factor is required in the analysis of earning capacity and disability." Instead, Defendants contend that "[t]he fact that . . . Plaintiff's misconduct resulted in his termination for cause deprived . . . Defendant the opportunity to return him to suitable employment[.]" According to Defendant, it "has a job for . . . Plaintiff but for the fact he was terminated for unsafe driving when he fell asleep and drove his truck off the road[,]" an undisputed violation of Defendant's established safety protocols. Because it "has a job approved by the authorized treating physician which would have been available to . . . Plaintiff, but for his termination, the fact that termination did not occur during rehabilitative employment appears irrelevant." We cannot agree.

¶ 23 In seeking to apply the *Seagraves* test to cases such as this—in which the injured employee was terminated for causing the accident that resulted in his injury and so, pursuant to the employer's policies, has not and avowedly will not be offered suitable employment—Defendants essentially ask this Court to impose a for-cause bar to recovery of workers' compensation benefits when the employee is unable to find suitable employment elsewhere. Defendants' position is fundamentally incompatible with the well-established principles and purposes of the workers' compensation system, which deliberately eliminates negligence from its calculus in all but certain narrowly defined instances.

¶ 24 The Workers' Compensation Act has been carefully calibrated to balance the needs of compensably injured employees with the potential risks posed to employers. "The social policy behind the Workers' Compensation Act is twofold. First, the Act provides employees swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment. Second, the Act insures limited liability for employers." *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 184, 639 S.E.2d 429, 432 (2007) (citation omitted).

¶ 25 As part of this mutually beneficial exchange, our Supreme Court has long recognized that under the Workers' Compensation Act "not even gross negligence is a defense to a compensation claim. Only intoxication or injury intentionally inflicted will defeat a claim." *Hartley v. N.C. Prison Dep't*, 258 N.C. 287, 289, 128 S.E.2d 598, 600 (1962). Since *Hartley* was decided, only the unauthorized use of controlled substances has been added to this limited list of exceptions. *See* N.C. Gen. Stat. § 97-12 (providing that an employee forfeits compensation in the event of "intoxication," "being under the influence of any controlled substance" not properly prescribed, or "willful intention to injure or kill himself or another"). Therefore, an "employee's violation of a safety rule does not *of itself* constitute a bar to recovery of compensation where it may be determined that his injury arose in the course of the employment." *Spratt v. Duke Power Co.*, 65 N.C. App. 457, 466, 310 S.E.2d 38, 44 (1983).

¶ 26 In the instant case, Defendants clarify that they do not argue on appeal that fault has any place in the compensability determination, and they do not dispute that Plaintiff's injury was compensable. Nevertheless, Defendants argue that fault *does* have a place—or at least, it *should*—in the workers' compensation system, when it comes to determining when an employer may subsequently terminate workers' compensation benefits.

¶ 27 Our Supreme Court considered similar concerns when it first adopted the *Seagraves* test in *McRae*: "We . . . recognize that the current benefit

scheme faces the potential for abuse by employees. If injury-related benefits continued without regard to an employee's misconduct, injured employees conceivably could commit misconduct in order to be terminated without suffering the appropriate financial consequences." 358 N.C. at 495, 597 S.E.2d at 700. Yet the *McRae* Court contrasted that concern with its opposite: "[A]ny rule that would allow employers to evade benefit payments simply because the recipient-employee was terminated for misconduct could be open to abuse. Such a rule could give employers an incentive to find circumstances that would constitute misconduct by employees who were previously injured on the job." *Id.* In the end, our Supreme Court concluded that the *Seagraves* test "is an appropriate means to decide cases of this nature" because it "is intended to weigh the actions and interests of employer and employee alike. Ultimately, the *Seagraves* rule aims to provide a means by which the Industrial Commission can determine if the circumstances surrounding a termination warrant preclusion or discontinuation of injury-related benefits." *Id.*

¶ 28 We thus are bound to reject Defendants' argument, and hold that the Full Commission did not err by concluding that the *Seagraves* test does not apply in the instant case.

¶ 29 Each of Defendants' remaining arguments assumes the applicability of the *Seagraves* test in this case. Accordingly, we need not address those arguments in light of our decision.

III. Conclusion

¶ 30 For the foregoing reasons, the Full Commission's Opinion and Award is affirmed.

AFFIRMED.

Judges WOOD and GRIFFIN concur.

STATE v. ADAMS

[285 N.C. App. 379, 2022-NCCOA-596]

STATE OF NORTH CAROLINA
v.
MICHAEL LEONARD ADAMS, JR., AND VANESSA PENA, DEFENDANTS

No. COA21-459

Filed 6 September 2022

1. Child Abuse, Dependency, and Neglect—misdemeanor child abuse—parents fighting over physical possession of child—pulling opposite ends of child—sufficiency of evidence

The State presented sufficient evidence to convict defendants of committing misdemeanor child abuse (N.C.G.S. § 14-318.2) against their four-year-old son where, during a custody exchange, defendant-father and defendant-mother engaged in a "tug of war" over the child, in which the parents violently pulled opposite ends of the child, placing him at substantial risk of being injured—even if they did not intend to hurt him. Although defendant-mother argued that she was trying to protect the child because the father was in an irate and dangerous state of mind, the State was not required to rule out every hypothesis of innocence to survive the motion to dismiss.

2. Jury—criminal trial—voir dire—reopening—trial court's discretion

In a prosecution for misdemeanor child abuse, the trial court did not abuse its discretion by denying defendant-parents' motions to reopen voir dire of a juror who, after he had been passed upon by counsel but before the jury was impaneled, stated that he believed defendants should be required to testify. The trial court carefully instructed the juror on defendants' right not to testify, heard arguments from counsel, considered the matter overnight, considered the negative impact that reopening voir dire could have on the orderly disposition of defendants' charges, and was satisfied that the juror would follow the law as the court instructed him.

3. Probation and Parole—during pendency of appeal—requirement to complete conditions of probation—stayed

In its judgments entered upon jury verdicts finding defendant guilty of misdemeanor child abuse, the trial court erred by ordering defendant to fulfill conditions of his probation during the pendency of his appeal. Defendant's probation was stayed by N.C.G.S. § 15A-1451 upon his notice of appeal.

Appeal by defendants from judgments entered on or about 18 March 2021 by Judge Michael D. Duncan in Superior Court, Yadkin County. Heard in the Court of Appeals 22 February 2022.

Attorney General Joshua H. Stein, by Assistant Attorneys General Ryan C. Zellar and Deborah M. Greene, for the State.

Michael E. Casterline, for defendant Michael Leonard Adams, Jr.

Gilda C. Rodriguez, for defendant Vanessa Pena.

STROUD, Chief Judge.

¶ 1 Defendants appeal from judgments entered upon jury verdicts finding them each guilty of misdemeanor child abuse. Defendant Adams argues the trial court erred (1) by denying his motion to dismiss at the close of all evidence; (2) by denying his motion to reopen *voir dire* of a juror after that juror expressed a potential bias toward defendants who do not testify on their own behalf; and (3) by ordering him to complete conditions of his probation while this appeal was pending. Defendant Pena presents arguments for (1) and (2) above, but does not challenge the portion of the trial court's judgment ordering her to complete conditions of her probation while this appeal was pending. We find the trial court committed no error as to Defendants' motions to dismiss or motions to reopen *voir dire* but did err by ordering Defendant Adams to complete the special conditions of his probation while his appeal was pending. The case is remanded for resentencing as to Defendant Adams only.

I. Background

¶ 2 Defendants were tried on 1 May 2019 in Yadkin County District Court. Both Defendants were found guilty of misdemeanor child abuse. Both appealed to the Superior Court and were tried 15 March 2021.

¶ 3 During the unrecorded jury selection at the Superior Court trial, and after he had been passed upon by the State and by defense counsel for both Defendants, but before the jury was impaneled, one of the jurors, Juror Clark,[1] raised his hand and "indicated that he wanted to say something." The rest of the jurors were dismissed for the evening and Juror Clark was held back to speak to the trial court. Juror Clark told the trial court he could not hear one of the questions, and Defendant Adams's counsel repeated the question:

1. A pseudonym.

> The one about if they choose not to testify? Yes, sir. If -- the defendants have a choice not to testify in the trial. If they exercise that right and choose not to testify, do you believe that you can give the defendants a fair trial based on their choosing not to testify?

Juror Clark then indicated he thought both Defendants should be required to "answer the questions themselves." The trial court did not reopen *voir dire*, but examined Juror Clark regarding his opinion on the Defendants' rights not to testify, and told Juror Clark he "cannot hold that against them if they choose not to testify." After the trial court's questions and instructions, Juror Clark affirmed he understood the Defendants have a right not to testify and that he could follow the law as instructed by the trial court. Counsel for both Defendants made motions to reopen *voir dire* to question Juror Clark; the trial court heard arguments and then elected to "give it some thought overnight."

¶ 4 The following morning, the trial court heard additional arguments by all parties and brought Juror Clark back into the courtroom for additional examination. After a lengthy instruction, and after Juror Clark again affirmatively responded that he could follow the law as instructed by the trial court, the trial court denied Defendants' motions to reopen *voir dire*.

¶ 5 The trial proceeded, and only the State presented evidence. The State's evidence tended to show at approximately 6 p.m. on 21 September 2018 Detective Ryan Preslar with the Yadkinville Police Department was "walking out of the police department to go home" when he heard "screaming and hollering." He "walked out to the parking lot to look, and . . . [saw] a man in the back driver's side door" of a vehicle across the street, "behind the driver's seat, half his body [was] in the car and he [was] coming in and out." Detective Preslar testified "[i]t was hard to tell . . . if he was hitting somebody or jerking on something." The vehicle was in the Sheriff's Office parking lot, across the street from the Yadkinville Police Department parking lot.

¶ 6 Detective Preslar radioed for help and ran toward the vehicle. As he approached, he noticed "[Defendant] Adams had the child out of the vehicle. He had [his arm] wrapped kind of around [the child's] upper torso and arm and he's pulling in one direction and [Defendant] Pena had [the child] by the bottom half of his body, his legs area and she's pulling in the opposite direction." Detective Preslar testified the Defendants were "violent[ly]" pulling the child in opposite directions, because "[t]hey were both wanting that child." The child was "hollering, crying

out[,]" and appeared to be in pain. The "tug of war" continued for approximately 20 to 30 seconds while Detective Preslar approached the vehicle, and "[w]hen [he] [got] within feet of [the Defendants] they let go" of the child. Defendants did not drop the child, but quickly put him down on his feet. At about this time Deputy Nathaniel Hodges from the Yadkin County Sheriff's Office arrived and the Defendants were separated. Detective Preslar did not notice injuries on either Defendant or on the child, and the child calmed down significantly after Detective Preslar separated the Defendants. Detective Preslar noticed that the car seat in the car "was actually pulled from its strapped-in position, and it was kind of set to the side."

¶ 7 Deputy Hodges interviewed the Defendants. Defendant Adams stated "he just wanted his child, that he was there to pick up their child . . . for a child custody exchange." Defendant Adams also told Deputy Hodges he was supposed to have someone with him to supervise the child custody exchange, but he still attended the custody exchange after his mother, the usual supervisor, could not attend. Defendant Pena stated she was putting shoes on the child when "[Defendant] Adams approached the vehicle and began trying to, in her words, rip the child out of the vehicle." Defendant Pena held on to the child and the "tug of war" ensued "due to the fact she did not want [Defendant] Adams to take the child" because he was "irate." Deputy Hodges charged both Defendants with child abuse under North Carolina General Statute § 14A-318.2 and arrested both Defendants. After Defendants were arrested, DSS was contacted and took temporary custody of the child.

¶ 8 At the close of State's evidence, both Defendants made motions to dismiss. These motions were renewed at the close of all evidence. The motions were denied, and the charges were submitted to the jury. The jury returned a guilty verdict for each Defendant, and the trial court proceeded to sentencing. Both Defendants were sentenced to serve 75 days of imprisonment, suspended for 18 months of supervised probation. As one of the special conditions of probation, each Defendant was ordered to "enroll and complete any coparenting classes." In the written judgments, the trial court noted each Defendant had entered notice of appeal in open court but ordered as to each Defendant that "probation is to commence once the appeal decision is reached but the Defendant is to enroll [and] complete the co-parenting classes while the appeal is pending." (Capitalization altered.) Both Defendants appeal.

II. Analysis

¶ 9 Defendant Adams contends (1) the State presented insufficient evidence to convict him because the child suffered no injury and no

substantial risk of injury was created by his conduct; (2) "the trial court abused its discretion when it denied [his] motion to reopen *voir dire* of Juror [Clark]," (capitalization altered), because good reason existed to reopen *voir dire*; and (3) the trial court violated North Carolina General Statute § 15A-1451(a)(4) when it ordered him to serve conditions of his probation while his appeal was pending. Defendant Pena presents substantially the same arguments for the first two issues. Defendant Adams alone asserts the trial court erred by ordering him to complete the conditions of his probation during the pendency of his appeal. Defendant Pena proposed this issue for review but did not address this error in her brief and it has been abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). We will address each Defendant's argument regarding denial of the motions to dismiss separately. We will address their arguments regarding denial of the motion to re-open *voir dire* together, and we will address Defendant Adams's argument regarding the special condition of his probation last.

A. Sufficiency of the Evidence

1. Standard of Review

¶ 10 This Court's standard of review of a trial court's ruling on a motion to dismiss is well-settled:

> A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 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). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565, 132 L.Ed.2d 818 (1995). "Contradictions and discrepancies are for

> the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

State v. Watkins, 247 N.C. App. 391, 394, 785 S.E.2d 175, 177 (2016). "[T]he only question before us . . . is whether a reasonable juror *could* have concluded that the defendant was guilty based on the evidence presented by the State. If so, even if the case is a close one, it must be resolved by the jury." *Id.* at 396, 785 S.E.2d at 178 (emphasis in original).

2. Analysis

¶ 11 **[1]** Both Defendants were convicted under North Carolina General Statute § 14-318.2. Section 14-318.2 provides in relevant part:

> (a) Any parent of a child less than 16 year of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2 (2018). "[T]he State must introduce substantial evidence that the parent, by other than accidental means, either (1) inflicted physical injury upon the child; (2) allowed physical injury to be inflicted upon the child; or (3) created or allowed to be created a substantial risk of physical injury." *Watkins*, 247 N.C. App. at 395, 785 S.E.2d at 177. There is no dispute that Defendants are the parents of the child or that the child is less than 16 years old, and the State only sought a conviction on the substantial risk theory of misdemeanor child abuse. Therefore, the sole element of misdemeanor child abuse in dispute is whether each Defendant "creat[ed] or allow[ed] to be created a substantial risk of physical injury, upon or to such child by other than accidental means . . . ." N.C. Gen. Stat. § 14-318.2; *id.*

a. Defendant Adams's Motion to Dismiss

¶ 12 This Court has recognized a "paucity of cases applying" the substantial risk prong of § 14-318.2. *See Watkins*, 247 N.C. App. at 395, 785 S.E.2d at 177-78. Because "substantial risk of physical injury" is not defined by § 14-318.2, this Court engages in a fact-specific inquiry to determine if such risk exists. *See id.* at 395-96, 785 S.E.2d 177-78. Defendant Adams argues "*State v. Watkins* . . . appears to [be] the only precedential case where a parent was convicted of child abuse without proof of some injury, but instead for merely creating a substantial risk of injury." He also

argues *Watkins* is distinguishable from this case and the State has not put forth substantial evidence Defendant Adams created a substantial risk of physical injury to the child by other than accidental means. He argues that the short duration of the incident cuts against any finding of a substantial risk. We hold there was sufficient evidence to submit the case to the jury, and the trial court did not err in denying Defendant Adams's motion.

¶ 13 Defendant Adams appears to be correct that *Watkins* is the sole reported case applying the "substantial risk" prong of § 14-318.2. In *Watkins*, the defendant parked her car outside the Madison County Sheriff's Office and left her 19-month-old son buckled in his car seat while she went inside the Sheriff's Office to leave money for an inmate in the jail. *Id.* at 392, 785 S.E.2d at 176. The State's evidence showed when she was in the lobby, she could not see her car, which was parked about 46 feet away from the front door. *Id.* A detective escorted the defendant out after she argued with employees in the lobby and saw the child in the car. *Id.* at 392-393, 785 S.E.2d at 176.

¶ 14 The defendant in *Watkins* testified in her own defense. *Id.* at 393, 785 S.E.2d at 176. She testified the child was very warmly dressed in a "snowsuit . . . mittens, boots, a toboggan, pants, and a sweater." *Id.* She said the car had been running before she arrived at the Sheriff's Office with the heater on, and the car was "hotter than blazes" when she got out. *Id.* She claimed she left the windows closed when she went inside the Sheriff's Office, where she believed, based on past experience, it would only take " 'three or four minutes' to purchase [a] calling card." *Id.* at 393, 785 S.E.2d at 177. She also claimed she could see the car from where she was standing in the lobby. *Id.*

¶ 15 The *Watkins* Court, viewing the evidence in the light most favorable to the State, analyzed the evidence as to substantial risk of physical injury in these circumstances:

> Here, viewing the evidence, as we must, in the light most favorable to the State with every inference drawn in the State's favor, James, who was under two years old, was left alone and helpless—outside of Defendant's line of sight—for over six minutes inside a vehicle with one of its windows rolled more than halfway down in 18–degree weather with accompanying sleet, snow, and wind. Given the harsh weather conditions, James' young age, and the danger of him being abducted (or of physical harm being inflicted

> upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that Defendant "created a substantial risk of physical injury" to him by other than accidental means. *See* N.C. Gen. Stat. § 14–318.2(a).

Id. at 395-96, 785 S.E.2d at 178.

¶ 16 In addition to *Watkins*, Defendant Adams argues several unreported cases from this Court are persuasive, even if they are not binding precedent, and they illustrate what constitutes a "substantial risk of physical injury" in violation of § 14-318.2. *See*, *e.g.*, *State v. Parker*, 278 N.C. App. 606, 2021-NCCOA-389, ¶ 24 (unpublished) ("[D]riving at sixty (60) miles per hour with a car door open creates a 'substantial risk of injury' for any passengers, including children, in the vehicle."); *State v. Miller*, 276 N.C. App. 276, 2021-NCCOA-84, ¶ 16 (unpublished) (Where defendant " 'exceeded the speed limit for approximately one minute' before 'sometimes crossing the center line to pass pulled-over vehicles' with Deputy Rae in pursuit with his blue lights flashing"); *State v. Thomas*, 217 N.C. App. 198, 719 S.E.2d 254 (2011) (unpublished) (exposure to 41 grams of cocaine and a loaded firearm); *In re I.H.*, No. COA09-244, 2009 WL 2139096 (N.C. App. July 7, 2009) (unpublished) (high speed police chase resulting in accident where children were injured).

¶ 17 But the factual circumstances here Defendant Adams seeks to distinguish from *Watkins* and the unreported cases are instead similar in relevant ways. In all the cases, the potentially dangerous incidents were quite brief, just minutes, and in all but one case the children involved were fortunately unharmed. The question is whether the actions "created a substantial risk of physical injury" to the child by "other than accidental means." Based upon these cases, a "substantial risk of physical injury" may arise in an incident lasting only moments, where the defendant has intentionally engaged in the activity presenting a risk of physical harm to the child and has exposed the child to the risk of injury—whether the child was exposed to illicit substances, or exposed to severe weather conditions, or risk of abduction, or in a speeding car driven in a manner creating a substantial risk of a crash. The circumstances in which a "substantial risk of physical injury" vary from case to case, based on the severity and length of the risky conduct, but presented a jury question sufficient to survive a motion to dismiss.

¶ 18 Thus, while illustrative, these cases "do not resolve the issue presently before us—that is, whether the State's evidence here was sufficient to raise a jury question regarding a violation of N.C. Gen. Stat.

§ 14-318.2(a) by Defendant." *Watkins*, 247 N.C. App. at 396, 785 S.E.2d at 178. Close questions are questions that must be resolved by the jury, and the question before us is "whether a reasonable juror *could* have concluded that [both] defendant[s] [were] guilty based on the evidence presented by the State." *Id.* (emphasis in original). Here, the State's evidence tended to show Defendant Adams attended the custody exchange of the parties' four-year-old son without a court-ordered supervisor. Defendant Adams then became incensed, for reasons undisclosed by the record, and attempted to forcibly remove the child from the vehicle. He grabbed the child around the child's upper torso and began to violently pull the child out of the vehicle, which appears to have caused the child to "holler" or "cry out" in pain. Given the fact the car seat also appeared to have been "pulled from its strapped-in position[,]" a reasonable inference to be drawn from the evidence is that Defendant Adams pulled hard enough to move the car seat out while attempting to take the child. Then, for 20 to 30 seconds, Defendant Adams ignored police instructions and engaged in a "tug of war" with Defendant Pena, with the child serving as the "rope," placing the child at risk of physical injury from the fight between Defendants.

¶ 19 It is not difficult to conclude the child was at a substantial risk of being injured in many ways during the "tug of war." The evidence, viewed in the light most favorable to the State, shows that Defendant Adams "created a substantial risk of physical injury" to his child. *Watkins*, 247 N.C. App. at 395, 785 S.E.2d at 177. Many of these injuries may occur very quickly, and Defendant Adams's argument that the short duration of the incident cuts against a finding of "substantial risk of physical injury" is not persuasive. The evidence simply creates a question for the jury to resolve as to whether the duration of the incident was long enough to create a "substantial risk of physical injury." During the struggle, the child could have been dropped and suffered injury. The child could have been harmed by the mere act of pulling the child in two directions. Defendant Adams had wrapped his arm around the child's upper torso, and the child's neck or head could have been compressed or contorted as a result of the struggle. If either parent lost their grip on the child, the child could have been thrown to the ground by the force exerted by the other parent and injured. And the record reflects that none of Defendant Adams's conduct was accidental. His attempts to wrest the child away from Defendant Pena were quite intentional, even though he did not intend to harm the child. There was no indication in *Watkins* or any of the unreported cases cited by Defendant Adams that the defendants had any intention or desire of harming the children in those situations; they intentionally engaged in risky activities in a time and manner that

also placed a child at risk of injury. The State presented substantial evidence Defendant "create[d] or allow[ed] to be created a substantial risk of physical injury, upon or to [his] child by other than accidental means" in violation of North Carolina General Statute § 14-318.2. The trial court did not err by denying his motion to dismiss.

b. Defendant Pena's Motion to Dismiss

¶ 20 Much of the evidence presented by the State as to Defendant Adams's culpability under § 14-318.2 is equally applicable to the prosecution of Defendant Pena. Upon a *de novo* review of the evidence presented by the State, viewed "in the light most favorable to the State[,]" *Watkins*, 247 N.C. App. at 394, 785 S.E.2d at 177 (quotation omitted), the State's evidence was sufficient to show Defendant Pena "created or allowed to be created a substantial risk of physical injury" to the child and thus must be resolved by the jury. *See id.* at 395, 785 S.E.2d at 177.

¶ 21 The State's evidence tended to show Defendant Pena was an equal participant in the "tug of war" over the Defendants' child. When Detective Preslar was approaching the vehicle in the Sheriff's Office parking lot, he observed Defendant Pena with her arms around the "[m]iddle of the [child's] legs." As Detective Preslar approached, Defendant Pena also ignored his instructions to "put the child down" and continued to pull the child in the direction opposite Defendant Adams for approximately 20 to 30 seconds. Additionally, although Defendant Adams was not seriously injured, Defendant Adams told Detective Preslar that Defendant Pena became violent in close proximity to the child during the physical struggle and "bit [Defendant Adams] on the forearm and punched him in the face several times." Detective Preslar characterized Defendant Pena as pulling on the child "hard" or "violent[ly]." Even though Defendant Adams "was supposed to be getting custody of the child that day[,]" Defendant Pena resisted a cooperative custody exchange and instead engaged in a violent physical struggle over possession of the child, starting in the confines of a vehicle.

¶ 22 Defendant Pena cites *State v. Noffsinger*, 137 N.C. App. 418, 426, 528 S.E.2d 605, 611 (2000), and argues " 'a parent owes a special duty to her child which has long been recognized by statute and by common law' and that 'a parent has a duty to take affirmative action to protect her child and may be held criminally liable if she is present when someone harms her child and she does not take reasonable steps to prevent it.' " She frames the struggle over the child as "taking affirmative action to protect her son from [Defendant] Adams, who arrived without the court ordered custody [supervisor] and forcibly removed [the child] from her

car, and [to] keep [Defendant] Adams from driving away with [the child] in the erratic and dangerous state in which he was in." But Defendant Pena does not address another possible interpretation of the evidence: that even though they met in the parking lot of the Sheriff's Office (and across the street from the Police Department), where she could have quickly summoned an officer to assist if Defendant Adams was in an "erratic and dangerous" state, she instead participated in an unreasonable struggle over physical possession of the child with the child's father. Instead of seeking help, she took affirmative action that placed the child in danger by engaging in the "tug of war" over him. Regardless, even though Defendant Pena "offered an innocent explanation for [her] conduct," the State's evidence need not " 'rule out every hypothesis of innocence.' " *State v. Winkler*, 368 N.C. 572, 582, 780 S.E.2d 824, 830 (2015) (quoting *State v. Thomas*, 350 N.C. 315, 343, 514 S.E.2d 486, 503 (1999)). "[A] reasonable juror *could* have concluded that the defendant was guilty based on the evidence presented by the State." *Watkins*, 247 N.C. App. at 396, 785 S.E.2d at 178 (emphasis in original).

¶ 23 The State presented substantial evidence to submit to the jury the question of whether Defendant Pena "create[d] or allow[ed] to be created a substantial risk of physical injury, upon or to [her] child by other than accidental means" in violation of North Carolina General Statute § 14-318.2. The trial court did not err by denying Defendant Pena's motion to dismiss.

c. Conclusion

¶ 24 Because the State presented substantial evidence of each element of misdemeanor child abuse, *see Watkins*, 247 N.C. App. at 394, 785 S.E.2d at 177, "a reasonable juror *could* have concluded that [both] defendant[s] [were] guilty based on the evidence presented by the State." *Id.* at 396, 785 S.E.2d at 178 (emphasis in original). The trial court did not err by denying Defendants' motions to dismiss.

B. Defendants' Motions to Reopen *Voir Dire*

1. Standard of Review

¶ 25 "In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *State v. Rodriguez*, 371 N.C. 295, 312, 814 S.E.2d 11, 23-24 (2018) (quotation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523,

527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("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.").

2. Analysis

¶ 26 **[2]** All parties agree North Carolina General Statute § 15A-1214 governs jury selection. Section 15A-1214(g) provides:

> (g) If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:
>
> (1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.
>
> (2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.
>
> (3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

N.C. Gen. Stat. § 15A-1214(g) (2018). Section 15A-1214(g) gives the court "leeway to make an initial inquiry when allegations are received before a jury has been impaneled that would, if true, establish grounds for reopening *voir dire* . . . ." *State v. Boggess*, 358 N.C. 676, 683, 600 S.E.2d 453, 457 (2004). "As part of this initial investigation, the judge may question any involved juror and may consult with counsel out of the juror's presence. Based on information thus developed, the judge has discretion to reopen *voir dire* or take other steps suggested by the circumstances." *Id.*

¶ 27 Defendants argue there was "good reason . . . to challenge [Juror Clark] for cause or, alternatively, to exercise a peremptory challenge[.]" (Capitalization altered.) The State argues that even with good cause, "the trial court is permitted, but is not required to reopen *voir dire*." The trial court did not abuse its discretion, and Defendants' arguments are overruled.

¶ 28 Here, the trial court questioned Juror Clark after he offered his opinion that he thought Defendants should "answer the questions themselves." The trial court sought to clarify Juror Clark's opinion, then carefully instructed him "that [the Defendants] have a right to testify if they wish and they have a right not to testify if they wish, and you cannot hold that against them if they choose not to testify." The trial court stretched this examination over two days, allowing Juror Clark to think on his opinion overnight before reexamining him the next morning. The trial court also heard arguments from counsel on both days. The trial court "ha[d] discretion to reopen *voir dire* or take other steps suggested by the circumstances[]" after its initial inquiry, *Boggess*, 358 N.C. at 683, 600 S.E.2d at 457, and ultimately chose to question Juror Clark without reopening *voir dire*.

¶ 29 Both Defendants cite our decision in *Bond*. *See State v. Bond*, 345 N.C. 1, 478 S.E.2d 163 (1996). They argue a juror's equivocal statements as to the death penalty qualify as "good reason" to reopen *voir dire*, as were the juror's statements in *Bond*, *see id.* at 20, 478 S.E.2d at 172, and Juror Clark's statement here is a similarly "good reason" to reopen *voir dire*. But *Bond* is distinguishable. In *Bond*, the trial court reopened the prosecution's *voir dire* after the juror appeared to have changed his mind regarding the death penalty between the State's and the defense's *voir dire*. *Id.* at 18-19, 478 S.E.2d at 171-72. *Voir dire* was still ongoing at the time of the trial court's ruling, and the juror had not yet been passed upon by both the prosecution and the defense. *Id.* Here, as far as the record reflects, Juror Clark did not make equivocal statements until after jury selection was completed.[2] Juror Clark made a single statement after both parties had passed on him and he had been seated in seat 2. *Bond* is not controlling. But, more importantly, even if equivocal statements like those by the juror in *Bond* or Juror Clark's statements volunteering an opinion can constitute "good cause" to reopen *voir dire*, the decision to reopen *voir dire* is still squarely within the discretion of the trial court. *See* N.C. Gen. Stat. § 15A-1214(g); *Rodriguez*, 371 N.C. at 312, 814 S.E.2d at 23-24; s*ee also Bond*, 345 N.C. at 19-20, 478 S.E.2d at 172 ("This Court has previously interpreted the language of N.C.G.S. § 15A-1214(g) and found that the decision to reopen *voir dire* rests in the trial court's discretion. . . . [A]bsent a showing of abuse of discretion, the trial court's decision to reopen the examination of prospective juror Robbins will not be disturbed."). We must still review the trial court's decision not to reopen *voir dire* for an abuse of discretion.

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2. Because jury selection was unrecorded, our record is limited to statements made after *voir dire*, but there is no contention the issue arose earlier.

¶ 30 After examination of Juror Clark on the first day, the court expressed concerns about reopening *voir dire*:

> We've already passed on jurors. If you didn't ask them that question, you know that -- it concerns me obviously that you're going to have other jurors stepping up saying the same thing. That's the attorneys' responsibility from both sides to ask what questions they feel are necessary to get a picture of whether or not, in their own mindset a juror can be fair and impartial to both sides.
>
> I have great concerns about just starting back again with number two, and then even greater concerns if we were to do that in front of all the other jurors. It just opens a Pandora's box, and I'm not going to allow that to happen. I'll hear any further arguments in the morning if you want to go get me some case law or if you want to do a little research and you feel like you need to do a brief, any of those things are acceptable to the court.

The trial court reasoned that reopening *voir dire* would have a negative impact on the orderly disposition of Defendants' charges, possibly resulting in a lengthy delay, and instead opted to perform the extensive examination of Juror Clark, giving him overnight to continue to consider the trial court's instructions, to determine if his opinion would prevent him from serving as a fair and impartial juror. The trial court also allowed parties an additional opportunity to develop their arguments and be heard the next day. At the end of the first day, the trial court did not doubt Juror Clark's ability to remain fair and impartial:

> The Court was satisfied when [Juror Clark] left yesterday that regardless of how he felt about the law, whether he liked it or disliked it, that he indicated that he would follow and obey the law as the Court instructed him.

And, after hearing additional arguments from counsel the next day, the trial court was still "satisfied with the answer of [Juror Clark]" and denied both Defendants' motions.

¶ 31 "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." *White*, 312 N.C. at 777, 324 S.E.2d at 833. The trial court in this case denied Defendants' motions after inquiring into Juror Clark's opinion and only after determining Juror Clark would be able to follow the law. Defendants' motions were denied because the trial court was concerned that reopening *voir dire* would "open[] a Pandora's box" and cause delays during Defendants' trial, Defense counsel for both parties had already passed on Juror Clark, and Juror Clark gave repeated affirmations that he understood and could apply the law. The trial court came to "a reasoned decision" when it denied Defendants' motions. *Id.*

¶ 32 We do not need to reach Defendants' alternative argument that, "if *voir dire* of [Juror Clark] had been reopened and the trial court did not dismiss him for cause, [Defendants] could have used a peremptory challenge to remove him[,]" because the trial court did not abuse its discretion by refusing to reopen *voir dire*. *See* N.C. Gen. Stat. § 15A-1214(c)-(f) (2021) (establishing that peremptory challenges may only be exercised while *voir dire* is open). Because the trial court did not abuse its discretion by denying Defendants' motions after examining Juror Clark without reopening *voir dire*, the trial court committed no error and did not violate § 15A-1214(g).

C. Defendant Adams's Conditions of Probation

¶ 33 **[3]** "An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*." *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011) (quoting *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (1998)).

¶ 34 Defendant Adams asserts the trial judge violated North Carolina General Statute § 15A-1451(a)(4) by "order[ing] him to enroll in co-parenting classes and serve the active portion of his split sentence before the appeal was decided." The State concedes that this was an error. After a review of the judgment, we agree the trial court did err by ordering Defendant Adams to fulfill conditions of his probation while his appeal was pending. Although the trial court's judgment is identical as to Defendant Pena, she failed to argue this issue on appeal and it has been abandoned. *See* N.C. R. App. P. 28(a).

¶ 35 North Carolina General Statute § 15A-1451(a)(4) provides: "(a) When a defendant has given notice of appeal: . . . (4) Probation or special probation is stayed." N.C. Gen. Stat. § 15A-1451(a)(4) (2018). Defendant Adams gave notice of appeal in open court after the trial court suspended his sentence and ordered the co-parenting classes as conditions

of probation. Then, the trial court included the following in its written judgment: "Probation is to commence once the appeal decision is reached *but the Defendant is to enroll* [*and*] *complete the co-parenting classes while the appeal is pending . . . .*" (Capitalization altered and emphasis added.) Because Defendant Adams's probation was stayed by North Carolina General Statute § 15A-1451 upon his notice of appeal, the trial court erred when it ordered Defendant Adams to complete conditions of his probation while his appeal was pending. We remand for resentencing.

III. Conclusion

¶ 36 We conclude the trial court did not err by denying Defendants' motions to dismiss and motions to reopen *voir dire* of Juror Clark. We also conclude the trial court erred by ordering Defendant Adams to complete his probation while his appeal was pending. The case is remanded for resentencing as to Defendant Adams only.

NO ERROR IN PART; REMANDED IN PART.

Judges ARROWOOD and WOOD concur.

STATE OF NORTH CAROLINA
v.
RONALD DALE CHEERS, DEFENDANT

No. COA21-498

Filed 6 September 2022

Satellite-Based Monitoring—jurisdiction—recidivist status—sufficiency of findings

Where, in light of *State v. Grady*, 327 N.C. 509 (2019), the trial court vacated a previous order imposing lifetime satellite-based monitoring (SBM) on defendant and issued a new order requiring him to enroll in SBM for a period of 30 years, the appellate court rejected defendant's argument that the trial court lacked subject matter jurisdiction to do so, as the trial court continued jurisdiction over the original order and could modify it pursuant to defendant's motion for appropriate relief. Further, the trial court had statutory authority to impose SBM because defendant's offense was committed against a minor; and finally, the trial court made sufficient

findings to support its determination that defendant required the "highest possible level of supervision and monitoring" for a term of 30 years.

Appeal by Defendant from order entered 20 January 2021 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 7 June 2022.

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

Dylan J.C. Buffum Attorney at Law, PLLC, by Dylan J.C. Buffum, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant-Appellant Ronald Dale Cheers ("Defendant") appeals from an order of the trial court vacating a previous order imposing lifetime satellite-based monitoring ("SBM") and ordering him to enroll for a period of 30 years. He argues: (1) the trial court lacked subject matter jurisdiction to conduct an evidentiary hearing and impose SBM upon him; (2) the trial court did not have statutory authority at the time of his hearing to impose a term of years based on his classification as a "recidivist;" and (3) the trial court erred in concluding Defendant required the "highest level of supervision." After careful consideration of our SBM statutes, precedent, and the record, we affirm the order of the trial court.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 On 30 June 2008, Defendant pled guilty to two counts of indecent liberties with a child after sexually abusing the minor daughter of his then-girlfriend. Pursuant to the plea agreement, the trial court consolidated his convictions and sentenced him to 25 to 30 months in prison, with credit for 342 days of pre-trial confinement. The trial court also ordered Defendant to enroll in SBM for his natural life ("2008 SBM order"). The form order included the finding:

> The defendant was convicted of a reportable conviction as defined by [N.C. Gen. Stat. §] 14-208.6(4) and is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated

> offense as those terms are defined in [N.C. Gen. Stat. §] 14-208.6.

However, the order did not specify which statutory ground—sexually violent predator, recidivist, or aggravated offender—required Defendant's lifetime enrollment.

¶ 3 After two years in prison, in May 2010, Defendant was unconditionally discharged and his rights to citizenship were restored. Nearly ten years later, in light of our Supreme Court's holding in *State v. Grady*, 327 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"), that our SBM statutes were unconstitutional as applied to unsupervised recidivists, the State served Defendant with two notices of hearing to review Defendant's lifetime SBM enrollment. Then, the State advised Defendant's counsel via e-mail that Defendant's "previous compulsory lifetime SBM [was] unconstitutional" and Defendant was "entitled to a SBM hearing if and when he want[ed] to petition the court for removal based upon the ruling in *Grady*."

¶ 4 Upon the State's recommendation, on 24 August 2020, Defendant filed a motion for appropriate relief ("MAR"), seeking to terminate his mandatory lifetime enrollment in SBM. The State then moved to deny Defendant's motion, requesting instead that the trial court convert Defendant's motion to a "Petition to Terminate Defendant's Satellite-Based Monitoring" and conduct a hearing to determine whether Defendant should be enrolled in the SBM program for a term of years pursuant to N.C. Gen. Stat. § 14-208.40A (2019). In its motion, the State conceded that, at the time Defendant was convicted of two counts of indecent liberties in 2008, the trial court had enrolled Defendant in SBM based on his statutory classification as a recidivist.

¶ 5 Defendant's motion came on for hearing on 8 January and 13 January 2021. On 20 January 2021, the trial court vacated the 2008 lifetime SBM order, concluded Defendant "require[d] the highest level of supervision and monitoring," and ordered Defendant enroll in SBM for a term of 30 years, retroactive to his initial monitoring on 26 May 2010 ("2021 SBM order"). In its order, the trial court found the 2008 lifetime enrollment order "was unclear as to why the Defendant was ordered to enroll in lifetime [SBM]." Defendant appeals.

II. ANALYSIS

A. Trial Court's Jurisdiction

¶ 6 Defendant argues the trial court lacked subject matter jurisdiction to conduct an evidentiary hearing in January 2021 and enter an

order imposing SBM. We hold the trial court appropriately exercised its jurisdiction.

¶ 7 Whether a trial court has subject matter jurisdiction is a question of law, which we review *de novo*. *State v. Billings*, 278 N.C. App. 267, 2021-NCCOA-306, ¶ 14. Under *de novo* review, we consider the matter anew and freely substitute our own judgment for that of the lower tribunal. *Id.*

¶ 8 Defendant relies on *Billings*, a recent decision from this Court about the trial court's jurisdiction to conduct an SBM hearing, but he overlooks a key distinction between that case and the one before us and ignores more recent precedent from our Supreme Court on the issue. In *Billings*, we considered whether the trial court had jurisdiction to conduct an SBM hearing ten years after the offender was enrolled in SBM, two years after he was convicted and sentenced on his most recent offense, based solely on a scheduled hearing in the absence of any motion for SBM review. *Id.* ¶¶ 17, 21-23. We interpreted our SBM statutes to permit the trial court to conduct an SBM hearing either "during the sentencing phase" or "[w]hen an offender is convicted of a reportable conviction . . . and *there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring*[.]" *Id.* ¶¶ 23, 24 (emphasis in original) (quoting N.C. Gen. Stat. §§ 14-208A(a), 14-208.40B(a) (2019)). Neither of those scenarios existed, *id.* ¶ 25, so we considered whether the trial court's jurisdiction had otherwise properly been invoked by "valid motion, complaint, petition, or other valid pleading[.]" *Id.* ¶ 28 (quotation marks and citation omitted). Because no motion was filed, we held the trial court was without jurisdiction to conduct an SBM hearing where the offender had already been enrolled and vacated the trial court's order without prejudice to the State's filing "an application for satellite-based monitoring." *Id.* ¶¶ 31-33.

¶ 9 In this case, Defendant filed an MAR with the trial court after the State advised him that he was entitled to relief under *Grady III*. Unlike in *Billings*, Defendant's own motion properly brought the matter before the trial court. In fact, at the hearing, the trial court opened: "We are back on the record . . . on the motion for appropriate relief." Defendant's counsel began his argument, "I filed this motion for appropriate relief on August 4, 2020, on behalf of [Defendant], pursuant to the recent case law in . . . *Grady*."

¶ 10 Further, though Defendant filed a criminal MAR, recent precedent from our Supreme Court has clarified that SBM orders are "civil in nature[.]" *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 34 ("Since

the SBM program is civil in nature, the North Carolina Rules of Civil Procedure govern. As such, a defendant may also seek removal of SBM through Rule 60(b)." (citation omitted)); *see also State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶¶ 17-18 ("The trial courts of this state are endowed with 'ample power to vacate judgments whenever such action is appropriate to accomplish justice' through the operation of Rule 60(b)(6) and are invited to wield that power in a judicious manner." (quoting *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971)).

¶ 11 Rule 60(b)(6) provides that "upon such terms as are just, the court may relieve a party . . . from a final . . . order . . . [for] [a]ny . . . reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2021)."The test for whether a[n] . . . order . . . should be modified or set aside under Rule 60(b)(6) is two-pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted." *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987).

¶ 12 Following our Supreme Court's recent precedent in *Hilton* and *Strudwick*, we hold the trial court had continued jurisdiction over the original 2008 SBM order and could modify it pursuant to Defendant's motion. Defendant has not shown the trial court abused its discretion otherwise. *See Bank of Hampton Rds. v. Wilkins*, 266 N.C. App. 404, 406, 831 S.E.2d 635, 639 (2019) ("Rule 60 motions are addressed to the sound discretion of the trial court and will not be disturbed absent a finding of abuse of discretion.").

¶ 13 Assuming *arguendo* the trial court lacked jurisdiction, Defendant cannot ask this Court to invalidate the very relief he requested. *See* N.C. Gen. Stat. § 15A-1443(c) (2021) ("[A] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."); *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) ("A defendant who invites error has waived his right to all appellate review concerning the invited error.").

B. Recidivist Status

¶ 14 Defendant contends the trial court lacked statutory authority to impose SBM because, as a recidivist convicted of an offense involving the physical, mental, or sexual abuse of a minor, he was not eligible for SBM under our statutes as they existed at the time of the hearing. We hold Defendant's reading of our statutes conflicts with precedent defining the Legislature's intent.

¶ 15 "[A]lleged statutory errors are questions of law and as such, are reviewed *de novo*." *State v. Harding*, 258 N.C. App. 306, 321, 813 S.E.2d 254, 265 (2018).

¶ 16 Defendant's prior convictions/record level worksheet is not included in the record on appeal, but the trial court's findings in the 2021 SBM order reveal Defendant was also convicted of four counts of indecent liberties with a child in 1994. Defendant has not challenged that finding, so it is binding on this Court. *See Strudwick*, ¶ 24 ("[U]nchallenged findings of fact are binding on appeal." (quotation marks and citation omitted)).

¶ 17 In its order imposing SBM for 30 years, the trial court also found Defendant's offense "involv[ed] the physical, mental or sexual abuse of a minor pursuant to N.C. Gen. Stat. § 14-208.40A" and "Defendant is a recidivist[.]" Because the trial court found Defendant fit into both statutory categories, Defendant does not fall into the unsupervised, recidivist-only class exempted from lifetime monitoring under *Grady III*. *See Grady III*, 372 N.C. at 545, 831 S.E.2d at 569 ("The category to which this holding applies includes only those individuals who are not on probation, parole, or post-release supervision; who are *subject to lifetime SBM solely by virtue of being recidivists* as defined by the statute." (emphasis added)); *Strudwick*, ¶ 20 ("[T]he holding of *Grady III* concerning the unconstitutionality of North Carolina's lifetime SBM scheme as it applies to recidivists . . . is wholly inapplicable." (citation omitted)). Thus, not unlike the defendants in *Strudwick* and *Hilton* who, as aggravated offenders, fell outside *Grady III*'s holding, Defendant, even as a recidivist, *also* committed an offense involving the physical, mental, or sexual abuse of a minor and is beyond *Grady III*'s reach. *See Hilton*, ¶ 20 (explaining *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.").

¶ 18 The version of our statutes in effect at the time of the 2021 SBM order from which Defendant appeals provided:

> (d) If the court finds that the *offender committed an offense that involved the physical, mental, or sexual abuse of a minor*, that the offense is not an aggravated offense or a violation of G.S. 14-27.23 or G.S. 14-27.28 *and the offender is not a recidivist*, the court shall order that the Division of Adult Correction do a risk assessment of the offender. . . .

> (e) Upon receipt of a risk assessment from the Division of Adult Correction and Juvenile Justice pursuant to subsection (d) of this section, the court shall determine whether, based on the Division of Adult Correction and Juvenile Justice's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

§ 14-208.40A(d)-(e) (2019) (emphasis added). Since the trial court entered the 2021 SBM order, Subsections 14-208.40A(d) and (e) have been amended so that recidivists, now referred to as "reoffenders," are subject to the same procedures outlined above. *See* 2021 N.C. Sess. Laws 138, § 18(d); § 14-208.40A(c)-(c1) (2022).

¶ 19 Defendant's own summary of our caselaw acknowledges that the trial court's finding that his offense involved the physical, mental, or sexual abuse of a minor makes him eligible for enrollment in the SBM program. *See Harding*, 258 N.C. App. at 322, 813 S.E.2d at 266. In addition, his reading of the previous iteration of the statute would lead to absurd results, contrary to the intent of the General Assembly in identifying specific categories of sex offenders subject to monitoring, including those convicted of an offense involving the physical, mental, or sexual abuse of a minor. *See State v. Jones*, 367 N.C. 299, 306, 758 S.E.2d 345, 350 (2014) ("Where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." (cleaned up)).

¶ 20 We must construe Subsections 14-208.40A(d) and (e) together and *in pari materia* with other provisions of the SBM statutes in effect at the time of the 2021 SBM order. *See State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) ("Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." (citations omitted)); *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) ("In discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible."). Subsection 14-208.40(a)(2), in particular, provided the SBM program "shall be designed to monitor three categories of offenders[,]" including any offender that

> (i) is convicted of a reportable conviction as defined by [N.C. Gen. Stat. §] 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) *has committed an offense involving the physical, mental, or sexual abuse of a minor*, and (iv) based on the Division of Adult Correction and Juvenile Justice's risk assessment program requires the highest possible level of supervision and monitoring.

§ 14-208.40(a)(2) (2019) (emphasis added).

¶ 21 In holding our SBM statutes were unconstitutional as applied to unsupervised, recidivist offenders in *Grady III*, our Supreme Court created a loophole for individuals in Defendant's position, as an unsupervised recidivist convicted of an offense involving the physical, mental, or sexual abuse of a minor. Recent legislative amendments resolved this discrepancy and bolstered the Legislature's original intent for the SBM regime—that sexually violent predators, recidivists, aggravated offenders, offenders convicted of an offense violating N.C. Gen. Stat. §§ 14-27.2A or 14-27.4A, and offenders convicted of an offense involving the physical, mental, or sexual abuse of a minor, be subject to SBM. *See* 2021 N.C. Sess. Laws 138, § 18(d); § 14-208.40A(c)-(c1) (2022). And, as noted above, in *Hilton* and *Strudwick*, our Supreme Court held that the imposition of lifetime SBM to offenders like Defendant, who meet statutory criteria other than as a recidivist, does not violate the Fourth Amendment. *Hilton*, ¶ 36 (holding "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"); *Strudwick*, ¶ 28 (holding lifetime SBM was constitutional for another aggravated offender).

¶ 22 Based on our canons of statutory construction and binding precedent, we hold the trial court did not err in imposing SBM upon Defendant for a period of 30 years.

¶ 23 Further, we note the Legislature amended our SBM regime just several months after the trial court entered its order from which Defendant now appeals. *See* 2021 N.C. Sess. Laws 138, § 18(d). Those legislative amendments provide in part that Defendant may petition the trial court to modify or terminate his SBM enrollment, and the trial court must cap the term at ten years. *See* N.C. Gen. Stat. § 14-208.46(a) (2022) ("An offender who was ordered prior to December 1, 2021, to enroll in satellite-based monitoring for a period longer than 10 years may file a

petition for termination or modification of the monitoring requirement with the superior court in the county where the conviction occurred."); *State v. Anthony*, 2022-NCCOA-414, ¶ 19 ("[I]f 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 program be terminated.' Combined with a change setting a ten-year maximum on new SBM enrollments, the statutory system now limits SBM to ten years for all offenders." (quoting N.C. Gen. Stat. § 14-208.46(d)-(e)) (citations omitted). In other words, since Defendant has been enrolled in SBM for more than ten years, he can obtain a court order terminating that enrollment today.

C. Sufficient Findings to Support "Highest Level of Supervision"

¶ 24 Lastly, Defendant asserts the trial court erred in determining he required the "highest level of supervision" based on a mistaken understanding of his risk assessment and because it failed to enter sufficient "additional findings" derived from competent evidence to justify the monitoring for a period of 30 years.

¶ 25 We review the trial court's findings of fact in an SBM order to determine whether they are supported by competent evidence, and we review the trial court's conclusions of law "for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *Harding*, 258 N.C. App. at 321, 813 S.E.2d at 265 (citations omitted). For Defendant's challenge, in particular, we review the trial court's order "to ensure that the determination that 'defendant requires the highest possible level of supervision and monitoring' 'reflect[s] a correct application of law to the facts found.' " *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citation omitted).

¶ 26 Defendant concedes "as a matter of historical fact" that he scored a "4" on the Static-99R evaluation conducted on 6 January 2021. But Defendant argues Findings of Fact 7 and 8: (1) are unsupported by competent evidence; (2) demonstrate the trial court misunderstood the application of Defendant's Static-99R score because the assessment measures the estimated likelihood of recidivism at the time an offender is released up to two years post-release where Defendant had not re-offended for ten years in the community; and (3) indicate the trial court misconstrued Defendant's recidivism risk percentage. The trial court's findings provide:

> 7. Defendant scored a "4" on the Static-99R evaluation conducted January 6, 2021, indicating Defendant is at an "above average risk" of recidivism;

> 8. Pursuant to the Static 99R result, Defendant's sexual recidivism rate is in the moderate high-risk category of 6.1-12.2%[.]

The Static-99R Coding Rules provide:

> The longer an offender has been free of detected sexual offending since his release to the community from their index sex offence, the lower their risk of recidivism. Our research has found that, in general, for every five years the offender is in the community without a new sex offence, their risk for recidivism roughly halves. Consequently, we recommend that for offenders with two years or more sex offence free in the community since release from the index offence, the time they have been sex offence free in the community should be considered in the overall evaluation of risk. Static risk assessments estimate the likelihood of recidivism at the time of release and we expect they would be valid for approximately two years.

Soc'y for the Advancement of Actuarial Risk Need Assessment, *Static-99R Coding Rules* 13 (Rev. 2016).[1]

¶ 27 Based on the Static-99R guidance, Defendant argues the trial court should have considered that he had not committed a sex offense for a decade since his release in its risk assessment and that his risk should have been 3.0 to 6.1 percent, in the "low" to "moderate-low" risk range.

¶ 28 Even if, as Defendant argues, the trial court misunderstood or misapplied Defendant's Static-99R rating, the trial court made sufficient additional findings based in competent evidence to support the "highest level of supervision:" (1) Defendant scored a "4" on his recent Static-99R; (2) Defendant authored a letter prior to his 2008 conviction saying he would "do it again when [he] g[o]t out;" (3) Defendant's prior record level was IV; (4) Defendant had been convicted of six counts of taking indecent liberties and had disclosed to his therapist that he had impregnated a fourteen-year-old when he was in college, forcing the child to have an abortion; (5) Defendant had not completed sex offender treatment either while in prison or since his release; (6) he abused a position of trust and authority in perpetrating the sex offenses; (7) Defendant

1. Available at: https://saarna.org/download/static-99r-coding-rules-revised-2016/.

had several non-compliance issues with his monitoring device since his release; and (8) based on a psycho-evaluation of Defendant, Defendant had minimized his criminal conduct which "could be a sign of dishonesty." The trial court made sufficient findings to support its determination that Defendant required the "highest possible level of supervision and monitoring" for a term of 30 years. *See Kilby*, 198 N.C. App. at 366, 679 S.E.2d at 432. *Cf. State v. Dye*, 254 N.C. App. 161, 170-71, 802 S.E.2d 737, 743 (2017) ("[T]he trial court found that Defendant required the highest possible level of supervision and monitoring 'based on the risk assessment of the Division of Adult Correction,' and did not make any further findings of fact as to why SBM was appropriate. This finding was in error, and requires us to vacate the SBM order.").

III. CONCLUSION

¶ 29 Based on the foregoing, we affirm the order of the trial court vacating Defendant's lifetime SBM enrollment and ordering Defendant to enroll in SBM for a term of 30 years.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
RAY MARSHALL LAWSON, SR.

No. COA21-698

Filed 6 September 2022

1. Indictment and Information—felony animal cruelty—name of horse—surplusage

In an indictment charging defendant with felony animal cruelty, the trial court properly allowed the State to amend the indictment by removing the name of the horse, which was not an essential element of the offense and therefore was not required to render the indictment facially valid. Further, the remaining description of the animal as a "chestnut mare horse" was sufficiently clear to allow defendant the ability to prepare an adequate defense and to protect himself from being twice put in jeopardy for the same offense.

2. Criminal Law—prosecutor's closing argument—felony animal cruelty—reading of case law—not grossly improper

The prosecutor's closing argument in a trial for felony animal cruelty—during which the prosecutor read to the jury, without objection, the facts of a prior animal cruelty case and opined that since the facts were similar to the instant case, the element of intent was established beyond a reasonable doubt—was not so grossly improper as to require a new trial, given the overwhelming evidence presented by the State.

Appeal by Defendant from Order entered 27 January 2021 by Judge Josephine K. Davis in Durham County Superior Court. Heard in the Court of Appeals 7 June 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

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

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Raymond Marshall Lawson Sr. (Defendant) appeals from Judgment entered upon his conviction by a jury for felony animal cruelty. The Record, including evidence introduced at trial, tends to reflect the following:

¶ 2 Two brothers, William and Coleman Cameron, both of whom are now deceased, owned adjacent parcels of land in Durham County. Prior to their death, Defendant paid Coleman $6,000 for "lifetime rights" to keep his horses on Coleman's property. Coleman also allegedly gave Defendant two of his horses in the same transaction. In total, Defendant kept seven horses on Coleman's property. In 2016 William died, and his nephew, Greg Lee (Mr. Lee), moved onto the land William formerly owned and "kept an eye on" Coleman's property.

¶ 3 After moving onto the property in 2016, Mr. Lee disputed Defendant's ownership of the two horses Coleman allegedly gave to Defendant, claiming they still belonged to the deceased Coleman. On 25 February 2016, Defendant discovered that Mr. Lee shot and killed one of the horses Coleman had given him after it allegedly "went lame." Mr. Lee attempted to cremate the body in lieu of burying it as the ground was too cold and hard at the time.

¶ 4 That day Defendant called the Durham County Sheriff's Office in an attempt to press charges against Mr. Lee for killing his horse. However, Sheriff's Deputies told Defendant the horse's ownership was a probate question, and they were powerless to help until a court resolved the issue. The Deputies directed Defendant to bury the dead horse and departed the scene. The next day, on 26 February 2016, Deputies returned for a "compliance follow-up." The Deputies confirmed that Defendant had buried the horse and saw him feeding the remaining horses.

¶ 5 On 4 June 2016, Mr. Lee called animal control to report several deceased horses on the property. Officers with the Durham County Animal Services division (Animal Services) responded to the call. Once on the scene, Animal Services discovered the skeletal remains of three horses. Additionally, one emaciated "chestnut mare" horse was found in Defendant's paddock, still alive. The horse's ribs, spine, hips, and tail bone were visible through its skin. The paddock had no food or water, and the ground lacked any forageable vegetation. The horse also had a severe bacterial skin infection known as "rain rot," wherein the horse develops painful lesions on its skin.

¶ 6 Deputies obtained a warrant to seize the emaciated horse. The horse was taken to the Durham Animal Protection Society (APS). Durham APS subsequently transferred the horse to a rescue in Orange County for more intensive medical care.

¶ 7 Two days later, on 6 June 2016, a Deputy went to Defendant's house to speak with him. During the conversation, Defendant announced that he could no longer care for his horses and wished to surrender them.

¶ 8 Defendant filled out the paperwork and surrendered a total of five horses.

¶ 9 On 19 August 2019, Defendant was charged with felony animal cruelty, misdemeanor animal cruelty, and misdemeanor animal abandonment. Defendant's indictment for the felony animal cruelty charge originally read:

> And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above, the defendant named above unlawfully, willfully, and feloniously did maliciously torture by deprivation of necessary sustenance of an animal, a chestnut mare horse named "Diamond," owned by the Defendant and/or Raykell Jeanee Smith.

¶ 10 Subsequently, the State dismissed the two misdemeanor charges leaving only the felony animal cruelty charge under N.C. Gen. Stat. § 14-360(b) (2021). The State also moved to strike surplus language in the indictment seeking to remove the words "named Diamond" from each count.

¶ 11 On 20 January 2021, the trial court conducted a hearing on the motion. At this hearing, defense counsel argued that the change would force Defendant to defend against broader charges. Prior to the change, Defendant argued he had planned his defense around the theory that the horse the State seized was not Diamond and did not belong to Defendant. Defense counsel argued Defendant would be prejudiced by the amendment because he would now be unable to argue the horse at issue was not Diamond and thus not his. The State countered by arguing that only one horse was seized, and the modification would not change the alleged identity of the horse and would not prejudice Defendant's planned argument. The State further argued that the name was surplusage, and Defendant was still free to argue that the horse was named Diamond and did not belong to Defendant. Ultimately the trial court granted the motion over the defense counsel's objections.

¶ 12 Trial began on 20 January 2021. During the State's case in chief, four witnesses testified that it was Defendant who owned the horse in question and the paddock in which it was found. Additionally, Defendant's expert witness testified that the emaciated horse "could very well be Diamond." Defendant himself was unable to explain where his horse was now if, in fact, the State had incorrectly identified the horse seized by Animal Services as belonging to him.

¶ 13 During the State's closing arguments, the prosecutor argued that the intent element of animal cruelty was proven beyond a reasonable doubt by reading to the jury facts from a similar case, *State v. Coble*, 163 N.C. App. 335, 593 S.E.2d 109 (2004), in which this Court upheld an animal cruelty judgment. The prosecutor told the jury that the facts should "sound familiar" because they were "the same things we have here for intent." The State's closing argument drew no objections from defense counsel.

¶ 14 After trial, on 27 January 2021, the jury found Defendant guilty of felony animal cruelty. The trial court sentenced Defendant to 11 to 23 months in prison but elected to suspend the sentence for 36 months of supervised probation. Defendant gave Notice of Appeal in open court on the same day.

Issues

¶ 15 The issues on appeal are whether: (I) the removal of the name of the horse from the indictment rendered it facially invalid; and (II) the prosecutor's recitation of case law during her closing argument constituted gross impropriety necessitating a new trial.

Analysis

I. Removal of Horse's Name from Indictment

¶ 16 **[1]** Defendant contends that the horse's name was an essential element of the charged crime and that deleting it deprived him of the opportunity to prepare an adequate defense and now exposes him to double jeopardy. Thus, Defendant argues that the State's amendment to remove the name of the horse from the indictment rendered it facially invalid and, therefore, deprived the trial court of jurisdiction.

¶ 17 "When a criminal defendant challenges the sufficiency of an indictment lodged against him, that challenge presents this Court with a question of law which we review *de novo*." *State v. Oldroyd*, 380 N.C. 613, 2022-NCSC-27, ¶ 8. Indictments are not required to conform to any "technical rules of pleading." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). However, indictments must conform to certain threshold requirements and the strictures of N.C. Gen. Stat. § 15A-924 (2021). Generally, indictments must (1) be sufficiently clear as to "allow the defendant to identify the event or transaction against which [they have] been called to answer so that [they] may prepare a defense," (2) be sufficiently specific to "protect the defendant against being twice put in jeopardy for the same crime," *Oldroyd*, 2022-NCSC-27, ¶ 8, and (3) "allege all of the essential elements of the offense charged." *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985).

¶ 18 The requirements are satisfied with "[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. Gen. Stat. § 15A-924(a)(5) (2021). *See also Oldroyd*, 2022-NCSC-27, ¶¶ 7–8 ("[A]n indictment is sufficient if it asserts facts plainly, concisely, and in a non-evidentiary manner which supports each of the elements of the charged crime with the exactitude necessary to allow the defendant to prepare a defense and to protect the defendant from double jeopardy.").

¶ 19 Additionally,

> [e]very criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express 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. Gen. Stat. § 15-153 (2021).

¶ 20 Pursuant to N.C. Gen. Stat. § 15A-923(e) (2021), indictments may not be amended, meaning there must be no change "which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). However, "if an indictment contains an averment unnecessary to charge the offense, such averment may be disregarded as inconsequential surplusage." *State v. Grady*, 136 N.C. App. 394, 396–97, 524 S.E.2d 75, 77 (2000). Accordingly, surplus language which "in no way change[s] the nature or the degree of the offense charged" may be stricken from an indictment. *State v. Peele*, 16 N.C. App. 227, 233, 192 S.E.2d 67, 71, *cert. denied*, 282 N.C. 429, 192 S.E.2d 838 (1972).

¶ 21 In the case at bar, Defendant was indicted for felony animal cruelty under N.C. Gen. Stat. § 14-360(b) (2021). The elements of felony animal cruelty under N.C. Gen. Stat. § 14-360(b) (2021) are (1) intentional and malicious (2) torture, mutilation, maiming, cruelly beating, disfiguring, poisoning, or killing of (3) any animal.[1] Thus, the indictment must allege all of these elements in a non-evidentiary fashion and in a manner sufficiently clear and specific so as to "allow the defendant to identify the event or transaction against which he had been called to answer so that he may prepare a defense" and "protect the defendant against being twice put in jeopardy for the same crime." *Oldroyd*, 2022-NCSC-27, ¶ 8.

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1. "As used in this section, the words 'torture', 'torment', and 'cruelly' include or refer to any act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death. As used in this section, the word 'intentionally' refers to an act committed knowingly and without justifiable excuse, while the word 'maliciously' means an act committed intentionally and with malice or bad motive. As used in this section, the term 'animal' includes every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings." N.C. Gen. Stat. § 14-360(c) (2021).

¶ 22 Here, the trial court's Order granting the motion to strike surplus language removed only the words "named 'Diamond' " from the indictment, leaving the animal described as only a "chestnut mare horse." However, on 4 June 2016, there was only one living horse, a chestnut mare, that Animal Services seized from the property. Thus, the indictment, with or without the horse's name, was sufficiently clear as to "allow the defendant to identify the event or transaction against which he had been called to answer so that he may prepare a defense." *See Oldroyd*, 2022-NCSC-27, ¶ 8. Indeed, the identity of the chestnut mare horse at issue was known to all parties at all times, both before and after the motion to strike surplus language. Additionally, only one horse was ultimately discussed at trial, and, despite the change in the indictment, the State continued to allege that the horse's name was "Diamond."

¶ 23 Following the modification and through trial, Defendant and all other parties continued to understand precisely what horse and what event the indictment referred to, and the same remains clear to any potential future court. Thus, the indictment remained sufficiently clear to "allow the defendant to identify the event or transaction against which he had been called to answer so that he may prepare a defense," and sufficiently specific to "protect the defendant against being twice put in jeopardy for the same crime." *Id.*

¶ 24 Moreover, under N.C. Gen. Stat. § 14-360(b) (2021), the name of the horse is not an essential element of the crime of felony animal cruelty. Indeed, it has long been held that it is acceptable to identify subject animals by general description in indictments. *See State v. Credle*, 91 N.C. 640, 643–46 (1884) (the words "cattle beast" in an indictment were sufficient in a case where the defendant was charged with killing the ox of another). In this case, ultimately, the name of the horse was immaterial to the offense charged because there was no confusion as to the horse—the chestnut mare—at issue. As such, here, striking the name of the horse "in no way change[s] the nature or the degree of the offense charged[.]"[2] *Peele*, 16 N.C. App. at 233, 192 S.E.2d at 71.

¶ 25 Therefore, inclusion of the horse's name was not necessary in this case to charge the offense by way of a facially valid indictment and did

2. There may well be instances where the name of the animal at issue may be necessary—or at least helpful—to avoid confusion, to distinguish between animals, avoid double jeopardy concerns and, in turn, amending an indictment to reference a potentially different animal could be problematic. We need not and do not decide that issue today as, in this case, the Record reflects no confusion as to the horse the State alleged to be at issue.

not change the nature or degree of offense charged. Thus, it was permissible to strike the name of the horse from the indictment as surplusage. Consequently, the trial court did not err in allowing the State's motion to amend the indictment.

II. The State's Closing Argument

¶ 26 **[2]** Defendant contends that the prosecutor's reading of case law in closing argument constituted gross impropriety making it an error for the trial court to fail to intervene *ex mero motu*, necessitating a new trial.

¶ 27 In this case, because the statement at issue did not draw an objection from defense counsel, our review is conducted under a heightened standard.

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. . . . In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord . . . .

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). In conducting this review, we must analyze "(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). Both elements are essential for this Court to find that "the error merits appropriate relief." *Id.*

¶ 28 When reviewing for gross impropriety, "[o]ur standard of review dictates that '[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.' " *Id.* (quoting *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001)). "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L.Ed.2d 144, 157 (quoting *Darden v. Wainwright*, 699 F.2d 1031, 1036 (11th Cir. 1983)). A prosecutor's statements are not reviewed

in a vacuum; rather, we take them "in context and in light of the overall factual circumstances to which they refer." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995).

¶ 29 Further, even when an argument is deemed so improper, and the trial court should have intervened *ex mero motu*, this Court is not permitted to presume prejudice; rather, Defendant has the burden of demonstrating prejudice. *See Huey*, 370 N.C. at 186, 804 S.E.2d at 474. In order for a new trial to be ordered, the prosecutor's statements must have been so improper that they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Wainwright*, 477 U.S. at 169, 91 L. Ed. 2d at 145. There must be "a showing that the argument is so grossly improper that a defendant's right to a fair trial was prejudiced by the trial court's failure to intervene." *Huey*, 370 N.C. at 180, 804 S.E.2d at 469–70. Additionally, when the Supreme Court of North Carolina "has found the existence of overwhelming evidence against a defendant, [it has] not found statements that are improper to amount to prejudice and reversible error." *Id.* at 184.

¶ 30 "In jury trials, the whole case as well of law as of fact may be argued to the jury." N.C. Gen. Stat. § 7A-97 (2021). This statute "grants counsel the right to argue the law to the jury, which includes the authority to read and comment on reported cases and statutes." *State v. Gardner*, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986). However, "counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client." *Id.*

¶ 31 Here, the prosecutor read the jury the facts of *State v. Coble*, 163 N.C. App. 335, 593 S.E.2d 109 (2004), and told them that the facts should "sound familiar" because "that is the same things we have here for intent." Presuming, without deciding, the prosecutor's reading from *Coble* and argument thereon in this case was improper, Defendant cannot show the argument was so grossly improper, in light of the full context and the evidence presented against Defendant, that Defendant's "right to a fair trial was prejudiced by the trial court's failure to intervene." *Huey*, 370 N.C. at 174, 804 S.E.2d at 469–70.

¶ 32 The evidence presented included the testimony of four witnesses who all testified that the horse at issue belonged to Defendant and could only have belonged to Defendant. Additionally, the four witnesses all testified that the paddock in which the horse was found belonged to Defendant. Defendant's own expert witness also testified that the horse at issue "could very well be Diamond." Multiple witnesses, including one

who was admitted as an expert on equine care, testified about the emaciated and infected condition in which the horse was found. Moreover, for his own part, Defendant testified that he visited the paddock every day. He could not explain where his horse was now if the horse in the State's possession was not his.

¶ 33 Therefore, in light of the evidence presented at trial, we cannot conclude Defendant was deprived of a fair trial or his right to due process. Thus, Defendant has not established the prosecutor's closing argument was so grossly improper the trial court was required to intervene *ex mero motu*. Consequently, the trial court did not err by failing to intervene in the closing argument *ex mero motu*.

Conclusion

¶ 34 Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the Judgment against Defendant.

NO ERROR.

Judges INMAN and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
YON HWAR SEE

No. COA22-9

Filed 6 September 2022

1. Discovery—voluntary discovery—criminal case—laboratory records—procedures for blood alcohol analysis

In a prosecution for felony death by vehicle and driving while impaired, where a chemical analysis of defendant's blood by the City-County Bureau of Identification laboratory indicated that defendant was drunk when she fatally struck a pedestrian with her car, the trial court did not abuse its discretion in denying defendant's request for voluntary discovery of the laboratory's audit, non-conformity, and corrective-action records, which defendant argued might contain information demonstrating possible user error in the operation of the machine used to analyze her blood. The State provided sufficient information to familiarize defendant with the laboratory's testing procedures, which she used to effectively cross-examine the

doctor who analyzed her blood sample. Further, on appeal from her convictions, defendant failed to cite any authority or assert any legal basis for her claim that the denial of her discovery request violated her due process rights under the state constitution.

2. Appeal and Error—preservation of issues—constitutional argument—admission of blood test in criminal case

In a prosecution for felony death by vehicle and driving while impaired, defendant failed to preserve for appellate review her argument that the trial court erred by admitting her blood alcohol test results into evidence—based on her contention that her consent to the blood draw was not knowing, voluntary, or intelligent, in violation of the federal and state constitutions—where defense counsel did not raise the constitutional argument at trial. Further, the Court of Appeals declined to invoke Appellate Rule 2 to review this argument in defendant's appeal from her convictions.

Appeal by defendant from judgment entered 7 May 2021 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 10 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the State.

Daniel M. Blau for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Yon Hwar See appeals from a judgment entered upon a jury's verdicts finding her guilty of driving while impaired and felony death by vehicle. On appeal, Defendant challenges the trial court's denial of her request for discovery of the City-County Bureau of Identification laboratory's audit, non-conformity, and corrective-action records, as well as the admission of her blood test results into evidence. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

¶ 2 While driving to work at approximately 6:00 a.m. on 23 June 2020, Defendant fatally struck a pedestrian, Patrick Simmons, with her vehicle. Mr. Simmons had been "walking on or near the fog line in the right lane" of the road when Defendant's car struck him from behind. The front windshield of Defendant's car was "smashed[,]" and the front

bumper was dented. The portion of the road at which the collision occurred was "perfectly straight[,]" and driving conditions that morning were clear.

¶ 3 Shortly after the collision, Lindsey Childs noticed "what [she] initially assumed to be just some discarded clothes on the side of the road[,]" but which she determined upon closer examination to be the body of Mr. Simmons. Ms. Childs pulled over and approached Defendant's car "to make sure she was okay." Defendant "didn't make eye contact" with Ms. Childs and "didn't say anything" to her; she was "[j]ust sitting, staring straight forward" in her car. Ms. Childs then called 9-1-1.

¶ 4 At approximately 7:00 a.m., Raleigh Police Department Officer Lee Granger arrived at the scene of the collision to serve as the lead investigator. Several other law enforcement officers were already present. Officer Granger did not administer any standardized field sobriety tests to Defendant at any point during his investigation, because other officers informed him that "someone had already checked her out for alcohol, and there was no alcohol in this case."

¶ 5 Officer Daniel Egan, a member of the Raleigh Police Department's Crash Reconstruction Unit, responded to the scene at approximately 7:15 a.m. Other law enforcement officers told Officer Egan that Defendant had performed the standardized field sobriety tests, and that alcohol was not a factor. Consequently, Officer Egan did not administer any standardized field sobriety tests or otherwise inquire into Defendant's level of impairment during his investigation.

¶ 6 Officer Granger cited Defendant with misdemeanor death by vehicle. While he spoke with Defendant, Officer Granger was wearing a mask due to the COVID-19 pandemic; Defendant was also wearing a mask. Officer Granger informed Defendant of her implied consent rights and requested a sample of her blood for chemical analysis. Defendant consented, and at 8:43 a.m., a paramedic collected two vials of Defendant's blood at the scene.

¶ 7 Officer Granger then transported the "blood kit" containing Defendant's blood sample to the City-County Bureau of Identification ("CCBI") laboratory for testing. Dr. Richard Waggoner, employed in the CCBI's DWI Blood Chemistry Department, received Defendant's blood kit on 26 June 2020 and conducted the chemical analysis on 6 July 2020. His analysis revealed that on the morning of 23 June 2020, Defendant had a blood-alcohol concentration of 0.18 grams per 100 milliliters. Later, at trial, both Officers Granger and Egan admitted that they were surprised by the results of Defendant's blood analysis, and stated that they would

have investigated the scene differently if they had known at the time that Defendant was impaired.

¶ 8 On 12 October 2020, a Wake County grand jury indicted Defendant for felony death by vehicle, driving while impaired, and failure to reduce speed. The next day, the State dismissed the charge of misdemeanor death by vehicle.

¶ 9 On 12 March 2021, Defendant filed a motion for voluntary discovery. On 22 March 2021, after consultation with her toxicology expert, Defendant filed a request for additional voluntary discovery and a motion to continue, seeking documents and records of the CCBI laboratory "relating to testing protocols, operating procedures and maintenance records." Specifically, Defendant sought, *inter alia*:

> 10. Findings of any and all *internal* laboratory audits from 6/26/2019 (year prior to sample submission to laboratory) to [22 March 2021].
>
> 11. Findings of any and all *external* laboratory audits from 6/26/2019 (year prior to sample submission to laboratory) to [22 March 2021].
>
> 12. Records of all corrective actions, non-conformities, and/or non-conforming events received at any time for all laboratory employees that were in custody of the blood sample.

¶ 10 Defendant's request for additional voluntary discovery came on for hearing on 12 April 2021 in Wake County Superior Court. Regarding requests 10, 11, and 12, Defendant contended that these materials were necessary to enable her expert to conduct a peer review of Dr. Waggoner's analysis of her blood sample, in that "[i]nternal and external audits are tools for peer review that are recognized as an accepted practice in the field of forensic toxicology." The State argued that the requests were "overbroad and irrelevant[,] . . . amounting to nothing more than a fishing expedition." When the trial court asked Defendant's counsel whether he had "some reason to believe there may be [exculpatory] information" contained in the laboratory's audit, non-conformity, and corrective-action records, Defendant's counsel conceded that he was "not able to make a plausible showing" as to why he thought that the materials contained exculpatory evidence.

¶ 11 Dr. Waggoner testified at the hearing. He explained the auditing processes conducted at the CCBI laboratory:

> Every year our accrediting body requires us to perform an internal audit of the entire laboratory process, including management and technical aspects of the entire process.
>
> And then every two years an accrediting body will send auditors externally that will inspect the entire process of our laboratory and perform a total and complete audit.

Dr. Waggoner further explained that there are six separate sections of the CCBI, but that the auditors perform "one comprehensive audit of the entire laboratory." He opined that neither the audits nor any corrective-action records would be necessary to perform a peer review of the chemical analysis process, and that he would only consider such materials necessary "if [he] saw issues in the quality control documents."

¶ 12 On 14 April 2021, the trial court entered an order denying without prejudice Defendant's requests for the items described in numbers 10, 11, and 12, finding that these requests were "overly broad[.]" The court granted Defendant's requests for the remaining items that the State had not yet provided.

¶ 13 Defendant's case came on for trial on 3 May 2021 in Wake County Superior Court. At trial, Defendant's expert did not testify.

¶ 14 Dr. Waggoner testified at length as the State's expert, describing the processes and protocols he followed while conducting the blood analysis. Dr. Waggoner explained that he arrived at the 0.18 blood-alcohol concentration figure by averaging the results gathered from the two smaller samples he tested, which were derived from one of the vials of Defendant's blood in the blood kit that Officer Granger provided to the CCBI. He further explained that he purposefully spaced out the testing of Defendant's smaller samples in order to reduce the likelihood of any repeated error, and that he had the results reviewed by another analyst to ensure their accuracy. Dr. Waggoner also stated that "[i]f alcohol is contaminated with a yeast and it's not preserved and it's exposed to elevated temperatures, there is a possibility that some fermentation could occur. But if it's preserved, collected under aseptic conditions, and refrigerated, there's virtually no possibility of that occurring." He detailed the process by which he ensures proper calibration of the machines used for the blood analysis, and explained that there was a 99.73% probability that his calculations were within 0.012 grams per milliliter of the 0.18 figure he ultimately calculated.

¶ 15 At the close of the State's evidence, the trial court granted Defendant's motion to dismiss the charge of failure to reduce speed. On 7 May 2021, the jury returned verdicts finding Defendant guilty of the remaining charges. The trial court arrested judgment on the driving while impaired conviction, and sentenced Defendant to a mitigated sentence of 50 to 72 months in the custody of the North Carolina Division of Adult Correction for the felony death by vehicle conviction.

¶ 16 Defendant timely appealed.

Discussion

¶ 17 On appeal, Defendant argues that the trial court "erred by denying [her] discovery request[s] for audit, non-conformity, and corrective-action records from the CCBI laboratory, in violation of N.C. Gen. Stat. § 15A-903 and Article I, Sections 19 and 23 of the North Carolina Constitution." Defendant also contends that the trial court plainly erred by admitting her blood test results into evidence because her consent to the blood draw was not knowing, voluntary, or intelligent.

I. Standard of Review

¶ 18 "We review a [trial court's] ruling on discovery matters for an abuse of discretion." *State v. Pender*, 218 N.C. App. 233, 240, 720 S.E.2d 836, 841, *appeal dismissed and disc. review denied*, 366 N.C. 233, 731 S.E.2d 414 (2012). "An abuse of discretion will be found where the ruling was so arbitrary that it cannot be said to be the result of a reasoned decision." *Id.* (citation omitted).

II. Requests for Voluntary Discovery

¶ 19 **[1]** Defendant first contends that the trial court "should have allowed discovery" of the CCBI laboratory's audit, non-conformity, and corrective-action records pursuant to N.C. Gen. Stat. § 15A-903 because these items may have contained information demonstrating "an increased possibility of user error in the operation of th[e] machine" used to analyze her blood sample. We disagree.

¶ 20 This Court broadly construes a defendant's right to discovery pursuant to N.C. Gen. Stat. § 15A-903, which governs discovery matters in criminal cases. *State v. Dunn*, 154 N.C. App. 1, 9, 571 S.E.2d 650, 655 (2002), *supersedeas and disc. review denied*, 356 N.C. 685, 578 S.E.2d 314 (2003).

¶ 21 The parties cite no cases that directly address whether a defendant has a right to discover a laboratory's audit, corrective-action, or non-conformity records pursuant to N.C. Gen. Stat. § 15A-903(a)(1)a.

Nevertheless, we find instructive opinions in which the defendant's right to discovery was evaluated under the prior version of the statute, N.C. Gen. Stat. § 15A-903(e),[1] in that the right to discovery that was articulated in subsection (e) is similar to a defendant's right to discovery pursuant to § 15A-903(a)(1)a. *Compare* N.C. Gen. Stat. § 15A-903(e) (2003), *with id.* § 15A-903(a)(1)a (2021).

¶ 22 Section 15A-903(a)(1) now provides that "[u]pon motion of the defendant, the court must order . . . [t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant." N.C. Gen. Stat. § 15A-903(a)(1) (2021). For the purpose of § 15A-903, such "files" include any "matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." *Id.* § 15A-903(a)(1)a.

¶ 23 Furthermore, "[w]hen any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes." *Id.*; *see State v. Cunningham*, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992) (concluding that N.C. Gen. Stat. § 15A-903(e) (1988) "must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also of any tests performed or procedures utilized by chemists to reach such conclusions").

¶ 24 Nonetheless, a defendant's right to voluntary discovery is not unlimited. When an examination or test is conducted in a defendant's case, the State need not provide "information concerning peer review of the testing procedure, whether the procedure has been submitted to the scrutiny of the scientific community, or is generally accepted in the scientific community." *State v. Fair*, 164 N.C. App. 770, 774–75, 596 S.E.2d 871, 874 (2004). Such information "is beyond the scope of N.C. Gen. Stat. § 15A-903's discovery provisions" because access to this type of information is not "necessary for the defendant to understand the testing

1. N.C. Gen. Stat. § 15A-903(e) granted defendants the right "to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor." N.C. Gen. Stat. § 15A-903(e) (2003). However, this provision was removed in 2004 upon the General Assembly's amendment to N.C. Gen. Stat. § 15A-903. *See* An Act to . . . Provide for Open Discovery in All Felony Cases . . . , S.L. 2004-154, § 4, 2004 N.C. Sess. Laws 515, 517–20.

procedure and to conduct an effective cross-examination of the State's expert witness." *Id.* at 774, 596 S.E.2d at 873–74; *see also Cunningham*, 108 N.C. App. at 196, 423 S.E.2d at 809 (concluding that the defendant was entitled to additional discovery because the chemist's report—which contained "only the ultimate result" of the tests performed—"d[id] not enable [the] defendant's counsel to determine what tests were performed and whether the testing was appropriate, or to become familiar with the test procedures").

¶ 25 In the instant case, Defendant contends that she "cannot cross-examine a machine, so it [wa]s vitally important that she have access to information in the State's possession that may show an increased possibility of user error in the operation of th[e] machine" that Dr. Waggoner used to analyze her blood samples and determine her blood-alcohol concentration.

¶ 26 After careful review of the record, we conclude that the trial court did not abuse its discretion in denying in part Defendant's request for additional voluntary discovery, as Defendant was provided with sufficient information to become familiar with the testing procedure and to adequately cross-examine Dr. Waggoner. Apart from the documents requested in numbers 10, 11, and 12, the State provided—either voluntarily or by court order—substantial laboratory information. Such discovery included the CCBI laboratory's standard operating procedure and quality control logs; the laboratory's maintenance records from 6 July 2019 through 6 July 2020 for both machines that were used to analyze the blood samples; the maintenance records from the same period for "any analytical balances used"; the records of temperature in the refrigerators containing the blood samples and the analytical controls; the laboratory's internal chain of custody records; the chromatography data for the calibrators and controls relevant to the blood samples; and the certificate of laboratory accreditation.

¶ 27 At the 12 April 2021 hearing, Dr. Waggoner explained the significance of these materials. The quality control logs contain a variety of testing information, such as data concerning the quality control samples, which are used "to check the entire process to see if there's anything that could be amiss with it." The maintenance records indicate whether the laboratory followed the CCBI maintenance schedule. The records of temperature in the refrigerators could potentially reveal "noncompliance" with protocols, which could affect the laboratory's testing accuracy and accreditation. And the chromatography data for the calibrators and controls indicate whether the machines were properly operating at the time of the analysis.

¶ 28 Defendant was then able to use this information during her cross-examination of Dr. Waggoner to challenge the validity of the blood analysis. Her counsel extensively questioned Dr. Waggoner—who performed the analysis—regarding the testing processes and protocols, as well as his compliance with the protocols. Defense counsel also inquired as to whether the samples were refrigerated prior to Dr. Waggoner's testing, which Dr. Waggoner did not know, and which he admitted could affect the blood-alcohol concentration test results. Furthermore, Dr. Waggoner confirmed during cross-examination that the CCBI laboratory does not "quality control test" the blood kits; he acknowledged that he did not know "whether the iodine was used correctly in sterilizing the injection point on [Defendant] when her blood was taken," which could affect the results; and he conceded that carryover of alcohol content from one blood sample to another during testing "is always a concern" because it could affect the accuracy of the tests.

¶ 29 The trial court provided Defendant with pretrial discovery of not only the "conclusory laboratory report[ ]," but also "any tests performed or procedures utilized by" Dr. Waggoner to reach his conclusions, thereby sufficiently "enabl[ing D]efendant's counsel to determine what tests were performed and whether the testing was appropriate, [and] to become familiar with the test procedures." *Cunningham*, 108 N.C. App. at 195–96, 423 S.E.2d at 808–09. Because Defendant was able "to understand the testing procedure and to conduct an effective cross-examination of the State's expert witness" with the discovery provided to her, *Fair*, 164 N.C. App. at 774, 596 S.E.2d at 873, we conclude that the trial court did not abuse its discretion in denying her request for the laboratory's audit, non-conformity, and corrective-action records, *see Pender*, 218 N.C. App. at 240, 720 S.E.2d at 841.

¶ 30 Defendant next contends that the trial court's denial of her requests concerning the laboratory's audit, non-conformity, and corrective-action records "violated [her] state constitutional rights to due process, a fair trial, confrontation, and compulsory process." Again, we disagree.

¶ 31 A defendant's right to discovery of exculpatory information stems from the United States Constitution. *See Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). In *Brady*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* "Favorable evidence is material if there is a reasonable probability that its disclosure to the defense would result in a different outcome in the jury's deliberation." *State v. Strickland*,

346 N.C. 443, 456, 488 S.E.2d 194, 202 (1997) (citation and internal quotation marks omitted), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). The North Carolina Constitution provides similar protections. *See Cunningham*, 108 N.C. App. at 196, 423 S.E.2d at 809. However, "[t]he defendant has the burden of showing that the undisclosed evidence was material and affected the outcome of the trial." *State v. Tirado*, 358 N.C. 551, 589–90, 599 S.E.2d 515, 541 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005).

¶ 32 In the present case, Defendant advances no argument that the trial court's denial, in part, of her additional discovery requests violated her federal constitutional rights, only asserting that the court "should have allowed the discovery under Article I, Sections 19 and 23 of the state constitution." Defendant fails to explain how the court's actions violated her constitutional rights. She cites no authority to support her propositions beyond the mention of "Article I, Sections 19 and 23 of the state constitution" and a recital of what she asserts are the "unique facts of this case[.]" As such, we have no legal basis upon which to review this alleged error. *See* N.C. R. App. P. 28(b)(6). Furthermore, "[i]t is not the role of this Court to craft [D]efendant's arguments for h[er]." *State v. Earls*, 234 N.C. App. 186, 192, 758 S.E.2d 654, 658, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 643 (2014).

¶ 33 Regardless, Defendant is unable to demonstrate "that the undisclosed evidence was material and affected the outcome of the trial." *Tirado*, 358 N.C. at 590, 599 S.E.2d at 541. Her argument fails accordingly.

III. Admission of Blood Test Results

¶ 34 **[2]** Finally, Defendant argues that the trial court plainly erred by admitting the blood test results into evidence, in that her "consent for the blood draw was not knowing, voluntary, or intelligent, in violation of the" federal and state constitutions.

¶ 35 Defendant concedes that her counsel did not argue such constitutional violations below, so that this issue has not been preserved for appellate review. Thus, Defendant requests that we invoke Appellate Rule 2 to review this purported constitutional error. We decline to do so. *See State v. Dean*, 196 N.C. App. 180, 188, 674 S.E.2d 453, 459 ("Defendant never presented any constitutional arguments to the trial court, and we will not address such arguments for the first time on appeal."), *appeal dismissed and disc. review denied*, 363 N.C. 376, 679 S.E.2d 139 (2009); *see also State v. Register*, 206 N.C. App. 629, 634, 698 S.E.2d 464, 469 (2010).

Conclusion

¶ 36 For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges INMAN and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 SEPTEMBER 2022)

BLAYLOCK v. YORK 2022-NCCOA-601 No. 22-173	Alamance (18CVS2459)	Dismissed
GOODE v. LEISURE ENT. CORP. 2022-NCCOA-602 Nos. 22-77, 22-370	Mecklenburg (21CVS6227)	Affirmed
GRAY v. WELLS FARGO BANK, N.A. 2022-NCCOA-603 No. 21-609	Dare (16CVS489)	Affirmed
HALL v. BRUNSWICK PLANTATION PROP. OWNERS ASS'N 2022-NCCOA-604 No. 21-748	Wake (21CVD5636)	Affirmed
IN RE J.M. 2022-NCCOA-605 No. 21-775	Forsyth (19JB111)	Vacated and Remanded
IN RE Z.M. 2022-NCCOA-606 No. 22-167	Mecklenburg (19JT172) (19JT173) (19JT174) (19JT175)	Affirmed
STATE v. ABERNATHY 2022-NCCOA-607 No. 21-765	Cleveland (19CRS2165) (19CRS54910)	Affirmed
STATE v. BOSWELF 2022-NCCOA-608 No. 21-789	Onslow (16CRS51743) (17CRS56861) (19CRS114)	No Error
STATE v. BURBAGE 2022-NCCOA-609 No. 22-35	Beaufort (16CRS50482)	Affirmed In Part; Remanded For Correction Of Clerical Error.
STATE v. GONCALVES 2022-NCCOA-610 No. 21-801	Pender (19CRS51910-12) (20CRS131)	NO PLAIN ERROR
STATE v. KIRK 2022-NCCOA-611 No. 21-531	Mecklenburg (07CRS231089) (08CRS34203)	Affirmed

STATE v. LARKIN 2022-NCCOA-612 No. 22-10	Mecklenburg (16CRS223316) (16CRS223318)	Affirmed in part; vacated and remanded in part.
STATE v. LASSITER 2022-NCCOA-613 No. 21-461	Durham (15CRS58280) (15CRS58364)	No Error
STATE v. MINTZ 2022-NCCOA-614 No. 21-437	Cleveland (16CRS51838)	No Error
STATE v. NICHOLSON 2022-NCCOA-615 No. 21-465	New Hanover (17CRS53234) (17CRS53329) (17CRS5688)	No Error
STATE v. NICKELSON 2022-NCCOA-616 No. 21-699	Columbus (20CRS51455) (21CRS157)	No Error
STATE v. OUTLAW 2022-NCCOA-617 No. 21-669	Wayne (19CRS50705)	No Error
STATE v. WILLIAMS 2022-NCCOA-618 No. 21-647	Wake (18CRS215086)	No Error
STROHM v. MORGAN 2022-NCCOA-619 No. 22-91	Moore (21CVS82)	Affirmed
SUOZZO v. SUOZZO 2022-NCCOA-620 No. 22-62	Pitt (19CVS313)	Affirmed
ZHANG v. ZHANG 2022-NCCOA-621 No. 22-245	Wake (21CVS6076)	Affirmed

DONALD DAVIDSON, Plaintiff
v.
EMILY TUTTLE, Defendant

No. COA21-387

Filed 20 September 2022

Child Custody and Support—modification of visitation—substantial change in circumstances—increased time with father—dysfunctional behavior

The trial court did not err in reducing a father's visitation with his preschool-aged sons based on a substantial change in circumstances adversely affecting the sons' welfare where the sons' behavior had become dysfunctional—as evidenced by their cursing and screaming, throwing objects, threatening a child at school, saying they hated their mother, disowning their mother's last name, and saying they wanted their mother to die—after a prior child custody order increased their visitation time with the father. The trial court's findings were supported by competent evidence in the form of videos of the sons' behavior, witness testimony, the father's behavior and statements at the hearing, and circumstantial evidence (such as the inference that neither their school nor their mother's family would teach the children to disown their mother's last name), and the findings supported the trial court's conclusions of law.

Appeal by plaintiff from order entered on or about 19 November 2020 by Judge Robert K. Martelle in District Court, Rutherford County. Heard in the Court of Appeals 22 February 2022.

Parsons Law, P.A., by Patrick K. Bryan, for plaintiff-appellant.

W. Martin Jarrard and Jarald N. Willis, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiff-father appeals the trial court's order reducing his visitation time with his children. Upon careful review, we determine the trial court's findings of fact are supported by the evidence, and those finding support the trial court's determination that a substantial change adversely impacting the welfare of the minor children occurred since the prior custody order and that the modification of the custodial schedule is in the children's best interests. We therefore affirm.

I. Background

¶ 2 On or about 4 June 2015, plaintiff-father filed a verified child custody complaint against defendant-mother requesting custody for the parties' two children, Adam and Bryan[1], and moved to establish paternity. On 19 August 2015, a temporary, non-prejudicial memorandum of judgment was entered ordering a paternity test. On or about 24 August 2015, defendant-mother filed an answer and counterclaimed for custody. The paternity testing established plaintiff-father is the children's father. On 13 May 2016, the trial court entered a custody order granting both parties joint legal custody with defendant-mother having primary physical custody. Father had visitation beginning in May of 2016 for two hours, twice a week; the children were approximately 14 months old at the time this visitation began. Father's physical custody was set to slowly increase through the months with a specific schedule laid out with changes when the children turned two years old and when they began kindergarten.

¶ 3 On 10 February 2017, Father moved to modify the child custody order arguing "there has been a substantial change in circumstances affecting the custody and visitation of the minor children," including that "the spirit" of the order indicates he should get "more time" with the children as they age; the children are no longer bottle fed, and thus they can have more flexible schedules; the children are close with Father; and Mother would be moving her residence five hours away. Thereafter, on 31 December 2018, Father amended his motion to modify, alleging Mother had been dating and when she was not with the children she allowed her parents to keep them rather than him.

¶ 4 On 29 August 2019, the trial court entered a custody order, by consent of the parties.[2] The 29 August 2019 custody order modified the custodial schedule to give Father more physical time with the children, including 14 overnights each month beginning in August of 2019 and running through "school months[.]" On 18 November 2019, Mother filed a verified motion to modify custody alleging a "substantial change in circumstances affecting the welfare of the minor children," because the children "have not adjusted well emotionally to the new schedule[;]" Father has not been involved in preschool or speech therapy; the children often have "physical ailments" after being with Father; Father often has a woman in his home whose "fitness" around the children is

1. Pseudonyms are used.

2. On 1 August 2019, the parties entered a Memorandum of Order with the terms of the revised custodial schedule; the formal order based on the Memorandum was filed on 29 August 2019.

"concern[ing;]" and the children are "no longer thriving" as they were under the prior schedule. On 10 February 2020, Mother filed a verified supplement to her motion to modify custody, claiming Father often took the children to his elderly grandfather's house "subjecting" them to 8 hours in the car on weekends in "an unwholesome environment" with "dangerous conditions;" and Father made "disparaging comments about" Mother to the children.

¶ 5 On 19 February 2020, Father answered Mother's motion, denying most of the allegations regarding a substantial change of circumstances and moving for attorney fees. After a hearing on 12 August 2020 and 24 September 2020, the trial court entered a custody order concluding there had "been a substantial change in circumstances since entry of the August 1, 2019 Consent Order that adversely affects the welfare of the subject minor children and which warrants . . . modification[.]" The trial court modified Father's visitation to visitation every other weekend from Friday at 3:00pm to Sunday at 3:00pm with specific provisions for some holidays. Father appeals.

II. Modification of Custody Order

¶ 6 Father first contends that "the trial court made *no* findings of fact demonstrating a substantial change in circumstances since entry of the August 1, 2019 custody order" and "there is a lack of substantial evidence to demonstrate any substantial change of circumstances had occurred since the entry of the August 1, 2019 order." (Emphasis added and capitalization altered.) Thus, Father contends "the trial court failed to make *any* findings of fact demonstrating a substantial change in circumstances occurred." (Emphasis added.)

A. Standard of Review

¶ 7 As our Court has explained,

> In *Shipman v. Shipman*, our Supreme Court set forth the requirements for modification of a custody order, and this Court's standard of review of an order modifying custody. *See Shipman v. Shipman*, 357 N.C. 471, 473-75, 586 S.E.2d 250, 253-54 (2003).
>
> > It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the

child warrants a change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.

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. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests.

The trial court's examination of whether to modify an existing child custody order is twofold. 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 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.

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.

Id. (citations, quotation marks, and brackets omitted).

Huml v. Huml, 264 N.C. App. 376, 387–89, 826 S.E.2d 532, 541–42 (2019).

B. Findings of Fact

¶ 8 Father contests eleven of the trial court's findings of fact as not supported by the "substantial competent evidence." We address the contested findings of fact in two separate sets.

1. Findings of Fact 14-20

¶ 9 Father challenges findings of fact 14-20. We first note that findings of fact 7-13, and particularly finding of fact 11, address, in some part, the children's "dysfunctional behavior[,]" and Father's response to it, and thus are helpful for context regarding the challenged findings of fact. Further, findings of fact 7-13 are not contested, and thus those findings are binding on appeal. *See Isom v. Duncan*, 2021-NCCOA-453, ¶ 1 ("When a finding of fact is unchallenged, it is binding on appeal.") We also note the children were born in 2015, so they were four or five years old during the time of the events addressed by these findings of fact.

> 7. Shortly after the entry of the handwritten memorandum of a modified Custody Order on August 1, 2019, which substantially increased the number and frequency of overnights that they spent with the [Father], the subject minor children began acting out in an angry and maladjusted manner, using profanity and saying hateful things to their Mother. This type of dysfunctional behavior on the part of the subject minor children occurred regularly upon their returning to the [Mother]'s home after spending the night with the [Father], and also occurred regularly while the subject minor children were being readied to return to the physical custody of the [Father], and has continued consistently from August 2019 until now.
>
> 8. The [Mother] immediately became alarmed when she noticed this drastic, negative change in the subject minor children's behavior following the entry of the handwritten memorandum of a modified Custody Order on August 1, 2019, and notified the [Father] right away of her serious concerns about the subject minor children's well[-]being.
>
> 9. The [Mother] videoed numerous episodes of this regular dysfunctional behavior on the part of the subject minor children, and presented these videos as evidence in this case. The Court finds that these

videoed episodes fairly and accurately illustrate the described, regularly occurring dysfunctional behavior on the part of the subject minor children.

10. This dysfunctional behavior on the part of the subject minor children, as described in the testimony of the [Mother], the [Mother]'s husband, [Jon Smith], and the [Mother]'s Mother, [Jane Jones], and as illustrated by the representative episodes shown in the videos, cause the Court grave concern for the subject minor children's welfare and emotional well-being.

11. Specific examples of the children's dysfunctional behavior that cause the Court grave concern for the subject minor children's welfare and emotional well-being, and which occurred either upon their returning to the [Mother]'s home after spending the night with the [Father], or while they were being readied to return to the physical custody of the [Father], are as follows:

- On August 25, 2019, upon returning home after spending the night with the [Father], the children screamed at the [Mother], and [Adam] told the [Mother] to "shut your damn mouth;"

- On September 11, 2020, upon returning home after spending the night with the [Father], they screamed at the [Mother] "I hate you" and "you hate me" at least 10 times and [Adam] threw his shoes at his Mother;

- On September 29, 2020, upon returning home after spending the night with the [Father], [Adam] asked "why do you hate me so much?" Mother responded "I do not hate you" and [Adam] said "yes you do;"

- On October 16, 2019, upon returning home after spending the night with the [Father], both of the children were screaming, hitting the couch, throwing stuff, and [Bryan] screamed "I don't have to listen because I don't want to;"

- On November 3, 2019, upon returning home after spending the night with the [Father], [Adam] screamed "I hate you" and he threw things, kicked toys, threw a blanket;

- On November 13, [201]9, upon returning home after spendi[ng the] night with the [Father] [Adam] screamed "I'm going [to b]e mean to you all day because I want to - Everyone hates me" and . . . when [Mother] told him that she loved him, he responded by calling her a liar. Then [Adam] also screamed "My name is Davidson, I am not a Tuttle. Why do you lie all the time?" And then [Adam] said "I want you to die;"

- On November 18, 2019, upon returning home after spending the night with the [Father], [Adam] wakes up in the middle of the night in a night terror and begins screaming to his Mother "I hate you" when she tries to comfort him;

- On November 20, 2019, upon returning home after spending the night with the [Father], [Bryan] screams at his Mother "I'm going to beat you" and "You're mean to me" [Bryan] also uses profanity and calls his Mother an "asshole" and a "son of a bitch;"

- On Sunday, November 24, 2019, upon returning home after spending the night with the [Father], [Bryan] begins screaming about his jacket, [Bryan] begins kicking and attacks his Mother. [Bryan] screams at his Mother "I hate you." [Bryan]'s scream is a blood-curdling scream, and screams at his Mother that night "I hate you" at least 5 times and then he calls his Mother "a baby."

- On one day in February, 2020, upon returning home after spending the night with the [Father], [Adam] screams at his Mother "you hate me, I'm a bad guy" and "I hate you," and then [Adam] begins punching his Mother.

- On February 19, 2020, upon returning home after spending the night with the [Father], [Adam] calls his Mother a "son of a bitch" and an "asshole" and a "dumb ass motherfucker;"

- On March 8, 2020, upon returning home after spending the night with the [Father], [Bryan] and [Adam] scream repeatedly at their Mother that they "hate her" and [Adam] screams at his Mother that he "wants her to die;" and

- On June 14, 2020, upon returning home after spending the night with the [Father], [Bryan] repeatedly

screamed at his Mother "I hate you" and "why do you hate me["] and "you want me to die."

12. There was also an incident at [Bryan]'s and [Adam]'s school in 2020 before school closed down in March 2020, when [Bryan] and [Adam] surrounded another boy and scared the other boy half to death - they had the other boy on the ground crying and they were threatening to harm this other child.

13. The [Father] suggested in his testimony that the subject minor children learned this profane language and these abnormal behaviors at school, or that the [Mother] or her family has coached the subject minor children to act this way or to use the profanity to gain an advantage in these court proceedings.

¶ 10 Turning now to the contested findings:

14. This dysfunctional behavior on the part of the subject minor children was not improperly influenced or manipulated by the [Mother], the [Mother]'s husband, [Jon Smith], or the [Mother]'s Mother, [Jane Jones], and this type of language and hateful conduct toward the [Mother] by the subject minor children was not learned at school.

15. The subject minor chil[d]'s screaming that their last name wa[s] ["Da]vidson" and not "Tuttle" would not be something they [w]ould learn at school, nor would the expressions of "hatred" toward and about the [Mother] be something they would learn at school.

16. The [Father], upon being told in August 2019 about this alarming conduct on the part of the subject minor children, was unconcerned and refused to participate in any family counseling to get to the bottom of it.

17. The [Father] detests and resents the [Mother], and expressed those feelings in no uncertain terms during his testimony at this hearing.

18. Because of his hostile feelings toward the [Mother], the [Father] refuses to co-parent with the [Mother] to the detriment of the subject minor children.

> 19. Based in part on the circumstantial evidence that the subject minor children's use of profanity and saying hateful things to their Mother did not begin until after the entry of the modified Custody Order on August 1, 2019, which modified Custody Order substantially increased the frequency of overnights that the subject minor children spent with the [Father], and based on the circumstantial evidence that the subject minor children could not and did not learn this type of profanity and this expression of hostility toward their Mother from the [Mother] and her family, from classmates at school, or from any other known source, the Court finds that the [Father] has regularly used profanity in the presence of the subject minor children and repeatedly expressed his hostile feelings for the [Mother] in the presence of the subject minor children.
>
> 20. The Court's finding that the [Father] regularly used profanity in the presence of the subject minor children and repeatedly expressed his hostile feelings for the [Mother] in the presence of the subject minor children, is also based, in part, on the direct observations of witness Kandice Brown.

¶ 11 Essentially, findings of fact 14-20, indicate that the children's "dysfunctional behavior" as described in findings of fact 7-20 was caused by their extended time with their Father since entry of the August 2019 order. In making its determination, the trial court explains it used the "direct observations of witness Kandice Brown[,]" Father's own attitude toward Mother and failure to address the children's troubling behavior, and "circumstantial evidence" such as the fact that neither the school nor Mother's family would teach the children to disown Mother's last name and claim only his.

¶ 12 As to Ms. Brown, Father contends her testimony "is not credible, is not reliable, is full of inconsistences, and is rife with . . . [her] motivation to see [Father] lose his children." But,

> we note that in custody cases, the trial court sees the parties in person and listens to all the witnesses. With this perspective, the trial court is able to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the

> reasonable inferences to be drawn therefrom. This opportunity of observation allows the trial court to detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges.

Weideman v. Shelton, 247 N.C. App. 875, 879–80, 787 S.E.2d 412, 416 (2016) (citations and quotation marks omitted). Thus, we will not reweigh the trial court's credibility determinations. Ms. Brown testified to Father's profanity in front of the children and disparaging comments about their Mother. Father testified he had not heard the boys curse, and the children do not need "counseling" for their behavior. Father speculated Mother had taught the children to call her names and otherwise act out as a "whole conspiracy" for the trial court.

¶ 13 Turning back to the contested findings of fact, ultimately, beyond Father's speculation, which the trial court plainly did not deem credible, there was no evidence the children's troubles stemmed from Mother, her family members, or the school. Father's testimony verifies he was not fond of Mother and was not concerned about the children's emerging problems, as he found the children's behavior to be "normal," and he did not believe they needed mental health services. Further, Ms. Brown testified Father used profanity and disparaged Mother in front of the children. Accordingly, findings of fact 14-20 were supported by the substantial, competent evidence.

2. Findings of Fact 21-23, 27, and 28

¶ 14 As to findings of fact 21-23, 27, and 28, Father contends "Findings of Fact 21, 22, 23, 27, and 28 are based upon, and presupposed upon, Findings 19 and 20. Because Findings 19 and 20 are not based upon substantial, competent evidence, Findings 21, 22, 23, 27, and 28 are not." However, we have concluded findings of fact 19 and 20 are based upon substantial competent evidence. Because findings of fact 21, 22, 23, 27, and 28 are challenged only upon the grounds that they were based upon findings of fact 19 and 20, findings which stand, these findings also remain intact.

C. Substantial Change in Circumstances

¶ 15 Having addressed the challenged findings of fact, we turn back to Father's main argument that "the trial court erred in modifying the August 1, 2019 order without first sufficiently finding a substantial change of circumstances affecting the welfare of the children had occurred since August 1, 2019." This argument is without merit.

1. Findings of Fact Supporting a Determination of Substantial Change of Circumstances

¶ 16 We have already noted the findings of fact regarding the changes in the children's behavior after the previous custody order which had substantially increased Father's visitation time. Further, the children were newly emotionally distressed, and Father was unconcerned with these changes. Father is correct that any changes in circumstances "must significantly affect the welfare of the children" before the court may modify the custodial schedule:

> When a trial court modifies a custody order, the requisite change in circumstances cannot be "inconsequential" or "minor," but rather must significantly affect the welfare of the children. *Pulliam*, 348 N.C. at 630, 501 S.E.2d at 905 (Orr, J., concurring). "By this, we mean that the changes are of the type which normally or usually affect a child's well-being—not a change that either does not affect the child or only tangentially affects the child's welfare." *Id.*

Stephens v. Stephens, 213 N.C. App. 495, 499, 715 S.E.2d 168, 171 (2011).

¶ 17 Father contends the changes in the children's behavior as found by the trial court are "inconsequential" and "minor[.]" *Id.* Further, Father contends the prior court-ordered modification of custody cannot serve as the substantial change of circumstances. But the prior modification of the custody order increasing Father's visitation was not itself the substantial change of circumstances considered by the trial court. If the children did not have any significant behavioral or emotional changes after the new visitation schedule started, there would be no change of circumstances affecting the children. The trial court found the children's drastic change in behavior and heightened distress to be the substantial change and that this significantly affected the welfare of the children. The fact that the substantial changes in the children was apparently caused by more time with their Father does not mean the increase in custodial time in the prior order *was* the substantial change in circumstances. The trial court's findings regarding the children's drastic change from well-adjusted to "dysfunctional behavior," once they began spending more time with Father, were very detailed. The troubling behaviors -- in children aged four and five years old -- include screaming and cursing, throwing objects, surrounding another boy and scaring him to the point he was on the ground crying while Adam and Bryan threatened him, and statements from the children about hating Mother, Mother hating

one of the children, not having to listen to Mother, purposefully being mean to Mother, disowning Mother's last name, calling Mother profane names, and stating a desire for Mother to die. These major and consequential changes in the children certainly demonstrate a change of circumstances. *See id.*; *see generally Huml*, 264 N.C. App. at 387–88, 826 S.E.2d at 541. However, the substantial change in circumstances does not end with the children's behavior.

¶ 18 In addition, a parent's intensifying "anger" and "hostility" toward another parent can create a substantial change of circumstances:

> A substantial change in circumstances that affects the welfare of the children can occur when a parent demonstrates anger and hostility in front of the children and attempts to frustrate the relationship between the children and the other parent. Additionally, although interference alone is not enough to merit a change in the custody order, where interference with visitation becomes so pervasive as to harm the child's close relationship with the noncustodial parent, it may warrant a change in custody.

Stephens, 213 N.C. App. at 499, 715 S.E.2d at 172 (citations, quotation marks, and brackets omitted). Here, the trial court made several findings regarding Father's expression of "his hostile feelings for" Mother in front of the children, noting it had "influenced the subject minor children and to some degree has contributed to the subject minor children's dysfunctional behavior[.]" Accordingly, the trial court did not err in determining there was a substantial change in circumstances since entry of the prior custody order.

2. Linking the Substantial Change of Circumstances to the Children's Welfare

¶ 19 Father also contends "[t]he trial court failed to make any finding directly linking any change in circumstances to the welfare of the children" and similarly, "[t]he record and evidence are devoid of substantial evidence to demonstrate any nexus between any substantial change and the welfare of the children." (Capitalization altered.) In fact, the trial court's order, much of which is quoted above, is a plain declaration of the ways the children's welfare was negatively affected after Father's visitation time increased.

¶ 20 To the extent Father is contending the children's behavior does not impact their welfare, we find this implausible. A child's behavior affects

his welfare in many ways because his behavior affects his relationships with others and his opportunities and ability to learn and to make friends. A child who demonstrates the behaviors as described by the trial court's findings at school will likely be unable to make friends and to learn to his full potential, and if the behaviors continue as the child gets older, he could even be suspended from school, at the very least. For example, the incident at school described in finding of fact 12 indicates the children's behavior was causing significant problems at school, not just at home with Mother. Further, children who are ages four and five cannot express their feelings and thoughts as an older child can; with young children, we often must discern the welfare of the child in large part by looking at the child's behavior. Here, the substantial change of the children's behavior upon the modification of custody -- and the absence of any evidence of any other explanation for the change in behavior -- supports the trial court's finding of a link between the increased time with Father and the negative changes in the children.

¶ 21 Lastly, we note, Father does not directly contest the trial court's determination of best interests of the children to return to the prior custodial schedule but instead makes the same argument in slightly different words: "the trial court's conclusion that there was a substantial of circumstances adversely affecting the welfare of children warranting custody modification was not supported by the orders factual findings." (Capitalization altered.) The trial court did not abuse its discretion in determining it was in the best interest of the children to spend less time with Father. *See generally Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000) ("[W]e hold that the trial court committed no abuse of discretion by concluding that a modification of custody was in Nicholas' best interests.").

III. Conclusion

¶ 22 We conclude the trial court properly modified custody based on a substantial change of circumstances impacting the welfare of the minor children.

AFFIRMED.

Judges ARROWOOD and WOOD concur.

FRYE v. HAMROCK, LLC

[285 N.C. App. 440, 2022-NCCOA-623]

JAMES FRYE, ANTHONY FRYE, AND APRIL FRYE, NEXT OF KIN OF TONEY A. FRYE, DECEASED EMPLOYEE, PLAINTIFFS
v.
HAMROCK, LLC, EMPLOYER, CAROLINA MUTUAL INS. CO., CARRIER, DEFENDANTS

No. COA22-188

Filed 20 September 2022

Workers' Compensation—compensability—death—work relatedness unknown—presumption of work relatedness

In a workers' compensation case, where an employee died in a vehicle collision while driving a dump truck for his employer, the subsequent autopsy indicated that the employee died of a heart attack, and neither the autopsy nor the remaining evidence in the record confirmed whether the heart attack caused the employee to crash the truck during the accident or whether the circumstances of the accident caused the heart attack, the Industrial Commission properly awarded death benefits to the employee's children and next of kin under the rule that, where the work relatedness of an employee's death is unknown but the employee died in the course and scope of his employment, that death is presumptively work-related and therefore compensable under the Workers' Compensation Act.

Appeal by defendants from opinion and award entered 8 November 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 August 2022.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Andrew J. Howell, for plaintiffs-appellees.

Orbock Ruark & Dillard, PC, by Barbara E. Ruark, for defendants-appellants.

ZACHARY, Judge.

¶ 1 Defendants Hamrock, LLC and Carolina Mutual Insurance Company appeal from an Opinion and Award entered on 8 November 2021 by the full North Carolina Industrial Commission "determin[ing] that the Employee's death was compensable under the Workers' Compensation Act." After careful review, we affirm.

I. Background

¶ 2 On 18 July 2017, Toney A. Frye ("Decedent") was driving a "dump truck filled with a load of asphalt" for his employer, Defendant Hamrock, LLC. As Decedent drove southbound down Coxes Creek Mountain on a stretch of U.S. Highway 226 in Marion that "is steeply graded, curvy, and notorious for motor vehicle accidents[,]" the dump truck crossed the double yellow lines and collided head-on with an oncoming vehicle. The dump truck then crashed into an embankment before coming to rest on its side.

¶ 3 Multiple witnesses observed Decedent's truck prior to the accident. Among these witnesses was Special Agent Jennifer Trantham, who was traveling northbound on Highway 226 when she noticed Decedent's truck traveling southbound "at an unsafe speed." She reported that she saw Decedent immediately prior to the accident with "what appeared to be, a cigarette in his left hand with his left arm resting on the window sill [sic]" and "[h]eavy smoke . . . billowing from the rear axles of the truck." Later, at her deposition in this matter, Special Agent Trantham added that Decedent was "very conscious" and appeared "very calm" when she saw him, and that he did not appear "slumped over the wheel or down in the cab."

¶ 4 Decedent and the front-seat passenger of the oncoming vehicle were declared dead at the scene. The EMS Narrative from the scene stated that Decedent was "pinned in pulseless and not breathing[,]" having suffered a "crush injury . . . due to the weight applied to [Decedent] from the truck." The EMS Narrative also reported that the extrication process was "extended[,]" exceeding twenty minutes, because of "the metal wrapped around the driver compartment[.]" Decedent's death certificate stated that his "immediate cause" of death was "multi-system trauma" and "motor vehicle collision."

¶ 5 Eugene R. Edwards, a paramedic who responded to the accident, reported that the roof of the dump truck appeared to have "collapsed on to [Decedent]'s head and back pinning him between the roof and steering wheel." Edwards and the McDowell County Medical Examiner later "examined Decedent at the funeral home," at which time Edwards noted "a hematoma to the back of the head . . . [approximately] 2.5 inches in diameter protruding outward [approximately] 1" in height[,]" as well as, *inter alia*, multiple lacerations to the head and bruising to the shoulder and back. Edwards also reported that "an autopsy was initially 'refused' as the physician . . . felt [it] would not benefit the outcome[.]"

¶ 6 On 19 July 2017, Defendants filed a Form 19 Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission, as well as a motion for an autopsy. *See* N.C. Gen. Stat. § 97-27 (2021). Defendants' motion was granted that same day. On 20 July 2017, Dr. Brent Hall conducted an autopsy and concluded that "[t]he cause of death in this case was ischemic heart disease secondary to coronary heart disease." He also noted "multiple fresh abrasions of the head, trunk, and extremities" but did not identify any "significant trauma."

¶ 7 On 9 October 2017, Defendants filed a Form 61 Denial of Workers' Compensation Claim. The stated reason for the denial was: "No injury by accident during the normal course and scop[e] of employment. The employee's cause of death was related to an idiopathic health condition and not related to any trauma or work incident." On 24 August 2018, Plaintiffs' counsel filed a Form 33 Request that Claim be Assigned for Hearing. On 23 October 2018, Defendants filed a Form 33R Response to Request that Claim be Assigned for Hearing, asserting that:

> [Decedent]'s accident and death were caused by an underlying heart condition. Defendants contend that [Decedent] had a heart condition that precipitated both the accident and resulting in his death. Defendants contend that the autopsy report confirms that [Decedent] did not die of any cause that would have been due to the work-related accident.

¶ 8 This matter came on for hearing, via deposition testimony only, before the Deputy Commissioner. Among the witnesses who provided deposition testimony were Special Agent Trantham and Dr. Hall. On 8 April 2020, the Deputy Commissioner entered an Opinion and Award denying the claim. Plaintiffs' counsel timely filed notice of appeal to the full North Carolina Industrial Commission.

¶ 9 On 13 August 2020, the matter came before the Full Commission, and on 8 November 2021, the Full Commission entered its Opinion and Award. The Full Commission concluded that Plaintiffs were entitled to the *Pickrell* presumption—that, "where the circumstances bearing on work-relatedness are unknown and the death occurs within the course of employment, claimants should be able to rely on a presumption that death was work-related, and therefore compensable, whether the medical reason for death is known or unknown[,]" *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 370, 368 S.E.2d 582, 586 (1988)—and that Defendants had not provided sufficient evidence to rebut the presumption. Alternatively, the Full Commission concluded that Plaintiffs had shown

that "Decedent was exposed to a special hazard" because "Decedent's position in attempting to control a dump truck loaded with asphalt careening down the mountainside[ ] subjected him to unusually stressful and extreme conditions of his employment."

¶ 10 Accordingly, the Full Commission entered an award of 500 weeks of death benefits, beginning from Decedent's date of death, to Plaintiffs James Frye, Anthony Frye, and April Frye, Decedent's children and next of kin. The Full Commission also ordered that Defendants pay Decedent's burial and funeral costs, not to exceed $10,000.00, as well as "all medical bills for Decedent that were incurred as a result of his death." Defendants timely filed notice of appeal.

II. Discussion

¶ 11 On appeal, Defendants argue (1) that the Full Commission erred by concluding that the *Pickrell* presumption applies in this case; (2) that, even if the *Pickrell* presumption does apply, Defendants have successfully rebutted it; and (3) that the Full Commission erred by concluding, in the alternative, that Decedent's heart attack was the result of a work-related accident.

A. Standard of Review

¶ 12 "Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006), *reh'g denied*, 361 N.C. 227, 641 S.E.2d 801 (2007). Because the Commission "is the sole judge of the weight and credibility of the evidence," its "findings of fact are conclusive on appeal if supported by competent evidence[.]" *Blackwell v. N.C. Dep't of Pub. Instruction*, 282 N.C. App. 24, 2022-NCCOA-123, ¶ 5 (citation omitted). Thus, in reviewing an opinion and award of the Industrial Commission, "our function is not to weigh the evidence but is to determine whether the record contains any competent evidence tending to support the findings." *Strickland v. Cent. Serv. Motor Co.*, 94 N.C. App. 79, 82, 379 S.E.2d 645, 647, *disc. review denied*, 325 N.C. 276, 384 S.E.2d 530 (1989).

¶ 13 "Findings not supported by competent evidence are not conclusive and will be set aside on appeal. But findings supported by competent evidence are conclusive, even when there is evidence to support contrary findings." *Johnson v. Covil Corp.*, 212 N.C. App. 407, 408–09, 711 S.E.2d 500, 502 (2011) (citations and internal quotation marks omitted).

"Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Fields v. H&E Equip. Servs., LLC*, 240 N.C. App. 483, 485–86, 771 S.E.2d 791, 793 (2015) (citation omitted).

¶ 14 The Commission's conclusions of law are reviewed de novo. *Blackwell*, 282 N.C. App. 24, 2022-NCCOA-123, ¶ 5. Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Fields*, 240 N.C. App. at 486, 771 S.E.2d at 793–94 (citation omitted).

B. Analysis

¶ 15 Defendants first argue that the Full Commission erred by concluding that the *Pickrell* presumption is applicable to this case, and that if it does apply, they have successfully rebutted the presumption. We disagree.

¶ 16 "In order for a claimant to recover workers' compensation benefits for death," the claimant bears the burden of proving "that death resulted from an injury (1) by accident; (2) arising out of his employment; and (3) in the course of the employment." *Pickrell*, 322 N.C. at 366, 368 S.E.2d at 584; *see* N.C. Gen. Stat. § 97-2(6), (10). In *Pickrell*, our Supreme Court examined the question of "what mode of proof" a claimant may use to meet this burden "where the evidence shows [the] decedent died in the course and scope of his employment, but there is no evidence as to whether the cause of death was work-related, *i.e.*, from an injury by accident arising out of employment." 322 N.C. at 366, 368 S.E.2d at 584.

¶ 17 Our Supreme Court explained that "[t]he general rule is that a claimant under such circumstances may rely upon a presumption that the death resulted proximately from a work-related injury[.]" *Id.* at 367, 368 S.E.2d at 584. Thus, our Supreme Court articulated what is commonly known as the *Pickrell* presumption:

> In cases . . . where the circumstances bearing on work-relatedness are unknown and the death occurs within the course of employment, claimants should be able to rely on a presumption that death was work-related, and therefore compensable, whether the medical reason for death is known or unknown.

Id. at 370, 368 S.E.2d at 586. This presumption "may be used to help a claimant carry [the claimant's] burden of proving that death was caused by accident, or that it arose out of the decedent's employment, or both." *Id.* at 368, 368 S.E.2d at 585.

¶ 18 "The first step in the analysis is whether the presumption applies, based upon the facts of the case." *Gray v. United Parcel Servs., Inc.*, 212

N.C. App. 674, 678, 713 S.E.2d 126, 129, *disc. review and cert. denied*, 365 N.C. 351, 717 S.E.2d 743 (2011). Once the Commission determines that a claimant is entitled to rely upon the *Pickrell* presumption, "the defendant must come forward with some evidence that death occurred as a result of a non-compensable cause; otherwise, the claimant prevails." *Pickrell*, 322 N.C. at 371, 368 S.E.2d at 586. However,

> [i]n the presence of evidence that death was not compensable, the presumption disappears. In that event, the Industrial Commission should find the facts based on all the evidence adduced, taking into account its credibility, and drawing such reasonable inferences from the credible evidence as may be permissible, the burden of persuasion remaining with the claimant.

Id.

¶ 19 Defendants contend that the Full Commission erred by concluding that the *Pickrell* presumption applies in the instant case for two reasons. First, Defendants argue that the *Pickrell* presumption should only apply when the claimant is "found dead" and that the presumption "should not be broadened to encompass the facts of the current case." Second, Defendants argue that the *Pickrell* presumption should not apply because there is evidence that Decedent died as a result of a non-compensable cause.

1. "Found Dead"

¶ 20 Defendants first argue that the Full Commission erred in applying the *Pickrell* presumption because it failed to consider—or even acknowledge—the requirement that a claimant be "found dead" in order for the *Pickrell* presumption to apply. However, Defendants' argument construes *Pickrell* too narrowly.

¶ 21 Defendants' argument is primarily predicated on our Supreme Court's justification of the *Pickrell* presumption, in part, on the basis that "[i]n unexplained death cases where the medical reason for death is known, . . . the circumstances bearing on work-relatedness remain unknown. It is these circumstances, not the medical reasons for death, which are critical in determining whether a claimant is entitled to workers' compensation benefits." *Id.* at 369–70, 368 S.E.2d at 586. Our Supreme Court reasoned that a presumption of compensability would be appropriate in these cases because, *inter alia*, "[e]mployers may be in a better position than the family of the decedent to offer evidence on the circumstances of the death. Their employees ordinarily are the last

to see the decedent alive, and the first to discover the body." *Id.* at 370, 368 S.E.2d at 586.

¶ 22 Defendants rely on this language to support their argument that the *Pickrell* presumption should not apply in the case at bar because Decedent's "coworkers were not the last individuals to see him alive and were not the individuals to discover [his] body." Defendants further argue that Decedent "was not found dead, as there were several individuals who witnessed the events leading up to the motor vehicle accident" and "no one contends that a passerby happened upon [Decedent]'s wrecked vehicle and found him dead inside." As such, Defendants maintain that the Full Commission erred by expanding the scope of the *Pickrell* presumption "beyond what [our Supreme Court] originally intended."

¶ 23 However, careful review of *Pickrell* and subsequent case law shows that being "found dead" is not, in and of itself, a necessary condition for application of the presumption as articulated by our Supreme Court. Defendants acknowledge as much, noting that "[a]s time has passed," our appellate courts have, "without explanation, . . . sometimes failed to apply the requirement" that the deceased employee be "found dead." Indeed, as our Supreme Court articulated in *Pickrell*, the presumption applies in cases "where the circumstances bearing on work-relatedness are unknown and the death occurs within the course of employment, . . . whether the medical reason for death is known or unknown." *Id.* A decedent being "found dead" may naturally inform the application of the *Pickrell* presumption, given that it is a fact-dependent analysis, *see Gray*, 212 N.C. App. at 678, 713 S.E.2d at 129, and it is the "circumstances bearing on work-relatedness" that "are critical in determining whether a claimant is entitled to workers' compensation benefits[,]" *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586.

¶ 24 Accordingly, Defendants' argument is overruled.

2. Compensable Cause of Death

¶ 25 Defendants next argue that the *Pickrell* presumption does not apply in this case because "there is evidence that [Decedent] died from a cause other than a compensable cause[.]" Defendants contend that Dr. Hall's autopsy "confirmed that [D]ecedent died from a heart attack and that he was dead prior to the time of any impact[,]" and that this Court has held that the *Pickrell* presumption "is applicable . . . only where there is no evidence that [the] decedent died other than by a compensable cause." *Gilbert v. Entenmann's, Inc.*, 113 N.C. App. 619, 623, 440 S.E.2d 115, 118 (1994). However, as Defendants candidly acknowledge in their brief,

this Court has previously distinguished *Gilbert* with respect to deaths attributable to heart attacks.

¶ 26 In *Wooten v. Newcon Transportation, Inc.*, the defendants relied upon *Gilbert* for the same principle as do Defendants in the present case. 178 N.C. App. 698, 702, 632 S.E.2d 525, 528 (2006), *disc. review denied*, 361 N.C. 704, 655 S.E.2d 405 (2007). The *Wooten* Court explained that

> in *Gilbert*, the Court concluded that [the] plaintiff was not entitled to the *Pickrell* presumption because [the] decedent died from a subarachnoid hemorrhage, which is not a compensable cause. In contrast, an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to *unusual or extraordinary exertion* or extreme conditions.

Id. (citation and internal quotation marks omitted); *see also Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586 ("A . . . heart attack may, or may not, be compensable, *depending on the manner in which the event occurred*." (emphasis added)). Further, the *Wooten* Court "note[d] that there was no evidence . . . that [the] decedent died by other than a compensable cause" because the Full Commission concluded in the opinion and award on review in that case that "the evidence fail[ed] to show whether [the] decedent had a heart attack that caused the motor vehicle accident or whether the circumstances of the accident caused [the] decedent's heart arrhythmia." 178 N.C. App. at 703, 632 S.E.2d at 528.

¶ 27 Here, as in *Wooten*, the Full Commission found that "the exact cause of [Decedent]'s heart attack remains unknown." Notably, the Full Commission expressly gave weight to the deposition testimony of Defendants' expert, Dr. Hall, in which he "admitted that he could not, to a reasonable degree of medical certainty, give an opinion as to 'whether [Decedent] had this accident because of a heart attack or whether he had a heart attack because of the circumstances of this accident.' " This last finding is significantly similar to the dispositive finding in *Wooten* that "the evidence fail[ed] to show whether [the] decedent had a heart attack that caused the motor vehicle accident or whether the circumstances of the accident caused [the] decedent's heart arrhythmia." *Id.* As "our function is not to weigh the evidence but is to determine whether the record contains any competent evidence tending to support the findings[,]" *Strickland*, 94 N.C. App. at 82, 379 S.E.2d at 647, and the record

contains competent evidence in the form of Defendants' expert's testimony, we are bound by the Full Commission's weighing of this evidence.

¶ 28 Defendants do not challenge the finding of fact that recites relevant portions of Special Agent Trantham's testimony:

> Special Agent Trantham testified that [Decedent] "was traveling at a high rate of speed" and appeared "very calm." She further testified that [Decedent] "traveled over into her lane" as he was "coming out of a curve." She recalled that [Decedent]'s "head was turned to be able to see her" and "he had his arm hanging out of the window . . . and it appeared that he had a cigarette in his . . . left hand." According to Special Agent Trantham, [Decedent] was "very conscious" and did not appear "slumped over the wheel or down in the cab."

(Ellipses in original).

¶ 29 Nevertheless, Defendants challenge the Full Commission's related finding that, in pertinent part, "the Full Commission gives weight to the testimony of Special Agent Trantham who saw [Decedent] moments before his death, driving his vehicle while 'very conscious,' but also not in complete control of his loaded dump truck, traveling at an unsafe speed down a curvy, steep mountain road." However, as stated above, the Full Commission "is the sole judge of the weight and credibility of the evidence," and its "findings of fact are conclusive on appeal if supported by competent evidence[.]" *Blackwell*, 282 N.C. App. 24, 2022-NCCOA-123, ¶ 5 (citation omitted). We are similarly bound by the Full Commission's determination to "give[ ] weight to the testimony of Special Agent Trantham" and, as the Full Commission's findings are supported by her testimony, this challenged finding of fact is conclusive on appeal. *See id.*

¶ 30 Accordingly, the Full Commission's findings of fact support its conclusion that "[t]he greater weight of the evidence indicates that the circumstances regarding the work-relatedness of Decedent's heart attack are unknown and that the death occurred as the result of an injury by accident sustained in the course and scope of Decedent's employment." In that "the circumstances [of Decedent's death] bearing on work-relatedness are unknown and the death occur[red] within the course of employment[,]" *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586, the Full Commission appropriately concluded that the *Pickrell* presumption applies in this case and therefore "the burden shift[ed] to

Defendants to rebut this presumption and show that the heart attack did not arise out of the employment."

3. Rebuttal of the Pickrell *Presumption*

¶ 31 Defendants next argue that "they have rebutted the [*Pickrell*] presumption and it no longer exists." "In order to rebut the presumption, the defendant has the burden of producing credible evidence that the death was not accidental or did not arise out of employment." *Wooten*, 178 N.C. App. at 703, 632 S.E.2d at 528 (citation and internal quotation marks omitted).

¶ 32 In its Opinion and Award, the Full Commission "conclude[d] that Defendants have shown that Decedent died from a heart attack but have not provided sufficient evidence that the death occurred as a result of a non-compensable cause." Much of Defendants' argument to the contrary is a rehash of their assertions regarding the weight of the evidence in the record. However, the "Commission is the sole judge of the weight and credibility of the evidence," *Blackwell*, 282 N.C. App. 24, 2022-NCCOA-123, ¶ 5 (citation omitted), and thus this Court will not reweigh the evidence on appeal.

¶ 33 Defendants also argue that this case is distinguishable from *Wooten*, in which this Court held that "the Commission correctly concluded that [the] defendants did not rebut the [*Pickrell*] presumption of compensability" where it was "undisputed that [the] decedent was involved in an accident," 178 N.C. App. at 703, 632 S.E.2d at 529, and where "[t]he evidence fail[ed] to show whether [the] decedent had a heart attack that caused the motor vehicle accident or whether the circumstances of the accident caused [the] decedent's heart arrhythmia[,]" *id.* at 703, 632 S.E.2d at 528. Defendants argue that "the competent evidence in this case is that the heart attack precipitated [Decedent]'s loss of control of the vehicle. The only credible evidence in this case establishes that [Decedent] was already deceased at the time of the actual collision."

¶ 34 In fact, there is competent evidence in the record to support the inference that losing control of the truck precipitated Decedent's heart attack. In his deposition, Dr. Hall testified that a "stressful event" such as losing control of a speeding truck "could predispose one to a heart attack." In addition, North Carolina Highway Patrol Trooper Justin Sanders, who oversaw the investigation of the accident, testified in his deposition that, based upon his measurements and analysis of the tire impressions made by Decedent's truck leading up to the accident, it was his opinion that Decedent "was operating the vehicle" and was "applying the brake[s]" on the dump truck prior to the collision. Indeed, Trooper

Sanders further testified that it was "obvious that [Decedent was] trying to control [the truck] and keep it in the road."

¶ 35 Neither the record in this case nor the binding findings of fact support Defendants' argument that "[t]he *only* credible evidence in this case establishes that [Decedent] was already deceased at the time of the actual collision" or that "the heart attack precipitated [Decedent]'s loss of control of the vehicle." (Emphasis added). "Therefore, [D]efendants have failed to meet their burden of showing that [Decedent's heart attack] occurred prior to and caused [his] injury by accident[,]" *id.* at 702, 632 S.E.2d at 528, and Defendants' argument must be overruled.

¶ 36 As we conclude that the Full Commission properly concluded that the *Pickrell* presumption applied in this case and Defendants have not successfully rebutted the presumption, we need not address Defendants' final argument that the Full Commission erred by concluding, in the alternative, that Decedent's heart attack was the result of a work-related accident.

III. Conclusion

¶ 37 For the foregoing reasons, the Opinion and Award of the Full Commission is affirmed.

AFFIRMED.

Judges WOOD and GRIFFIN concur.

IN RE PELLICCIOTTI

[285 N.C. App. 451, 2022-NCCOA-624]

IN THE MATTER OF ANTHONY JOSEPH PELLICCIOTTI

No. COA21-497

Filed 20 September 2022

Sexual Offenders—registration—out-of-state conviction—substantially similar to North Carolina offense

The trial court did not err by ordering defendant to register as a sex offender based on defendant's conviction in Pennsylvania of second-degree statutory sexual assault since that offense was substantially similar to the North Carolina reportable offense of statutory rape of a person fifteen or younger (N.C.G.S. § 14-27.25(a)) despite a minor variation regarding the minimum age difference between victim and defendant. The rule of lenity did not apply where there was no ambiguity with regard to which North Carolina statute should be used as comparison, and where there was no ambiguity in either of the statutes under comparison.

Appeal by defendant from the Order entered 2 February 2021 by Judge Michael O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 8 March 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Alan D. McInnes, for the State-Appellee.

Thomas, Ferguson & Beskind, LLP by Kellie Mannette and Jay H. Ferguson, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Anthony Joseph Pellicciotti ("Defendant") appeals from an order (the "Order") requiring him to register as a sex offender upon his relocation to North Carolina, arguing the out-of-state offense is not substantially similar to a reportable North Carolina offense. After careful review, we affirm the Order of the trial court.

I. Factual and Procedural Background

¶ 2 On 28 November 2011, Defendant pleaded guilty to second-degree statutory sexual assault in Pennsylvania. 18 Pa. Cons. Stat. Ann. § 3122.1

(West 1995) (amended 2012).[1] On 13 November 2020, after Defendant moved to North Carolina, the Durham County Sheriff's Office notified Defendant that he was required to register as a sex offender based on his out-of-state conviction. Defendant timely filed a petition contesting the registration requirement.

¶ 3 On 2 February 2021, the trial court held a hearing on the petition. The State argued 18 Pa. Cons. Stat. Ann. § 3122.1 was substantially similar to N.C. Gen. Stat. § 14-27.25(a). Defendant conceded 18 Pa. Cons. Stat. Ann. § 3122.1 was substantially similar to subsection (b) of N.C. Gen. Stat. § 14-27.25, a non-reportable Class C felony, but argued it was not substantially similar to subsection (a) of the same, a reportable Class B1 felony. The trial court concluded 18 Pa. Cons. Stat. Ann. § 3122.1 was substantially similar to N.C. Gen. Stat. § 14-27.25(a), a reportable offense, and entered the Order requiring registration as a sex offender. On 9 February 2021, Defendant filed timely, written notice of appeal.

II. Jurisdiction

¶ 4 Jurisdiction lies in this Court as a matter of right over a final judgment of the superior court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issue

¶ 5 The sole issue on appeal is whether the trial court erred by determining the Pennsylvania offense of second degree statutory sexual assault was substantially similar to the reportable North Carolina offense of statutory rape of a person who is fifteen years of age or younger, thereby requiring Defendant to register as a sex offender upon his change of residency to North Carolina.

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1. The Pennsylvania statute was amended in December 2011, with the amended version taking effect in February 2012. The record reveals the trial court conducted its substantial similarity analysis using the amended 2012 version of the Pennsylvania statute, whereas Defendant was convicted under the 1995 version. The 1995 version, which did not contain subsections, is quoted above. The 2012 version added a second category of defendants who could be convicted of a second-degree felony: one who is eight years older but less than eleven years older than the complainant. 18 PA. Cons. Stat. Ann. § 3122.1(a)(2) (amended 2012). The 2012 amendment also added a first-degree felony when a defendant is eleven or more years older than the complainant. 18 PA. Cons. Stat. Ann. § 3122.1(b) (2012). In short, the 2012 amendment expanded the Pennsylvania statute; however, it did not substantively alter the offense applicable to Defendant's case, which explains why this apparent discrepancy was not challenged on appeal.

IV. Analysis

A. Standard of Review

¶ 6 The question of "whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (citation omitted). Questions of law are reviewed by an appellate court *de novo*. *Id.* at 669, 687 S.E.2d at 524. The trial court determines whether the statutes are substantially similar by "compar[ing] the elements of the out-of-state . . . offense to those purportedly similar to a North Carolina offense." N.C. Gen. Stat. § 14-208.12B(c) (2021). The inquiry in a comparison of the elements test is narrow; courts are limited to examining the elements of each statute, without considering any underlying facts of the conviction or legislative purpose. *See State v. Sanders*, 367 N.C. 716, 719–20, 766 S.E.2d 331, 334 (2014).

B. Substantial Similarity

¶ 7 Under North Carolina law, any person with a "reportable conviction" must register with the sheriff of their county of residence. N.C. Gen. Stat. § 14-208.7(a) (2021). A reportable conviction includes any conviction from another state "which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense . . . ." N.C. Gen. Stat. § 14-208.6(4)(b) (2021). At the hearing, the State is required to prove by a preponderance of the evidence that the out-of-state conviction is substantially similar to a reportable conviction in North Carolina. N.C. Gen. Stat. § 14-208.12B(c). When performing the analysis, it is not a requirement that the "statutory wording precisely match, but rather that the offense be substantially similar[.]" *State v. Graham*, 379 N.C. 75, 2021-NCSC-125, ¶ 7 (internal quotations omitted); *see also* N.C. Gen. Stat. § 14-208.6(4)(b).

> Standing alone, neither word—"substantially" or "similar"—connotes literalness; therefore, when these words are combined to create the legal term of art "substantially similar," this chosen phraseology reinforces the lack of a requirement for the statutory language in one enactment to be the same as the statutory language in another enactment in order for the two laws to be treated as "substantially similar."

Graham, 379 N.C. 75, 2021-NCSC-125, ¶ 12.

¶ 8 The version of the Pennsylvania statute in effect at the time of Defendant's conviction reads: "a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and person are not married to each other." 18 Pa. Cons. Stat. Ann. § 3122.1 (West 1995). The trial court determined this offense was substantially similar to the North Carolina offense of "[s]tatutory rape of person who is 15 years of age or younger." N.C. Gen. Stat. § 14-27.25.

¶ 9 In order to compare the offenses contained in the two statutes, we examine each element in turn. The 1995 version of the Pennsylvania statute results in a second-degree felony when a defendant:

(1) Engages in *sexual intercourse*;
(2) With a person under the age of 16;
(3) The defendant is *four* or more years older; and
(4) The person and defendant are not married to each other.

18 Pa. Cons. Stat. Ann. § 3122.1 (emphasis added). The elements of the North Carolina offense of statutory rape requires proof the defendant:

(1) Engaged in *vaginal intercourse*;
(2) With another person who is under the age of 16;
(3) And defendant is at least *six* years older than the complainant; and
(4) Defendant was not lawfully married to complainant.

N.C. Gen. Stat. § 14-27.25(a) (emphasis added). Under North Carolina law, statutory rape is classified as a sexually violent offense reportable under N.C. Gen. Stat. § 14-208.6(4) and thus requiring registration. *See* N.C. Gen. Stat. § 14-208.6(5) (2021) (listing all sexually violent offenses); *see also* N.C. Gen. Stat. § 14-27.25(a). Because subsection (b) is not a reportable offense, the sole focus of our substantial similarity analysis is subsection (a). *See* N.C. Gen. Stat. § 14-27.25.

¶ 10 Defendant asserts our Legislature has drawn a "line" between the two categories of offenders: those required to register under subsection (a), and those not required to register under subsection (b). *See* N.C. Gen. Stat. § 14-27.25. However, in a "comparison of the elements test," the legislative purpose of respective statutes is not a consideration for the courts. *See Sanders*, 367 N.C. at 719–20, 766 S.E.2d at 333–34 (rejecting the State's argument that the court should "look beyond the elements of the offenses and consider . . . the legislative purpose of the respective statutes" as the court may only consider the elements of the offenses);

see also Graham, 379 N.C. 75, 2021-NCSC-125, ¶ 14 (citing the *Sanders* Court's narrow elemental inquiry in a "comparison of the elements" test approvingly). Assuming *arguendo* that the applicable Pennsylvania offense is substantially similar to N.C. Gen. Stat. § 14-27.25(b), Defendant would not be required to register, and the point is moot. The Order requiring Defendant's registration indicates the trial court determined the Pennsylvania offense was substantially similar to N.C. Gen. Stat. § 14-27.25(a), thus requiring Defendant to register as a sex offender in this State. *See* N.C. Gen. Stat. § 14-208.7(a). Our inquiry is accordingly limited to whether a comparison of the elements reveals the Pennsylvania offense is substantially similar to N.C. Gen. Stat. § 14-27.25(a). We now turn to that question.

1. Type of Intercourse Required

¶ 11 The first distinction between the two statutes is the type of intercourse required to commit the offense of statutory rape. The North Carolina statute uses the term "vaginal intercourse," whereas the Pennsylvania statute uses the more expansive term "sexual intercourse." *See* N.C. Gen. Stat. § 14-27.25(a); *see also* 18 Pa. Cons. Stat. Ann. § 3122.1. "Both statutes employ nearly identical language that the act of physical intercourse is conducted by the perpetrator with another person and that the other person is not the offender's spouse by virtue of a lawful marriage." *See Graham*, 379 N.C. 75, 2021-NCSC-125, ¶ 9 (comparing the definitions of "sexual intercourse" in a Georgia statute and "vaginal intercourse" in N.C. Gen. Stat. § 14-27.25). Accordingly, we conclude Pennsylvania's "sexual intercourse" element is substantially similar to North Carolina's "vaginal intercourse" element.

2. Age Requirements for Offenders

¶ 12 Defendant maintains the Pennsylvania offense of statutory rape is not substantially similar to the North Carolina offense because Pennsylvania requires a defendant be at least four years older than complainant, and North Carolina requires the defendant be at least six years older. *See* 18 Pa. Cons. Stat. Ann. § 3122.1(a); *see also* N.C. Gen. Stat. § 14-208.7(a). To support his position, Defendant relies on two cases where a court determined the out-of-state offense was not substantially similar to a North Carolina offense. After careful review, we conclude each case is distinguishable.

¶ 13 First, in *Sanders*, our Supreme Court determined the Tennessee offense of "domestic assault" was not substantially similar to North Carolina's offense of "assault on a female" because the relevant statutes applied to different defendants and different victims. 367 N.C at 721,

766 S.E.2d at 334. A person is guilty of domestic assault in Tennessee when they commit an assault against a "domestic abuse victim." *Id.* at 719, 766 S.E.2d at 333. Whether someone is a "domestic abuse victim" is determined by six categories, all of which require some sort of relationship between the defendant and the victim, *e.g.*, spouses, related by blood or adoption, or dating partners. *Id.* at 720, 766 S.E.2d at 333–34. In North Carolina, a person commits the offense of assault on a female when a male assailant, at least eighteen years old, attacks a female. *Id.* at 719, 766 S.E.2d at 333. These statutes were not substantially similar, as recognized by the Court, because a stranger could attack a female in Tennessee and it would not be domestic assault, and a mother could strike her child, husband, or another female in North Carolina and it would not be assault on a female. *See id.* at 721, 766 S.E.2d at 334 (listing possible scenarios in which a defendant could be convicted under the Tennessee statute but not the North Carolina statute, and vice versa). As explained by the *Graham* Court during its analysis of the statutory differences between its case and *Sanders*, there is a "meaningful difference" between "1) a one-year difference in the age of early teenagers who are victims and 2) specified age difference delineations between victims and offenders in [*Graham*], and 1) a total elimination of one gender from the ability to offend and 2) the relationship status of victims and offenders in *Sanders*." *Graham*, 379 N.C. 75, 2021-NCSC-125, ¶ 15.

¶ 14 Second, Defendant's reliance on *State v. Bryant* is misplaced—its reasoning has been soundly rejected, if not implicitly overruled, by subsequent North Carolina jurisprudence. 255 N.C. App. 93, 804 S.E.2d 563 (2017); *see State v. Graham*, 270 N.C. App. 478, 494–95, 841 S.E.2d 754, 767–68 (2020), *aff'd*, 379 N.C. 75, 2021-NCSC-125. In *Bryant*, this Court held the South Carolina offense of criminal sexual conduct with a minor was not substantially similar to North Carolina's statutory rape of a child by an adult because the age of the victims in each statute differed by two years. 255 N.C. App. at 99–100, 804 S.E.2d at 567–68. *Bryant* is an anomaly in our jurisprudence—in most other cases in which our courts have found two statutes were not substantially similar, one offense contained an element far more distinct than a different age requirement. *See Sanders*, 367 N.C. at 719–21, 766 S.E.2d at 333–34; *State v. Hogan*, 234 N.C. App 218, 230, 758 S.E.2d 465, 474 (2014) (holding the New Jersey offense of third degree theft was not substantially similar to the North Carolina offense of felony larceny because "there are many elements of third degree theft not found in misdemeanor larceny" and some of the elements of the New Jersey offense would make "the larceny a felony in North Carolina"); *State v. Hanton*, 175 N.C. App. 250, 259, 623 S.E.2d 600, 607 (2006) (holding New York's second degree assault offense was

not substantially similar to North Carolina's assault inflicting serious injury because it lacked the "serious injury" requirement). Moreover, our courts have also found substantial similarity between two offenses with greater differences than an age requirement. *See Fortney*, 201 N.C. App. at 671, 687 S.E.2d at 525 (holding Virginia's possession of a firearm by a felon was substantially similar to North Carolina's analogous offense, even though the Virginia offense required *mens rea* and the North Carolina offense only required the firearm be in the defendant's "possess[ion], custody, care, or control").

¶ 15 The "aberrant nature of our holding in *Bryant*" has been recognized by this Court. *Graham*, 270 N.C. App. at 495, 841 S.E.2d at 768, *aff'd*, 379 N.C. 75, 2021-NCSC-125. Furthermore, our Supreme Court recently held in *Graham* that minor deviations in an age requirement are insufficient to prevent two offenses from being substantially similar. *See Graham*, 379 N.C. 75, 2021-NCSC-125, ¶ 11.

¶ 16 The instant case is nearly identical to *Graham*, which therefore controls our analysis. *See id.* In *Graham*, our Supreme Court conducted a substantial similarity analysis comparing N.C. Gen. Stat. § 14-27.25 and Georgia's statutory rape provision. *Id.*, ¶¶ 4, 5. The Georgia statute applied to sexual intercourse with any person under sixteen years of age, "unless the victim is fourteen or fifteen years of age and the defendant is no more than three years older than the victim." *Id.*, ¶ 4 (citing Ga. Code Ann. § 16-6-3 (2001)). The North Carolina offense, incidentally the same at issue here, required the defendant be at least six years older. *Id.*, ¶ 5 (citing N.C. Gen. Stat. § 14-27.25 (2015)). The Court rejected the defendant's argument that the Georgia statutory rape offense and the North Carolina offense were not substantially similar due to the different age requirements. *Id.*, ¶ 10. The defendant contended two statutes could not be substantially similar if one statute "render[ed] the other state's law narrower or broader" such that a person could be convicted of the same crime in one state, but not the other. *Id.* In rejecting this argument, the majority reasoned the defendant "conflate[d] the requirement that statutes subject to comparison be substantially similar to one another with his erroneous perception that the two statutes" must be identical. *Id.*, ¶ 11. As a result, the Court held the Georgia statutory rape statute was substantially similar to the North Carolina statutory rape statute. *Id.*

¶ 17 Here, unlike in *Sanders*, the Pennsylvania offense of second-degree statutory rape and the North Carolina offense both apply to victims who are under the age of sixteen, and they both require physical intercourse of some kind. *See Sanders*, 367 N.C. at 719–20, 766 S.E.2d at 333–34. The two statutes implicate the same behavior to the same victim. Akin

to *Graham*, where a primary difference between the two statutes was a one-year difference in the age of victims, the age differential between victims and defendants required by the statutes *sub judice* varies by merely two years. *See Graham*, 379 N.C. 75, 2021-NCSC-125, ¶ 10. Contrary to Defendant's argument, even though a defendant who is five years older than the victim could be prosecuted in Pennsylvania but not North Carolina, that difference alone is insufficient to render the two statutes substantially dissimilar. *See id.*, ¶ 11; *see also State v. Riley*, 253 N.C. App. 819, 827, 802 S.E.2d 494, 500 ("There may be other hypothetical scenarios which highlight the more nuanced differences between the two offenses. But the subtle distinctions do not override the almost inescapable conclusion that both offenses criminalize *essentially the same conduct*[.]") (emphasis added).

¶ 18 In relying on *Sanders* to support the proposition that the statutes are not substantially similar due to different age requirements, Defendant conveniently overlooks the reasoning in *Graham* that "substantially similar," by definition, requires something less than "identicalness." *See Graham*, 379 N.C. 75, 2021-NCSC-125, ¶ 12. The majority in *Graham* strongly emphasized the distinction between "substantially similar" and "identicalness[,]" reasoning that requiring a "mirrored reflection" between two statutes takes an "erroneously expansive approach" to the analysis. *Id.* Our Supreme Court expressly declined to articulate a "bright line rule" because such an analysis requires "flexibility" in comparing the elements of two statutes. *Id.*, ¶ 16. The majority of our Supreme Court rejected the dissent's approach, which it characterized as a "test of identicalness[,]" because "[t]here are so many iterations of so many similar laws written in so many different ways . . . [and] courts of this state must necessarily possess the ability to operate with *flexibility*" in determining whether two laws are substantially similar. *Id.*, ¶ 17 (emphasis added); *see also id.*, ¶ 32 (Earls J., dissenting) (arguing the "majority's unwillingness to articulate a clear legal rule . . . creates a significant risk of rendering [the statute] unconstitutionally vague").

¶ 19 *Graham* further differentiated cases such as here, where there is a two-year age difference in defendants, from *Sanders*, where one statute eliminates one gender from the list of potential offenders. *Id.*, ¶ 15. Based on *Graham*, a two-year disparity in the minimum age difference between victims and defendants is insufficient to persuade us the Pennsylvania statute and the North Carolina statute are not substantially similar. *See id.*

¶ 20 Finally, Defendant argues *Graham* limited its holding to sentencing purposes only. We disagree. Although the narrow issue on appeal in *Graham*

concerned the calculation of sentencing points resulting from prior convictions, the majority conducted a thorough substantial similarity analysis without including language limiting its reasoning to sentencing purposes. *See id.*, ¶¶ 12–14. Defendant notes two *Graham* references to "sentencing purposes," but these references explain the lower court's actions rather than constituting substantive analysis. *Id.*, ¶¶ 8, 11. Furthermore, requiring registration as a sex offender and calculating prior record points share a similar purpose of determining present consequences for prior bad acts. We discern no logical basis to suggest "substantial similarity" would be defined or applied differently in either context, hence our application of the sound legal principles set forth in *Graham*.

¶ 21 Our conclusion that the Supreme Court's reasoning in *Graham* controls is only reinforced by the fact that the Court considered the same North Carolina statute at issue here. We therefore hold the trial court did not err in concluding the two offenses specified in the Pennsylvania and North Carolina statutes are substantially similar despite a minor variation in minimum age difference between victim and defendant.

C. Rule of Lenity

¶ 22 Finally, Defendant asserts the rule of lenity should apply to interpret the statute in his favor because the rule applies when there are "multiple North Carolina offenses" that are substantially similar to the out-of-state offense. *See Hanton*, 175 N.C. App. at 259, 623 S.E.2d at 606. "The rule of lenity is a principle of statutory interpretation that only applies when an appellate court is charged with interpreting an ambiguous statute." *State v. Huckelba*, 240 N.C. App. 544, 562, 771 S.E.2d 809, 823 (2015), *rev'd on other grounds*, 268 N.C. 569, 780 S.E.2d 750; *see also State v. Heavner*, 227 N.C. App. 139, 144, 741 S.E.2d 897, 901 (2013) (the rule of lenity only applies when the relevant statute is ambiguous). The rule of lenity should not be used when a statute "only has one plausible reading . . . ." *Heavner*, 227 N.C. App. at 144, 741 S.E.2d at 902 (brackets omitted). The rule of lenity is "reserved for cases where, 'after seizing everything from which aid can be derived, the Court is left with an ambiguous statute.' " *DePierre v. United States*, 564 U.S. 70, 88, 131 S. Ct. 2225, 2237, 180 L. Ed. 2d 114, 129 (2011) (quoting *Smith v. United States*, 508 U.S. 223, 239, 113 S. Ct. 2050, 2059 124 L. Ed. 2d 138, 155 (1993)).

¶ 23 In *State v. Hanton*, the trial court examined a criminal statute which gave either the State or the defendant the ability to prove an out-of-state offense was substantially similar to a North Carolina offense by a preponderance; however, the statute did not delineate how to determine which North Carolina offense was most substantially similar to the out-of-state offense. 175 N.C. App. at 259, 623 S.E.2d at 606 (interpreting

N.C. Gen. Stat. § 15A-1340.14 (2003)). The statute was therefore ambiguous because multiple North Carolina statutes with similar elements could have been used in the comparison. *Id.* at 259, 623 S.E.2d at 606. This Court reasoned the rule of lenity applied in the defendant's favor because of the ambiguity regarding which criminal statute should apply. *Id.* at 259, 623 S.E.2d at 606.

¶ 24 Defendant's reading of *Hanton* is overbroad. The ambiguity present in *Hanton* is absent here because N.C. Gen. Stat. § 14-208.7(a) clearly and unambiguously directs courts to the comparable statute. Under N.C. Gen. Stat. § 14-208.7(a), any person with a "reportable conviction" must register with the sheriff of their county of residence. N.C. Gen. Stat. § 14-208.7(a). A reportable conviction includes any conviction from another state "which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense . . . ." N.C. Gen. Stat. § 14-208.6(b) (2021). Statutory rape of a person who is fifteen years or younger is a sexually violent offense under N.C. Gen. Stat. § 14-208.6(5).

¶ 25 Moreover, N.C. Gen. Stat. § 14-27.25 itself is unambiguous. *See DePierre*, 564 U.S. at 88, 131 S. Ct. at 2237, 180 L. Ed. 2d at 129. We note our Supreme Court has established a clear framework for comparing two statutes—first in *Sanders*, and subsequently refined in *Graham*—where the Court analyzed the same statute at issue in this case. *See Sanders*, 367 N.C. 716, 766 S.E.2d 331; *see also Graham*, 379 N.C. 75, 2021-NCSC-125, ¶¶ 4, 5 (comparing North Carolina's statutory rape statute with Georgia's statutory rape statute). There is no ambiguity regarding which North Carolina offense to analyze for substantial similarity, nor is there ambiguity present in either statute. Our General Assembly and Supreme Court have provided more than sufficient "aid" to reach the conclusion we do today. *See DePierre*, 564 U.S. at 88, 131 S. Ct. at 2237, 180 L. Ed. 2d at 129. Accordingly, we conclude the rule of lenity is inapplicable to the instant case.

V. Conclusion

¶ 26 Based on the foregoing, we hold the Pennsylvania statutory sexual assault statute and the North Carolina statutory rape statute are substantially similar for purposes of registration as a sex offender under North Carolina law. Additionally, the rule of lenity does not apply in Defendant's favor. We therefore affirm the trial court's Order requiring Defendant to register as a sex offender in this State.

AFFIRMED.

Judges GORE and GRIFFIN concur.

LOGUE v. LOGUE

[285 N.C. App. 461, 2022-NCCOA-625]

JASON LOGUE, PLAINTIFF
v.
CHESSICA LOGUE AND CHESSICA A. LOGUE, DDS, PA, DEFENDANTS

No. COA21-485

Filed 20 September 2022

Divorce—equitable distribution—business valuation—market value approach—recent arms-length transaction—goodwill

In an equitable distribution proceeding, the trial court did not err in its valuation of defendant's stake in her dental practice by employing a market-value approach—which is an accepted, reliable method of valuation—based on an arms-length transaction that occurred two years before the parties separated and based on the court's determination that there were no changes to the business in the interim that might have substantially impacted its market value. It was reasonable for the trial court to find that the goodwill value of the business had not changed since the arms-length transaction, even though the senior dentist was transitioning out of the practice, and the trial court was not required to base its goodwill valuation on expert testimony where it was employing the market-value approach and simply determining whether the goodwill calculation—which had been calculated by outside experts at the time of the arms-length transaction—remained applicable.

Appeal by defendant from judgment entered 29 July 2020 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 9 March 2022.

Wyrick Robbins Yates & Ponton LLP, by Charles W. Clanton and K. Edward Greene, for plaintiff-appellee.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, for defendant-appellant.

DIETZ, Judge.

¶ 1 This family law appeal concerns the valuation of a dental practice. Business valuation always is a fraught undertaking, and particularly so for a small professional business like the one in this case. By far, the greatest value-adding component of this business is its human capital—the skill and reputation of the dentists who draw paying customers to

the business. This component typically is reflected on a balance sheet as part of the intangible asset known as goodwill.

¶ 2 Here, the trial court used a rudimentary but accepted method of valuation: it examined the market value of Defendant's stake in the business based on an arms-length transaction two years before the parties separated—a transaction that involved a valuation of the business and calculation of goodwill by outside experts. The court then determined that there were no changes to the business that might substantially alter that market valuation (and corresponding goodwill calculation) in the intervening two years.

¶ 3 On appeal, Defendant challenges this valuation of the business. She contends that the trial court's chosen method of valuation is unreliable and that the court wrongly calculated the business's goodwill without the benefit of expert testimony.

¶ 4 We reject these arguments. As explained below, the trial court used a reliable method of valuation. To be sure, the market-value approach used by the court has flaws. But the parties did not present the court with evidence or expert testimony that would have permitted the court to incorporate additional methodology into its analysis. Moreover, although expert testimony ordinarily is necessary for a court to calculate goodwill in the first instance, the court here did not calculate goodwill in the first instance. Instead, the court examined the market value of the business in an arms-length sale transaction (which included a goodwill calculation done by outside experts) and then found that there were no changes to the business in the interim that might have substantially impacted that market value. We therefore hold that the trial court's findings, and its valuation methodology, were appropriate, and we affirm the trial court's judgment.

Facts and Procedural History

¶ 5 Plaintiff Jason Logue and Defendant Chessica Logue married in 2004, separated in 2015, and divorced in 2016. As part of the separation and divorce, the parties sought equitable distribution of their marital assets. Among those assets is Chessica Logue's stake in her dental practice known as Chessica A. Logue, DDS, PA.

¶ 6 The trial court entered its first equitable distribution judgment in 2018. As part of the trial court's equitable distribution judgment, the court valued the dental practice. Defendant appealed that valuation, arguing that the trial court's findings were insufficient to support the court's valuation.

¶ 7 In 2020, this Court vacated the trial court's order and remanded for additional findings and a revised valuation determination. *Logue v. Logue*, 270 N.C. App. 820, 839 S.E.2d 873, 2020 WL 1683094 (2020) (unpublished) (*Logue I*). We held that the trial court properly classified the dental practice as marital property but that the court did not make sufficient findings of fact to support the valuation of the business at the date of separation. *Id.* at *5. Our holding turned largely on the absence of findings that identified the valuation methodology that the trial court employed in its analysis:

> At the hearing, neither party provided appraisals of the value of Logue P.A. at the time of separation. Although both parties testified about the appraisal and three pro formas created in 2012, and their respective tax returns since 2014, both parties presented conflicting evidence as to what the value of Logue P.A. was at the time of separation and what they relied on in making their determinations. Even if the trial court relied on the information provided in those documents, the trial court's findings do not specify what values were relied on from those documents.
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> . . .
>
> The court did not make findings explaining how the value of the assets included in the purchase price of [the seller's] interest had varied between the 2012 purchase price and the 2015 date of separation. Thus, we are unable to determine how the trial court arrived at the value of $219,565.00.

Id. at *5–6. We remanded this case with instructions to conduct a new valuation of the business using "specific and clear methodology." *Id.*

¶ 8 On remand, the trial court held a hearing and then filed a second equitable distribution judgment. In this judgment, the trial court provided a more detailed explanation of its valuation analysis, which we quote here for context during our analysis:

> When wife joined Hedgecoe Dentistry in 2009, it was with the hope that she would eventually be able to buy into the practice. The practice enjoys an excellent reputation within the Fayetteville community. The practice was owned by a father (Joel Hedgecoe) and son (David Hedgecoe) and the father was

considering selling his share and gradually retiring. In 2012, discussions began about the purchase of the father's 50% interest in the partnership. In preparation for negotiations on the sale price, the practice was appraised by Roger K. Hall & Company, Inc. of Charlotte. The practice was subsequently reappraised by the same company and husband and wife hired a second firm in Raleigh to review the appraisal. Husband and wife met with the appraisers in Charlotte and with Brent Sumner of McFadyen and Sumner, CPAs of Fayetteville. McFadyen Sumner was used by the couple to prepare their taxes and for other accounting work. As part of the evaluation, the company prepared a document anticipating potential future income of wife, the son, and the father from the practice.

Ultimately, the Hedgecoes and the Logues agreed to a price and wife created an S Corporation (Chessica Logue, DDS, PA) for the actual purchase. Wife is the 100% owner of the S Corporation. The purchase price based on the appraisal was $1,249,800.00 and was completely financed.

. . .

Joel Hedgecoe continued to work in the practice after the sale and was paid by the practice as an associate. He continued to work past the time originally contemplated when the sale was consummated so that wife developed her own patients rather than taking over many of his. As of August 2018, he had slowed considerably and only worked on Mondays and Tuesdays.

No evidence was presented as to his current status in the practice. Despite Joel Hedgecoe continuing past the anticipated date, wife is receiving income from the practice generally as anticipated.

. . .

McFadyen Sumner, the CPA firm that prepared the taxes for the S Corporation and for the parties, provided as part of the tax documents introduced as Plaintiff's Exhibit 20 a listing of the assets of the

> corporation. From 2013 through 2017, the asset statement continued to list goodwill of $1,018,800.00. The court finds this to be reasonable considering that Dr. Joel Hedgecoe continued to work as previously, and wife continued to develop her own clientele. Persons looking at the practice would not see any change that might impact the goodwill. As of December 31, 2014, the other assets of the business had the following values as listed on the asset sheet – equipment and furniture at $186,848.00, restrictive covenants at $10,000.00 and patient files at $10,000.00. The Court finds the value of the S Corporation on the date of separation to be $1,225,648.00 (goodwill, equipment and furniture, restrictive covenants, and patient files) less $1,030,253.00 (the balances payable on the 3 debts as of the date of separation) for a value of $195,395.00.

¶ 9 The trial court then applied this valuation of the business in its determination of the appropriate distributive award in its judgment. Defendant again appealed.

Analysis

¶ 10 Defendant appeals the trial court's latest equitable distribution judgment, arguing that, on remand, the court again failed to apply reliable methodology to value the dental practice.

¶ 11 There is "no single best approach to valuing an interest in a professional partnership" and "various appraisal methods can and have been used to value such interests." *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270 (1985). "The task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value of the partnership interest." *Id.*

¶ 12 To ensure meaningful appellate review of this valuation analysis, the trial court "should make specific findings regarding the value of a spouse's professional practice" and "should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied." *Id.* at 422, 331 S.E.2d at 272.

¶ 13 There are many possible approaches to valuation, all of which carry risks of over- or under-valuing the business. These approaches range from simply examining the balance sheet of the business and calculating its book value (by subtracting liabilities from assets), to

complicated forecasting techniques that examine discounted cash flows and enterprise value using projections for growth and the expected life of the business.

¶ 14 One acceptable valuation approach is to assess the market value of a stake in a closely-held business by examining the fair market value paid for that stake in a recent arms-length transaction—in other words, "the price that a willing buyer would pay to a willing seller for it." *See id.* at 421, 331 S.E.2d at 271.

¶ 15 The trial court used this approach. The court first examined the price Defendant paid for her stake in the dental practice approximately two years before the date of separation and explained why this was an arms-length transaction that involved a valuation by outside experts. The court then examined the state of the business in the intervening time period, including examination of the balance sheet, tax records, and evidence about the progress in transitioning the most experienced dentist out of full-time practice.

¶ 16 This last factor is particularly important because the largest recorded asset of the practice, by far, is the intangible asset known as goodwill. That goodwill is largely a reflection of the practice's human capital and, specifically, the reputation of Dr. Joel Hedgecoe, the most senior dentist at the practice, whose skills helped the business cultivate an "excellent reputation within the Fayetteville community" over the years. The court examined whether this goodwill figure may have changed and found no evidence that it had: "the asset statement continued to list goodwill of $1,018,800.00. The court finds this to be reasonable considering that Dr. Joel Hedgecoe continued to work as previously, and wife continued to develop her own clientele. Persons looking at the practice would not see any change that might impact the goodwill."

¶ 17 Accordingly, we hold that the trial court's methodology—employing a market-value approach based on a recent arms-length transaction and then examining whether any changes in the intervening period likely impacted that market value in a significant way—is an acceptable, reliable method of valuation. We therefore reject Defendant's argument that the trial court failed, in its second attempt at valuation, to use a reliable method of valuation that reasonably approximates the value of Defendant's stake in the business.

¶ 18 Defendant also contends that, even if the overall methodology is reliable, the trial court erred because it considered the goodwill of the business without the benefit of expert testimony. In *Poore*, this Court

held that "the existence and value of goodwill is a question of fact" and that it "should be made with the aid of expert testimony." 75 N.C. App. at 421, 331 S.E.2d at 271. But this statement concerned a trial court that was calculating goodwill in the first instance—that is, a court examining a business's goodwill without the benefit of recent calculations of that goodwill by outside valuation experts. *Id.* In that scenario, the court is engaging in a valuation methodology typically referred to as book value or balance sheet value. This involves the court assessing the assets and liabilities of the practice, subtracting liabilities from assets, and arriving at a net value for that practice.

¶ 19 Here, the trial court used a different methodology. As described above, the court employed a market-value approach based on a recent arms-length transaction. In that approach, when the evidence in the record demonstrates that there were no substantial changes at the practice that could have impacted the goodwill calculation, the court appropriately can find that the goodwill calculation established in that earlier transaction remains applicable in the current valuation, without the need for additional expert testimony.

¶ 20 We conclude by re-emphasizing that "there is no single best approach to valuing a professional association or practice, and various approaches or valuation methods can and have been used." *Id.* at 419, 331 S.E.2d at 270. Valuation is complicated, and those with the skills to do it effectively can demand a high price for their services. Thus, in many family law proceedings, if the parties had unlimited resources, they could offer sophisticated valuation evidence, including testimony from experts that would permit the court to examine a range of valuation methodologies, take them all into account, and arrive at an accurate, highly defensible value for the business.

¶ 21 But parties in family law proceedings do not have unlimited resources. What trial courts more frequently encounter are records containing quite limited evidence and testimony from which to value a business. Nevertheless, when equitable distribution is sought, the trial court must "determine the net fair market value of the property based on the evidence offered by the parties." *Quesinberry v. Quesinberry*, 210 N.C. App. 578, 585, 709 S.E.2d 367, 373 (2011).

¶ 22 In this case, the market-value approach employed by the trial court admittedly is a rudimentary one. But it was sufficiently reliable to reasonably approximate the value of Defendant's stake in the business, particularly in light of both parties' choice not to retain experts and provide

additional evidence and testimony that would permit the court to engage in more sophisticated valuation methodology. We therefore affirm the trial court.

Conclusion

¶ 23 We affirm the trial court's judgment.

AFFIRMED.

Judges TYSON and COLLINS concur.

MELISSA MOSIELLO, Plaintiff
v.
ANTHONY MOSIELLO, Defendant

No. COA21-734

Filed 20 September 2022

1. Divorce—equitable distribution—unequal—statutory distributional factors

There was no abuse of discretion in the trial court's determination that an unequal distribution of marital property was equitable, where the court made its decision after considering several distributional factors set forth in N.C.G.S. § 50-20(c), including the duration of the marriage, the relative health of the parties, the husband's intentional acts which left the marital home uninhabitable for at least six months, and the wife's financial outlay to repair the damage to the home.

2. Divorce—equitable distribution—unequal—valuation of property—sufficiency of evidence

In an equitable distribution matter in which the trial court determined that an unequal division of the marital property was equitable, the court's findings of fact that were challenged by the husband—regarding the marital home's value, the value of two cars, whether the husband intentionally set fire to the home, and the parties' date of separation—were supported by competent evidence in the record. It was within the trial court's province to weigh the evidence and assess the witnesses' credibility and to resolve any discrepancies.

3. Divorce—equitable distribution—delay in entry of order—prejudice analysis

In an equitable distribution matter, where the husband did not assert how he was harmed by the trial court's fifteen-month delay in entering its order after the equitable distribution hearing, he failed to demonstrate that the delay was prejudicial.

Appeal by defendant from judgment entered 28 June 2021 by Judge William F. Helms in Union County District Court. Heard in the Court of Appeals 24 August 2022.

Leitner, Bragg & Griffin, PLLC, by Jordan M. Griffin, for plaintiff-appellee.

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

TYSON, Judge.

¶ 1 Anthony Mosiello ("Anthony") appeals from an order granting an unequal distribution of marital property to his ex-wife, Melissa Mosiello ("Melissa"). We affirm.

I. Background

¶ 2 Anthony and Melissa married on 4 September 1992. Both parties remained uncertain about the official date of separation during the equitable distribution hearing. When the divorce hearing was held over one year later, the trial court found the parties had separated on 9 March 2009. The trial court entered a Judgment of Divorce on the same day as the divorce hearing, 5 April 2021. Melissa's claim for equitable distribution was heard on 10 March 2020. The trial court took the matter under advisement and entered a written order on 28 June 2021. The trial court concluded an unequal division would be equitable. Anthony filed a timely appeal.

II. Jurisdiction

¶ 3 This Court possesses appellate jurisdiction over equitable distribution orders "if the order or judgment would otherwise be a final order or judgment." N.C. Gen. Stat. § 50-19.1 (2021); *see also* N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

¶ 4 Anthony argues the trial court: (1) abused its discretion when determining whether an equal distribution of the marital estate was not equitable; (2) failed to rely on sufficient evidence to support its finding of facts; and, (3) prejudiced him by delaying entry of the order.

IV. Unequal Distribution of Marital Property

¶ 5 **[1]** The trial court found an unequal distribution of marital property was equitable in this case. Anthony argues the trial court abused its discretion by distributing the most substantial marital asset, the marital home valued at $153,000, to Melissa.

A. Standard of Review

¶ 6 Trial courts are accorded discretion when distributing marital property, and "the exercise of that discretion will not be disturbed in the absence of clear abuse." *McNeely v. McNeely*, 195 N.C. App. 705, 709, 673 S.E.2d 778, 781 (2009) (citation and quotations omitted). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was 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). "Once the trial court decides that an unequal division of the marital property would be equitable, its decision will only be reversed for an abuse of discretion." *Albritton v. Albritton*, 109 N.C. App. 36, 42, 426 S.E.2d 80, 84 (1993) (citing *White*, 312 N.C. at 777, 324 S.E.2d at 833).

B. Analysis

¶ 7 N.C. Gen. Stat. § 50-20 (2021) governs the distribution of marital and divisible property. "[E]quitable distribution is a three-step process requiring the trial court to (1) determine what is marital [and divisible] property; (2) find the net value of the property; and, (3) make an equitable distribution of that property." *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009) (citations and quotations omitted).

¶ 8 Trial courts are mandated by statute to divide marital property equally "unless the court determines that an equal division is not equitable." N.C. Gen. Stat. § 50-20(c). If the trial court determines "an equal division is not equitable, the court shall divide the marital property and divisible property equitably" and "consider all of the following factors under [N.C. Gen. Stat. § 50-20(c)(1)-(12)]." *Id.*; *see also White*, 312 N.C. at 776-77, 324 S.E.2d at 832-33 (explaining that "if no evidence is admitted

tending to show that an equal division would be inequitable, the trial court must divide the marital property equally").

¶ 9 When determining whether an unequal distribution is equitable, the trial court must make written findings of fact demonstrating and adjudicating which relevant and admitted evidence supports the N.C. Gen. Stat. § 50-20(c) distributional factors the court considered. *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 249, 502 S.E.2d 662, 665 (1998) (citation omitted). "The trial court need not make 'exhaustive' findings of the evidentiary facts, but must include the 'ultimate' facts considered." *Id.* (quoting *Armstrong v. Armstrong*, 322 N.C. 396, 405–06, 368 S.E.2d 595, 600 (1988)).

¶ 10 If a party presents evidence that an unequal distribution is not equitable under one or more of the N.C. Gen. Stat. § 50-20(c) factors, the trial court must exercise its discretion when assessing and adjudicating how much weight to give each factor. *White*, 312 N.C. at 776-77, 324 S.E.2d at 832-33 (explaining that when "evidence tending to show that an equal division of marital property would not be equitable is admitted, . . . the trial court must exercise its discretion in assigning the weight [accorded to] each factor"). "[T]he trial court is not required to show how it balanced the factors; the weight given to each factor is in the trial court's discretion; and there is no need to show exactly how the trial court arrived at its decision regarding unequal division," but an appellate court must be able to review and conclude the statutory factors were followed. *Montague v. Montague*, 238 N.C. App. 61, 70-71, 767 S.E.2d 71, 78 (2014) (citation omitted).

¶ 11 "A single distributional factor may support an unequal division." *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010) (citation omitted); *see also Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1995) (finding three distributional factors in favor of one spouse supported an unequal distribution order). Our Supreme Court has held "a party's misconduct during the marriage which *dissipates or reduces the value* of the marital assets for non-marital purposes can be considered under [factor (12) of] N.C. Gen. Stat. § 50–20(c)(12) in determining whether equal would be equitable." *Coleman v. Coleman*, 89 N.C. App. 107, 109-110, 365 S.E.2d 178, 180 (1988) (citing *Smith v. Smith*, 314 N.C. 80, 81, 331 S.E.2d 682, 683 (1985)).

¶ 12 The trial court in *Albritton* relied on four of the twelve N.C. Gen. Stat. § 50-20(c) factors when deciding an equal distribution was not equitable. 109 N.C. App. at 42, 426 S.E.2d at 84. The trial court gave "particular weight" to evidence indicating the "plaintiff had secreted funds,

attempted to devalue the marital estate and was less than truthful in much of her testimony," and also considered the "defendant's declining health and inability to work" important. *Id*. This Court held the trial court did not abuse its discretion because the decision was well reasoned and not arbitrary. *Id*.

¶ 13 Here, the trial court reached a well-reasoned decision that was not arbitrary. The trial court considered the statutory factors and concluded an unequal distribution was equitable. The order reveals which N.C. Gen. Stat. § 50-20(c) factors the trial court weighed, although the court did not specifically label each factor.

¶ 14 The trial court considered factor (3), the duration of the marriage and the physical health of Melissa. N.C. Gen. Stat. § 50-20(c)(3). The trial court also appeared to heavily weigh Anthony's destructive acts, finding Anthony had "intentionally" set the marital home on fire and rendered the home "uninhabitable for at least six (6) months." Melissa paid for all subsequent repairs to the home and the increased insurance premiums resulting from the fire. These findings clearly align with factor (11a), which allows courts to consider the "[a]cts of either party to maintain, preserve, develop, or expand; or to *waste*, *neglect*, *devalue or convert the marital property* or divisible property, or both, during the period after separation of the parties and before the time of distribution." N.C. Gen. Stat. § 50-20(c)(11a) (emphasis supplied).

¶ 15 Those findings of fact also fall within factor (12) because trial courts may consider any action that "dissipates or reduces the value of the marital assets." *Smith*, 314 N.C. at 81, 331 S.E.2d at 683. Although Anthony may not agree with how the trial court weighed each factor, the trial court was not required to show how it balanced the factors or the exact weight given to each factor, as a prior panel of this Court explained in *Montague*, 238 N.C. App. at 70-71, 767 S.E.2d at 78.

¶ 16 The trial court, vested with the discretion to determine how much weight to give each of the N.C. Gen. Stat. § 50-20(c) factors, concluded factors (3), (11a), and (12) favored an unequal distribution. A single N.C. Gen. Stat. § 50-20(c) distributional factor may support an unequal division, as explained in *Mugno*. Because the trial court's decision is not shown to be arbitrary, the trial court's decision should not be set aside and must be given deference.

V. The Sufficiency of the Evidence

¶ 17 **[2]** Anthony next argues several of the trial court's findings of fact are not supported by relevant admitted evidence. Anthony asserts four of

the trial court's findings of fact do not comply with the statutory obligations governing the classification and valuation of marital property for equitable distribution orders.

A. Standard of Review

¶ 18 Trial courts possess great discretion when distributing marital property, and this Court will only reverse an equitable distribution order if the trial court abused its discretion. *Albritton*, 109 N.C. App. at 42, 426 S.E.2d at 84 (citation omitted). "Accordingly, this Court will not reverse [a] trial court's findings of fact on appeal as long as they are supported by competent evidence." *Id.* (citation omitted); *see also Troutman v. Troutman*, 193 N.C. App. 395, 400-01, 667 S.E.2d 506, 510 (2008) (explaining a trial court's decision will not be overturned unless, "upon consideration of the cold record . . . the division ordered by the trial court [ ] has resulted in an obvious miscarriage of justice") (citations and quotations omitted).

B. Analysis

¶ 19 Trial courts must publish written findings of fact to support their conclusions of law to enable appellate courts to assess the record and determine whether the evidence admitted supports the findings of fact and the legal conclusions represent a correct application of the law. *Mrozek v. Mrozek*, 129 N.C. App. 43, 49-50, 496 S.E.2d 836, 841 (1998) (citation omitted). "This [obligation to provide written orders] only requires that the court make findings as to the ultimate rather than evidentiary facts. The trial court is not required to recite in detail the evidence it considered in determining what division is equitable." *Id.* at 50, 496 S.E.2d at 841 (citation and quotation omitted).

¶ 20 "[F]indings of fact are conclusive if they are supported by any competent evidence from the record." *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (citations and quotations omitted). "[D]etermining the credibility of the evidence [is] the court's province as finder of the facts." *Nye v. Nye*, 100 N.C. App. 326, 327, 396 S.E.2d 91, 92 (1990) (explaining the trial court did not err when it determined defendant's stock had no value and would not appreciate—notwithstanding contrary evidence presented by the plaintiff—because the court "simply did not believe" the plaintiff's evidence). "This Court is not here to second-guess values of marital and separate property where there is evidence to support the trial court's figures." *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386 (1988).

¶ 21 As noted above, the distribution of marital property encompasses a three-step process: (1) the classification of property as marital or

separate, (2) the assignment of value to the property, and (3) the distribution of the marital property. *Petty*, 199 N.C. App. at 197, 680 S.E.2d at 898 (citation omitted).

¶ 22 Marital property refers to "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." N.C. Gen. Stat. § 50-20(b)(1) (2021). Divisible property encompasses the "appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, *except that appreciation or diminution in value which is the result of postseparation actions or activities* of a spouse shall not be treated as divisible property." N.C. Gen. Stat. § 50-20(b)(4)(a) (emphasis supplied).

¶ 23 Once the trial court classifies property, N.C. Gen. Stat. § 50-21(b) specifies that marital property should "be valued as of the date of the separation," while divisible property is "valued as of the date of distribution." Courts should then use the "net value" of both marital and divisible property when distributing it amongst the parties. N.C. Gen. Stat. § 50-20(c). This Court has given "net value" its ordinary meaning when applying N.C. Gen. Stat. § 50-20(c) and defined it as the "market value, if any, less the amount of any encumbrance serving to offset or reduce market value." *Alexander v. Alexander*, 68 N.C. App. 548, 550-51, 315 S.E.2d 772, 775 (1984).

¶ 24 While trial courts should make explicit findings regarding the net fair market value of property on the date of separation, a spouse is not necessarily prejudiced by the trial court's failure to state the net value of the property if it is easily ascertained by the trial court's findings, as explained in *Wall v. Wall*. 140 N.C. App. 303, 307, 536 S.E.2d 647, 649-50 (2000).

> Defendant does not question the accuracy of the trial court's findings, but argues that the trial court did not make an explicit finding about the net value of the marital home on 5 May 1988, the date of separation. However, the trial court found a gross fair market value on the date of separation of $186,000.00, subject to encumbrances of $132,136.71 and $17,753.20. Subtracting the encumbrances from the gross value of the home leaves a net fair market value on the date of separation of $36,110.09. While it would have been better practice for the trial court to make a specific

> finding as to the net fair market value of the dwelling house on the date of separation, such value can be easily calculated from its findings. . . . Though the net fair market value of the Walls' residence was not explicitly set out, it can be made certain from the facts found by the trial court.

Id. (citation omitted) (emphasis supplied).

¶ 25 Trial courts may rely on a variety of relevant evidence, including the lay opinions of testifying spouses, when assessing the value of property.

> Lay opinions as to the value of the property are admissible if the witness can show that he has knowledge of the property and some basis for his opinion. Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value. . . . Rather, an owner is deemed to have sufficient knowledge of the price paid for his land, the rents or other income received, and the possibilities of the land for use, and to have a reasonably good idea of what the land is worth.

Hill v. Hill, 244 N.C. App. 219, 229, 781 S.E.2d 29, 37 (2015) (citations and quotations omitted).

¶ 26 On appeal, this Court may consider whether the trial court's valuation of marital property fell "within the range of the plaintiff's and defendant's valuations." *Smith*, 104 N.C. App. at 792, 411 S.E.2d at 200. This Court has also held one party's valuation of property in an equitable distribution affidavit may support a finding of value. *See Lawing v. Lawing*, 81 N.C. App. 159, 163-64, 344 S.E.2d 100, 104 (1986) (finding the plaintiff's affidavit valuing the ring constituted competent value evidence, even though no other evidence was entered at trial and the defendant's affidavit included a conflicting value).

¶ 27 Claims regarding post-separation changes in the value of real property often center around how the misclassification of marital property affects each spouse's award when the property is divided *equally*. *See McLean v. McLean*, 88 N.C. App. 285, 293, 363 S.E.2d 95, 100 (1987) (stating this Court is required "to credit a former spouse 'with at least the amount by which he decreased the principal owed' on marital debt by using his separate funds") (citation omitted).

¶ 28 If property is divided equally between spouses, but one spouse made post-separation payments towards marital property, the court must consider whether the spouse making the payments used marital funds and determine the value of those payments. *Smith*, 104 N.C. App. at 790-92, 411 S.E.2d at 199 (explaining the court committed error by failing to credit plaintiff for the "various taxes, insurance and reduction of principal as to marital property" plaintiff paid because, as a result, plaintiff received an *unequal* share despite the court's determination that an *equal* share was equitable).

¶ 29 Assessing the type of funds used to make the payment is important because, if a spouse used separate funds to benefit the marital estate, those payments may be credited to the payor when distributing the marital estate. *Loving v. Loving*, 118 N.C. App. 501, 505-06, 455 S.E.2d 885, 888 (1995) (explaining a spouse "who makes some payment on the marital debt after the date of separation and before the equitable distribution trial" should be awarded "either (1) a reimbursement from the other spouse for the amount of the payment, (2) a credit to his share of the equitable distribution award in an amount equal to the payment, or (3) an upward adjustment in his percentage of the distribution of the marital properties"). Although a spouse may sometimes be credited for the other spouse's exclusive post-separation use of the marital residence, the trial court may also balance such use and adjust if the spouse residing in the home is separately "forced to expend considerable sums to repair and maintain [it]." *Leighow*, 120 N.C. App. at 622, 463 S.E.2d at 292.

¶ 30 Anthony argues four of the trial court's findings of fact do not properly comply with the trial court's obligations under N.C. Gen. Stat. §§ 50-20, 50-21. We address each of the contested findings of fact in turn.

1. Value of the Home

¶ 31 Anthony contends the trial court committed three errors when valuating the marital home at $153,000. First, Anthony argues the $153,000 evaluation of the house was not supported by competent evidence because several conflicting values of the marital residence were offered at trial. Next, Anthony asserts the trial court did not consider whether post-separation changes in the value of the marital property constituted divisible property. Lastly, Anthony argues the trial court did not value the property as of the date of separation. Anthony's arguments are without merit.

¶ 32 At trial, Melissa offered evidence regarding the value of the home. Melissa testified to the tax value of the property per the Union County tax records, which listed two tax evaluations for 2019 ($143,000 and

$157,000). Melissa also testified regarding the current mortgage balance in 2019 (approximately $7,000) and the mortgage balance when Anthony initially left the marital residence ($17,000). Melissa's equitable distribution affidavit included the value of the land ($140,000), the value of the attached home ($30,000), and the encumbrances on the land ($17,000).

¶ 33 The trial court's valuing the land and improvements at $153,000 is supported by relevant admitted evidence. Like in *Wall*, subtracting the $17,000 encumbrances from the $170,000 gross value of the marital residence nets fair market value on the date of separation of $153,000. The fair net market value can be made certain by the findings of fact. This value rests within the range of the evidence entered at trial, as explained in *Smith*, and is supported by more evidence than the sole affidavit as in *Lawing*. 81 N.C. App. at 165, 344 S.E.2d at 105 ("One of our roles in reviewing findings of fact is to reconcile apparently inconsistent findings and uphold the judgment when practicable.").

¶ 34 Next, the trial did not err by failing to consider the post-separation changes of value in the property as divisible because any appreciation or diminution was "the result of postseparation actions or activities" of Melissa. N.C. Gen. Stat. § 50-20(b)(4)(a). Anthony does not contend Melissa used marital funds to pay off the encumbrances, nor does Anthony dispute the findings of fact listing all the postseparation actions and activities of Melissa. Unlike in *Smith*, the trial court found an *unequal* distribution of the marital residence was equitable, so any failure to quantify post-separation improvements to the marital residence did not harm Anthony. *Id.*

¶ 35 Lastly, the trial court's findings of fact regarding the date of separation is supported by competent evidence. Both parties presented conflicting evidence about the date of separation, offering three different years of separation (9 March 2009, 10 March 2010, and 1 January 2012). While the Judgment of Divorce, entered 5 April 2021, ultimately concluded the parties separated on 9 March 2009, Melissa explained she used 1 January 2012 on the Equitable Distribution Affidavit because Anthony had left North Carolina and moved to New York, and had stopped coming by the home. The finding was supported by competent evidence in the record. Anthony cannot show an abuse of the court's discretion.

2. Value of the Cars

¶ 36 Plaintiff testified to the Kelley Blue Book values of two cars in Anthony's possession: "At the time [Anthony left the home] the Cougar was valued at $4000 in the Blue Kelley Book, and the Lincoln was valued at $2000." Anthony offered no evidence regarding the value of the cars

and did not submit an Equitable Distribution Affidavit. The trial court's finding of facts regarding the value of the cars was supported by competent evidence, the lay opinion of Melissa, who is allowed to testify to the value of property under *Hill*. 244 N.C. App. at 229, 781 S.E.2d at 37.

3. Actions of the Defendant

¶ 37 Anthony contends the trial court's finding of fact that Anthony "intentionally" set the house on fire is not supported by the weight of the evidence. Melissa testified how her daughter witnessed Anthony "go into the home with a gasoline jug and rag, take all [her] belongings, put them [into] the bedroom . . . and light the house on fire." Melissa also stated their daughter told police Anthony held the daughter down when she was "trying to put the fire out with a pot of water." Melissa faced increased insurance premiums because the fire was set intentionally. Anthony denied setting the house on fire, asserting the pictures entered into evidence at trial depicted him "outside doing fire on red ants."

¶ 38 After hearing the evidence and assessing the witnesses' credibility, the trial court did not abuse its discretion by finding Anthony set the fire intentionally. The trial court may properly consider evidence regarding marital conduct that "dissipates or reduces the value of the marital assets," per *Smith*. 314 N.C. at 81, 331 S.E.2d at 683.

4. The Length of the Marriage

¶ 39 Anthony's argument regarding the trial court's finding of fact detailing the length of the marriage mirrors Anthony's argument regarding the date of separation. For the same reasons detailed above, we disagree. This argument is without merit.

VI. Prejudicial Delay

¶ 40 **[3]** Anthony contends the trial court prejudiced Anthony by entering the order fifteen months after the equitable distribution hearing. We disagree.

A. Standard of Review

¶ 41 As Anthony correctly notes, this Court in *Wall* established a "case-by-case inquiry as opposed to a bright line rule [must] determin[e] whether the length of a delay is prejudicial." *Britt v. Britt*, 168 N.C. App. 198, 202, 606 S.E.2d 910, 912 (2005) (citing *Wall*, 140 N.C. App. at 314, 536 S.E.2d at 654); *see also Nicks v. Nicks*, 241 N.C. App. 487, 510, 774 S.E.2d 365, 381 (2015).

B. Analysis

¶ 42 This Court has declined to reverse late-entered equitable distribution orders when the complaining party is not prejudiced by the delay. *Britt*, 168 N.C. App. at 202, 606 S.E.2d at 912. In *Britt*, a sixteen-month delay between an equitable-distribution hearing and the equitable-distribution order did not warrant reversing the trial court's order and entry of a new one. *Id*. The court found no "potential changes in the value of marital or divisible property between the hearing and entry of the equitable distribution order [to] warrant[ ] additional consideration by the trial court." *Id*. The marital home, which was sold before the hearing, "was the most significant item of property distributed" and its value would "not change for the purposes of equitably distributing the parties' marital property." *Id*. at 202, 606 S.E.2d at 912-13.

¶ 43 Anthony's argument fails to assert how he was harmed by the delay. Like in *Britt*, Anthony and Melissa's most significant marital asset was the marital residence. Any changes in the value of the residence between the hearing and the entry of the order did not harm Anthony because the trial court distributed the entirety of the marital residence to Melissa. Finally, the delay in this case was slightly shorter than the sixteen-month delay in *Britt*. Any delay did not prejudice Anthony.

VII. Conclusion

¶ 44 The trial court's findings of fact are supported by admitted and competent evidence in the record. Those findings support the conclusions of law that an unequal distribution of the parties' marital assets is equitable. Anthony has failed to show any abuse of discretion or prejudice in the trial court's equitable distribution order. The order appealed from is affirmed. *It is so ordered*.

AFFIRMED.

Judges ARROWOOD and GRIFFIN concur.

STATE v. CAMPBELL

[285 N.C. App. 480, 2022-NCCOA-627]

STATE OF NORTH CAROLINA
v.
JAMES EDWARD CAMPBELL, III, DEFENDANT

No. COA21-143

Filed 20 September 2022

1. Evidence—expert testimony—drugs—Rule 702 gatekeeping—plain error analysis

In defendant's prosecution for drug offenses, even assuming the trial court erred under Evidence Rule 702(a)—by failing to properly exercise its gatekeeping function—in admitting the expert opinion of the State's forensic chemist that the substance sold by defendant was cocaine, there was no plain error because the expert testified that he used a "gas chromatography mass spectrometry test" and that, based on the test results, his opinion was that the substance was cocaine.

2. Drugs—jury instructions—possession—actual or constructive—plain error review

In defendant's drug prosecution, even assuming the trial court erred by instructing the jury on the theory of constructive possession where the theory was not supported by the evidence, there was no plain error because the trial court also instructed the jury on actual possession—and the State presented overwhelming evidence of defendant's actual possession of the cocaine, including the testimony of the undercover officer who conducted the undercover transaction, the testimony of other officers who surveilled the transaction, and the audio and video recording of the transaction.

3. Sentencing—drugs—conditional discharge—joined convictions

The trial court erred by imposing a supervised probation sentence on defendant's conviction for possession of cocaine, rather than a conditional discharge pursuant to N.C.G.S. § 90-96, because his joined conviction of sale of cocaine did not count as a previous conviction under section 90-96. The matter was remanded for a new sentencing hearing for the trial court to determine whether conditional discharge was appropriate.

Appeal by Defendant from judgments entered 27 February 2020 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 2021.

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

William D. Spence for defendant-appellant.

MURPHY, Judge.

¶ 1 Expert testimony must comply with the requirements of North Carolina Rule of Evidence 702. Here, where an expert testified that he performed a chemical analysis and further testified as to the result of the chemical analysis, the trial court did not plainly err.

¶ 2 To carry its burden in proving possession of a controlled substance, the State may prove actual or constructive possession. Where, as here, there is overwhelming evidence of actual possession of a controlled substance, a trial court's error in instructing the jury on constructive possession does not amount to plain error.

¶ 3 Unless a statutory exception applies, N.C.G.S. § 90-96 requires trial courts to conditionally discharge defendants who are convicted of eligible drug offenses and who have no previous convictions for drug offenses. Previous convictions do not include joined convictions, and Defendant was entitled to conditional discharge under N.C.G.S. § 90-96 for his possession of cocaine conviction because he had no disqualifying previous convictions. We remand to the trial court for resentencing.

BACKGROUND

¶ 4 In January 2018, a confidential informant told Detective Jordan Buehler of the Charlotte-Mecklenburg Police Department that Defendant, James Edward Campbell, III, was selling cocaine in the Charlotte area. In response, Buehler opened an investigation. As a part of the investigation, the confidential informant provided Buehler's phone number to Defendant. Thereafter, Defendant initiated a text-message conversation with Buehler wherein they coordinated a time and place for Buehler to purchase 31.5 grams of cocaine from Defendant.

¶ 5 On 7 February 2018, the day of the transaction, Buehler arrived at the agreed-upon location and texted Defendant "I'm here." Defendant walked to Buehler's vehicle, entered the vehicle, produced a small amount of what appeared to be cocaine, and confirmed that Buehler brought the correct amount of money. Defendant then exited Buehler's vehicle. Thereafter, Defendant returned to Buehler's vehicle, produced "a clear bag with [a] white powder substance inside of it" ("State's Exhibit 5"),

and took Buehler's money. Equipment inside Buehler's vehicle recorded audio and video of the transaction between Defendant and Buehler. This recording was played for the jury at trial. In addition, other surveillance officers testified to observing the transaction from a distance.

¶ 6 On 31 May 2018, Defendant was arrested and subsequently indicted on charges of trafficking cocaine by possession, trafficking cocaine by transportation, and trafficking cocaine by sale. At Defendant's trial, the State's expert, Mark Jackson, a forensic chemist at the Charlotte-Mecklenburg Police Department Forensic Crime Lab, testified to examining State's Exhibit 5. Jackson testified at trial that:

> [JACKSON:] In this case after I weighed [State's Exhibit 5,] I performed a powder test that also requires a gas chromatography mass spectrometry or GCMS for short.
>
> [THE STATE:] What is that in layman's terms?
>
> [JACKSON:] So a color test essentially is dropping a liqui[d] on the powder and it would provide a certain color which give[s] me the indication of what that substance possibly could be or what class of drug it could be. That way I know how to move forward. The GCMS is a piece of equipment that will actually separate out the different components of the powder or what have you. And after it comes out of a long column, separates it out all of this capillary tube [sic]. They'll separate out the components. The components come out of one end. It's bombarded with electron fragments and molecules and gives it a fingerprint that I can then [use to] identify the substance.
>
> [THE STATE:] So a lot of things happen to this substance for you to determine what it is?
>
> [JACKSON:] Correct.
>
> [THE STATE:] And the color test gives you an indication of how to proceed?
>
> [JACKSON:] Correct.
>
> [THE STATE:] And based upon the test that you did, did you have an opinion as to the identity of State's Exhibit 5?

[JACKSON:] Yes.

[THE STATE:] What was that opinion?

[JACKSON:] That the substance was cocaine.

[THE STATE:] And did all of your tests support that opinion?

[JACKSON:] Yes.

¶ 7 At the close of the State's evidence, the trial court conducted a charge conference. At the charge conference, the trial judge began to discuss proposed jury instructions and stated, "[A]ctual constructive possession, 104.41. I think that's probably appropriate. What do you all say?" In response, both counsel for the State and counsel for Defendant said, "Yes, Your Honor." Thereafter, the trial judge responded, "All right. The [c]ourt will give that." The trial court instructed on actual and constructive possession.

¶ 8 Following Defendant's trial, the jury found Defendant guilty of the lesser included charge of possession of cocaine and the lesser included charge of sale of cocaine. Thereafter, the trial court sentenced Defendant to an active term of imprisonment within the presumptive range of 13-24 months on the conviction for sale of cocaine. The trial court also imposed a consecutive sentence of 6-17 months on the conviction for possession of cocaine, which was suspended for 30 months of supervised probation. Defendant timely appeals.

ANALYSIS

¶ 9 Defendant argues that (A) the trial court committed plain error by allowing Jackson to state that, in his opinion, State's Exhibit 5 was cocaine; (B) the trial court committed plain error by instructing the jury on the theory of constructive possession because the theory was not supported by the evidence; and (C) the trial court erred by imposing a supervised probation sentence on his conviction of possession of cocaine rather than a conditional discharge under N.C.G.S. § 90-96.

A. Jackson's Testimony

¶ 10 **[1]** Defendant argues that the trial court committed plain error by allowing Jackson to state that, in his opinion, State's Exhibit 5 was cocaine.[1]

1. Defendant seeks plain error review because the issue regarding Jackson's testimony was unpreserved. The State argues that plain error review is unavailable because the decision to admit expert testimony falls within the discretion of the trial court. In addition,

Specifically, Defendant argues that Jackson did not testify to performing a "chemical analysis" and that Jackson's opinion testimony did not satisfy the three-prong reliability test under Rule 702(a) of our Rules of Evidence.

¶ 11 Since our review is limited to plain error, we ask whether a "fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518 (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.* (quoting *State v. Odom*, 307 N.C. 655, 660 (1983)). "Moreover, because plain error is to be 'applied cautiously and only in the exceptional case,' the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Id.* (quoting *Odom*, 307 N.C. at 660). Here, Defendant has not demonstrated plain error in light of our decisions in *State v. Piland*, 263 N.C. App. 323, 339-40 (2018), and *State v. Sasek*, 271 N.C. App. 568, 574-75, *disc. rev. denied*, 376 N.C. 543 (2020).

¶ 12 "[A] criminal defendant fail[s] to establish plain error" in admitting expert opinion testimony as to the identity of a controlled substance "when an expert testifie[s] that a chemical analysis was performed, but the evidence 'lack[ed] any discussion of that analysis.' " *Sasek*, 271 N.C. App. at 574 (quoting *Piland*, 263 N.C. App. at 339). In *Piland*, the defendant was discovered in possession of a pill bottle containing a large quantity of white tablets. *Piland*, 263 N.C. App. at 326. The State's expert testified that she "performed a chemical analysis" and, based on the results, determined that the pills she examined were hydrocodone; however, her testimony "lack[ed] any discussion of that analysis." *Id.* at 338-39. The defendant in *Piland* argued that the trial court committed plain error in admitting the expert testimony under Rule 702(a) because the expert "did not identify the test she performed, describe how she performed it, or explain[] why she considered it reliable[,]" but simply said she "performed a chemical analysis." *Id.* at 339.

¶ 13 While we held in *Piland* that "it was error for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify to the methodology of her chemical analysis[,]" we made clear that

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the State argues that Defendant invited the error by failing to object to the identity of the substance at trial. The State's arguments are unpersuasive. We have held that, "when a defendant does not challenge the admission of the expert testimony at trial, we only review for plain error." *State v. Piland*, 263 N.C. App. 323, 338 (2018). In addition, if failing to object constituted invited error, then we would never be able to review such unpreserved issues for plain error. Therefore, we will review this first issue for plain error.

"the error d[id] not amount to plain error because the expert testified that she performed a 'chemical analysis' and [testified] as to the results of that chemical analysis."[2] *Id.* at 339-40; *see Sasek*, 271 N.C. App. at 574.

¶ 14 We reach the same conclusion here. Even assuming that the trial court erred in admitting Jackson's testimony under Rule 702(a), the error did not amount to plain error. Although Jackson did not explicitly use the words "chemical analysis," he explicitly testified to using a "gas chromatography mass spectrometry test or GCMS for short[.]" We have previously treated an expert's testimony to "perform[ing] a 'gas chromatography mass spectrometer' test" to be testimony of performing a chemical analysis. *See Sasek*, 271 N.C. App. at 570, 574-75. Therefore, even assuming, *arguendo*, that it was error for the trial court to allow Jackson to testify that, in his opinion, the substance he tested was cocaine, the error did not amount to plain error because Jackson testified that he performed a chemical analysis and testified to the results of that chemical analysis. *Sasek*, 271 N.C. App. 568; *Piland*, 263 N.C. App. 323.

B. Constructive Possession

¶ 15 **[2]** Defendant argues that the trial court committed plain error by instructing the jury on the theory of constructive possession because the theory was not supported by the evidence. We disagree. Here, the Record demonstrates overwhelming evidence that Defendant had actual possession of cocaine. As a result, assuming, *arguendo*, that the trial court erred by instructing the jury on the theory of constructive possession, Defendant cannot demonstrate that the instructional error was a "fundamental error" that "had a probable impact on the jury's finding that [he] was guilty." *Lawrence*, 365 N.C. at 518.

¶ 16 To prove possession, "the State must prove actual possession, constructive possession, or acting in concert with another to commit the crime." *State v. Garcia*, 111 N.C. App. 636, 639-40 (1993). "Actual possession requires that a party have physical or personal custody of the item." *State v. Alston*, 131 N.C. App. 514, 519 (1998). Here, the State provided overwhelming evidence that Defendant had actual possession

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2. In *Piland*, the expert testified that she "performed a chemical analysis" and, "based on the results of [her] analysis," she determined that the pills she examined were hydrocodone. *Piland*, 263 N.C. App. at 338-39. The expert did not testify to the specific results of the "chemical analysis"; however, we considered the expert's opinion testimony to be testimony "as to the results of that chemical analysis." *Id.* at 340. Therefore, under plain error review, the expert does not need to explicitly state the scientific results of a test. Rather, the expert's ultimate opinion as to the identity of the substance based on the results of the test used is sufficient to constitute testimony as to the result of the chemical analysis.

of cocaine. First, Detective Buehler testified that Defendant entered Buehler's vehicle and sold him a clear bag with a white powder substance in it. More specifically, Buehler testified that Defendant handed Buehler a bag containing a white powder substance, which was later marked as State's Exhibit 5, and that the bag "came from [Defendant's] hand." Second, other surveillance officers testified to observing and recording Defendant meeting with Buehler, getting into Buehler's vehicle, and getting out of Buehler's vehicle. Third, equipment inside Buehler's vehicle recorded audio and video of the transaction between Defendant and Buehler, which was played for the jury. That video depicted Buehler showing Defendant money and Defendant "reach[ing] back and rais[ing] a bag of white powder substance to his nose and sniff[ing] it."

¶ 17 The above evidence presented at trial constitutes overwhelming evidence that Defendant had physical or personal custody of State's Exhibit 5 and, thus, actual possession of the cocaine. *Alston*, 131 N.C. App. at 519. The evidence of Defendant's actual possession of the cocaine was sufficient to support Defendant's convictions. Therefore, assuming, *arguendo*, that the trial court erred by instructing the jury on the theory of constructive possession, Defendant cannot demonstrate that the instructional error was a "fundamental error" that "had a probable impact on the jury's finding that [he] was guilty" of possession of cocaine. *Lawrence*, 365 N.C. at 518.

C. Conditional Discharge Under N.C.G.S. § 90-96

¶ 18 **[3]** Defendant argues that the trial court erred by imposing a supervised probation sentence on his conviction for possession of cocaine rather than a conditional discharge under N.C.G.S. § 90-96.[3] This issue presents a question of statutory interpretation, which is a question of law reviewed de novo. *State v. Jones*, 237 N.C. App. 526, 530 (2014), *disc. rev. denied*, 368 N.C. 248 (2015).

¶ 19 In addressing issues of statutory interpretation, our Supreme Court has stated that "the principal goal of statutory construction is to accomplish the legislative intent." *Wilkie v. City of Boiling Spring Lakes*, 370

3. This issue is preserved for appellate review, despite not being raised below, by operation of statute. *See* N.C.G.S. § 15A-1446(d)(18) (2021) ("Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. . . . The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law."); *see also State v. Meadows*, 371 N.C. 742, 748 (2018) (holding that "[the] defendant's nonconstitutional sentencing arguments are preserved by [N.C.G.S. § 15A-1446(d)(18)]").

N.C. 540, 547 (2018). While we have acknowledged that we can infer legislative intent from "the language of the statute, the spirit of the act and what the act seeks to accomplish[,]" our Supreme Court has held that "[s]tatutory interpretation properly begins with an examination of the plain words of the statute." *Id.* (marks omitted); *JVC Enters.*, *LLC v. City of Concord*, 376 N.C. 782, 2021-NCSC-14, ¶ 10. "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *JVC Enters.*, 2021-NCSC-14 at ¶ 10. Nevertheless, if a literal interpretation of a word or phrase's plain meaning 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. Rankin*, 371 N.C. 885, 889 (2018). Finally, "where the statute is ambiguous or unclear as to its meaning," the courts must further "interpret the statute to give effect to the legislative intent[,]" which includes employing canons of statutory interpretation. *JVC Enters.*, 2021-NCSC-14 at ¶ 10.

¶ 20 At the outset, it is important to note that the scope of our analysis regarding statutory interpretation is not bound by the parties' specific arguments. We have held:

> To be sure, the parties could have more fully addressed the proper construction of this statute. But there is no question that the meaning of the statute is an issue preserved for appellate review—indeed, it is the primary issue in this case both at the trial level and on appeal. When this Court is called upon to interpret a statute, we must examine the text, consult the canons of statutory construction, and consider any relevant legislative history, regardless of whether the parties adequately referenced these sources of statutory construction in their briefs. To do otherwise would permit the parties, through omission in their briefs, to steer our interpretation of the law in violation of the axiomatic rule that while litigants can stipulate to the facts in a case, no party can stipulate to what the law is. That is for the court to decide.

Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co., 250 N.C. App. 280, 286 (2016).

¶ 21 Here, under N.C.G.S. § 90-96(a):

> [W]henever any person who has not previously been convicted of (i) any felony offense under any state

> or federal laws; (ii) any offense under this Article; or (iii) an offense under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 of the General Statutes pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules I through VI of this Article or by possessing drug paraphernalia as prohibited by [N.C.G.S. §] 90-113.22 or [N.C.G.S. §] 90-113.22A or (ii) a felony under [N.C.G.S. §] 90-95(a)(3), the court shall, without entering a judgment of guilt and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require, unless the court determines with a written finding, and with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.

N.C.G.S. § 90-96(a) (2021). As an initial matter, Defendant argues that, according to the language of N.C.G.S. § 90-96(a), a trial court *must* place an eligible defendant under a conditional discharge, unless the trial court determines with a written finding, and with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense. We agree. In fact, we have already held that the use of "shall" in N.C.G.S. § 90-96(a) is a mandate to trial courts. *State v. Dail*, 255 N.C. App. 645, 649 (2017). Accordingly, our review of this third issue focuses on whether Defendant was eligible for conditional relief under N.C.G.S. § 90-96(a) due to his joined conviction that, if applicable, would disqualify him from being eligible.

¶ 22 Defendant argues summarily that he was eligible for conditional relief under N.C.G.S. § 90-96(a). The State argues, however, that Defendant's "same-day conviction" for the sale of cocaine qualifies Defendant as having "previously been convicted" of a felony offense under state law and, therefore, renders Defendant ineligible for relief under N.C.G.S. § 90-96(a).

¶ 23 "When examining the plain language of a statute, undefined words in a statute 'must be given their common and ordinary meaning.' " *State v. Reiger*, 267 N.C. App. 647, 649 (2019) (quoting *Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219 (1974)). The meaning of "previously

been convicted of" is not defined by statute; thus, we consider its ordinary meaning. In doing so, it is appropriate to refer to dictionaries. *See Town of Boone v. State*, 369 N.C. 126, 132-33 (2016) (referring to dictionary definitions of words to help ascertain the plain meaning of a phrase). "Previous" is defined as "[e]xisting or occurring before something else in time or order[.]" *Previous*, *The American Heritage Dictionary* 1085 (3rd ed. 1997); *see also Previous*, *Webster's New World College Dictionary* 1154 (5th ed. 2014) (defining "previous" as "occurring before in time or order").

¶ 24 Defendant applies this language in a way that excludes joined convictions, instead focusing on the lack of applicable convictions in Defendant's prior record worksheet, which he contends entitles him to conditional discharge under N.C.G.S. § 90-96(a), whereas the State contends that the phrase "previously been convicted" includes Defendant's joined conviction for selling cocaine, which would disqualify him from receiving conditional discharge under N.C.G.S. § 90-96(a).

¶ 25 If we were to substitute the plain meaning of "previous" into the statute (and rearrange it for grammar), N.C.G.S. § 90-96 would apply to

> any person who [does] not [have a conviction of] (i) any felony offense under any state or federal laws; (ii) any offense under this Article; or (iii) an offense under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 of the General Statutes [that existed or occurred in time or order before he] pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules I through VI of this Article or by possessing drug paraphernalia as prohibited by [N.C.G.S. §] 90-113.22 or [N.C.G.S. §] 90-113.22A or (ii) a felony under [N.C.G.S. §] 90-95(a)(3)[.]

N.C.G.S. § 90-96(a) (2021). Simplified further to the facts of this case, it would apply to a defendant "who [does] not [have a conviction of] [the felony of selling cocaine under N.C.G.S. § 90-95(a)(1)] [that existed or occurred in time or order before he] pleads guilty to or is found guilty of [possession of cocaine under N.C.G.S. § 90-95(a)(3).]" *Id.*

¶ 26 This reading requires us to consider when a conviction exists. "Our Court has interpreted [N.C.G.S.] § 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction. In other

words, a person has a conviction immediately upon being found guilty by a jury, or upon pleading guilty or no contest." *State v. Pritchard*, 186 N.C. App. 128, 130 (2007) (citations and marks omitted) (citing *State v. Fuller*, 48 N.C. App. 418, 420, *disc. rev. denied*, 301 N.C. 403 (1980)). This would mean that a conviction would exist here upon the jury's finding of guilt. When this rule is read in conjunction with the language of N.C.G.S. § 90-96 and applied to joined convictions entered upon a jury's verdict, in order to have an applicable previous felony or drug conviction prohibit the application of N.C.G.S. § 90-96, the jury must have found Defendant guilty of the applicable felony or drug conviction first.

¶ 27 In *State v. West*, we analyzed whether N.C.G.S. § 15A-1340.11(7) permits the consideration of joined convictions. *State v. West*, 180 N.C. App. 664, 669-70 (2006), *appeal dismissed*, *disc. rev. denied*, 361 N.C. 368 (2007). N.C.G.S. § 15A-1340.11(7) states "[a] person has a prior conviction when, on the date a criminal judgment is entered, *the person being sentenced has been previously convicted of a crime*[.]" N.C.G.S. § 15A-1340.11(7) (2021) (emphasis added). We held "that the assessment of a defendant's prior record level using *joined convictions* would be unjust and in contravention of the intent of the General Assembly." *West*, 180 N.C. App. at 669 (emphasis added). We also stated "the 'rule of lenity' forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *Id.* at 670.[4]

¶ 28 In *State v. Watlington*, we applied the rule from *West* to prohibit the use of convictions from a first trial as prior convictions in a second trial on charges that were retried following the inability of a jury to reach a unanimous verdict in the first trial. *State v. Watlington*, 234 N.C. App. 601, 608-09, *disc. rev. denied*, 367 N.C. 791 (2014). We held:

> It would be unjust to punish a defendant more harshly simply because, in his first trial, the jury could not reach a unanimous verdict on some charges, but in a subsequent trial, a different jury convicted that

4. We note that our ruling in *West* was based on N.C.G.S. § 15A-1340.11(7) and was not based on N.C.G.S. § 15A-1340.14(d), which states, as it did when *West* was decided, "[f]or purposes of determining the prior record level, if an offender is convicted of more than one offense in a single [S]uperior [C]ourt during one calendar week, only the conviction for the offense with the highest point total is used. If an offender is convicted of more than one offense in a single session of [D]istrict [C]ourt, only one of the convictions is used." N.C.G.S. § 15A-1340.14(d) (2021). As a result, our prior interpretation of the language of N.C.G.S. § 15A-1340.11(7) in *West* is applicable without consideration of the requirements of N.C.G.S. § 15A-1340.14(d).

> defendant on some of those same charges. There is no policy reason that would support such a result and, because the General Assembly has not clearly stated an intention to allow for harsher punishments in such situations, we hold the "rule of lenity" forbids such a construction of the sentencing statutes.

Id. at 609.

¶ 29 It is appropriate here to consider how we have interpreted other sentencing statutes in light of our previous treatment of N.C.G.S. § 90-96 as a sentencing statute. *See Dail*, 255 N.C. App. at 650 (citing *State v. Burns*, 171 N.C. App. 759, 761 (2005)) ("[*State v. Burns*] indicates that the general criminal sentencing statutes fill in the gaps in [N.C.G.S.] § 90-96."). Given the similarity of the language in N.C.G.S. § 15A-1340.11(7)—stating "the person being sentenced has been previously convicted of"—and the language in N.C.G.S. § 90-96—stating "any person who has not previously been convicted of"—we conclude the reasoning from *West* similarly applies to N.C.G.S. § 90-96 to prohibit consideration of the joined convictions in determining whether a defendant was previously convicted of an applicable offense. N.C.G.S. § 15A-13.40.11(7) (2021); N.C.G.S. § 90-96 (2021); *see West*, 180 N.C. App. at 669-70 (marks and citations omitted) ("[T]he assessment of a defendant's prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly. Further, the 'rule of lenity' forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention."); *see also State v. High*, 271 N.C. App. 771, 775 (2020) (marks omitted) (applying *West* and *Watlington* to conclude "none of [the joined convictions] could have been used as a prior conviction for purposes of sentencing on any of the others"). Here, like in *West* and *Watlington*, N.C.G.S. § 90-96 does not clearly state an intent to consider joined convictions in determining the applicability of the statute; thus, the rule of lenity forbids us from interpreting N.C.G.S. § 90-96 to increase the penalty it places on defendants. *State v. Boykin*, 78 N.C. App. 572, 577 (1985) ("[T]he 'rule of lenity' forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention.").[5]

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5. We also note that other statutes support this interpretation of the General Assembly's intent. For example, N.C.G.S. § 20-179—a statute concerning sentencing after a conviction for impaired driving—indicates that "[a] prior conviction for an offense involving impaired driving" can be considered a grossly aggravating factor if "[t]he conviction occurs after the date of the offense for which the defendant is presently being sentenced,

¶ 30 We hold N.C.G.S. § 90-96 applies to Defendant despite his joined conviction because said joined conviction does not constitute a previous conviction.[6] Furthermore, the remaining requirement of N.C.G.S. § 90-96 is satisfied for Defendant, as he was convicted of felony possession of cocaine under N.C.G.S. § 90-95(d)(2). *See* N.C.G.S. § 90-96 (2021) (emphasis added) ("Whenever any person who has not previously been convicted of [an applicable felony or drug offense] pleads guilty to or *is found guilty of . . . a felony under [N.C.G.S. §] 90-95(a)(3)*, the court shall, without entering a judgment of guilt and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require, unless the court determines with a written finding, and with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense."). Therefore, the trial court was required to provide conditional discharge in accordance with N.C.G.S. § 90-96 unless the trial court and the State agreed that it was inappropriate for Defendant.

¶ 31 In light of this error, Defendant requests that we remand to the trial court for entry of a conditional discharge pursuant to N.C.G.S. § 90-96. The State, however, requests a new sentencing hearing where the trial court can determine whether conditional discharge is appropriate for Defendant. We agree with the State that a new sentencing hearing on this conviction is appropriate.

¶ 32 In *Dail*, we noted that "it [was] clear that the trial court did not afford either party the opportunity to establish [the] defendant's eligibility or lack thereof" for conditional discharge under N.C.G.S. § 90-96. *Dail*, 255 N.C. App. at 650. As a result, we "vacate[d] the trial court's judgment,

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but prior to or contemporaneously with the present sentencing." N.C.G.S. § 20-179(c)(1)(b) (2021). This statute reflects that the General Assembly knows how to clearly indicate that same-day convictions should be included within sentencing, but chose not to here. We have held that, "[w]hen a legislative body includes particular language in one section of a statute but omits it in another section of the same [statute], 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 (2009) (marks omitted). Although these are not the same acts, they are both sentencing statutes, and we presume the General Assembly understood it could have expressly required the consideration of same-day convictions, but elected not to.

6. We note that the General Assembly may address this statute to clarify its application to the situation presented *sub judice* as well. *See Wake Radiology Diagnostic Imaging LLC v. North Carolina Department of Health and Human Services*, 279 N.C. App. 673, 2021-NCCOA-536, ¶ 7 (2021) ("We interpret the law as it is written. If that interpretation results in an unintended loophole, it is the legislature's role to address it.").

and remand[ed] th[e] matter to the trial court for a new sentencing hearing. The trial court [was ordered to] follow the procedure for the consideration of eligibility for conditional discharge as prescribed by statute." *Id*. Here, there was no discussion whatsoever of N.C.G.S. § 90-96, and, as a result, like in *Dail*, we conclude that the appropriate remedy is to vacate the sentence entered by the trial court and remand for resentencing.

CONCLUSION

¶ 33 Assuming, *arguendo*, that the trial court erred in admitting Jackson's testimony under Rule 702(a), the error did not amount to plain error. *Piland*, 263 N.C. App. at 338-40; *Sasek*, 271 N.C. App. at 574-75. Assuming, *arguendo*, that the trial court erred in instructing the jury on the theory of constructive possession, the error did not amount to plain error as the Record demonstrates overwhelming evidence that Defendant had actual possession of cocaine. Accordingly, the error could not have "had a probable impact on the jury's finding that [] [D]efendant was guilty" of possession of cocaine. *Lawrence*, 365 N.C. at 518. N.C.G.S. § 90-96 applies to Defendant despite his joined conviction. Thus, the trial court erred in failing to address N.C.G.S. § 90-96, and we vacate Defendant's sentence as to his conviction of felony possession of cocaine and remand for resentencing.

NO PLAIN ERROR IN PART; VACATED AND REMANDED FOR RESENTENCING IN PART.

Judges ZACHARY and COLLINS concur.

STATE v. CHARLES

[285 N.C. App. 494, 2022-NCCOA-628]

STATE OF NORTH CAROLINA
v.
CHEITO CHARLES, DEFENDANT

No. COA21-792

Filed 20 September 2022

1. Criminal Law—jury instruction—felonious cruelty to animals—malicious act—proximately causing animal's death

In a prosecution for arson and felonious cruelty to animals, where defendant was charged with setting fire to another man's home while the man's four-month-old puppy was still inside, the trial court did not err when it instructed the jury that, to find defendant guilty of the animal cruelty charge, the State only had to prove that defendant intentionally and maliciously started the house fire that proximately caused the puppy's death. Under the plain language of the animal cruelty statute (N.C.G.S. § 14-360(b)), it was unnecessary for the jury to find that defendant knew the puppy was inside the home and intended to kill it at the time he started the fire.

2. Crimes, Other—felonious cruelty to animals—acting intentionally and maliciously—sufficiency of evidence

In a prosecution for arson and felonious cruelty to animals, where defendant was charged with setting fire to another man's home while the man's four-month-old puppy was still inside, the trial court properly denied defendant's motion to dismiss the animal cruelty charge for insufficiency of the evidence. The State met its burden at trial of showing that defendant acted intentionally and maliciously by starting the fire which proximately caused the puppy's death, and it was irrelevant whether defendant actually knew the puppy was inside the home when he set fire to it.

3. Indictment and Information—sufficiency—felonious cruelty to animals—malice—intent

In a prosecution for arson and felonious cruelty to animals, where defendant was charged with setting fire to another man's home while the man's four-month-old puppy was still inside, the indictment was not fatally defective where it sufficiently alleged the malice element of the animal cruelty charge (by alleging under the accompanying arson charge that defendant "did maliciously burn the dwelling" where the puppy died) and the intent element of the charge (by alleging that defendant "willfully" killed an animal).

STATE v. CHARLES

[285 N.C. App. 494, 2022-NCCOA-628]

Appeal by Defendant from judgment entered 1 July 2021 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 7 June 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Haley A. Cooper, for the State.

Blass Law, PLLC, by Danielle Blass, for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Cheito Charles appeals from judgments entered upon a jury verdict finding him guilty of second-degree arson and felonious cruelty to animals. Defendant argues that the trial court erred by (1) instructing the jury on the doctrine of transferred intent regarding the cruelty to animals charge; (2) denying Defendant's motion to dismiss the cruelty to animals charge for insufficient evidence; and (3) failing to dismiss the cruelty to animals charge due to a fatal defect in the indictment. We conclude that Defendant received a fair trial, free from error.

I. Factual and Procedural Background

¶ 2 In July 2020, Defendant lived in a van with his sister, McKumba Charles, located in or around Fayetteville, North Carolina. On some nights, McKumba did not stay in the van with Defendant and instead stayed with her boyfriend, Marcus Perry. Defendant and Marcus knew each other and saw one another "a good amount of times." Defendant testified that he and his sister were "always together[,] so just as much as [Marcus was] around [his] sister," Defendant was around Marcus as well. Defendant also stated that he thought he had stayed at Marcus's house "at least seven times" over the course of one year.

¶ 3 At trial, Marcus described his relationship with Defendant as "[n]ot good." Defendant stated that he and Marcus were friendly but would sometimes "have disagreements about stuff." McKumba suffered from alcoholism, and Marcus testified that "she would drink and get missing and then [Defendant] would be mad at me about her getting missing."

¶ 4 McKumba was drinking heavily while at Marcus's house on the evening of 18 July 2020. Marcus testified that he and McKumba had "[a] disagreement" that night about her drinking: "She wanted more [to] drink that night and I wouldn't go out to buy none so she had left and when I woke up she was gone. I told her I wasn't buying no more drink. No more liquor and no beer like that so I woke up and she was just gone."

¶ 5 The next morning, at around 9:30 a.m., Marcus travelled to the "parking lot of a gas station across the street from the flea market" in order to sell "some shoes." Marcus testified that he often sold items on the side of the road. At "around 10:30 or 11:00" a.m., Marcus saw Defendant in the parking lot riding his bicycle. Marcus testified that Defendant "was wrapped in a . . . hospital sheet" and was carrying "a sword." Marcus stated that it was his "very first time seeing him wrapped in a sheet with a sword." Defendant then approached Marcus and stated, "Where's my sister?" Marcus stated, "I don't know, she left," to which Defendant replied, "[O]kay, I ain't forgot, I'll be back, I'll be back, I'll be back." Defendant then rode away on his bicycle.

¶ 6 About thirty minutes later, Marcus saw Defendant again on his bicycle. Marcus stated that Defendant "rode by and he just gave me a mean look like, stared real hard and road off on the bike." This was the last time Marcus saw Defendant that day.

¶ 7 Defendant testified that he had driven by Marcus's home several times that day and at one point saw Marcus's neighbor, Anthony. Defendant stated, "[Anthony] didn't see me—he didn't see me but I saw him. I was just watching from afar. But I was watching him." When asked why Defendant was watching Anthony, Defendant stated, "I was just riding around."

¶ 8 Anthony testified that sometime around noon "[a] white van pulled in across the street" at Marcus's house. Anthony confirmed at trial that he observed Defendant driving the van and that Defendant was wearing "like a gown you wear in the hospital." Anthony stated that at first he "didn't really pay that much attention" to the van because he had seen the van at Marcus's house "numerous times" before and had seen Defendant at Marcus's house "quite often." However, about five minutes later, Anthony looked over to Marcus's house and saw that "the porch was on fire." He stated that, at the time he saw the fire, the van "was still there" and "pointing toward the road."

¶ 9 Anthony immediately told his daughter to call 911 upon seeing the flames. He then observed Defendant "walk[] back to the van" and drive away. Anthony watched the fire grow "worse and worse" with flames over the top of the residence while he waited on first responders to arrive at the scene.

¶ 10 About one month prior to the fire, Marcus adopted a puppy. Before leaving for work on the day of the fire, Marcus took the puppy outside to use the bathroom and then put the puppy inside the house. After Marcus got off work, he traveled to his mother's house and his daughter informed

him that his house had caught fire. Marcus rushed home and tried to enter the house, but first responders would not let him in. Fire fighters then informed Marcus that his puppy had died and helped Marcus bury the dog in the yard. Defendant claimed at trial that he did not know Marcus had a puppy.

¶ 11 On 9 November 2020, a Cumberland County grand jury indicted Defendant on one count of second-degree arson and one count of felonious cruelty to animals. The case was tried before a jury on 29 June 2021 in Cumberland County Superior Court. After the close of the State's evidence, Defendant moved to dismiss both charges for lack of sufficient evidence. With respect to the animal cruelty charge, Defendant argued that there was "no evidence that [Defendant] knew of the existence of the [puppy] and much less that there was an animal in the house." The trial court denied Defendant's motion.

¶ 12 After the close of all evidence, the trial court instructed the jury that, in order to convict Defendant of felonious cruelty to animals, the jury need only conclude that Defendant maliciously and "intentionally start[ed] a house fire which proximately result[ed] in the injury or death to the animal." Under this instruction, it was unnecessary for the State to prove that Defendant knew that Marcus had a puppy in the home in order for the jury to find Defendant guilty of felonious cruelty to animals.

¶ 13 On 1 July 2021, the trial judge entered judgments upon the jury's verdict finding Defendant guilty of second-degree arson and felonious cruelty to animals. Defendant timely appeals.

II. Analysis

¶ 14 Defendant argues that the trial court erred by (1) instructing the jury on the doctrine of transferred intent regarding the cruelty to animals charge; (2) denying Defendant's motion to dismiss the cruelty to animals charge for insufficient evidence; and (3) failing to dismiss the cruelty to animals charge due to a fatal defect in the indictment. We address each argument.

A. Jury Instruction

¶ 15 **[1]** Defendant argues that the trial court erred by instructing the jury on the doctrine of transferred intent regarding the animal cruelty charge, "such that the State had to prove that . . . Defendant intentionally and maliciously started a fire that resulted in the death of an animal, as opposed to being required to prove that [Defendant] intentionally and maliciously killed the animal." We hold that the plain language of N.C. Gen. Stat. § 14-360 adequately supported the trial court's instruction to the

jury. We therefore need not decide whether the doctrine of transferred intent is applicable in this case.

¶ 16 First, the State argues that Defendant failed to lodge an objection to the jury instruction and that this issue should thus be reviewed for plain error. However, after the trial court announced the instruction during the charge conference, the judge asked, "Any objection to any of that?" Defendant's counsel then stated, "Your Honor, . . . I don't think saying that the defendant acted knowingly in starting the house fire automatically transfers the intent to harm one—to the animal." Defendant thus properly objected to the jury instruction.

¶ 17 "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). "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 (2010).

¶ 18 In this case, the trial court's instruction to the jury regarding the charge of felonious cruelty to animals read as follows:

> The defendant has also been charged with felonious cruelty to an animal. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant caused to be killed a four-month-old puppy in a house fire; second, that the defendant acted intentionally; that is knowingly, starting the house fire; and third, that the defendant acted maliciously. To act maliciously means to act with intent and with malice or other bad motive. . . . It also means the conduct of the mind which prompts a person to intentionally start a house fire which proximately results in the injury or death to the animal.

¶ 19 N.C. Gen. Stat. § 14-360(b) provides that "[i]f any person shall maliciously . . . kill, *or cause or procure to be* . . . killed, any animal, every such offender shall for every such offense be guilty of a Class H felony." N.C. Gen. Stat. § 14-360(b) (2021) (emphasis added). "As used in this section, . . . the word 'maliciously' means an act committed intentionally and with malice or bad motive." *Id.* § 14-360(c). In other words, one who

merely acts maliciously is guilty of felonious cruelty to animals under the statute if that act "*cause[s]* . . . to be . . . killed, any animal." *Id.* § 14-360(b) (emphasis added). It is therefore unnecessary in such cases for the State to prove that a defendant knew of or otherwise acted with malicious intent toward the animal. It is enough to prove that the defendant acted maliciously and that the act proximately caused the death of an animal.

¶ 20 Here, Defendant was convicted of second-degree arson, which required the jury to find that Defendant willfully and *maliciously* burned the dwelling of another while the dwelling was unoccupied. *See State v. Scott*, 150 N.C. App. 442, 453, 564 S.E.2d 285, 293 (2002) (listing the elements of second-degree arson). The jury thus needed to conclude only that Defendant maliciously set fire to Marcus's house and that the fire proximately caused the puppy's death in order to support a conviction of felonious cruelty to animals under N.C. Gen. Stat. § 14-360(b). Accordingly, the trial court did not err in so instructing the jury, and Defendant's argument is without merit.

B. Sufficiency of Evidence

¶ 21 **[2]** Defendant argues that "the trial court erred in denying [Defendant's] motion to dismiss for insufficiency of the evidence on the charge of cruelty to animals" because the State did not present "evidence that the alleged act of animal cruelty was committed intentionally (knowingly) or maliciously (knowingly and with malice)."

¶ 22 We have already held that the trial court permissibly instructed the jury that, in order to find Defendant guilty of felony cruelty to animals, it need only conclude that Defendant maliciously and "intentionally start[ed] a house fire which proximately result[ed] in the injury or death to the animal." It is therefore irrelevant whether Defendant in fact knew that the animal was inside the home at the time Defendant started the fire. Rather, it was sufficient for the State to show that Defendant intentionally and maliciously started the fire which proximately resulted in the animal's death. The State met its burden under this standard. Defendant's argument is without merit.

C. Indictment

¶ 23 **[3]** Lastly, Defendant argues that the indictment failed to allege two essential elements of the animal cruelty offense, and thus the trial court lacked subject matter jurisdiction over this charge. Because the indictment sufficiently apprised Defendant of the charge, we reject this argument.

¶ 24 "This Court reviews the sufficiency of an indictment de novo." *State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (quoting *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009)). "A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, and to give authority to the court to render a valid judgment." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008) (quoting *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002)). An indictment requires "[a] plain and concise factual statement in each count . . . assert[ing] facts supporting every element of a criminal offense and the defendant's commission thereof." N.C. Gen. Stat. § 15A-924(a)(5) (2021). "If the indictment fails to state an essential element of the offense, any resulting conviction must be vacated." *State v. Rankin*, 371 N.C. 885, 886–87, 821 S.E.2d 787, 790 (2018).

¶ 25 However, "[t]he law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed." *Id.* at 887, 821 S.E.2d at 790–91; *see State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953) (holding that an indictment is sufficient where the "offense is charged in the words of the statute, either literally or substantially, or in equivalent words"). "An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984).

¶ 26 Here, we evaluate whether the essential elements of the animal cruelty charge are "adequately" alleged within the indictment. Inflexible and technical indictment rules are disfavored. To be fatally defective, the indictment must fail to provide Defendant with sufficient certainty as to the nature of the animal cruelty charge.

¶ 27 Defendant contends first that the indictment failed to allege that the act was carried out "maliciously." However, adequate notice was provided by the accompanying charge for second-degree arson, which explicitly alleged that Defendant "unlawfully, willfully and feloniously did *maliciously* burn the dwelling." (Emphasis added). The indictment provided Defendant with sufficient certainty of the offense committed, such that he was in no danger of subsequent prosecutions, nor would he be unable to prepare a defense.

¶ 28 Defendant further asserts that the "intentional" element was missing from the indictment. We disagree. The indictment alleged that Defendant

"unlawfully, *willfully* and feloniously did kill an animal." (Emphasis added). In *State v. Dickens*, the Court observed that the meaning of the word willfully "[as] used in a statute creating a criminal offence, means something more than an intention to do a thing. It implies . . . doing the act purposely and deliberately, indicating a purpose to do it, . . . and it is this which makes the criminal intent." *State v. Dickens*, 215 N.C. 303, 305, 1 S.E.2d 837, 838–39 (1939) (quoting *State v. Whitener*, 93 N.C. 590, 592 (1885)). Thus, as used in the indictment, the word "willfully" adequately expresses that the offense requires an intentional act.

¶ 29 An indictment need only provide an adequate expression of the charge; therefore, this indictment was sufficient to confer subject matter jurisdiction on the trial court.

III. Conclusion

¶ 30 We conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges INMAN and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
ERIC JAMES FAUCETTE, DEFENDANT

No. COA21-749

Filed 20 September 2022

Identity Theft—knowing use of another person's identifying information—actual person—insufficiency of evidence

The trial court erroneously denied defendant's motion to dismiss an identity theft charge for insufficiency of the evidence where, although the State's evidence indicated that defendant checked himself into a hospital under a false name and birthdate to avoid arrest for another criminal charge, none of the evidence linked the false identifying information to a real person.

Appeal by Defendant from judgments entered 19 February 2021 by Judge Richard Kent Harrell in the New Hanover County Superior Court. Heard in the Court of Appeals on 25 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Asher P. Spiller, for the State.

William D. Spence for defendant-appellant.

MURPHY, Judge.

¶ 1 Defendant Eric James Faucette appeals the trial court's denial of his motion to dismiss a charge of identity theft based on the sufficiency of the evidence. Defendant has several theories as to why there was insufficient evidence presented at trial to support his conviction under N.C.G.S. § 14-113.20, but we need not reach the merits of those arguments as the State concedes that "there was insufficient evidence presented at trial showing that Defendant knowingly used identifying information of another person living or dead within the meaning of the identity theft statute." As we agree with both parties that there was insufficient evidence showing that Defendant intended to fraudulently represent that he was any actual person living or dead, the trial court erred in denying Defendant's motion to dismiss. We therefore vacate Defendant's conviction.

BACKGROUND

¶ 2 On 7 November 2018, Curtis Frashure received a phone call regarding a disturbance at a trailer he owned. Frashure was told that Defendant, a former tenant of Frashure, was destroying the trailer, tearing holes in the wall, and tearing doors down. Frashure had previously told Defendant that he was no longer permitted to live in the trailer. Upon receiving the phone call, Frashure contacted his friend James Hinson, who lived across the street, and asked Hinson to find out what was going on at his trailer. Frashure then called 911 to report the disturbance.

¶ 3 After speaking with Frashure, Hinson and Mary Baisden, Hinson's fiancé, walked over to Frashure's home, where they observed Defendant picking through a trashcan. Hinson told Defendant that he was not supposed to be there, that Frashure had told Defendant to leave, and that Defendant would need to go. Without giving any verbal response, Defendant stepped away from the trashcan and struck Hinson in the head with a machete. Hinson then sought to disarm Defendant by punching him but was not successful.

¶ 4 During their encounter, Hinson was hit with the machete multiple times. Baisden eventually led Hinson back to their trailer, where they called 911. Hinson was then taken to New Hanover Regional Medical

Center where he received stitches and staples on the lacerations on his head. In addition to scarring, the assault left Hinson with recurring headaches, which still recurred at the time of trial.

¶ 5 After the assault, Defendant fled and eventually checked himself into New Hanover Regional Medical Center. Defendant told hospital personnel that his name was David Bostic and that his date of birth was 24 September 1972. Defendant eventually left the hospital, apparently without receiving medical services or treatment, wearing a bracelet identifying his name as David Bostic and his date of birth as 24 September 1972.

¶ 6 Later that evening, Defendant was arrested by Sergeant Joshua Bryant. At trial, Sgt. Bryant testified that he stopped Defendant after observing him riding a bicycle without the required safety equipment. Sgt. Bryant observed what appeared to be blood on Defendant's clothes. He also recognized Defendant from a picture that had been texted to him by another officer. Defendant began talking about the incident and, while speaking to Sgt. Bryant, stated that he "went into the hospital under another person's name."

¶ 7 On 18 February 2019, Defendant was indicted on charges of assault with a deadly weapon inflicting serious injury and identity theft. At trial, with respect to the identity theft charge, the State argued that Defendant gave the hospital false information because he had an outstanding charge for failing to appear in court. The State introduced and published a video recording of an interview of Defendant conducted by John Carpenter, a former detective of the New Hanover County Sherriff's Office. During Defendant's interview, Defendant stated that he gave the false name to the hospital because he had a failure to appear. He further stated, in reference to giving the false information to the hospital, "[t]his is just me protecting myself from not [sic] having to go to jail." Defendant further indicated that the information he provided to the hospital did not belong to a real person. Defendant stated that he thought he could just be "John Doe" at the hospital, and "that's all it was." He also stated, in reference to the false name and birthdate, "that person doesn't even exist."

¶ 8 At trial, the wristband that Defendant obtained upon being admitted at the hospital was also introduced into evidence. The name on the wristband was "David Bostic," and the birthdate on the wristband was 24 September 1972. Carpenter testified that he contacted a man named David Bostic who verified that he did not visit the hospital on 7 November 2018. The State then called David Bostic himself, who

testified he lived in Pender County,[1] did not visit New Hanover Regional Medical Center on 7 November 2018, did not know Defendant, and had never given Defendant permission to use his identity. He also testified that his date of birth was 28 May 1975.

¶ 9 At the close of the State's evidence, Defendant made a motion to dismiss the charge of identity theft based on the sufficiency of the evidence. Defendant's motion was denied. Subsequently, Defendant renewed his motion to dismiss at the close of all evidence, which was again denied. Defendant timely appealed.

ANALYSIS

¶ 10 The sole issue on appeal is whether the trial court erred in failing to dismiss the charge of identity theft at the close of all evidence on the ground that the evidence was insufficient to establish every element of the crime pursuant to N.C.G.S. § 15A-1227. *See generally* N.C.G.S. § 15A-1227 (2021). Defendant argues that the evidence presented was not sufficient to convince a rational trier of fact to find each element of this charge beyond a reasonable doubt and, therefore, the trial court should not have allowed this charge to go to the jury. The State concedes that this argument is correct, and we agree.

¶ 11 "We review the trial court's denial of a motion to dismiss *de novo*." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010). "This Court, under a *de novo* standard of review, considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* (citing *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)).

> A defendant's motion to dismiss should be denied if there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When ruling on

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1. We take judicial notice that Pender and New Hanover are adjoining counties. *See Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 6, 657 S.E.2d 673, 677 (quoting *West v. G.D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981)) ("Appellate courts may take judicial notice *ex mero motu* on 'any occasion where the existence of a particular fact is important . . . .' [Facts subject to judicial notice are those] which are either so notoriously true as not to be the subject of reasonable dispute or 'capable of demonstration by readily accessible sources of indisputable accuracy' . . . ."), *aff'd per curiam in part, disc. rev. improvidently allowed in part*, 362 N.C. 675, 669 S.E. 2d 320 (2008).

> a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State. The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.

Id. at 144-45, 701 S.E.2d at 382-83 (marks and citations omitted).

¶ 12 N.C.G.S. § 14-113.20 provides, in pertinent part, that identity theft exists when "[a] person . . . knowingly obtains, possesses, or uses identifying information of another person, living or dead, *with the intent to fraudulently represent that the person is the other person* . . . for the purpose of avoiding legal consequences[.]" N.C.G.S. § 14-113.20(a) (2021) (emphasis added). N.C.G.S. § 14-113.20(b) further provides a non-exclusive list of information that constitutes "identifying information" within the meaning of the statute. *See* N.C.G.S. § 14-113.20(b) (2021); *State v. Miles*, 267 N.C. App. 78, 89, 833 S.E.2d 27, 34 (2019), *disc. rev. denied*, 373 N.C. 588, 837 S.E.2d 891 (2020).

¶ 13 This Court has determined that another person's actual name, date of birth, and address may constitute forms of identifying information under N.C.G.S. § 14-113.20(b). *See Miles*, 267 N.C. App. at 89, 833 S.E.2d at 34. In *State v. Miles*, the defendant went to Duke Regional Hospital to receive treatment for gunshot wounds after fleeing from an assault with a deadly weapon. *Id.* at 80-81, 833 S.E.2d at 29-30. Upon arrival, the defendant gave the hospital the actual name, date of birth, and address of another person, Jerel Thompson. *Id.* On these facts, we found that a name, date of birth, and address of another person are "possible forms of identifying information where a defendant, like [the] defendant in the instant case, uses the information for the purposes of escaping arrest or other legal consequences and possibly to receive hospital services for his injuries." *Id.* at 89, 833 S.E.2d at 34.

¶ 14 Here, however, there was no evidence presented that an actual person matched the identifying information on Defendant's hospital wristband: David Bostic, born on 24 September 1972. And Defendant did not give the hospital an address. While the State's evidence, taken in the light most favorable to it, indicated that Defendant gave the false name of David Bostic and a false birthdate to hospital personnel and further showed that he did so for the purpose of avoiding arrest for a failure to appear, there was no evidence presented at trial to connect Defendant's

use of this information with an actual person, living or dead. The individual named David Bostic who testified at trial did not have the same birthdate the State's evidence suggested Defendant provided the hospital, and the remaining evidence presented at trial does not indicate that anyone could have used the information given by Defendant to identify any real person.

¶ 15 Therefore, under the facts of this case and a plain reading of the statute, there was insufficient evidence at trial to show that Defendant "knowingly . . . use[d] identifying information of another person, living or dead, with the intent to fraudulently represent that [Defendant was] the other person" within the meaning of N.C.G.S. § 14-113.20(a). N.C.G.S. § 14-113.20(a) (2021).

CONCLUSION

¶ 16 There was insufficient evidence at trial to show that Defendant intended to fraudulently represent he was the David Bostic who testified at trial or that Defendant used the identifying information of any other actual person, living or dead. Accordingly, the trial court erred in denying Defendant's motion to dismiss, and his conviction for identity theft under N.C.G.S. § 14-113.20(a) is vacated.[2]

VACATED.

Judges ARROWOOD and CARPENTER concur.

2. We note that, because Defendant's sentence for the identify theft conviction was to be served concurrently with an equivalent term of imprisonment for the assault conviction, which Defendant did not challenge on appeal, vacatur of the identify theft conviction does not necessitate a new sentencing hearing.

STATE v. HARPER

[285 N.C. App. 507, 2022-NCCOA-630]

STATE OF NORTH CAROLINA
v.
RONALD PRESTON HARPER

No. COA21-752

Filed 20 September 2022

1. Police Officers—resisting a public officer—elements—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of resisting, delaying, or obstructing a public officer where substantial evidence showed that a police officer briefly detained defendant at a gas station to investigate a disturbance call—in which the caller reported being verbally harassed by defendant at the gas station—and defendant repeatedly refused to provide identification. The officer was lawfully discharging a duty of his office by detaining defendant where he had a reasonable suspicion that defendant was the subject of the disturbance call (when the officer arrived at the scene, the caller identified defendant and the officer saw defendant yelling at a gas station attendant), and defendant willfully obstructed the investigation by refusing the officer's requests for verifiable identification (defendant did provide a card with initials, a last name, and a telephone number, but there was no way to confirm that the information was accurate).

2. Constitutional Law—right to counsel—knowing, intelligent, and voluntary waiver—written waiver—rebuttable presumption

At a trial for resisting, delaying, or obstructing a public officer, the superior court did not err in allowing defendant to waive his right to counsel and represent himself where defendant had previously signed a written waiver of counsel that was certified by the district court during district court proceedings, thereby creating a rebuttable presumption that the waiver was executed knowingly, intelligently, and voluntarily pursuant to N.C.G.S. § 15A-1242 and rendering additional inquiries by the superior court unnecessary. Further, nothing in the record adequately rebutted this presumption.

3. Appeal and Error—waiver of appellate review—invited error—jury instructions—failure to object—express agreement

A criminal defendant waived appellate review of his argument that the trial court erred by not instructing the jury on justification or excuse as defenses to the charge of resisting, delaying, or

obstructing a public officer where, at trial, defendant never requested a jury instruction on justification or excuse, failed to object to the court's jury instructions both before and after the jury heard them, and expressly agreed to the instructions as given—actions which, taken together, constituted invited error.

Judge INMAN concurring in the result.

Appeal by defendant from judgments entered 24 June 2021 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Juliane L. Bradshaw, for the State.

Hynson Law, PLLC, by Warren D. Hynson, for defendant-appellant.

TYSON, Judge.

¶ 1 Ronald Preston Harper ("Defendant") appeals from judgment entered upon a jury's verdict finding him guilty of willingly resisting, delaying, or obstructing a public officer. We find no error.

I. Background

¶ 2 Winterville Police Officers Jordan Cruse ("Officer Cruse") and Jordan Fuquay ("Officer Fuquay") were dispatched to a Sam's Club gas station in Winterville on 14 September 2019 at approximately 2:40 p.m. The dispatch was in response to a caller reporting an individual "cursing and using profanity towards" the caller.

¶ 3 Prior to the officers' arrival, Defendant was talking to the caller at the gas station about a "blue line" bumper sticker located on the caller's car and race relations. The Defendant and the caller disagreed over policing practices within the United States. No physical confrontation or altercation occurred between Defendant and the caller.

¶ 4 Upon arrival, Officer Cruse and Officer Fuquay observed the caller seated inside a vehicle parked at a gas pump. Defendant's vehicle was parked behind the caller's vehicle at another gas pump. The officers located the caller, who stated Defendant was bothering him. At that time, Defendant was arguing with the gas station attendant over the gas pump, which was spilling fuel due to the hose being over extended.

¶ 5 Officer Cruse and Officer Fuquay requested to speak with Defendant about the reason for the dispatch call. Defendant refused to speak with the officers, stating he was "attending to his pumping duties." Officer Cruse continued to request Defendant to speak with him, whereby Defendant asked if he was under arrest. Officer Cruse responded, "[n]o, you're not free to leave right now." Defendant added, "So I'm under arrest. What statute in North Carolina are you coming to talk to me about?" Officer Cruse responded to Defendant that he was being detained for "causing a disturbance." Officer Cruse reiterated, "[t]he reason that I am talking to you is because we had a gentleman call, complaining that you were harassing him . . . That's all I'm here to talk to you about." Defendant replied, "[w]ell, I'm not talking to you about it."

¶ 6 The exchange continued until Officer Cruse requested Defendant provide identification. Defendant reached into his shirt pocket and produced a card purportedly containing Defendant's name with initials, title, a telephone number, and a quote from *City of Houston v. Hill*. 482 U.S. 451, 462-63, 96 L.Ed.2d 398, 412-13 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."). Defendant asserted he had previously worked as an "investigative journalist" for twenty years.

¶ 7 Officer Cruse continued to request Defendant's identification several times to complete the investigation and dispatch report. Defendant continued to refuse to produce any identification other than the card. Defendant again tried to hand Officer Cruse the same card, requesting Officer Cruse to read the card because the encounter was "a constitutional issue."

¶ 8 Soon thereafter, Defendant responded to yet another request for identification, stating it was located inside his vehicle. Officer Cruse escorted Defendant over to his vehicle where Defendant grabbed his card holder attached to his cell phone. Defendant again tried to give Officer Cruse the card, stating "I'm not giving you nothing until you take this. Take that!" When Officer Cruse refused, Defendant offered the card to Officer Fuquay.

¶ 9 Officer Cruse handcuffed Defendant and requested Officer Fuquay retrieve Defendant's card, out-of-state driver's license, and cell phone. Defendant's license identified him as "Ronald Preston Harper Jr. from Pennsylvania." Defendant was placed under arrest for obstructing Officer Cruse's investigation by refusing to provide identification and charged with resisting, delaying, or obstructing a public officer.

¶ 10 Officer Cruse was conducting unrelated third-party traffic stops or investigations post-arrest when Defendant appeared at three locations on 22 October 2019 and twice on 17 December 2019. Defendant moved within 10 feet of the stop and recorded Officer Cruse. Defendant next appeared at a stop Officer Cruse was conducting on 17 December 2019. He came near the officer and stated, "I am watching you Jordan, you A--hole." During the second stop on 17 December 2019, Defendant drove by and gestured with a hand motion resembling a gun pointed at Officer Cruse. Officer Cruse charged Defendant with communicating threats. The two charges were joined and tried together. Defendant was convicted by a jury of resisting, delaying, or obstructing a police officer but was acquitted of communicating threats. Defendant appeals.

II. Jurisdiction

¶ 11 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1), 15A-1444(a) (2021).

III. Issues

¶ 12 Defendant raises three issues on appeal: (1) whether the trial court properly denied Defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer; (2) whether the trial court erred by allowing Defendant to waive counsel and represent himself in superior court after Defendant had signed a waiver of counsel in district court; and, (3) whether the trial court erred by failing to instruct the jury on justification or excuse for the charge of resisting, delaying, or obstructing a public officer.

IV. Motion to Dismiss

¶ 13 **[1]** At the close of the State's evidence, Defendant moved to dismiss the obstructing a public officer charge. Following the defense's evidence, the trial court renewed *sua sponte* Defendant's motion to dismiss and the motion. The issue is preserved for review by this Court. N.C. R. App. P. 10(a)(3).

A. Standard of Review

¶ 14 Where a defendant properly preserves a motion to dismiss, this Court reviews the denial of a motion to dismiss *de novo*. *State v. Parker*, 274 N.C. App. 464, 469, 852 S.E.2d 638, 644 (2020) (citation omitted). Under *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment" for that of the trial court. *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

B. Analysis

¶ 15 In ruling on a motion to dismiss criminal charges, the question is "whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

¶ 16 Whether the State presented substantial evidence of each essential element of the offense is a question of law this Court reviews *de novo*. *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020) (citation omitted). In ruling on a motion to dismiss, this Court views all evidence in the light most favorable to the State and draws all reasonable inferences in the State's favor. *Id.*

¶ 17 The elements of the offense of resisting, delaying, or obstructing a public officer are: (1) "the victim was a public officer"; (2) "the defendant knew or had reasonable grounds to believe the [officer] was a public officer"; (3) "the [officer] was [lawfully] discharging or attempting to discharge a duty of his office"; (4) "the defendant resisted, delayed, or obstructed the [officer] in discharging or attempting to discharge a duty of his office"; and, (5) "the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse." *State v. Peters*, 255 N.C. App. 382, 387, 804 S.E.2d 811, 815 (2017) (explaining the essential elements of N.C. Gen. Stat. § 14-223 (2021)).

¶ 18 Defendant does not challenge the first two elements on appeal. Officer Cruse was a public officer in uniform responding to a dispatched call in a marked vehicle, identified himself, announced the reason for his presence on the scene, and requested Defendant to identify himself. N.C. Gen. Stat. § 14-223 (2021).

1. Lawful Discharge of Duties

¶ 19 Defendant first asserts the trial court erred in denying his motion to dismiss the charge of resisting, delaying, or obstructing a public officer because the initial contact with Defendant was not a lawful discharge of the officer's duties. To succeed in a motion to dismiss, substantial evidence must tend to show Officer Cruse was either not discharging or attempting to discharge his duties or was doing so unlawfully. This element "presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office." *State v. Sinclair*, 191 N.C. App. 485, 489, 663 S.E.2d 866, 870 (2008).

¶ 20 "The Fourth Amendment protects individuals 'against unreasonable searches and seizures,' [under] U.S. Const. amend. IV, and the North

Carolina Constitution provides similar protection, [under] N.C. Const. art. I, § 20." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008). Our Supreme Court has stated that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *Id.* at 423-24, 665 S.E.2d at 445.

¶ 21 Reasonable suspicion requires "[t]he stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994) (citations omitted). "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Styles*, at 414, 665 S.E.2d at 439 (citations and internal quotation marks omitted).

¶ 22 The State's evidence tends to show Officer Cruse established reasonable suspicion through articulable facts prior to approaching and detaining Defendant. Officers knew the description of the parties from the call reporting a disturbance. Upon the officers' arrival at the scene, the caller immediately identified Defendant as the person who had caused the disturbance. Officer Cruse also testified he observed Defendant "yelling and fussing" at the gas station attendant upon his arrival. The basis for the call and subsequent investigation was substantiated prior to Defendant being approached and detained. *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70.

¶ 23 When reviewing the reasonableness of a warrantless detention, this Court considers the totality of circumstances to determine whether reasonable suspicion exists to make an investigatory detention. *See State v. Sanchez*, 147 N.C. App. 619, 623, 556 S.E.2d 602, 606 (2001) (citations omitted).

¶ 24 This Court determined officers had " 'a reasonable basis to stop [the] defendant and require him to identify himself' to ascertain whether he was the named subject in their arrest warrants." *State v. Washington*, 193 N.C. App. 670, 680, 668 S.E.2d 622, 628 (2008) (citations omitted). By doing so, "the officers were lawfully discharging a duty of their office." *Id.* An officer may briefly detain a suspect when responding to and observing activity reasonably calculated to be criminal activity. *See State v. Harrell*, 67 N.C. App. 57, 63, 312 S.E.2d 230, 235 (1984) (holding an officer briefly seizing a driver to ask for his driver's license to determine his identity and employment status was proper).

¶ 25 The State need only show Officer Cruse reasonably believed some criminal activity may be occurring based on articulable facts to survive Defendant's motion to dismiss. Viewing evidence in the light most favorable to the State, Officer Cruse could have reasonably believed Defendant was the subject of the disturbance dispatch, verified that information with the caller, and observed and articulated facts sufficient to approach Defendant to request identification.

¶ 26 Upon arrival, Officer Cruse initially spoke with the caller who had reported Defendant was harassing him. The caller specifically identified Defendant as that person. Defendant was observed engaging in aggressive behaviors toward the gas station attendant. When Officer Cruse approached Defendant in the investigation of the disturbance call, reasonable suspicion existed. Officer Cruse was lawfully discharging his law enforcement duties and within his rights to confront and request Defendant's identity.

¶ 27 Viewing the evidence in the light most favorable to the State, substantial evidence was presented tending to show and for the jury to find the third element, that the officer was lawfully discharging or attempting to discharge a duty of his office, sufficient to overcome Defendant's motion to dismiss. *See Peters*, 255 N.C. App. at 387, 804 S.E.2d at 815 (citing N.C. Gen. Stat. § 14-223).

2. Resisting, Delaying, or Obstructing

¶ 28 Defendant next asserts the trial court erred in denying his motion to dismiss the charge of resisting, delaying, or obstructing a public officer because the actions by Defendant did not rise beyond mere criticism.

¶ 29 Defendant wrongfully relies upon case law attempting to attribute Defendant's breach of the peace and harassing and threatening conduct with that of mere questioning or criticism. *See State v. Leigh*, 278 N.C. 243, 251, 179 S.E.2d 708, 713 (1971); *State v. Humphreys*, 275 N.C. App. 788, 789, 853 S.E.2d 789, 791 (2020). Defendant argues his actions merely apprised the officers of his constitutional rights. *See Leigh*, 278 N.C. at 251, 179 S.E.2d at 713 (explaining that "criticizing or questioning an officer while he is performing his duty, when done in an orderly manner, does not amount to obstructing or delaying an officer"). We disagree.

¶ 30 Defendant has no right to breach the peace on private or public property or to harass others to constitutionally "express himself." Also, Defendant's harassing customers, arguing with employees, and spilling flammable fuel on private property are independent grounds for other potential charges and crimes to warrant the officers' request for identification.

¶ 31 A defendant commits the offense of resisting, delaying, or obstructing a public officer by "willfully and unlawfully resist[ing], delay[ing] or obstruct[ing] a public officer in discharging or attempting to discharge a duty of his office[.]" N.C. Gen. Stat. § 14–223. This Court has previously held the failure by an individual to provide personal identifying information during a lawful stop constitutes resistance, delay, or obstruction within the meaning of N.C. Gen. Stat. § 14-223. *See State v. Friend*, 237 N.C. App. 490, 493, 768 S.E.2d 146, 148 (2014).

¶ 32 Actions or even language which cause delays or obstruction in an officer's investigation can constitute this offense. *See Leigh*, 278 N.C. at 249, 179 S.E.2d at 711. Defendant was not a mere bystander present in a public place, but rather an identified subject of the complaint that initiated the dispatch call and the reason for the investigation.

¶ 33 Defendant's actions prevented and obstructed Officer Cruse from conducting a proper and prompt investigation into the alleged disturbance. Defendant refused to provide verifiable identification and delayed the officers' ability to promptly investigate and resolve the call. While Defendant did in fact attempt to give Officers Cruse and Fuquay a card with purported information, that was not immediately verifiable as accurate. The officers were unable to ensure accurate information was presented to investigate the disturbance dispatch, close out the call, and complete their report.

¶ 34 Together with the totality of all the evidence, Defendant's refusal to provide verifiable identification to law enforcement is for a jury to decide whether his conduct amounted to resisting, delaying, or obstructing the officers. N.C. Gen. Stat. § 14-223; *see State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (stating "contradictions and discrepancies of fact are for the jury to resolve and do not warrant dismissal"). Defendant's conduct and refusals tend to show the investigation was obstructed or delayed the release of other witnesses as Officer Cruse was unable to conduct a lawful investigation and complete the call. *Id.*

¶ 35 As noted, Officer Cruse arrived in uniform, identified himself, and was properly investigating and lawfully conducting a complaint of Defendant's actions breaching the peace on private property, by threatening and harassing others. By refusing to identify himself and cooperate with Officer Cruse's investigation, sufficient evidence of this element was presented tending to show and for the jury to find Defendant resisted, delayed, or obstructed the officer in discharging or attempting to discharge a duty of his office to survive Defendant's motion to dismiss. *See Peters*, 255 N.C. App. at 387, 804 S.E.2d at 815 (citing N.C. Gen.

Stat. § 14-223). Viewing the evidence in the light most favorable to the State, substantial evidence supports the fourth element that Defendant resisted, delayed, or obstructed the officer in discharging or attempting to discharge a duty of his office to overcome a motion to dismiss. *Id.* Defendant's argument is without merit.

3. Willful and Unlawful Conduct

¶ 36 Defendant asserts the trial court erred in denying his motion to dismiss the charge of resisting, delaying, or obstructing a public officer because his actions were justified and not willful. "Willful" is defined as "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Brackett*, 306 N.C. 138, 142, 291 S.E.2d 660, 662 (1982) (internal citation omitted).

¶ 37 As noted, Officer Cruse was properly dispatched to and was investigating a disturbance call, wherein Defendant was identified as the suspect, and he lawfully conducted a brief detention to identify Defendant. "Those [communications] intended to hinder or prevent an officer from carrying out his duty admittedly are discouraged by [N.C. Gen. Stat. §14-223]." *State v. Singletary*, 73 N.C. App. 612, 615, 327 S.E.2d 11, 13 (1985) (citation omitted).

¶ 38 Again, Defendant wrongfully rests his arguments on the detention being unlawful, as well as offering the card to justify his belligerency, conduct, and failure to provide verifiable identification. Defendant correctly points out the Court in *Friend* does not require a government-issued identification, although officers may require defendants to present verifiable identification. *Friend*, 237 N.C. App. at 493, 768 S.E.2d at 148.

¶ 39 As the State correctly argues, Defendant's card did not provide a legal name, photo, date of birth, address, or any other identifying information, other than initials and a last name. Defendant's vehicle also displayed out-of-state license plates preventing officers from immediately verifying identity and ownership, until his out- of-state driver's license was retrieved from inside the vehicle.

¶ 40 The State's evidence also tends to show Defendant was the identified subject of the investigation, was observed harassing others, spewing profanities and verbal bile, spilling gasoline on private property, and being uncooperative by refusing to offer information to delay and prolong the officers' investigation. *Singletary*, 73 N.C. App. at 615, 327 S.E.2d at 13. Defendant was the subject of the investigation and not a

mere bystander in a public place. Defendant argues nothing to grant a pre-emptive dismissal based on any justification or lack of willfulness.

¶ 41 Viewing the evidence in the light most favorable to the State, substantial evidence tends to show the fifth element that Defendant acted willfully and unlawfully and was intentional and without justification or excuse to overcome Defendant's motion to dismiss. *See Peters*, 255 N.C. App. at 387, 804 S.E.2d at 815 (citing N.C. Gen. Stat. § 14-223).

¶ 42 Officer Cruse reasonably believed Defendant was the subject of the complaint, properly conducted an investigatory detention, and lawfully requested Defendant's verifiable identification to conduct and complete an investigation. Substantial evidence was presented of each essential element of the offense charged, and of Defendant being the perpetrator of such offense. *Id.* The trial court did not err by denying Defendant's motion to dismiss. His argument is without merit and overruled.

V. Waiver of Counsel

¶ 43 **[2]** Defendant argues the trial court erred when it allowed Defendant to waive counsel and represent himself in superior court after Defendant signed a waiver of counsel in district court.

A. Standard of Review

¶ 44 This court reviews the sufficiency of a trial court's statutory inquiry concerning a defendant's waiver of his rights to counsel *de novo*. *State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011) (citations omitted).

B. Analysis

¶ 45 Both the Constitution of the United States and the North Carolina Constitution recognize criminal defendants have a right to assistance of counsel. U.S. Const. Amend. VI; N.C. Const. Art. I, §§ 19, 23; *see also State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000). Defendants also have the right to waive counsel, represent themselves, and handle their case without assistance of counsel. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972).

¶ 46 Before a defendant is allowed to waive the right to counsel, a trial court must conduct a statutorily-required colloquy to determine that "constitutional and statutory standards are satisfied." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008). Courts "must determine whether the defendant knowingly, intelligently and voluntarily waives the right to in-court representation by counsel." *Id.*

¶ 47 The procedure to waive counsel is codified in N.C. Gen. Stat. § 15A-1242 (2021). Courts may only enter an order to allow defendants to waive their right to counsel after being satisfied the movant: (1) has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled; (2) understands and appreciates the consequences of this decision; and, (3) comprehends the nature of the charges and proceedings and the range of permissible punishments. *Id.*

¶ 48 The record indicates Defendant executed a written disclosure and waiver of counsel on 3 October 2020 in open court during district court proceedings. Written waivers of counsel, certified by the trial court, create a rebuttable presumption that the waiver was executed knowingly, intelligently, and voluntarily pursuant to N.C. Gen. Stat. § 15A-1242; *State v. Kinlock*, 152 N.C. App. 84, 89, 566 S.E.2d 738, 741 (2002), *aff'd per curiam*, 357 N.C. 48, 577 S.E.2d 620 (2003). Once a written waiver of counsel is executed and certified by the trial court, subsequent waivers or inquiries are not necessary before further proceedings. *State v. Watson*, 21 N.C. App. 374, 378, 204 S.E.2d 537, 540 (1974).

¶ 49 Once the initial waiver of counsel was executed, it was not necessary for successive written waivers to be executed, nor for additional inquiries to be made by the district or superior court pursuant to N.C. Gen. Stat. § 15A-1242. The record on appeal contains no transcript of the proceedings challenging or surrounding the October 2020 waiver. The only evidence in the record before this Court regarding the waiver is the signed waiver and certification made by the district court judge that a proper inquiry and disclosure was made in compliance with N.C. Gen. Stat. § 15A-1242.

¶ 50 An executed waiver creates a "rebuttable presumption" of sufficiency and the record provides no grounds for rebuttal. The record indicates Defendant executed multiple waivers attesting he understood his rights, "voluntarily, knowingly and intelligently" elected to waive counsel and no evidence *contra* exists the initial waiver was statutorily or constitutionally insufficient. The trial court did not err when it allowed Defendant to waive counsel and represent himself in subsequent proceedings. N.C. Gen. Stat. § 15A-1242.

¶ 51 Any asserted inadequacy in a court's further inquiry into Defendant's waiver is immaterial, provided the original waiver was compliant with the statute and was certified by the trial court. Any successive inquiry beyond the original waiver would serve only to determine whether Defendant desired to withdraw his waiver. The record is devoid of any

objection, request to withdraw the waiver, or a request for counsel. Defendant failed to show the initial disclosure and waiver he executed and, which was certified in district court, failed to satisfy the statute. N.C. Gen. Stat. § 15A-1242 (2021). We find no prejudicial or reversible error. Defendant's argument is overruled.

VI. Jury Instruction on Justification or Excuse

¶ 52 **[3]** Defendant argues the trial court erred by failing to instruct the jury on justification or excuse for the charge of resisting, delaying, or obstructing a public officer. N.C. Gen. Stat. § 14-223 (2021).

A. Standard of Review

¶ 53 Trial courts have a duty to instruct the jury on all substantial features of the case arising from the evidence and "must properly instruct the jury as to all essential elements of the offense charged." *State v. Hairr*, 244 N.C. 506, 509, 94 S.E. 2d 472, 474 (1956). Errors in jury instructions are "preserved for appellate review, even without objection, 'when the trial court deviates from an agreed-upon pattern instruction.' " *State v. Clagon*, 279 N.C. App. 425, 432, 865 S.E.2d 343, 348 (2021) (internal citation omitted).

B. Analysis

¶ 54 Defendant failed to object to jury instruction at trial both during the charge conference and when asked by the trial court following the delivery of instruction to the jury. No evidence in the record indicates Defendant objected to the jury instructions agreed upon at the charge conference. After delivering the instructions to the jury, the trial court held the following colloquy with the parties:

> THE COURT: Before sending the verdict sheets to the jury and allowing them to begin their deliberations, I will hear at this time any objections or corrections to the Court's charge to the jury. First from the State?
>
> STATE: No, sir.
>
> THE COURT: From the Defendant?
>
> DEFENDANT: No, sir.

¶ 55 Defendant's failure to request, to object prior to or after the instructions were given to the jury, along with his express agreement after the instructions were given to the jury, constitutes invited error. Defendant's invited error waived any "right to all appellate review concerning the

invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (citation omitted).

¶ 56 We find instructive and precedential our Supreme Court's determination in *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998). The Court examined defense counsel's involvement in jury instructions in a capital murder-death penalty case. *Id.* The Court held: "Counsel . . . did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal." *Id.* at 570, 508 S.E.2d at 275 (citation omitted).

¶ 57 The record shows the jury instructions: (1) were agreed upon at the charge conference; (2) were not objected to at the charge conference; (3) were not objected to when provided to the jury; or, (4) when Defendant was given a further opportunity to object by the trial court before the jury retired. No deviations from the agreed-upon jury instructions were made by the trial court. By failing to object at trial and expressly agreeing to the jury instructions as given, Defendant waived any right to appeal this issue. Defendant's argument is barred as invited error. *Id.* Defendant's argument is dismissed.

VII. Conclusion

¶ 58 Upon *de novo* review, the trial court did not err in denying Defendant's motion to dismiss. Substantial evidence of each essential element of the charged offense of resisting, delaying, or obstructing a police officer, and of Defendant being the perpetrator of such offense, was presented to submit the charge to the jury. Officer Cruse was lawfully discharging his duties in responding to a breach of the peace and disturbance call and was within his rights to require Defendant, the identified subject, to provide verifiable identification.

¶ 59 With the totality of the circumstances and evidence introduced and admitted, Defendant's failure to provide the requested identification was sufficient to submit the charge and evidence to the jury for their consideration and resolution.

¶ 60 Defendant was apprised of his rights to counsel and expressly waived his right to assistance of counsel during district court proceedings. Defendant's waiver was certified by the trial court and sufficient to waive his right to counsel in further proceedings. Nothing in the record indicates the court failed to statutorily comply with apprising Defendant

of his rights prior to Defendant waiving counsel in district court. The superior court was not required to further apprise Defendant of his right to counsel and to undertake another statutory colloquy without request or objection.

¶ 61 Defendant invited any purported error by failing to object to the agreed-upon jury instructions at the charge conference or during and after delivery to the jury. No evidence suggests any deviation from the agreed-upon instructions.

¶ 62 Defendant received a fair trial, free from prejudicial errors he preserved or argued. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge GORE concurs.

Judge INMAN concurs in the result.

STATE OF NORTH CAROLINA
v.
JACKIE ALAN PIERCE, DEFENDANT

No. COA21-628

Filed 20 September 2022

1. Assault—law enforcement agency animal—attempt—serious harm—lesser-included offense—jury instructions

In defendant's prosecution for attempting to cause serious harm to a law enforcement agency animal (N.C.G.S. § 14-163.1(b)), the trial court did not err by declining defendant's request that the jury be instructed on the lesser-included offense of attempting to harm a law enforcement agency animal (N.C.G.S. § 14-163.1(c)). Although defendant argued that he wielded his makeshift spear in a defensive attempt to keep the police dog at bay, his purportedly defensive actions did not negate or conflict with the evidence that he intended serious harm, through his verbal threats that he would kill the police dog and his wielding of the makeshift spear and knife against the dog in a way that caused the dog's handler to fear for the dog's safety.

2. Assault—law enforcement agency animal—jury instructions —self-defense—lawful performance of official duties

In defendant's prosecution for attempting to cause serious harm to a law enforcement agency animal (N.C.G.S. § 14-163.1(b)), the trial court did not commit plain error by not giving a jury instruction on self-defense. The self-defense instruction was inapplicable where defendant's purportedly defensive actions were taken against a law enforcement officer lawfully acting in the performance of his official duties—here, responding to a request for emergency assistance with an armed person locked inside his home threatening self-harm.

3. Assault—law enforcement agency animal—jury instructions —willfulness—plain error analysis

In defendant's prosecution for attempting to cause serious harm to a law enforcement agency animal (N.C.G.S. § 14-163.1(b)), the trial court did not commit plain error by not including willfulness in its instruction on the elements of the crime charged. Even assuming the trial court erred, defendant could not show prejudice where the evidence showed unequivocally that defendant's actions were willful—specifically, defendant threatened to kill the police dog and then wielded a makeshift spear and a knife against the dog in a dangerous manner.

Appeal by Defendant from judgment entered 22 April 2021 by Judge James P. Hill, Jr., in Randolph County Superior Court. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for the State.

Hynson Law, PLLC, by Warren D. Hynson, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Jackie Alan Pierce ("Defendant") appeals from a judgment entered after a jury found him guilty of attempting to cause serious harm to a law enforcement agency animal under N.C. Gen. Stat. § 14-163.1(b) (2021). On appeal, Defendant contends that the trial court erred in declining to instruct the jury on a lesser-included offense and plainly erred in failing to instruct the jury on self-defense and willfulness. After careful review, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record below discloses the following:

¶ 3 On 8 September 2018, the Archdale Police Department ("APD") received a call from the Randolph County Sheriff's Office requesting assistance with a person armed with a knife and handgun who was threatening self-harm. APD routinely responded to such requests for assistance. Upon arrival at the scene, several APD officers were met in the front yard by Defendant's brother, who informed them that Defendant was drunk, armed with a knife, and had locked himself inside his bedroom. Responding officers knew Defendant from prior domestic disturbance calls from his family.

¶ 4 The APD officers entered the home and tried talking to Defendant through his bedroom door, as they had previously resolved a similar situation with Defendant peacefully. Defendant refused to come out and told the officers that "law enforcement[] would have to kill him if [they] entered." Defendant also threatened to hurt the officers if they tried to stop him. Defendant continued to grow more aggressive in his statements to law enforcement despite their attempts to negotiate a peaceful resolution.

¶ 5 With their efforts at de-escalation falling short, the officers alerted Defendant that they would be sending in a police dog, Storm, to subdue him if he did not cooperate. Police had Storm bark to let Defendant know that he would be utilized if Defendant did not comply. Defendant refused and "said . . . that he would kill law enforcement or [they] would have to kill him, that he would kill the dog."

¶ 6 Storm's handler kicked in Defendant's bedroom door. Inside the room, Defendant held a knife in one hand and a makeshift spear—crafted from a knife attached to a level—in the other. Defendant thrust the spear toward Storm at least five times, and Storm's handler believed the action to be a threat to the dog's safety. Defendant then lowered the level to try and cut himself with the knife held in his other hand, and Storm's handler instructed the dog to bite Defendant. Defendant dropped the spear as Storm's handler released the dog. Defendant then raised the arm holding the knife in what the handler perceived as a potentially "threatening gesture." Storm bit Defendant in the elbow of that arm, causing him to drop the knife. Storm then released Defendant, and APD officers took Defendant into custody.

¶ 7 On 7 October 2019, a grand jury indicted Defendant for willfully attempting to cause serious harm to a law enforcement agency animal.

At trial, the APD officers who responded to the call testified consistent with the above recitation of the facts. Defendant rested his case without presenting further evidence. At the charge conference, Defendant's counsel requested an instruction on the lesser-included offense of attempting to cause harm to a law enforcement agency animal; the trial court denied that request. Following instruction and deliberation, the jury found Defendant guilty of the charged offense on 21 April 2021. The trial court sentenced Defendant to 6 to 17 months imprisonment, suspended upon 36 months supervised probation. Defendant gave notice of appeal in open court.

II. ANALYSIS

¶ 8 Defendant offers three principal arguments, that the trial court: (1) erred in rejecting his special instruction on the lesser-included offense of attempting to harm a law enforcement agency animal; (2) plainly erred in failing to instruct the jury on self-defense; and (3) plainly erred in omitting willfulness in the jury instruction on the elements of the crime charged. We disagree.

A. Standards of Review

¶ 9 Preserved challenges to jury instructions are reviewed *de novo*. *State v. Richardson*, 270 N.C. App. 149, 152, 838 S.E.2d 470, 473 (2020). In determining whether the requested instruction is warranted, we view the evidence in the light most favorable to the defendant. *State v. Debiase*, 211 N.C. App. 497, 504, 711 S.E.2d 436, 441 (2011). To prevail on appeal, the defendant must show that there is a "reasonable possibility" that the jury would have reached a different result had the requested instruction been given. *State v. Brewington*, 343 N.C. 448, 454, 471 S.E.2d 398, 402 (1996).

¶ 10 We review unpreserved challenges to jury instructions under the plain error standard when such error is adequately asserted in a defendant's brief. *State v. Foye*, 220 N.C. App. 37, 44, 725 S.E.2d 73, 79 (2012); *see also* N.C. R. App. P. 10(a)(4) (2022) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. The Requested Lesser-Included Instruction

¶ 11 **[1]** Defendant requested, and the trial court refused, a jury instruction on the lesser-included offense of attempting to harm a law enforcement agency animal under N.C. Gen. Stat. § 14-163.1(c) (2021).

¶ 12 The State concedes, and we agree, that attempting to cause harm to a law enforcement animal under Subsection 14-163.1(c) is a lesser-included offense of attempting to cause serious harm to a law enforcement animal under Subsection 14-163.1(b), as the latter "contains all of the essential elements of the [former]." *State v. Smith*, 267 N.C. App. 364, 369, 832 S.E.2d 921, 925 (2019).

¶ 13 The trial court errs in denying this requested instruction if, in the light most favorable to Defendant, "there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (citation and quotation marks omitted). But " '[w]hen the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime,' an instruction on lesser included offenses is not required." *State v. Northington*, 230 N.C. App. 575, 578, 749 S.E.2d 925, 927 (2013) (quoting *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972)).

¶ 14 The sole distinction between the felony of attempting to cause serious harm to a law enforcement agency animal under Subsection 14-163.1(b) and misdemeanor attempting to cause harm to a law enforcement agency animal under Subsection 14-163.1(c) is the gravity of harm involved. The statute differentiates these offenses by defining serious harm as any harm that:

> a. Creates a substantial risk of death.
>
> b. Causes maiming or causes substantial loss or impairment of bodily function.
>
> c. Causes acute pain of a duration that results in substantial suffering.
>
> d. Requires retraining of the law enforcement agency animal or assistance animal.
>
> e. Requires retirement of the law enforcement agency animal or assistance animal from performing duties.

N.C. Gen. Stat. § 14-163.1(a)(4) (2021).

¶ 15 Defendant argues that, because the evidence shows he wielded the makeshift spear in a defensive attempt to "keep the dog at bay" and not in a more aggressive posture, there was evidence from which a jury could find that he acted without attempting to cause serious harm within the above statutory definition. We are not persuaded by this argument.

¶ 16 That the evidence shows Defendant took a more defensive stance in his confrontation with Storm does not negate the other uncontested evidence showing Defendant intended Storm deadly harm. A person may act in self-defense lethally just as well as non-lethally. APD officers testified, and Defendant did not rebut, that Defendant repeatedly expressed an intent to harm and kill police and/or Storm if they entered his room. When that occurred, Defendant wielded a spear fashioned from a level and knife toward Storm in an action that caused Storm's handler to fear for the animal's safety; indeed, that Defendant modified a knife into a *more* dangerous weapon evinces an intent to cause greater harm, even if defensively. After Defendant dropped the spear and Storm was released, he held the other knife in a perceptibly "threatening gesture." Knives, so used with express intention to cause death, are deadly weapons capable of causing serious injury. *See State v. Batts*, 303 N.C. 155, 161, 277 S.E.2d 385, 389 (1981) (noting that "[a] knife can be found to be a deadly weapon if, under the circumstances of its use, it is an instrument which is likely to produce death or great bodily harm, having regard to the size and condition of the parties and the manner in which the knife is used"); *State v. Walker*, 204 N.C. App. 431, 444, 694 S.E.2d 484, 493 (2010) (explaining that small or ordinary items may be deadly weapons if "wielded with the requisite evil intent and force").

¶ 17 Because Defendant's purportedly defensive actions do not negate or conflict with the evidence that he intended serious harm—through verbal threats of death and wielding a makeshift spear and knife against Storm—we hold the trial court did not err in denying his requested instruction on the lesser-included offense of misdemeanor attempted harm to a law enforcement animal. *See Northington*, 230 N.C. App. at 578, 749 S.E.2d at 927.

C. The Self-Defense Instruction

¶ 18 **[2]** Defendant next argues that the trial court committed plain error in failing to give an instruction on self-defense. Though Defendant acknowledges that a self-defense instruction is unavailable when the defensive actions were taken against a law enforcement officer "lawfully acting in the performance of his or her official duties," N.C. Gen. Stat. § 14-51.3(b) (2021), he contends that the APD officers were not acting in furtherance of any official duties "[b]ecause it was not apparent what,

if any, crime [Defendant] was committing by locking himself in his own bedroom with a knife at the time the police kicked in his door and commanded Storm to attack him." Again, we disagree.

¶ 19 APD officers testified at trial that they were responding to a call for assistance from the Randolph County Sheriff's Office in connection with an armed man who was locked inside his home and threatening self-harm. The officers were authorized to enter the house by Defendant's family to try and prevent harm to their relative, and APD officers had previously responded to similar domestic incidents involving Defendant. The exigency of the situation was underlined by Defendant's threats to kill police and Storm, and the report of potential self-harm was proved *ex post facto* by his attempts to slice his arm with a knife when confronted by the dog.

¶ 20 Law enforcements' official duties extend beyond investigating crime. *See State v. Gaines*, 332 N.C. 461, 471, 421 S.E.2d 569, 574 (1992) ("[T]he official duties of law enforcement officers . . . include[] such duties as investigative work (including stakeouts), crowd or traffic control, and routine patrol by automobile."). Police routinely respond to calls for assistance from ordinary citizens to address domestic disturbances in a variety of contexts. *See, e.g.*, *In re I.K.*, 377 N.C. 417, 2021-NCSC-60, ¶ 32 (recounting law enforcement's response to a domestic disturbance call in a child dependency case); *see generally State v. Madures*, 197 N.C. App. 682, 678 S.E.2d 361 (2009) (describing police's prior response to a 911 call reporting a domestic disturbance that gave rise to a conviction for communicating threats). Our Supreme Court has elsewhere cautioned us to avoid "an unduly narrow and unrealistically restrictive interpretation of the term 'official duties' as it relates in actual practice to law enforcement officers." *Gaines*, 332 N.C. at 471, 421 S.E.2d at 574 (emphasis added). Defendant does not cite, and we cannot find, any North Carolina caselaw where a police response to a domestic disturbance or an emergency call involving threats of self-harm was deemed outside law enforcements' official duties.

¶ 21 Other areas of the law demonstrate that law enforcement officers are tasked with more than just solving crimes and that these other duties include responding to requests for help with exigent threats to members of the public. For example, the Supreme Court of the United States has recognized an "emergency aid exception" to the Fourth Amendment's warrant requirement,[1] which "does not depend on the officers' subjective

1. Outside of a brief reference to "constitutional considerations" in his reply brief, Defendant has never contested the constitutionality of any of the police actions taken in

intent or the seriousness of any crime they are investigating when the emergency arises." *Michigan v. Fisher*, 558 U.S. 45, 47, 175 L. Ed. 2d 410, 413 (2009). The exception "requires only an objectively reasonable basis for believing that a person within the house is in need of immediate aid." *Id.* (cleaned up). Thus, police "responding to a report of a disturbance" and "encounter[ing] a tumultuous situation [at] the house" caused by an irate and outwardly violent inhabitant may enter the home to prevent him from "hurt[ing] himself in the course of his rage" or render him aid upon a reasonable belief that he "had hurt himself . . . and needed treatment that in his rage he was unable to provide." *Id.* at 48-49, 175 L. E. 2d at 413-14.

¶ 22 This Court has also formally recognized the "community caretaking" functions of law enforcement in analyzing warrantless searches and seizures. *State v. Smathers*, 232 N.C. App. 120, 126, 753 S.E.2d 380, 384 (2014). The doctrine is premised on public policy "giv[ing] police officers the flexibility to help citizens in need or protect the public even if the prerequisite suspicion of criminal activity which would otherwise be necessary for a constitutional intrusion is nonexistent." *Id.* In describing this doctrine, we favorably quoted the following observation from West Virginia's highest court:

> The doctrine recognizes that, in our communities, law enforcement personnel are expected to engage in activities and interact with citizens in a number of ways beyond the investigation of criminal conduct. Such activities include a general safety and welfare role for police officers in helping citizens who may be in peril or who may otherwise be in need of some form of assistance.

Id. (quoting *Ullom v. Miller*, 705 S.E.2d 111, 120-23 (W.Va. 2010)). Of note, law enforcement officers are specially trusted with the custody of mentally ill persons believed to be a threat to self or others and thus subject to involuntary commitment examination and are explicitly authorized to assist those requiring immediate psychiatric hospitalization as dangerous to self. *See, e.g.*, N.C. Gen. Stat. § 122C-262(a) (2021) (providing under our involuntary commitment statutes, "[a]nyone, *including a law enforcement officer*, who has knowledge of an individual who is subject

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this case. Needless to say, a reply brief is not the place for new argument, let alone one of constitutional magnitude. *See, e.g.*, *Animal Prot. Soc. v. State*, 95 N.C. App. 258, 269, 382 S.E.2d 801, 808 (1989) (declining to consider a newly-raised constitutional argument asserted in a reply brief).

to inpatient commitment [as mentally ill and dangerous] . . . and who requires immediate hospitalization *to prevent harm to self or others*, may transport the individual directly . . . for examination by a commitment examiner[.]" (emphasis added)).

¶ 23 In short, law enforcement's ordinary and lawful duties are not strictly limited to investigating crimes, and they can include responding to a request for emergency assistance with an armed person threatening self-harm. Defendant's plain error argument—premised entirely on the claim that "it was not apparent what, if any, crime [Defendant] was committing"—therefore fails.

D. The Willfulness Instruction

¶ 24 **[3]** In his final argument, Defendant asserts that the trial court committed plain error in failing to include willfulness in its instruction on the elements of the crime charged. Notwithstanding the fact that the trial court followed the pattern jury instructions—a practice explicitly encouraged by our Supreme Court, *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004)—we hold that Defendant cannot show the requisite prejudice.

¶ 25 The evidence unequivocally shows that Defendant acted willfully, *i.e.*, "purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law." *In re Adoption of Hoose*, 243 N.C. 589, 594, 91 S.E.2d 555, 558 (1956) (citation and quotation marks omitted). He verbally threatened to kill Storm numerous times, and he followed up on those threats by waiving a makeshift spear at the dog in a dangerous manner. He then wielded the knife toward Storm in a perceptibly threatening way. There is no indication from the record evidence that Defendant acted with any concern for the lawfulness of his own or the APD officers' actions. In light of this uncontradicted evidence, it is not probable that the jury would have reached a different result absent the alleged error, and Defendant cannot show plain error. *See Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

III. CONCLUSION

¶ 26 For the foregoing reasons, we hold that Defendant has failed to demonstrate reversible error.

NO ERROR; NO PLAIN ERROR.

Judges TYSON and GORE concur.

STATE v. SLAUGHTER

[285 N.C. App. 529, 2022-NCCOA-632]

STATE OF NORTH CAROLINA
v.
JACKIE SLAUGHTER, DEFENDANT

No. COA21-619

Filed 20 September 2022

1. Criminal Law—courtroom restraints—statutory procedure —waiver—prejudice

Defendant waived review of any error in the trial court's order that he be restrained in leg shackles during his trial for attempted murder where he was given the opportunity to object but failed to do so. Even if defendant had objected, any error in the trial court's failure to instruct the jury that it should not consider the restraints in its deliberations was not prejudicial because the trial court primarily followed its statutory mandate and nothing in the record indicated that the jury was affected by, or was even aware of, defendant's restraints.

2. Criminal Law—motion for appropriate relief—notice of appeal —appellate jurisdiction

Where the record on appeal contained no evidence that defendant had timely filed notice of appeal from the trial court's order denying his motion for appropriate relief, the Court of Appeals dismissed defendant's appeal for lack of jurisdiction.

Appeal by Defendant from judgment entered 16 March 2021 by Judge William H. Coward in Cherokee County Superior Court. Heard in the Court of Appeals 10 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Law Office of Bill Ward & Kirby Smith, P.A., by Kirby H. Smith, III, for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Jackie Slaughter appeals from a judgment entered upon a jury's verdict finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant argues the trial court abused its discretion by failing to follow the statutory mandate in

ordering Defendant to be shackled at trial. Defendant also contends that the trial court erred by failing to conduct an evidentiary hearing on Defendant's Motion for Appropriate Relief ("MAR"). We find no error and dismiss the MAR issue on appeal for lack of jurisdiction.

I. Factual and Procedural History

¶ 2 On 7 May 2017, Defendant struck an individual with a knife. When officers arrived at the scene, they detained Defendant with handcuffs.

¶ 3 A grand jury charged Defendant with attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. On 12 March 2021, it was put on the record, outside of the presence of the jury, that Defendant was to be shackled for the remainder of the trial "[b]ecause of some comments [Defendant] made to some folks who are assisting [Defendant] in getting back and forth to court[.]" The judge confirmed that the shackles were unable to be seen from where the jurors sat. When asked if Defendant had any questions about the restraints, Defendant answered, "No. I am Satisfied." When Defendant's counsel was asked the same, Defendant's counsel replied, "No, Your Honor[,]" and proceeded to explain that he was satisfied with Defendant's conduct throughout the trial.

¶ 4 On 16 March 2021, Defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury, but the jury did not reach a unanimous verdict on the charge of attempted first-degree murder and a mistrial was declared on the murder charge. The trial court sentenced Defendant to a minimum of 117 months and a maximum of 153 months in the North Carolina Division of Adult Corrections. Defendant appealed.

¶ 5 On 25 March 2021, Defendant filed a MAR requesting the trial court to dismiss the assault with a deadly weapon charge or, in the alternative, order a new trial. The MAR was denied without a hearing.

II. Analysis

A. Restraint Order

¶ 6 **[1]** Defendant contends that the trial court abused its discretion by "fail[ing] to follow the statutory mandate when it ordered [Defendant] to be held in leg shackles during trial[,]"and requests a "revers[al] [of] his conviction and remand [of] his case back to [the trial court] for a new trial."

¶ 7 "The propriety of physical restraints depends upon the particular facts of each case, and the test on appeal is whether, under all of the

circumstances, the trial court abused its discretion." *State v. Tolley*, 290 N.C. 349, 369, 226 S.E.2d 353, 369 (1976) (citations omitted). Generally, "a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances." *Id.* at 365, 226 S.E.2d at 366 (citations omitted). North Carolina General Statutes section 15A-1031 is an exception to the general rule and allows "[a] trial judge [to] order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons." N.C. Gen. Stat. § 15A-1031 (2021). In doing so, the statute requires a trial court judge to:

> (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his actions; and
>
> (2) Give the restrained person an opportunity to object; and
>
> (3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.

Id.

¶ 8 "If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact." *Id.* However, our appellate courts have "held that failure to object to shackling waives any error which may have been committed." *State v. Sellers*, 245 N.C. App. 556, 558, 782 S.E.2d 86, 88 (2016) (internal quotation marks omitted) (quoting *Tolley*, 290 N.C. at 371, 226 S.E.2d at 370). In *Tolley*, our Supreme Court upheld an order restraining a defendant due to a previous attempted escape before trial when there were no objections from the defendant or his attorney about the restraint at trial. *Tolley*, 290 N.C. at 371–72, 226 S.E.2d at 370.

¶ 9 Here, neither Defendant nor Defendant's counsel objected to the restraint order by the trial court when given the opportunity. Like in *Tolley*, when Defendant and his counsel were asked if there were any questions or objections, neither objected. *Id.* at 371, 226 S.E.2d at 370. Because Defendant was given the chance to respond out of the presence of the jury about the restraints and did not, Defendant "waive[d] any error which may have been committed." *Id.*

¶ 10 Assuming *arguendo* that Defendant or Defendant's counsel objected, the trial court followed part of its statutory mandate, and any error was not prejudicial.

¶ 11 A trial judge does not need formal evidence to order a defendant shackled. *Id.* at 368, 226 S.E.2d at 368 (citations omitted). Rather, "knowledge may stem from official record or what law enforcement officers have told him." *Id.* In *State v. Wilson*, the defendant contended that the trial court ordered the defendant to be restrained because of the "bailiff's opinion." *State v. Wilson*, 354 N.C. 493, 519, 556 S.E.2d 272, 289 (2001). The Supreme Court of North Carolina ruled that the trial court did not err, in part, because the restraint order was based on testimony by an officer in charge of the defendant that, though there had been no problems in the courtroom, the officer "had a lot of trouble out of [the defendant] while he's been in jail." *Id.* at 520, 556 S.E.2d at 289.

¶ 12 Here, the trial judge, outside the presence of the jury, stated his reasoning for ordering Defendant to be shackled was based on comments Defendant had made to those transporting him to court. The trial court then allowed Defendant and Defendant's counsel the opportunity to object. However, there is no indication that the trial court judge instructed the jury "that the restraint is not to be considered in weighing evidence or determining the issue of guilt." N.C. Gen. Stat. § 15A-1031(3). Regardless, our Supreme Court has held that where a defendant fails to cite anything from the record to suggest they were prejudiced by the restraint during trial, "the risk is negligible that the restraint undermined the dignity of the trial process or created prejudice in the minds of the jurors by suggesting that [the] defendant is a dangerous person." *State v. Holmes*, 355 N.C. 719, 729, 565 S.E.2d 154, 163 (2002) (citation omitted); *see State v. Simpson*, 153 N.C. App. 807, 809, 571 S.E.2d 274, 276 (2002) (holding there was no prejudicial error when the trial court failed to instruct the jury not to consider the restraints when "there [was] no showing on [the] record that the jurors were affected by, or even aware of, [the] defendant's restraint"). Here, Defendant has not pointed to anything in the record that indicates the jury "was affected by, or even aware of [Defendant's] restraint." *Simpson*, 153 N.C. App. at 809, 571 S.E.2d at 276. We conclude that the trial court primarily followed its statutory mandate and there was no prejudicial error by the trial court in failing to instruct the jury on Defendant's restraints.

B. MAR

¶ 13 **[2]** Defendant further argues that the trial court erred by failing to conduct an evidentiary hearing on Defendant's MAR. However, to complete

an appeal, "notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure." N.C. Gen. Stat. § 15A-1448(b) (2021). The North Carolina Rules of Appellate Procedure require notice of appeal in criminal cases to be filed "within fourteen days after a ruling on a motion for appropriate relief made during the fourteen-day period following entry of the judgment or order." N.C. R. App. P. 4(a)(2).

¶ 14 This Court has previously addressed this issue in *State v. Hagans*, 188 N.C. App. 799, 656 S.E.2d 704 (2008). In *Hagans*, the defendant filed a MAR "on the grounds that his right to be free from double jeopardy was violated" and the trial court denied his MAR. *Id.* at 805, 656 S.E.2d at 708. This Court concluded that the record on appeal did not include a timely notice of appeal from the denial of his MAR and that the "Court [was] without jurisdiction to review [the] defendant's assignment of error to the extent it challenges the denial of his [MAR]." *Id.* at 806, 656 S.E.2d at 709.

¶ 15 Here, like in *Hagans*, there is no evidence that Defendant filed timely notice of appeal from the trial court's order denying Defendant's MAR. Therefore, this Court is without jurisdiction to review Defendant's MAR challenge.

III. Conclusion

¶ 16 We hold that the trial court did not abuse its discretion in ordering Defendant restrained during trial, and this Court lacks jurisdiction to review Defendant's MAR.

NO ERROR IN PART; DISMISSED IN PART.

Judges ZACHARY and WOOD concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF
v.
LONNIE P. MERRITT, DEFENDANT

No. COA22-191

Filed 20 September 2022

1. Attorneys—discipline—attempted sexual relations with current client—evidence of intent

The State Bar Disciplinary Hearing Commission did not err by concluding that defendant attorney violated the Rules of Professional Conduct where the findings of fact supported the conclusion that defendant attempted to engage in sexual relations with a current client in violation of Rule 8.4(a). There was substantial evidence that defendant intended to have sexual relations with his client, as inferred through his overt acts—such as meeting with her in her home rather than at a neutral location because he felt they had a "mutual attraction" and by kissing and touching her and her underclothes—and by the fact that they did not have sexual intercourse on that occasion only because the client said they could not "go any further."

2. Attorneys—discipline—engaged in sexual relationship with current client—evidence of attorney-client relationship

The State Bar Disciplinary Hearing Commission did not err by concluding that defendant attorney violated the Rules of Professional Conduct where the findings of fact supported the conclusion that defendant engaged in a sexual relationship with a current client in violation of Rule 1.19(a). During the time in question, there was substantial evidence from which an attorney-client relationship could be inferred where defendant's actions—including entering into formal representation agreements with the woman, drafting and filing a divorce complaint and summary judgment motion on her behalf, communicating to opposing counsel that he would be filing the complaint, and representing the woman at the motion hearing—constituted the practice of law.

3. Attorneys—discipline—dispositional phase—sexual relations with divorce client—finding that attorney had inadequate boundaries

In a disciplinary matter in which the State Bar Disciplinary Hearing Commission (DHC) concluded that defendant attorney had attempted to engage in sexual relations and did engage in a sexual relationship

with a current client, there was substantial evidence to support the DHC's finding in the dispositional phase that defendant "had inadequate boundaries between his professional and personal relationships" where defendant met with his divorce client outside of business hours and at her home despite his usual practice of meeting clients in a neutral location during certain hours, he acted on a belief that there was a mutual attraction between them, he asked his client if he could kiss her, he conducted lengthy late-night phone calls with her, and he began a sexual relationship with her while she was still a client.

4. Attorneys—discipline—dispositional phase—sexual relations with divorce client—harm to fiduciary relationship

After the State Bar Disciplinary Hearing Commission (DHC) determined that defendant attorney had attempted to engage in sexual relations and did engage in a sexual relationship with a current client, the DHC's conclusion in the dispositional phase that defendant intentionally caused harm to the client and to the profession was supported by substantial evidence where, since defendant was hired to represent the client in her family matters (including divorce, child custody, and child support), it was reasonably foreseeable that an affair would undermine the fiduciary relationship that arose from the attorney-client relationship and cause emotional harm to the vulnerable client.

5. Attorneys—discipline—sexual relations with divorce client—one-year suspension from practicing law—abuse of discretion analysis

After the State Bar Disciplinary Hearing Commission (DHC) determined that defendant attorney had attempted to engage in sexual relations and did engage in a sexual relationship with a current client, there was no abuse of discretion in the imposition of a one-year suspension of defendant's license to practice law where substantial evidence supported the DHC's findings and, in turn, those findings supported its conclusions, and where the DHC demonstrated its consideration of lesser sanctions as well as the factors that justified suspension. The DHC's finding that defendant exhibited a selfish motive was supported by the evidence and, even if another finding—that there existed a pattern of misconduct—was not supported by evidence, there was no prejudicial error.

Appeal by defendant from order entered 21 September 2021 by the Disciplinary Hearing Commission. Heard in the Court of Appeals 23 August 2022.

The North Carolina State Bar, *by Deputy Counsel David R. Johnson*, *for Plaintiff-Appellee.*

Narain Legal PLLC, *by Lucky Narain*, *for Defendant-Appellant.*

CARPENTER, Judge.

¶ 1 Lonnie P. Merritt ("Defendant") appeals from an order of discipline (the "Order") entered by the Disciplinary Hearing Commission (the "DHC") of the North Carolina State Bar (the "State Bar"), concluding he attempted to engage in sexual relations with his current client, C.T., and did engage in sexual relations with C.T. while she was a current client, in violation of the North Carolina Rules of Professional Conduct (the "Rules"). The Order suspended Defendant's license to practice law for one year. After careful review, we affirm the Order.

I. Factual & Procedural Background

¶ 2 This is an attorney discipline case arising from a complaint filed by the State Bar alleging Defendant had an extramarital affair with his current client, C.T.

¶ 3 Defendant was admitted to the State Bar in August 2008. Defendant lived with his wife in Wilmington, North Carolina, where he practiced law. C.T. initially contacted Defendant in December 2017 to discuss marital separation and divorce. In March 2018, C.T. contacted Defendant again after receiving a proposed court filing from her spouse related to their domestic dispute. Defendant agreed to represent C.T. in the matter.

¶ 4 On 9 March 2018, C.T. and Defendant executed an agreement for C.T.'s representation, the Non-Litigation Client Agreement (the "Initial Agreement"). Pursuant to the Initial Agreement, the "Covered Services" included in the representation were, *inter alia*, drafting a consent order for equitable distribution, child custody, and child support. The Initial Agreement also included "seeking an [a]bsolute [d]ivorce" as one of the Covered Services, if such service was requested by C.T. Representation under the Initial Agreement "terminate[d] upon either: (1) the entry of an order with the court, or (2) when the Firm . . . provided Covered Services . . . or (3) [C.T.'s] fail[ure] to pay any fee that [became] due" under the agreement.

¶ 5 On 3 August 2018, C.T. and Defendant signed a second agreement, the Litigation Client Agreement (the "Second Agreement"), in which Defendant was to represent C.T. in the matters of child custody and

child support. The Second Agreement explicitly excluded the "[f]iling for absolute divorce" from the scope of representation. There was no language in the Second Agreement that superseded or nullified the Initial Agreement.

¶ 6 On Saturday, 4 August 2018, Defendant met C.T. after business hours at the health clinic where she worked and where he was not a client, following C.T.'s invitation. C.T. performed an ultrasound of Defendant's heart at no charge and without authorization of the clinic. For the procedure, Defendant removed his shirt at C.T.'s direction. As Defendant parted ways with C.T. at the end of the visit, Defendant advised C.T. that he and her husband's attorney had negotiated a consent order (the "Consent Order"), and it was ready to be signed.

¶ 7 Later that day, Defendant met C.T. at her house to execute the Consent Order, although Defendant never met clients at his own house and normally met clients at a coffee shop or an office space of a colleague. After C.T. and Defendant signed the Consent Order, Defendant sat on the couch with C.T. Defendant "perceived a mutual attraction at the [health] clinic" and "again at [C.T.'s] house." Defendant asked C.T. if he could kiss her, and she consented. The two "made out" on the couch, and Defendant moved his hand under her dress, touching her leg. Defendant also "snapped [C.T.'s Spanx bodysuit undergarment] on her side," causing Defendant and C.T. to laugh. At some point, C.T. asked Defendant to stop. Thereafter, they spoke but did not continue kissing, and Defendant went home. C.T. and Defendant had several "lengthy late-night phone calls," beginning that evening and through August 2018.

¶ 8 On 8 August 2018, the Consent Order was countersigned by C.T.'s husband and her husband's attorney. On 28 August 2018, the Consent Order was filed in the New Hanover County District Court and signed by a district court judge. The Consent Order allowed Defendant to withdraw as counsel for C.T., although there is no evidence in the record of Defendant doing so.

¶ 9 By mid-September, Defendant and C.T. began having sexual intercourse. On 24 September 2018, Defendant signed a divorce complaint on behalf of C.T. as the attorney of record, and the complaint was filed on 26 September 2018. Defendant filed a motion for summary judgment and represented C.T. at the hearing on the motion. On 2 November 2018, a divorce judgment was entered, granting C.T. an absolute divorce.

¶ 10 On 11 January 2021, the State Bar filed a complaint with the DHC against Defendant alleging Defendant violated the Rules by:

(a) "making out" with C.T. at her home because he "perceived a mutual attraction[.]" Defendant attempted to engage in sexual relations with a current client in violation of Rule 8.4(a);

(b) continuing to represent C.T. after they began a romantic relationship, Defendant represented a client under circumstances where his ability to represent her could be materially limited by his personal interests in violation of Rule 1.7(a)(2);

(c) engaging in a sexual relationship with his current client[in violation of] Rule 1.19(a); and

(d) falsely telling C.T. that his wife had threatened to sue her for alienation of affection, Defendant engaged in conduct involving dishonesty, deceit, or misrepresentation in violation of Rule 8.4(c).

The complaint sought disciplinary action against Defendant in accordance with N.C. Gen. Stat. § 84-28. On 10 February 2021, Defendant filed a *pro se* answer to the State Bar's complaint.

¶ 11 On 23 August 2021, the matter was heard before a three-member DHC panel, pursuant to N.C. Gen. Stat. § 84-28.1(b). Defendant was represented by counsel at the hearing. On 21 September 2021, the DHC entered its written Order, in which it made the following findings of fact by clear, cogent, and convincing evidence in the adjudication phase:

(1) Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar (Chapter 1 of Title 27 of the North Carolina Administrative Code).

(2) Defendant, Lonnie P. Merritt, was admitted to the North Carolina State Bar in August 2008, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Rules of Professional Conduct.

(3) During all or part of the relevant periods referred to herein, Merritt was engaged in the practice of law in Wilmington, New Hanover County, North Carolina.

(4) Merritt was properly served with the summons and complaint in this matter.

(5) C.T. hired Merritt in March 2018 for representation in her domestic case.

(6) On Saturday 4 August 2018, Merritt went to C.T.'s home to have her sign a consent order regarding equitable distribution, alimony, child custody, and child support.

(7) After C.T. signed the document, Merritt perceived that there was a mutual attraction, so he asked permission to kiss C.T. and she said yes. When they broke away from "making out" C.T. stated they could not "go any further," so they did not have sexual intercourse that day.

(8) C.T'.'s spouse didn't sign the consent order until 8 August 2018, and it wasn't filed until 23 [sic] August 2018.

(9) After their interaction on 4 August 2018, Merritt and C.T. began a romantic relationship that included lengthy late-night phone calls.

(10) In mid-September 2018, Hurricane Florence hit the Wilmington area. After the storm, Merritt stayed with C.T. at C.T.'s mother's house for two days. Merritt then stayed with C.T. at her home for several more days. Merritt and C.T. began having sex.

(11) Merritt filed a complaint for absolute divorce on C.T.'s behalf on 26 September 2018 and continued to represent C.T. until her divorce was finalized in November 2018.

¶ 12 Based on these findings of fact, the DHC then made the following conclusions of law in the adjudication phase:

(1) All parties are properly before the Hearing Panel and this tribunal has jurisdiction over Defendant,

Lonnie P. Merritt, and the subject matter of this proceeding.

(2) Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) in that Merritt violated the Rules of Professional Conduct in effect at the time of his conduct as follows:

(a) By "making out" with C.T. at her home because he "perceived a mutual attraction," Defendant attempted to engage in sexual relations with a current client in violation of Rule 8.4(a); and

(b) By engaging in a sexual relationship with his current client, Defendant violated Rule 1.19(a).

¶ 13 Finally, the DHC made additional findings of fact and conclusions of law regarding discipline in the dispositional phase. Based on all findings of fact and conclusions of law made by the DHC, it entered its order of discipline, suspending Defendant's license to practice law in the State of North Carolina for one year.

¶ 14 On 19 October 2021, Defendant filed timely written notice of appeal from the Order.

II. Jurisdiction

¶ 15 This Court has jurisdiction to address Defendant's appeal from a final order of the DHC. N.C. Gen. Stat. § 84-28(h) (2021).

III. Issues

¶ 16 The issues before this Court are whether the DHC: (1) erred in concluding Defendant attempted to engage in sexual relations with his current client C.T. by "making out" with her after he "perceived a mutual attraction"; (2) erred in concluding C.T. was a current client when Defendant and C.T. engaged in sexual relations; (3) erred in finding that Defendant had inadequate boundaries between his professional and personal relationships; (4) erred in finding that Defendant chose to undermine the fiduciary relationship he shared with C.T., intentionally causing harm to C.T. and the profession; (5) erred in concluding the factors of "selfish motive" and "pattern of misconduct" are present in Defendant's case; and (6) abused its discretion in suspending Defendant from the practice of law for one year.

IV. Standard of Review

¶ 17 This Court reviews decisions of the DHC using the "whole record" test, "which requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law." *N.C. State Bar v. Leonard*, 178 N.C. App. 432, 437, 632 S.E.2d 183, 187 (2006) (citation and quotation mark omitted); *see also* N.C. Gen. Stat. § 150B-51(5) (2021). "The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion." *N.C. State Bar v. DuMont*, 304 N.C. 627, 643, 286 S.E.2d 89, 99 (1982) (citation omitted). Moreover, the evidence "must rise to the standard of 'clear[, cogent,] and convincing.' " *N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576 S.E.2d 305, 310 (2003) (citation omitted). "[U]nchallenged findings of fact[ ] are binding on appeal." *N.C. State Bar v. Key*, 189 N.C. App. 80, 87, 658 S.E.2d 493, 498 (2008) (citation omitted).

> After reviewing the whole record, this Court must determine whether the DHC's decision has a rational basis in the evidence. [T]he following steps are necessary as a means to decide if a lower body's decision has a "rational basis in the evidence": (1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision? We note, too, that in cases such as the one at issue, e.g., those involving an "adjudicatory phase" (Did the defendant commit the offense or misconduct?), and a "dispositional phase" (What is the appropriate sanction for committing the offense or misconduct?), the whole-record test must be applied separately to each of the two phases.

N.C. State Bar v. Ethridge, 188 N.C. App. 653, 658–59, 657 S.E.2d 378, 382 (2008) (citation and quotation marks omitted).

¶ 18 "The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn." *Id.* at 660, 657 S.E.2d at 383 (citation omitted). However, "[t]he whole record test does not allow the reviewing court to replace the [DHC's] judgment as between two reasonably conflicting views, even though the court could justifiably have

reached a different result had the matter been before it *de novo*." *N.C. State Bar v. Nelson*, 107 N.C. App. 543, 550, 421 S.E.2d 163, 166 (1992).

V. Analysis

A. Challenges to the Adjudication Phase

1. Conclusion of Law 2(a)

¶ 19 **[1]** In his first argument, Defendant contends conclusion of law 2(a) is not supported by findings or substantial evidence. Defendant further contends "the word 'attempt' . . . is generally found within the context of criminal actions," and "[a]ttempt offenses are not listed in the [Rules]." The State Bar argues conclusion of law 2(a) is fully supported by Defendant's stipulations and the undisputed evidence.

¶ 20 Rule 8.4 provides "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct . . . ." N.C. R. Pro. Conduct 8.4(a). Thus, under the Rules, professional misconduct occurs, *inter alia*, when there is an attempt to violate *any* other rule of professional conduct. *See* N.C. R. Pro. Conduct 8.4(a). Rule 1.19 prohibits a lawyer from "hav[ing] sexual relations with a current client of the lawyer" unless "a consensual sexual relationship existed between the lawyer and the client before the legal representation commenced." N.C. R. Pro. Conduct 1.19(a)–(b). "Sexual relations" is defined as "(1) [s]exual intercourse; or (2) [a]ny touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party." N.C. R. Pro. Conduct 1.19(d).

¶ 21 This Court has applied the elements of criminal attempt to an attorney disciplinary action notwithstanding its acknowledgment that the Rules do not contain such a requirement. *See N.C. State Bar v. Livingston*, 257 N.C. App. 121, 129, 809 S.E.2d 183, 189–90 (2017), *disc. rev. denied*, 371 N.C. 112, 812 S.E.2d 853 (2018). The elements for common law criminal attempt are: "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *Id.* at 129, 809 S.E.2d at 189–90 (quoting *State v. Coble*, 251 N.C. 448, 449, 527 S.E.2d 45, 46 (2000)). "Intent is a mental attitude so it must ordinarily be proven by circumstances from which it can be *inferred*." *State v. English*, 241 N.C. App. 98, 106, 772 S.E.2d 740, 746 (citation and quotation marks omitted), *disc. rev. denied*, 368 N.C. 287, 776 S.E.2d 201 (2015).

¶ 22 Here, it can be reasonably inferred from the findings of fact, and the underlying substantial circumstantial evidence supporting these

findings, that Defendant attempted to have sexual relations with C.T. on 15 August 2018. *See id.* at 106, 772 S.E.2d at 746. Despite Defendant's testimony to the contrary, the substantial evidence of record, viewed as a whole, reveals Defendant intended to have sexual relations with C.T. on 15 August 2018. Defendant's intent is evidenced by meeting C.T. inside her home on a Saturday and asking to kiss her. *See id.* at 106, 772 S.E.2d at 746; *Coble*, 251 N.C. at 449, 527 S.E.2d at 46. He performed the overt acts of kissing C.T., touching C.T.'s leg under her dress, and snapping C.T.'s undergarment against her body. *See Coble*, 251 N.C. at 449, 527 S.E.2d at 46. Finally, Defendant did not have sexual intercourse with C.T. because C.T. did not want to "go any further"; thus, Defendant's actions fell short of a completed rule violation. *See id.* at 449, 527 S.E.2d at 46. We conclude the findings show Defendant attempted to have sexual relations with C.T. on 15 August 2018, in violation of Rule 1.19(a). *See id.* at 449, 527 S.E.2d at 46; *Livingston*, 257 N.C. App. at 129, 809 S.E.2d at 189–90; *see also* N.C. R. Pro. Conduct 1.19(a).

¶ 23 Relying on *Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) and citing a lower court's finding of fact in that case, Defendant argues "this Court [has] found kissing not to be 'sexual relations.' " Not only is this proposition inaccurate, the question of whether "kissing" constitutes "sexual relations" was not decided by the *Romulus* Court. Furthermore, *Romulus* did not concern whether an attorney had *attempted* to violate any rule of professional conduct. Rather, the pertinent issue was whether the plaintiff was barred from alimony pursuant to N.C. Gen. Stat. § 50-16.3A(a) for the "illicit sexual behavior" she was alleged to have engaged in during her marriage. *Id.* at 497, 715 S.E.2d at 310. This case is not applicable to the case before us, and Defendant's argument is without merit.

¶ 24 Defendant argues "[t]here was no sexual contact or even the exchange of words to substantiate an allegation of an attempt to engage in sexual relations." We disagree. By Defendant's own admissions at the hearing, he "wouldn't have seen [C.T. on 15 August 2018 had he] not gone to the clinic. . . . [He] probably would've just met her at Starbucks or wherever on the following Monday . . . ." Following the clinic visit, C.T. told Defendant "[i]t would be nice to see you again." At that point, Defendant made the decision to go to C.T.'s house later that day, based on their "mutual attraction" he perceived and his feelings of "lonel[iness]."

¶ 25 Defendant testified to feeling C.T.'s Spanx undergarment, which he described as being "very high up and low on her legs." He "snapped [C.T.'s undergarment] on her side," and they laughed. Defendant then asked C.T. what the undergarment was, and she said, "[y]ou know, we

can't--." Defendant further testified their consensual kiss "was not a chaste kiss," and "probably" involved tongue.

¶ 26 Finally, we consider the plain words of finding of fact 7, which provides: "[a]fter C.T. signed the [consent order], [Defendant] perceived that there was a mutual attraction, so he asked permission to kiss C.T. and she said yes. When they broke away from 'making out' C.T. stated they could not 'go any further,' so they did not have sexual intercourse that day."

¶ 27 The second sentence of finding of fact 7 contains two independent clauses, (1) "[w]hen they broke away from 'making out' C.T. stated they could not 'go any further,' " and (2) "they did not have sexual intercourse that day." These two clauses are separated by the word "so," which acts as a coordinating conjunction. The Merriam-Webster Dictionary defines "so" when used as a conjunction, as "with the result that," or "for that reason." *So*, Merriam-Webster, https://www.merriam-webster.com/dictionary/so (last visited 9 Sept. 2022). Thus, this finding indicates C.T. made a statement they "could not 'go any further,' " and *for that reason* Defendant and C.T. did not have sexual intercourse on 15 August 2018.

¶ 28 In his *pro se* answer, Defendant admitted to the State Bar's averment, from which finding of fact 7 was taken verbatim. Defendant later stipulated and agreed to this fact as part of a pre-hearing conference with the State Bar. Defendant did not specifically challenge finding of fact 7 on appeal. Therefore, we conclude adjudicatory finding of fact 7 is undisputed, binding on appeal, and supports conclusion law of 2(a). *See Leonard*, 178 N.C. App. at 437, 632 S.E.2d at 187; *Key*, 189 N.C. App. at 87, 658 S.E.2d at 498.

2. Conclusion of Law 2(b)

¶ 29 **[2]** Defendant asserts conclusion of law 2(b) is not supported by substantial evidence. Defendant further argues the DHC "erred in usurping authority to substantially modify [the Consent Order] to create an attorney-client relationship." In other words, Defendant argues the DHC's disregard of the provision of the Consent Order, which allowed Defendant to withdraw as counsel for C.T., had the practical effect of substantively changing the terms of the Consent Order. Moreover, Defendant contends the DHC, by concluding C.T. was a current client when sexual relations between Defendant and C.T. commenced, "appli[ed] unpromulgated legislative rules . . . and violate[d] Defendant's due process rights." Finally, Defendant maintains he was not practicing law in representing C.T. in the divorce proceeding because the representation was "administrative in nature." The State Bar contends "[t]he

attorney-client relationship between C.T. and Defendant began in or before March 2018 and did not conclude before the entry of C.T.'s divorce judgment in November 2018"; thus, their sexual relations occurred while C.T. was a current client. We agree with the State Bar.

¶ 30 As an initial matter, we reject Defendant's assertion he was not practicing law when he: signed C.T.'s divorce complaint, communicated to opposing counsel he would be filing the complaint, filed a motion for summary judgment, and represented C.T. at the hearing on the motion for summary judgment.

¶ 31 In North Carolina, the practice of law is defined as "performing any legal service for any other person, firm or corporation, with or without compensation . . . ." N.C. Gen. Stat. § 84-2.1(a) (2021). Defendant does not contend he was performing any acts that are explicitly excluded from the phrase "practice of law" under the statute. Certainly, Defendant was practicing law when he drafted and filed the divorce complaint and summary judgment motion on behalf of C.T. and represented C.T. before the New Hanover County District Court on the motion. *See id.*

¶ 32 Conclusion of law 2(b) provides: "[b]y engaging in a sexual relationship with his current client, Defendant violated Rule 1.19(a)." We first consider whether the findings demonstrate an attorney-client relationship existed between C.T. and Defendant before their sexual relations commenced.

¶ 33 The existence of an attorney-client relationship "is a question of fact for the [fact-finder.]" *Cornelius v. Helms*, 120 N.C. App. 172, 175, 461 S.E.2d 338, 339 (1995). "[T]he relation of attorney and client may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract." *N.C. State Bar. v. Sheffield*, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325 (citation omitted), *writ denied*, 474 U.S. 981, 106 S. Ct. 385, 88 L. Ed. 2d 338 (1985). Whether an attorney-client relationship exists depends on whether the "relationship could reasonably be inferred" from the attorney's conduct. *Id.* at 358, 326 S.E.2d 325.

¶ 34 Defendant correctly identifies the duties of the DHC, as an administrative agency.

> [O]nce all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility

> of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of the any witness.

Ethridge, 188 N.C. App. at 665, 657 S.E.2d at 386.

¶ 35 In this case, the record reveals Defendant entered into the Initial Agreement with C.T. on 9 March 2018. This agreement included filing for an absolute divorce as a Covered Service of the representation. On 3 August 2018—one day before Defendant's interaction with C.T. at her house—Defendant and C.T. entered into the Second Agreement, which specifically excluded the filing for absolute divorce from the Covered Services. On 28 August 2018, the Consent Order was filed with the court, which *could* have terminated Defendant's representation under the Initial Agreement; however, the Initial Agreement could have also been terminated when Defendant provided the Covered Services, based on the plain words of the agreement. Defendant's handling of C.T.'s divorce, consistent with the terms of the Initial Agreement and without the execution of a separate agreement, demonstrates his representation under the Initial Agreement was not complete until he sought C.T.'s absolute divorce.

¶ 36 C.T. testified she did not remember signing the Second Agreement. Defendant testified that he had the Second Agreement executed for tax-related purposes, and he needed the agreement to prove his earned income. According to Defendant, the Second Agreement had the same fee and same covered services. Contrary to Defendant's contentions, neither the fees nor the covered services were the same across the two agreements. The Second Agreement raised the fees by $600.00 and did not include filing for absolute divorce. Nevertheless, Defendant testified he did not intend to change the substantive terms of his Initial Agreement with C.T.; he only intended to create a duplicate agreement to provide to a third party. Defendant ultimately found the original Initial Agreement in his files. Lastly, despite Defendant's reference in his brief to the Second Agreement as a "superseding" agreement, the terms of the Second Agreement did not terminate the Initial Agreement or otherwise render the Initial Agreement void.

¶ 37 The DHC was presented with evidence of the two representation agreements, which it admitted, as well as other evidence, including testimony. From this evidence, the DHC "determine[d] the weight and sufficiency of the evidence and the credibility of the witnesses, . . . dr[e]w inferences from the facts, and . . . appraise[d] conflicting and

circumstantial evidence." *See Ethridge*, 188 N.C. App. at 665, 657 S.E.2d at 386.

¶ 38 In this proceeding, "Defendant was given proper notice of the allegations against him; he was allowed access to the evidence supporting these allegations; he was permitted to call his own witnesses, introduce evidence, and cross-examine opposing witnesses; and he was able to file motions and make legal arguments." *See N.C. State Bar v. Sutton*, 250 N.C. App. 85, 95, 791 S.E.2d 881, 891 (2016) (rejecting the defendant's argument he was denied due process in his disciplinary proceeding), *appeal dismissed*, 369 N.C. 534, 797 S.E.2d 296 (2017). Therefore, we are not persuaded by Defendant's argument that his due process rights were violated when the DHC made findings supported by the substantial evidence in view of the record, even if the evidence may have supported contrary findings. *See Nelson*, 107 N.C. App. at 550, 421 S.E.2d at 166; *see also Harding v. Bd. of Adjustment*, 170 N.C. App. 392, 398, 612 S.E.2d 431, 436 (2005) (explaining this Court cannot substitute its judgment for that of another administrative body even when "evidence in the record would have supported contrary findings and conclusions"). Additionally, we note Defendant did not challenge on appeal any findings of fact made during the adjudicatory phase; therefore, these findings are deemed supported by substantial evidence and "are binding on appeal." *See Key*, 189 N.C. App. at 87, 658 S.E.2d at 498.

¶ 39 The DHC did not make an explicit finding of fact that the attorney-client relationship existed between C.T. and Defendant from March 2018 and continued through November 2018; however, the findings show the representation began in March 2018, and Defendant "continued to represent C.T. until her divorce was finalized in November 2018." These findings were not contested on appeal and are therefore binding. *See Key*, 189 N.C. App. at 87, 658 S.E.2d at 498. Further, the DHC did not make a finding indicating the representation had terminated at any point in this time period, so we infer from these findings that the representation was continuous. Notwithstanding the formal representation agreements executed by C.T. and Defendant, and the timing of the orders filed in C.T.'s domestic case, there is substantial evidence in view of the whole record, that an attorney-client relationship existed between Defendant and C.T. in March 2018 and continued after entry of the Consent Order. *See Sheffield*, 73 N.C. App. at 358, 326 S.E.2d at 325.

¶ 40 Specifically, on 6 August 2018, Defendant wrote an email to the attorney representing C.T.'s husband in the domestic dispute indicating, "I will tell [C.T.] I we [sic] will file for absolute divorce after we get a signed order on this other stuff." That same day, C.T. replied to Defendant's

email, acknowledging she read Defendant's email to opposing counsel. Based on Defendant's statement that Defendant—or Defendant and C.T.—would file for C.T.'s absolute divorce, C.T. could reasonably infer an attorney-client relationship continued to exist between her and Defendant after she signed the Initial Agreement, and until the divorce judgment was entered. *See Sheffield*, 73 N.C. App. at 358, 326 S.E.2d at 325. Additionally, Defendant's statement that he would be filing for C.T.'s absolute divorce was consistent with the purpose for which C.T. originally sought his legal services as well as the terms of the Initial Agreement, which included absolute divorce within the scope of representation. No separate representation agreement was entered with respect to the service of filing for absolute divorce. Although Defendant argues the filed Consent Order *allowed* him to withdraw as counsel, there is no evidence he did in fact withdraw, and his actions demonstrate his continued representation of C.T. *See* N.C. R. Pro. Conduct 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client . . . ."). Hence, it can be reasonably inferred from DHC's findings that the attorney-client relationship was established in March 2018 and was ongoing until C.T.'s divorce judgment was entered on 2 November 2018.

¶ 41 Finding of fact 10, which is not challenged on appeal, states "[Defendant] and C.T. began having sex" in mid-September. Thus, this finding is "binding on appeal." *See Key*, 189 N.C. App. at 87, 658 S.E.2d at 498. As discussed above, the attorney-client relationship existed between March 2018 and 2 November 2018, when C.T.'s divorce judgment was entered. Therefore, the conclusion of law 2(b), which provides Defendant had sexual relations with a current client in violation of Rule 1.19(a), is supported by the unchallenged findings of fact. *See Leonard*, 178 N.C. App. at 437, 632 S.E.2d at 187.

B. Challenges to the Dispositional Phase

¶ 42 Defendant challenges two findings of fact made regarding discipline. He also challenges two conclusions of law regarding discipline relating to factors under 27 N.C. Admin. Code 1B.0116(f)(3) (2021). Finally, Defendant argues the DHC abused its discretion in ordering suspension.

¶ 43 "Suspension or disbarment is appropriate where there is evidence that the defendant's actions resulted in significant harm or potential significant harm to the clients, the public, the administration of justice, or the legal profession, and lesser discipline is insufficient to adequately protect the public." 27 N.C. Admin. Code 1B.0116(f)(1) (2021). The DHC considers the following factors in imposing suspension:

(A) intent of the defendant to cause the resulting harm or potential harm;

(B) intent of the defendant to commit acts where the harm or potential harm is foreseeable;

(C) circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;

(D) elevation of the defendant's own interest above that of the client;

(E) negative impact of defendant's actions on client's or public's perception of the profession;

(F) negative impact of the defendant's actions on the administration of justice;

(G) impairment of the client's ability to achieve the goals of the representation;

(H) effect of defendant's conduct on third parties;

(I) acts of dishonesty, misrepresentation, deceit, or fabrication; [and]

(J) multiple instances of failure to participate in the legal professional's self-regulation process.

27 N.C. Admin. Code 1B.0116(f)(1). In all disciplinary cases, the DHC considers certain factors, including *inter alia*, "dishonest or selfish motive," "a pattern of misconduct," and "any other factors found to be pertinent to the consideration of the discipline to be imposed." 27 N.C. Admin. Code 1B.0116(f)(3)(C), (F), (V).

1. Finding of Fact 3 regarding Discipline

¶ 44 **[3]** Defendant argues finding of fact 3 "is not substantially supported by competent evidence and unfairly attempts to cast a harsh light on Defendant despite Finding of Fact 2 confirming that Defendant has no prior professional discipline and Finding of Fact 6 stating that there is no indication of sexual relationships with other clients or a pattern of such misconduct." In support of his argument, Defendant points to his completion of a course addressing boundary concerns. We disagree.

¶ 45 Finding of fact 3 provides "Defendant's conduct demonstrates that he had inadequate boundaries between his professional and personal relationships." We note whether Defendant had prior professional discipline or sexual relations with his clients is not dispositive as to whether

Defendant "had inadequate boundaries between his professional and personal relationships." There was substantial evidence in the record of Defendant's "inadequate boundaries," including: (1) Defendant meeting C.T. on a Saturday—after business hours—in the health clinic where she worked for Defendant to obtain unauthorized services; (2) Defendant meeting C.T. inside her home when his usual practice was meeting his clients in a public place; (3) Defendant acting on his feelings of attraction toward his current client; (4) Defendant asking C.T. if he could kiss her while she was his current client; (5) Defendant having lengthy late-night phone calls with C.T. while she was his client; and (6) Defendant beginning a sexual relationship with C.T. while his conduct and actions inferred an attorney-client relationship existed.

¶ 46 Regarding Defendant's completion of a course, the record indicates Defendant completed a one-and-a-half-credit continuing legal education ("CLE") course entitled "The High Cost of Exercising Poor Professional Judgment" on 30 July 2021, approximately three weeks before the DHC hearing. The completion of said course roughly three years after the incidents in question is irrelevant to the DHC's disciplinary findings as to his conduct in 2018. Moreover, Defendant raises in his brief that "[c]oncerns about boundary issues for a kiss [were] not addressed within the context" of the CLE course he completed, which undermines his argument that completion of the course eliminated DHC's concerns for Defendant's blurred boundaries between professional and personal relationships. For the above reasons, finding of fact 3 is "supported by substantial evidence in view of the whole record." *See Leonard*, 178 N.C. App. at 437, 632 S.E.2d at 187.

2. Finding of Fact 4 regarding Discipline

¶ 47 **[4]** Defendant contests finding of fact 4 on the basis there was no fiduciary relationship between him and C.T. when they began an intimate relationship, and "[n]o evidence supports a finding that an attorney-client relationship existed" at that time. Defendant also asserts he did not intend to cause C.T. harm, and there is no evidence the State Bar determined that his trust account contained funds received from C.T.

¶ 48 Finding of fact 4 provides "[a]t the time Defendant began an intimate relationship with C.T., it was foreseeable that his actions would undermine the fiduciary relationship that he shared with her. By choosing to undermine the fiduciary attorney-client relationship, Defendant intentionally caused harm to the client and the profession."

¶ 49 It is well-established "[t]he relationship between attorney and client is a fiduciary relationship." *Booher v. Frue*, 98 N.C. App. 585, 587, 392 S.E.2d

105, 106 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 410 (1991). As stated above, an attorney-client relationship may exist even when no fees are received from a client; thus, any funds received by a client held in trust are unrelated to the inquiry of whether a fiduciary relationship exists with that client. *See Sheffield*, 73 N.C. App. at 358, 326 S.E.2d at 325. "[A] fiduciary relationship is generally described as arising when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (citations and quotations omitted).

¶ 50 As discussed in Sections A(1) and A(2) above, Defendant intended to engage, and did engage, in sexual relations with C.T. after establishing an attorney-client relationship, and therefore a fiduciary relationship. *See Booher*, 98 N.C. App. at 587, 392 S.E.2d at 106. The factor under 27 N.C. Admin. Code 1B.0116(f)(1) at issue in this finding concerns whether Defendant "intended to cause the resulting harm or potential harm." *See* 27 N.C. Admin. Code 1B.0116(f)(1)(A). Accordingly, we turn to the question of whether Defendant intended to cause harm to C.T. and the profession.

¶ 51 The issue of whether an inherent conflict of interest exists when an attorney engages in sexual relations with his or her divorce client has not been decided in North Carolina, and we need not decide it here. Nonetheless, we note other jurisdictions have concluded that when an attorney engages in consensual sexual relations with a divorce client where child custody, child support, alimony, and division of marital asserts are to be decided, there is a *per se* violation of the rules of professional conduct. *In re DiPippo*, 678 A.2d 454, 456 (R.I. 1996) (concluding it is impermissible for an attorney "to engage in sexual relations with a divorce client when issues of child custody, support, and distribution of marital assets are at stake . . . ."); *In re Lewis*, 262 Ga. 37, 38, 415 S.E.2d 173, 175 (1992) ("Every lawyer must know that an extramarital relationship can jeopardize every aspect of a client's matrimonial case . . . ."); *Att'y Grievance Comm'n v. Culver*, 381 Md. 241, 274, 849 A.2d 423, 443 (2002) (explaining an attorney who engages in consensual sexual relations with a domestic relations client has an inherent conflict of interest when divorce, child custody, and alimony, or distribution of marital assets are at issue). The reasoning for this bright-line rule is such a relationship may: (1) affect the client's ability to secure child custody, alimony, and attorney's fees; (2) create a conflict of interest; (3) impact marital property distribution; (4) interfere with the client's ability to reconcile with his or her spouse; (5) jeopardize the client's rights; or (6) prevent the attorney from exercising independent judgment. *See In re*

DiPippo, 678 A.2d at 456; *In re Lewis*, 262 Ga. at 38, 415 S.E.2d at 175; *Att'y Grievance Comm'n v. Culver*, 381 Md. At 274, 849 A.2d at 443.

¶ 52 A divorce client in North Carolina who engages in a sexual relationship with his or her attorney faces similar dangers. *See*, *e.g.*, N.C. Gen. Stat. § 60-16.3A(a) (2021) (prohibiting a dependent spouse from being awarded alimony where "the dependent spouse participated in an act of illicit sexual behavior"); N.C. Gen. Stat. § 50-16.4 (2021) (allowing a court to enter an order for reasonable attorney's fees where a dependent spouse is entitled to alimony); *Darden v. Darden*, 20 N.C. App. 433, 435, 201 S.E.2d 538, 539 (1974) (explaining that evidence of adultery is relevant to the inquiry of a parent's fitness for being awarded custody of minor children); *Sebastian v. Kluttz*, 6 N.C. App. 201, 207, 209, 170 S.E.2d 104, 107–09 (1969) (explaining two torts arising from adultery: alienation of affection and criminal conversation). Further, comments to Rule 1.19, prohibiting sexual relations with a client, explain:

> (2) [t]he relationship [between an attorney and a client is] inherently unequal. The client comes to a lawyer with a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the client's problem. The same factors that lead the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in a position of vulnerability.
>
> (3) A sexual relationship between a lawyer and a client may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that a sexual relationship with a client resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for a sexual relationship with a client, the lawyer violates one of the most basic ethical obligations, i.e., not to use the trust of the client to the client's disadvantage. This same principle underlies the rules prohibiting the use of client confidences to the disadvantage of the client and the rules that seek to ensure that lawyers do not take financial advantage of their clients.

. . . .

> (4) A sexual relationship also creates the risk that the lawyer will be subject to a conflict of interest.

N.C. R. Pro. Conduct 1.19 cmt. n.2–4. It follows, a sexual relationship between an attorney and his or her divorce client may cause, or threaten to cause, significant harm to the client and the profession alike.

¶ 53 The potential harm inherent in a consensual sexual relationship between an attorney and a client, whom the attorney represents in family law matters, is present in the instant case where Defendant was representing C.T in divorce, alimony, equitable distribution, child support, and child custody matters while he began an extramarital affair with her. The significant harm was foreseeable to Defendant, a family law attorney who had been licensed in North Carolina for approximately ten years when he began an affair with C.T. The DHC found C.T. to be "especially vulnerable" considering she was facing divorce and experiencing "significant turmoil" associated with her new single-parent status. Thus, the significant harm to C.T. was not merely financial harm, but emotional harm.

¶ 54 There were also allegations that Defendant's wife threatened to bring a claim against C.T. for alienation of affection. To limit harm to C.T., Defendant presented his wife with a settlement agreement, which waived Defendant's and his wife's rights to bring third-party claims, including claims for alienation of affection. Although Defendant and his wife executed the settlement agreement, Defendant's relationship with C.T. had the potential of causing significant financial harm to C.T. as her relationship with Defendant exposed her to the risk of liability from a third party.

¶ 55 Furthermore, C.T. sought advice from independent legal counsel regarding potential malpractice claims relating to the Consent Order Defendant negotiated just prior to attempting to have sexual relations with C.T. C.T. testified the Consent Order was not in her best interest because it did not allow her to claim both of her children on her tax returns and did not provide adequate child support. We do not foreclose the possibility Defendant's professional judgment in finalizing the Consent Order may have been impaired, as evidenced by his desire to immediately kiss C.T. after she and Defendant signed it.

¶ 56 Defendant argues on appeal DHC "ignore[d] the evidence that C.T. engaged the services of an attorney to extort $14,000 from Defendant of which he paid an amount." The record shows Defendant agreed to settle

with C.T., and Defendant provides no evidence of extortion. We do not believe the DHC ignored the evidence relating to C.T. and Defendant's settlement; rather, the DHC properly considered the evidence and the duties owed by Defendant to C.T. as her fiduciary, and concluded Defendant intended to cause the resulting harm to C.T. and the profession by engaging in deliberate, unethical conduct with a vulnerable client in contravention of a fiduciary relationship and Rule 1.19(a). Therefore, we conclude finding of fact 4 regarding discipline is "supported by substantial evidence in view of the whole record." *See Leonard*, 178 N.C. App. at 437, 632 S.E.2d at 187.

3. Challenged Conclusions of Law regarding Discipline & Suspension

¶ 57 **[5]** In his final arguments, Defendant challenges two conclusions of law regarding discipline and contends the DHC abused its discretion in suspending him from the practice of law for one year.

¶ 58 We review the DHC's imposition of sanctions for an abuse of discretion. *Nelson*, 107 N.C. App. at 552, 421 S.E.2d at 167. "[S]o long as the punishment imposed is within the limits allowed by the statute[,] this Court does not have the authority to modify or change it." *N.C. State Bar v. Wilson*, 74 N.C. App. 777, 784, 330 S.E.2d 280, 284 (1985) (citation omitted); *see also* N.C. Gen. Stat. § 84-28(h) ("Review by the appellate division shall be upon matters of law or legal inference."). Under N.C. Gen. Stat. § 84-28, "[m]isconduct by any attorney" is grounds for "[s]uspension for a period up to but not exceeding five years . . . ." N.C. Gen. Stat. § 84-28(c)(2) (2021).

> The DHC must support its punishment choice with written findings that are consistent with the statutory scheme of N.C. Gen. Stat. § 84-28(c). The order must also include adequate and specific findings that address how the punishment choice (1) is supported by the particular set of factual circumstances and (2) effectively provides protections for the public.

N.C. State Bar v. Adams, 239 N.C. App. 489, 495–96, 769 S.E.2d 406, 411 (2015) (citations omitted); *see also* N.C. Gen. Stat. § 84-28(c).

¶ 59 Defendant reiterates his arguments as to the adjudicatory findings of fact and conclusions of law. He also challenges portions of conclusion of law 4 regarding discipline.

¶ 60 Conclusion of law 4 provides:

> The Hearing Panel concludes that the following factors from § .0116(f)(3), which are to be considered in all cases, are present in this case:
>
> (a) the absence of prior disciplinary offenses in this state or any other jurisdiction;
>
> (b) selfish motive;
>
> (c) a pattern of misconduct;
>
> (d) vulnerability of victim; and
>
> (e) degree of experience in the practice of law.

¶ 61 Defendant argues the factor of "selfish motive" was inappropriate because no sexual relationship existed with a current client. As explained above, this argument is unconvincing. Defendant also challenges the factor of "a pattern of misconduct" as being unsupported by the evidence. Assuming *arguendo* this factor is not supported by the evidence, Defendant has failed to show the DHC's decision would have been different had this factor not been found. Thus, Defendant has failed to show prejudicial error. *See N.C. State Bar v. Frazier*, 62 N.C. App. 172, 180, 302 S.E.2d 648, 654 (1983) (concluding the defendant failed to show prejudicial error in arguing his due process rights were violated in the hearing before the DHC).

¶ 62 Here, the DHC made findings of fact stating how Defendant's conduct was inconsistent with his role as fiduciary and caused harm to C.T. and the profession. It then considered admonition, reprimand, and censure but found these sanctions "would not be sufficient discipline because of the gravity of the harm to the administration of justice and the potential harm to the public and the profession in the present case." The DHC concluded "[e]ntry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to attorneys and to the public regarding the conduct expected of members of the Bar in this state." Additionally, the DHC made findings consistent with the factors set out in 27 N.C. Admin. Code 1B.0116(f) to support the imposition of suspension: (1) an "intent of the defendant to cause the resulting harm or potential harm"; and (2) an "elevation of the defendant's own interest above that of the client." Thus, the Order adequately shows that Defendant's punishment is supported by the factual circumstances of the case and that the public will be protected from Defendant's conduct. *See Adams*, 239 N.C. App. at 495–96, 769 S.E.2d at 411.

¶ 63 Although Defendant does not raise the issue in his brief, we acknowledge the DHC did not make specific findings stating Defendant's conduct caused "*significant* harm," as required by the Administrative Code for the imposition of suspension. *See* 27 N.C. Admin. Code 1B.0116(f)(1); *see also Talford*, 356 N.C. at 637, 576 S.E.2d at 313 ("[F]indings must be made explaining how the misconduct caused significant harm or threatened significant harm, and why the suspension of the offending attorney's license is necessary in order to protect the public."). Nonetheless, we conclude implicit in the DHC's conclusion that Defendant violated Rules 8.4(a) and 1.19(a) is a determination that his misconduct presented "significant harm" to C.T. and the profession. *See Leonard*, 178 N.C. App. at 446, 632 S.E.2d at 191 (affirming the DHC's disbarment of the defendant and concluding the DHC implicitly found that the defendant posed a significant potential harm to clients and the profession where his violation of the Rules of Professional Conduct constituted misconduct).

¶ 64 Therefore, we hold there was substantial evidence to support the findings in the DHC's order of discipline, and these findings support the conclusions of law. *See Ethridge*, 188 N.C. App. at 658–59, 657 S.E.2d at 382. We find no abuse of discretion in the DHC's imposition of suspension as a disciplinary sanction. *See Nelson*, 107 N.C. App. at 552, 421 S.E.2d at 167.

VI. Conclusion

¶ 65 Our review under the whole record test reveals the DHC's findings of fact are adequately supported by substantial evidence, and these findings of fact support its conclusions of law that, *inter alia*, Defendant violated Rules 1.19(a) and 8.4(a). Together, the DHC's findings of fact and conclusions of law have a rational basis in evidence supporting the suspension of Defendant's license to practice law in North Carolina for one year.

AFFIRMED.

Judges DILLON and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 SEPTEMBER 2022)

BROWN v. McLEOD 2022-NCCOA-634 No. 21-704	Guilford (19CVS1098)	No Error
DRAGONETTE v. TAYLOR 2022-NCCOA-635 No. 22-168	Stanly (20CVD778)	Vacated and Remanded
F6 LAND CO., LLC v. EDWARDS 2022-NCCOA-636 No. 22-110	Nash (20CVS1210)	Affirmed
GUNTER v. THRIVE SENIOR LIVING, LLC 2022-NCCOA-637 No. 21-766	Mecklenburg (21CVS1201)	Reversed and Remanded
HD HOSP., LLC v. LIVE OAK BANKING CO. 2022-NCCOA-638 No. 21-795	New Hanover (18CVS906)	Affirmed
IN RE E.G. 2022-NCCOA-639 No. 22-237	Robeson (19JT180)	Affirmed
IN RE J.B.P. 2022-NCCOA-640 No. 22-210	Buncombe (18JT181) (18JT182)	Affirmed
IN RE J.M. 2022-NCCOA-641 No. 22-288	Forsyth (19JT101-103) (19JT107)	Vacated and Remanded
KASER v. ZWICK 2022-NCCOA-642 No. 22-1	Mecklenburg (09CVD15867)	Affirmed
McDONALD v. RAMIREZ 2022-NCCOA-643 No. 21-780	Cumberland (19CVS4462)	Affirmed
STATE v. COOPER 2022-NCCOA-644 No. 18-637-3	Beaufort (11CRS50617)	Affirmed

STATE v. CROTEAU 2022-NCCOA-645 No. 22-4	Alexander (20CRS50664) (20CRS50667-68)	Affirmed
STATE v. HAYES 2022-NCCOA-646 No. 21-613	Rowan (18CRS54801) (18CRS54804) (19CRS43)	No error in part; no prejudicial error in part.
STATE v. KARIUKI 2022-NCCOA-647 No. 22-11	Johnston (19CRS57452) (20CRS104)	No Error
STATE v. WHITAKER 2022-NCCOA-648 No. 21-732	Surry (19CRS51724) (20CRS299)	Affirmed
STATE v. WILLIAMS 2022-NCCOA-649 No. 21-577	Robeson (16CRS53666-67)	No Prejudicial Error

GOUCH v. ROTUNNO

[285 N.C. App. 559, 2022-NCCOA-650]

HARVEY W. GOUCH, PLAINTIFF
v.
CLIFFORD ROTUNNO AND DOLORES ROTUNNO, DEFENDANTS

No. COA22-75

Filed 4 October 2022

Appeal and Error—record on appeal—lack of transcript or narrative—basis of ruling unclear—appellate review frustrated

In a dispute concerning restrictive covenants, where defendants filed a motion to dismiss pursuant to Rule 12(b)(6) (failure to state a claim), the trial court's written order granted defendants' motion to dismiss pursuant to Rule 12(b)(2) (lack of personal jurisdiction), the parties stipulated that the trial court had personal jurisdiction over them, and the parties failed to include a transcript of the hearing in the record or to file a narrative pursuant to Appellate Rule 9(c)(1), the Court of Appeals was unable to engage in meaningful appellate review. The order was vacated and remanded.

Judge DIETZ concurring in separate opinion.

Appeal by Plaintiff from order entered 18 October 2021 by Judge Carla Archie in Gaston County Superior Court. Heard in the Court of Appeals 8 June 2022.

Winfred R. Ervin, Jr. and Isaac Cordero, for Plaintiff-Appellant.

Brett E. Dressler, for Defendants-Appellees.

WOOD, Judge.

¶ 1 Mr. Harvey Gouch ("Plaintiff") contends that the trial court erred in granting Clifford and Dolores Rotunno's ("Defendants") motion to dismiss and dismissing with prejudice Plaintiff's request for injunction and monetary damages based upon Defendants' alleged violation of a restrictive covenant. As explained below, we cannot engage in meaningful appellate review of the trial court's order because, on the record before us, we cannot determine whether the trial court ruled on Defendants' Rule 12(b)(6) motion. Consequently, we vacate the dismissal of Plaintiff's complaint and remand for further proceedings.

I. Factual and Procedural Background

¶ 2 In 2007, the property now owned by Defendants was held in ownership by Integrity Builders of NC, LLC ("Integrity"). On March 15, 2007, Integrity recorded a subdivision plat in the Gaston County Register of Deeds. The plat subdivided a tract of property owned by Integrity into sixteen residential building lots and designated the subdivisions as Stoney Brook Estates. Depicted on the plat are Lots 1-11, 30-34. The plat does not reference or refer to any type of restrictions. Defendants are the current owners of Lot 32, a property located in the Stoney Brook Estates residential subdivision of Gaston County.

¶ 3 On August 15, 2008, Integrity deeded eleven of the sixteen lots in Stoney Brook Estates to Plaintiff. Plaintiff's deed stated:

> THERE IS EXCEPTED from this conveyance Lots 6, 7, 8, 9 and 10 as shown on plat of STONEY BROOK ESTATES, Phase 1, which map is recorded in Map Book 73 at Page 85 in the Gaston County Public Registry.

On July 10, 2017, Plaintiff executed and recorded in the Gaston County Register of Deeds a "Declaration of Covenants, Conditions and Restrictions for Stoney Brook Estates" ("Declaration") which purported to place restrictions on the eleven lots he owned in Stoney Book Estates. The Declaration describes that "[t]he subdivision of Stoney Brook Estates is made subject to these protective covenants" but does not lay out any references to the lots subject to the Declaration, offer legal description of property, or reference a map book or page. The Declaration includes, among other requirements, a setback requiring all construction to be built at least 110 feet from the front property line of the lot and that the front and sides of each residence be constructed of brick, stone, or a combination of both.

¶ 4 On October 8, 2019, Plaintiff sold and conveyed Lot 32 of Stoney Book Estates to Defendants as tenants by the entirety. In 2020, Defendants constructed their home and garage within the 110-foot setback from the front property line and constructed the front and sides of their home with material other than brick and stone.

¶ 5 In a letter dated November 16, 2020, Plaintiff provided notice to Defendants of the purported violations of the Declaration and demanded that Defendants bring their Lot in compliance with the Declaration. Defendants refused to make the requested changes. Thereafter, Plaintiff filed a summons and complaint for injunctive relief and monetary damages on April 12, 2021. In response, on June 10, 2021, Defendants

filed a motion to dismiss pursuant to Rule 12(b)(6), alleging that the Declaration was not applicable to Lot 32; did not "create a North Carolina Planned Community; [was] not enforceable; and [was] not enforceable by Plaintiff." On October 18, 2021, the trial court filed its written order on Defendants' motion to dismiss, granting with prejudice Defendants' motion to dismiss pursuant to Rule 12(b)(2). The trial court's written order made no reference to Defendants' Rule 12(b)(6) motion. Plaintiff filed written notice of appeal from the trial court's order on November 12, 2021. On appeal, the parties stipulate that the trial court had personal jurisdiction over them.

II. Analysis

¶ 6 Plaintiff and Defendants raise several issues on appeal based upon a Rule 12(b)(6) motion. Neither party raised an issue on appeal as to the trial court's Rule 12(b)(2) ruling, contending instead that it was an error in the drafting of the order. However, the parties failed to include a transcript of the hearing in the record or to file a narrative in accordance with Rule 9(c)(1) of our Appellate Rules rendering us unable to ascertain what transpired or was argued in the hearing. Accordingly, we are unable to engage in meaningful appellate review of the trial court's order because, on the record before us, we cannot determine whether the trial court ruled on Defendant's Rule 12(b)(6) motion. *See Joines v. Moffitt*, 226 N.C. App. 61, 67, 739 S.E.2d 177, 182 (2013). We are, however, able to determine from the record that Rule 12(b)(2) is not applicable in this case. Consequently, we vacate the dismissal of Plaintiff's complaint and remand for further proceedings.

A. Appellate Jurisdiction

¶ 7 Before us, the record reflects that Defendants' motion to dismiss was granted by the trial court pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. The trial court's order states: "[t]he Court, having reviewed the Court's file, the parties' pleadings, case law, memorandum of law, materials submitted by counsel and the arguments of counsel," Defendants' motion to dismiss "pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure is GRANTED with prejudice."

¶ 8 There is no indication in the record Defendants' 12(b)(6) motion was heard in court, "nor did [the trial court judge] issue any ruling-whether oral or written" on the Rule 12(b)(6) motion. *State v. Ingram*, 242 N.C. App. 384, 776 S.E.2d 363, 2015 N.C. App. LEXIS 610, *8-9 (unpublished). The record shows that the trial court's order was based upon Rule 12(b)(2), and there is no mention of Rule 12(b)(6) in the order. Because the parties never obtained a ruling upon the Defendants' motion to dismiss

pursuant to Rule 12(b)(6), according to Rule 10 of our Rules of Appellate Procedure, this issue has not been preserved for appellate review. N.C. R. App. P. 10(a)(1).

¶ 9 Consistent with Rule 28 of our Rules of Appellate Procedure, our "scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a). Thus, under this Rule, Plaintiff and Defendants' failures to present and argue in their briefs the trial court's judgment based upon Rule 12(b)(2) preclude the parties from obtaining appellate review on this issue. *Stillwell Enter. v. Interstate Equip. Co.*, 300 N.C. 286, 288, 266 S.E.2d 812, 814 (1980) (citations omitted).

¶ 10 However, in the interest of justice and judicial economy, we elect to invoke Rule 2 of our Rules of Appellate Procedure in our discretion and consider on our own initiative the trial court's ruling based upon Rule 12(b)(2). *Id.*; N.C. R. App. P. 2.

B. Standard of Review

¶ 11 The standard of appellate 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; if so, this Court must affirm the order of the trial court." *Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 163, 565 S.E.2d 705, 708-09 (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000).

C. Personal Jurisdiction

¶ 12 Rule 12(b)(2) asserts the defense of the lack of personal jurisdiction. "Jurisdiction has been defined as 'the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment[.]' " *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) (cleaned up). Personal jurisdiction relates to the "Court's ability to assert judicial power over the parties and bind them by its adjudication." *Japan Gas Lighter Ass'n. v. Ronson Corp.*, 257 F. Supp. 219, 224 (D.N.J. 1966).

¶ 13 While Plaintiff's brief acknowledges that the trial court's order was based upon an alleged Rule 12(b)(2) motion, he contends that Defendants' motion to dismiss "was brought pursuant to Rule 12(b)(6)

of the North Carolina Rule of Civil Procedure, but the trial court mistakenly identified Rule 12(b)(2) in its Order to Dismiss." Further, both parties' arguments are based upon treating the trial court's order on the motion to dismiss as an order pursuant to a Rule 12(b)(6) motion.

¶ 14 Although the parties allege that the trial court mistakenly labeled Defendant's Rule 12(b)(6) motion as a Rule 12(b)(2) motion as both parties' briefs made arguments based upon a Rule 12(b)(6) motion, our role as an appellate court is not to accept what the parties think the issue is or should be. Instead, our role "is to review the trial court's order for errors of law." *JWL Invs., Inc. v. Guilford Cnty. Bd. of Adjustment*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717-18 (1999) (citation omitted).

¶ 15 Here, the parties stipulated in the record before us that the trial court had personal jurisdiction over them. *See Hobbs v. N.C. Dep't of Hum. Res.*, 135 N.C. App. 412, 415, 520 S.E.2d 595, 598-99 (1999). Additionally, the record demonstrates that Plaintiff's complaint alleged that he is a resident of Iredell County, North Carolina and Defendants are residents of Gaston County, North Carolina. In their filed motion to dismiss, Defendants cited Rule 12(b)(6) (failure to state a claim) but did not contest "lack of jurisdiction over the person" as grounds for dismissal. *Id.* at 415, 520 S.E.2d at 599. In light of the parties' pleadings and stipulations, it is unlikely that the trial court ruled on a Rule 12(b)(2) motion; nevertheless, the plain language of the trial court's order states the court dismissed the claims pursuant to Rule 12(b)(2). Trial courts address a great volume of cases, sometimes daily, and as a result, their orders occasionally contain clerical errors that complicate our appellate review; however, because we are able to ascertain that Rule 12(b)(2) does not apply to this case, it is in the interest of judicial economy to examine the order and in the exercise of our discretion after an individualized review, we vacate the order and remand it to the trial court for the court to enter an appropriate order. *State v. Lasiter*, 361 N.C. 299, 306, 643 S.E.2d 909, 913 (2007) ("Accordingly, in the interests of judicial economy, while this case is before us we exercise our authority under Rule 2[.]"); *see also State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017) ("[W]hether . . . [a] matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.").

¶ 16 The record does not show that Defendants argued for Plaintiff's claim to be dismissed pursuant to Rule 12(b)(2) in their pre-answer motion or memorandum in support of their motion to dismiss. However, Defendants were not precluded from arguing a Rule 12(b)(2) motion at the scheduled hearing, and there is no indication in the record what

motions were heard in court because no transcripts were filed. Because the parties "failed to include a transcript of the hearing in the record," or to file a narrative in accordance with Rule 9(c)(1) of our Appellate Rules, we are "unable to determine whether" this motion was even heard. *Lewis v. Hope*, 224 N.C. App. 322, 326, 736 S.E.2d 214, 218 (2012). Without the trial court transcripts from the October 11, 2021 hearing or a narrative, we are unable to determine whether the parties presented a Rule 12(b)(2) or Rule 12(b)(6) motion or both to the trial court below. Accordingly, we vacate the trial court's order and remand for further proceedings.

III. Conclusion

¶ 17 For the above reasons, we vacate the order granting Defendants' motion to dismiss and remand to the trial court for further proceedings.

VACATED AND REMANDED.

Judge DIETZ concurs by separate opinion.

Judge MURPHY concurs.

DIETZ, Judge, concurring.

¶ 18 I agree with the majority that the record on appeal—in particular, the lack of a transcript of the hearing—prevents us from engaging in meaningful appellate review of the trial court's order. It is exceedingly likely that the reference to Rule 12(b)(2) is an inadvertent clerical error and that the trial court meant to reference Rule 12(b)(6). But without a transcript, we cannot be certain that the issue of personal jurisdiction was not presented to the trial court. Thus, the appropriate remedy is to remand the matter for the court to clarify its ruling.

¶ 19 Beyond that remand, I see no need to invoke Rule 2 and reach the merits of the personal jurisdiction issue. Rule 2 is an extraordinary remedy and there is nothing extraordinary about this case. *See State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017). Given the volume of cases that trial courts must address, those courts occasionally make minor clerical errors in their rulings that complicate our appellate review. In that circumstance, our typical practice is simply to vacate and remand the case to permit the court to clarify the ruling, and that is what I would do here.

IN RE A.O.

[285 N.C. App. 565, 2022-NCCOA-651]

IN THE MATTER OF A.O.

No. COA22-295

Filed 4 October 2022

Juveniles—delinquency—privilege against self-incrimination—statutory warnings

In an adjudication hearing on a juvenile delinquency petition arising from a robbery by a group of teenagers in a convenience store parking lot, the trial court violated N.C.G.S. § 7B-2405 by failing to advise the juvenile of his constitutional right against self-incrimination before he testified on his own behalf. The error was prejudicial, as the State conceded, where the juvenile testified that he had taken the victim's wallet and there was otherwise no evidence about the identity of the person who took the wallet.

Appeal by juvenile from order entered 24 September 2021 by Judge Reggie E. McKnight in Mecklenburg County Juvenile Court. Heard in the Court of Appeals 7 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General LeeAnne N. Lawrence, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for juvenile-appellant.

WOOD, Judge.

¶ 1 Juvenile Anthony[1] appeals from the trial court's order adjudicating him as delinquent for the felony offense of larceny from the person, which resulted in a disposition order imposing upon him a Level 2 disposition. Because the trial court failed to advise Anthony of the privilege against self-incrimination before he testified, we vacate and remand.

I. Factual and Procedural Background

¶ 2 The actions leading to the State's juvenile delinquency petition occurred in the parking lot of a Fast Mart convenience store on April 4, 2021. On the day in question, Johnny Rodriguez ("Rodriguez") went to the convenience store to purchase some drinks. According to Rodriguez, upon

1. We use a pseudonym to protect the identity of the juvenile.

leaving the store, he noticed a group of male teenagers, three Hispanics and two African Americans, were standing outside. Rodriguez got into his vehicle to leave when one of the teenagers approached him asking for money and marijuana. A moment later, the teenager reached into Rodriguez's car and grabbed a container of marijuana located near the gear shifter. Rodriguez tried to retrieve the container and struggled with the teenager. According to Rodriguez, the other teenagers then started fighting him. During the fight, Rodriguez was pulled out of his car and found himself about 20 feet from the store during the attack. During the approximately five-minute fight, Rodriquez's car door remained open. As the fight progressed, Rodriguez saw someone in his car "going through [his] wallet."

¶ 3 Rodriguez managed to free himself and chased after the person who had his wallet until the individual tossed it into the air. Rodriguez was able to retrieve his wallet and return to his vehicle.

¶ 4 On April 5, 2021, the State filed a juvenile petition charging Anthony with common law robbery. On September 24, 2021, the State's petition was heard in Mecklenburg County Juvenile Court. At the adjudication hearing, Rodriquez testified that, due to an eye injury sustained during the attack, he was unable to identify Anthony as the individual who took his wallet. When Rodriguez was asked if he was able to identify the person who stole his wallet, he responded, "I'm not sure if it was him or if it was another one." At the close of the State's evidence Anthony's counsel moved the trial court to dismiss the charge, but the trial court denied the motion.

¶ 5 Anthony was called by his attorney to testify at the hearing and testified on his own behalf. The trial court did not administer any oral or written warnings to Anthony before he testified. Anthony testified that he was at the convenience store on April 4, 2021 with several friends, and that it was his friends, but not him, who started fighting Rodriguez. Anthony further testified that when Rodriguez's car was empty and "nobody was around[,]" he "jumped in the car . . . [and] took [Rodriguez's] wallet." Anthony further testified that when Rodriguez chased after him and tried to grab him, he "threw [the wallet] in the air."

¶ 6 The trial court concluded that Anthony had taken Rodriquez's wallet and adjudicated Anthony delinquent for committing larceny from the person. The trial court ordered a Level II disposition. Anthony gave oral notice of appeal in open court.

II. Analysis

¶ 7 On appeal, Anthony argues the trial court (1) erred by adjudicating him as delinquent for larceny from the person; and (2) violated N.C. Gen. Stat. § 7B-2405 by failing to advise Anthony of the privilege against self-incrimination. We agree the trial court erred by failing to advise Anthony of his privilege against self-incrimination. Because we vacate the adjudication order and remand for the court's failure to provide the statutory warnings against self-incrimination, we need not address Anthony's remaining argument.

A. Fifth Amendment Right Against Self-Incrimination

¶ 8 Anthony argues the trial court erred by failing to protect his privilege against self-incrimination as required by N.C. Gen. Stat. § 7B-2405. Because of this error, Anthony contends that this Court should remand the case for a new adjudication hearing. The State concedes that the trial court committed error by failing to advise Anthony of his constitutional right against self-incrimination. We agree that the trial court violated N.C. Gen. Stat. § 7B-2405 and that this error was prejudicial.

¶ 9 At the outset, we note Anthony's counsel did not object to this issue at the trial court. The general rule is a defendant's failure to object at the trial court to any alleged error precludes the defendant from later raising the issue on appeal. N.C. R. App. P. 10(a)(1); *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). However, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *Ashe*, 314 N.C. at 39, 331 S.E.2d at 659. *See In re E.M.*, 263 N.C. App. 476, 479, 823 S.E.2d 674, 676 (2019). Since Anthony alleges the trial court acted contrary to its statutory mandate, we conduct a *de novo* review notwithstanding Anthony's failure to object at trial. *In re E.M.*, 263 N.C. App. at 479, 823 S.E.2d at 676.

¶ 10 "Our courts have consistently recognized that the State has a greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution." *In re J.R.V.*, 212 N.C. App. 205, 207, 710 S.E.2d 411, 412 (2011) (quoting *In re T.E.F.*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005). The General Assembly has taken measures to ensure that a juvenile's rights are protected during a delinquency adjudication. *In re J.R.V.*, 212 N.C. App. at 207, 710 S.E.2d at 412. N.C. Gen. Stat. § 7B-2405 states, "In the adjudicatory hearing, the court shall protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law: . . . [t]he privilege against self-incrimination." N.C. Gen. Stat. § 7B-2405(4) (2021).

¶ 11 The use of the word "shall" by our Legislature in Section 7B-2405(4) "has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error." *In re J.R.V.*, 212 N.C. App. at 208, 710 S.E.2d at 413 (citation omitted). Thus, the "plain language of N.C. Gen. Stat. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication," including a juvenile's right against self-incrimination. *Id.*, at 210, 710 S.E.2d at 414. A trial court "cannot satisfy this affirmative duty by doing absolutely nothing." *Id.* at 208, 710 S.E.2d at 413. Every defendant has a constitutional right under the Fifth Amendment of the United States Constitution to not "be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The General Assembly has taken affirmative steps to ensure that the court protects the constitutional rights of juveniles regardless of the actions of the State or the juvenile's attorney. "[A]t the very least, some colloquy [is required] between the trial court and juvenile to ensure the juvenile understands his right against self-incrimination before choosing to testify at his adjudication hearing." *In re J.B.*, 261 N.C. App. 371, 373, 820 S.E.2d 369, 371 (2018) (quoting *In re J.R.V.*, 212 N.C. App. at 209, 710 S.E.2d at 413).

¶ 12 In the instant case, there was no colloquy between the trial court and Anthony. After the trial court denied the motion to dismiss at the end of the State's evidence, the juvenile's attorney called Anthony to testify. The trial court directed Anthony to stand up and to be sworn. Anthony did so and then testified. However, at no point did the trial court advise Anthony that he had the right not to incriminate himself. Because the trial court failed to engage in any colloquy with Anthony about the privilege against self-incrimination before Anthony testified, the court failed to follow its statutory mandate from N.C. Gen. Stat. § 7B-2405 to protect the juvenile's constitutional privilege against self-incrimination.

¶ 13 When a trial court violates N.C. Gen. Stat. § 7B-2405, the error is "prejudicial unless it was harmless beyond a reasonable doubt." *In re J.R.V.*, 212 N.C. App. at 209, 710 S.E.2d at 413. The State has the burden of demonstrating that a violation of a constitutional right is harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). Anthony argues, and the State concedes, that the State cannot demonstrate the trial court's error was harmless beyond a reasonable doubt. In fact, until Anthony testified and incriminated himself, there was no evidence about the identity of the person who took Rodriguez's wallet. We, therefore, conclude that the trial court's failure to comply with the mandate of N.C. Gen. Stat. § 7B-2405 was prejudicial and not harmless beyond a reasonable doubt. The proper remedy is

to vacate the adjudication order and remand for a new hearing, during which Anthony can be properly advised of his rights, should he choose to testify.

III. Conclusion

¶ 14 For the reasons stated herein, we hold that the trial court failed in its affirmative duty to protect Anthony's constitutional right against self-incrimination. Accordingly, we vacate the adjudication order and subsequent dispositional order and remand this case to the juvenile court for a new hearing.

VACATED AND REMANDED.

Judges HAMPSON and GRIFFIN concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEEDS OF TRUST
OF MICKEY W. SIMMONS
AND
WAYNE SIMMONS AND HIS WIFE SALLY SIMMONS, GRANTORS

TO J. GREGORY MATTHEWS

Original Deeds of Trust
In Book 1123, Page 573, recorded
On May 2, 2014 AND
In Book 1158, Page 67, recorded
June 12, 2015

No. COA21-682

Filed 4 October 2022

Mortgages and Deeds of Trust—foreclosure—motion to set aside—trustee neutrality—statutory requirements not met

Where a trustee in a foreclosure under power of sale failed to include a notice of trustee neutrality in the notice of the foreclosure hearing as required by N.C.G.S. § 45-21.16(c) and acted as attorney for the noteholders throughout the foreclosure process in violation of N.C.G.S. § 45-10(a), the trial court erred by denying plaintiffs' motion to set aside the foreclosure.

Appeal by Plaintiffs from order entered 3 May 2021 by Judge Michael D. Duncan in Yadkin County Superior Court. Heard in the Court of Appeals 8 August 2022.

Mickey W. Simmons, pro se.

Wayne Simmons and Sally Simmons, pro se.

No brief filed for Defendants-Appellees.

GRIFFIN, Judge.

¶ 1 Plaintiffs Mickey, Wayne, and Sally Simmons appeal from an order denying their motion to set aside a foreclosure action under N.C. R. Civ. P. 60(b). Plaintiffs argue that the trial court erred by denying their motion because (1) the trustee failed to include a notice of trustee neutrality in the notice of the foreclosure hearing; (2) the trustee acted as the foreclosure attorney for the noteholder; and (3) the trustee was the loan closing attorney for the foreclosure loan. We agree that the trial court erred by denying the motion because the trustee failed to include proper notice of neutrality and acted as the foreclosure attorney for the noteholder. For these reasons, we reverse the trial court's order.

I. Factual and Procedural History

¶ 2 In May 2014, Plaintiffs refinanced a mortgage for property located at 1708 Rudy Road in Yadkinville, North Carolina. J. Gregory Matthews was the closing attorney for the 2014 refinance transaction.

¶ 3 Two years later, on 12 April 2016, Mr. Matthews sent a letter to Mickey Simmons to inform him that the property noteholders, Betty and Donald Groce, contacted Mr. Matthews because Mickey had "made no payments on the amounts owed to them." Mr. Matthews requested in the letter that Mickey "contact [Mr. Matthew's] office to make arrangements to execute a deed to transfer the property back to Mr. and Mrs. Groce, in lieu of foreclosure." Mr. Matthews referred to Mr. and Mrs. Groce as his "clients" in the letter. Mr. Matthews sent the letter with his legal letterhead at the top, which reads, "J. Gregory Matthews, Attorney at Law" and signed the letter, "J. Gregory Matthews, Attorney at Law."

¶ 4 On 22 April 2016, Mr. Matthews sent Plaintiffs another letter to inform them that he had been "retained by Donald Groce and wife, Betty Groce, to initiate a foreclosure proceeding" on the property. This letter

also included Mr. Matthew's legal letterhead at the top and the signature, "J. Gregory Matthews, Attorney at Law."

¶ 5 Approximately three months after sending the letters, Mr. Matthews filed a notice of foreclosure hearing, signed, "J. Gregory Matthews, Trustee." There are three separate deeds of trust for the property in the record; Mr. Matthews is listed as the trustee on each deed. A foreclosure hearing proceeded on 6 October 2016. The Clerk of Yadkin County Superior Court ruled from the bench to allow the foreclosure sale to proceed, and, on 7 October 2016, the clerk entered a written order allowing the foreclosure sale.

¶ 6 On 15 October 2019, Mr. Matthews filed a certificate of service indicating that, acting as trustee, he served the notice of trustee's sale of real estate to Plaintiffs. Mr. Matthews did not include any notice of trustee neutrality in the notice of foreclosure hearing, as required by N.C. Gen. Stat. § 45-12.16(c)(7)(b) (2021). Finally, Mr. Matthews sold the property to his clients, the Groces, on 26 November 2019, and filed a trustee's deed for the property signed, "J. Gregory Matthews, Trustee" in December 2019, approximately two weeks after the foreclosure sale.

¶ 7 On 25 November 2020, Plaintiffs filed a motion in Yadkin County Superior Court to set aside the foreclosure procedure under N.C. R. Civ. P. 60(b). The motion was denied by the clerk in January 2021.

¶ 8 Plaintiffs appealed the clerk's decision, and the superior court conducted a *de novo* review. The superior court denied Plaintiffs' motion on 3 May 2021. Plaintiffs timely appeal.

II. Analysis

¶ 9 Plaintiffs argue that the superior court erred by denying their motion and not setting aside the foreclosure because (1) the trustee failed to include a notice of trustee neutrality in the notice of the foreclosure hearing; (2) the trustee acted as the foreclosure attorney for the noteholder; and (3) the trustee was the loan closing attorney for the foreclosure loan. We hold that the trial court erred in denying Plaintiffs' Rule 60(b) motion because the trustee failed to include proper notice of neutrality and acted as the foreclosure attorney for the noteholder.

¶ 10 "[A] motion for relief under [N.C.] Gen. Stat. § 1A-1, N.C. R. Civ. P. 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 194, 217 S.E.2d 532, 539 (1975). "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." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

¶ 11 Under Rule 60(b), a trial court may "relieve a party or his legal representative from a final judgment, order, or proceeding" for various reasons, including that "[t]he judgment is void." N.C. Gen. Stat. § 1A-1, Rules 60(b)(4) (2021). "A judgment is void . . . when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (citations omitted).

¶ 12 With respect to foreclosure under a deed of trust containing power of sale, N.C. Gen. Stat. § 45-21.16(c) provides that notice of foreclosure hearings must include, *inter alia*, "[a] statement that the trustee, or substitute trustee, is a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." N.C. Gen. Stat. § 45-21.16(c)(7)(b) (2021). Moreover, N.C. Gen. Stat. § 45-10(a) specifically prohibits an attorney serving as the trustee from representing the noteholders while initiating a foreclosure proceeding: "An attorney who serves as the trustee or substitute trustee shall not represent either the noteholders or the interests of the borrower while initiating a foreclosure proceeding." N.C. Gen. Stat. § 45-10(a) (2021).

¶ 13 In this case, Mr. Matthews did not provide any notice of neutrality in the notice of foreclosure hearing issued to Plaintiffs, as required by N.C. Gen. Stat. § 45-21.16(c)(7)(b). Mr. Matthews also represented the noteholders while initiating the foreclosure proceeding in direct violation of N.C. Gen. Stat. § 45-10(a). Mr. Matthews sent Plaintiffs multiple demand letters with his attorney letterhead at the top and "Attorney at Law" under his signature. In the first letter, Mr. Matthews referred to the noteholders as "his clients." In the second letter, Mr. Matthews informed Plaintiffs "he had been retained" by the noteholders to initiate the foreclosure proceeding. Mr. Matthews filed the notice of the foreclosure hearing and signed, "J. Gregory Matthews, Trustee." Mr. Matthews is listed as the trustee on three separate deeds of trust and a trustee's deed. Mr. Matthews filed a certificate of service indicating that, acting as trustee, he served the notice of trustee's sale of real estate to Plaintiffs. Mr. Matthews was the trustee for the property. These facts indicate that

Mr. Matthews was impermissibly acting as an attorney for the noteholders during the foreclosure proceedings.

¶ 14 "[W]hile a power of sale provision is meant to function as a more expeditious and less expensive alternative to a foreclosure by action, foreclosure under a power of sale is not favored in the law, and its exercise will be watched with jealousy." *In re Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010). In this case, not only did Mr. Matthews fail to provide Plaintiffs with any notice of his duty to remain neutral in the foreclosure proceedings, he affirmatively advocated for the noteholders throughout the foreclosure process. Allowing the foreclosure to proceed on these facts would eviscerate the requirement that trustees remain neutral in foreclosure proceedings. The trial court's order must be reversed and remanded for entry of an order setting aside the order allowing the foreclosure sale.

III. Conclusion

¶ 15 For the foregoing reasons, we reverse the trial court's order denying Plaintiffs' motion to set aside the foreclosure procedure under N.C. R. Civ. P. 60(b).

REVERSED.

Judges INMAN and WOOD concur.

LANNAN v. BD. OF GOVERNORS OF THE UNIV. OF N.C.

[285 N.C. App. 574, 2022-NCCOA-653]

JOSEPH LANNAN, AND LANDRY KUEHN, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, KNOWN AND DISTINGUISHED BY THE NAME OF "THE UNIVERSITY OF NORTH CAROLINA," A BODY POLITIC AND CORPORATE, DEFENDANT

No. COA21-554

Filed 4 October 2022

1. Appeal and Error—interlocutory order—one of two claims dismissed—substantial right—Rule 54 certification

In a breach of contract action asserted by plaintiffs (students) against defendant (a state university), the trial court's interlocutory order was immediately appealable because its denial of defendant's motion to dismiss plaintiffs' breach of contract claim on sovereign immunity grounds affected a substantial right, and because the trial court certified (pursuant to Civil Procedure Rule 54(b)) its dismissal of plaintiffs' constitutional claim for immediate appeal. Further, the Court of Appeals granted certiorari to review the denial of defendant's motion to dismiss based on Rule 12(b)(6), which was closely related to the other appealable issues.

2. Immunity—sovereign—breach of contract action—contract implied in fact—waiver applied

In a breach of contract action brought by students against a state university involving student and parking fees, in which the alleged contract at issue was one implied in fact, the Court of Appeals determined that, unlike contracts implied in law, contracts implied in fact could waive sovereign immunity because they constituted valid and enforceable contracts as if they were express or written.

3. Contracts—breach—sufficiency of allegations—contract implied in fact—based on payment of student and parking fees in exchange for services

In a breach of contract action brought by students (plaintiffs) against a state university (defendant), plaintiffs adequately pled the existence of a contract implied in fact by claiming that they paid student and parking fees in exchange for certain benefits and services offered by defendant. Defendant's argument that no meeting of the minds took place was for the trier of fact and did not preclude the suit from going forward. Since a contract implied in fact can waive sovereign immunity, the complaint effectively pled waiver

and, therefore, the trial court did not err by denying defendant's motion to dismiss on the grounds of sovereign immunity.

4. Contracts—breach—sufficiency of allegations—payment of student and parking fees in exchange for services—campus shutdown precluded access to services

Plaintiff students adequately pled their breach of contract action against defendant university by alleging that, in exchange for the payment of student and parking fees, defendant promised to provide various specified services and parking permits but a campus shutdown due to a pandemic rendered certain services unavailable and the parking spaces unnecessary. Based on these allegations, the trial court did not err by denying defendants' motion to dismiss under Civil Procedure Rule 12(b)(6) (failure to state a claim).

5. Constitutional Law—state constitutional claim—taking of vested property interest—adequate state law remedy against state university—breach of contract

In an action in which plaintiff students alleged that when defendant university shut down its campus during a pandemic, it breached its contract to provide the services and benefits that it agreed to provide in exchange for plaintiffs' payment of student and parking fees, plaintiffs had an adequate remedy under state law for breach of contract which was not barred by sovereign immunity. Therefore, the trial court properly dismissed their alternative claim, pursuant to *Corum v. Univ. of North Carolina*, 330 N.C. 761 (1992), that defendant violated their state constitutional right (under the Law of the Land Clause) by taking vested property rights without just compensation.

Appeal by defendant and cross appeal by plaintiffs from order entered 30 June 2021 by Judge Edwin G. Wilson, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 8 February 2022.

White & Stradley, PLLC, by J. David Stradley and Robert P. Holmes, IV, and Law Office of Brian D. Westrom, by Brian D. Westrom, for plaintiffs-appellees/cross-appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Laura McHenry and Kari R. Johnson, and Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr. and Jennifer K. Van Zant, for defendant-appellant/cross-appellee.

STROUD, Chief Judge.

¶ 1 Defendant Board of Governors of the University of North Carolina appeals from an order denying its Motion to Dismiss Plaintiffs Joseph Lannan and Landry Kuehn's breach of contract claims. Plaintiffs cross appeal from the same order's grant of Defendant's Motion to Dismiss their state constitutional claim under *Corum v. University of North Carolina Through Bd. of Governors*, 330 N.C. 761, 413 S.E.2d 276 (1992). We first confirm our appellate jurisdiction and grant Defendant's Petition for Writ of Certiorari as to the issue of whether the trial court erred in denying its Motion to Dismiss the contract claims for failure to state a claim under North Carolina Rule of Civil Procedure 12(b)(6). N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2021). As to Defendant's appeal, because Plaintiffs' Amended Complaint pled a valid implied-in-fact contract and such a contract can waive the State and its agencies' sovereign immunity, the trial court properly denied Defendant's Motion to Dismiss the contract claims on sovereign immunity grounds. Because Plaintiffs adequately pled breach of contract claims, the trial court also acted correctly in denying Defendant's Motion on Rule 12(b)(6) grounds. Turning to Plaintiffs' cross appeal, because their contract claims are adequate state remedies, the trial court properly granted the Motion to Dismiss their *Corum* claim. Therefore, we affirm.

I. Background

¶ 2 Since this case is at the pleading stage, we rely upon the facts as alleged in Plaintiffs' Amended Complaint.[1] Defendant is the Board of Governors for the University of North Carolina at Chapel Hill ("UNC-CH") and North Carolina State University at Raleigh ("NCSU"), two constituent institutions of the University of North Carolina ("Universities"). Before the Fall 2020 Term, Defendant required students planning to attend the Universities to pay certain student fees. These students included Plaintiff Kuehn, an undergraduate student at UNC-CH, and Plaintiff Lannan, a graduate student at NCSU. The Universities required students to pay these fees to register as a student, "remain . . . in good standing," receive "scholastic credit," and "obtain a transcript" for the Fall 2020 term.

1. Plaintiffs filed their original Complaint on 10 September 2020. Because the order on appeal ruled on Defendant's Motion to Dismiss the Amended Complaint, we do not discuss the original Complaint, with one exception noted below, for the remainder of this opinion. For completeness of the procedural history, we also note Defendant filed a motion to dismiss the original Complaint on 29 October 2020, and the Chief Justice of the Supreme Court of North Carolina, pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, designated the case as "exceptional" and specifically assigned Judge Wilson to the case on or about 18 November 2020.

¶ 3 The student fees were also "earmarked for specific categories of services and benefits" that Fall 2020 students at the Universities "[were] entitled to receive" from the Universities. The Universities "represented in writing on their respective websites and in written communications to each student" through emails to students, account statements, and an itemized bill, "each component Student Fee would be used for the purposes described . . . for that component fee." For example, both Universities had fees related to student health services. UNC-CH described its student health services fee as: "**Student Health Fee** - $400.16: 'Funds medical services for students, including the salaries, maintenance and operation of student health centers.' " Similarly, NCSU described its student health services fee as: "**Student Health Services Fee** – This fee of $407.00 is used by the University Health Center to offer medical and counseling services to students." The other student fees for the Fall 2020 term included: academic registration, education technology, library services, scholarships, teaching awards, student IDs, different schools within the universities, campus security, campus programming, student organizations, student publications, student government, student legal services, the student centers, sustainability, recreational sports, intercollegiate athletics, transit, night parking, and debt servicing for and expansion of certain on-campus buildings. Plaintiffs and the other students at the Universities paid these fees with the understanding they would be used for the listed services and benefits.

¶ 4 In addition to the student fees, Plaintiffs and some other students purchased from the Universities "optional motor vehicle parking permits which permitted the purchasers to park their motor vehicle on NCSU's and UNC-CH's convenient on-campus parking lots for the Fall 2020 Terms." For Plaintiff Lannan, this fee covered only the Fall 2020 Term, but for Plaintiff Kuehn, the parking permit included both the Fall 2020 and Spring 2021 Terms.

¶ 5 In August 2020, both NCSU and UNC-CH took measures to switch from in-person to online learning and shut down their campuses for the Fall 2020 Term. The original Complaint indicated this shut down was due to the COVID-19 pandemic, but the Amended Complaint includes no explanation for the shutdown. As a result of the shutdown, the constituent Universities: "evicted all students from on-campus housing"; cancelled "all in-person, on-campus instruction"; restricted "campus transportation service to the point that service was of extremely limited value"; barred students from accessing "on-campus student athletic[,] recreation facilities," and student activity venues; "shut down on-campus libraries . . . workshops, laboratories[,] studios, . . . museums[,] arboretums,"

the student unions, and dining halls; "stopped live art performances on campus"; prohibited students from attending intercollegiate sports; "discontinued student organization activity and other in-person student activity"; and "curtailed student health services and advised Fall 2020 Term students that they should obtain health services" elsewhere.

¶ 6 Based on these alleged facts, Plaintiffs eventually filed an Amended Complaint on 3 February 2021. The Amended Complaint includes claims for breach of contract, "or, in the alternative, if it is determined that Plaintiffs cannot assert a claim for breach of contract, a '*Corum* claim' " against Defendant for its constituent Universities UNC-CH and NCSU's decisions to "improper[ly]" assess and retain student fees and on-campus parking permit fees "after on-campus classes, activities, and student services at the" Universities "were stopped or curtailed in and after August 2020." The Amended Complaint states the suit is a class action "on behalf of students who registered and paid student fees for the Fall 2020 academic semester" at the constituent Universities of the University of North Carolina, with a separate class for those who paid for on-campus parking. As a result, the Amended Complaint includes "Class Action Allegations," (capitalization altered) but the class action component of the lawsuit is not at issue in this appeal.

¶ 7 Focusing on the relevant portions of the lawsuit, the breach of contract claims cover both student fees and parking permit fees. As to the student fees contract claim, the Amended Complaint alleges the Universities "offered to Plaintiffs and other prospective Fall 2020 Term . . . students that if the prospective students registered for the Fall 2020 Terms and promised to pay" student fees they "would, in turn, receive the services, benefits, and opportunities" described in the student fees. Plaintiffs and the other students then "accepted the offers" when they paid their student fees and thus "expected to receive, and were entitled to receive . . . all of the services, benefits, and opportunities" described. According to the Amended Complaint, this constituted "a meeting of the minds," thereby creating a contract.

¶ 8 While Plaintiffs and the other students in the class "fully performed their duties" by paying the student fees, the Universities breached the contract when they shut down their campuses, as detailed above, because they either stopped providing the services or "rendered" them "of no value whatsoever." The Amended Complaint alleges "[b]ut for the unnecessary decisions" to shut down the campuses, Plaintiffs and the other students in the proposed class "would have regularly gone on their respective campuses" and thus taken advantage of the services and benefits provided for by the student fees, as they and others had done in

the past. Finally, the Amended Complaint alleges Plaintiffs and the other students suffered damages because they did not receive "the services, benefits, and opportunities" they paid for with the student fees and the fees "were not adjusted, pro-rated, or rebated in any way" following the campus shutdowns.

¶ 9 As to the parking fees contract claim, the Universities "offered to sell optional parking permits" to Plaintiffs and other students "which would permit the purchaser to park a motor vehicle in an on-campus parking lot during the Fall 2020" Term. Plaintiffs and some other students "accepted the offers" by buying the parking passes, thereby forming a contract. The Amended Complaint alleges all relevant students performed by paying their parking fees fully and expected and were entitled to receive "the full benefit of their parking permits for the duration of the Fall 2020 Term." But the Universities breached the contract by shutting down their campuses, which meant the on-campus parking passes were "rendered worthless." While Plaintiffs and other students received partial refunds, the refunds did not cover the full cost of the parking passes and thus the full damages suffered.[2]

¶ 10 For both contract claims, the Amended Complaint also alleges Defendant waived sovereign immunity. It first alleges Defendant is a State agency. Then, it alleges when the State or its agencies, such as Defendant, enter into a contract, it "implicitly consents to be sued for the breach of that contract and the doctrine of sovereign immunity is not a defense." (Citing *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d. 412, 423–24 (1976).) The Amended Complaint finally alleges Defendant waived "any defense based on sovereign immunity when it entered into the contracts" for student fees and parking permits as already described.

¶ 11 Finally, the Amended Complaint includes a *Corum* claim "in the alternative" to its breach of contract claims if those are barred by sovereign immunity. The Amended Complaint alleges a *Corum* claim allows a direct claim under our Constitution for a violation of a right protected by our Constitution when a plaintiff lacks access to other statutory or common law remedies. Specifically, Plaintiffs allege the contracts with the Universities—wherein they paid money for certain services and benefits—created a "vested property interest" in those service and benefits such that they would either receive those things or "receive a timely and proportionate refund" for what the Universities "promised, but failed,

2. As to Lannan and other NCSU students, the Amended Complaint first alleges, "NCSU rebated no parking permit fees to Lannan, or, upon information and belief, to any other" impacted students before later saying Lannan received a rebate.

to provide." The Amended Complaint explains under our Constitution's Article I, § 19 "[L]aw of the [L]and" Clause, such private property could not be "taken for public use" unless "just compensation" was paid. (Citing *Eller v. Bd. of Educ. of Buncombe Cty.*, 242 N.C. 584, 586, 89 S.E.2d 144, 146 (1955).) According to the Amended Complaint's allegations, when the Universities shut down and denied Plaintiffs and other students those benefits, they took the vested property interest, and they did not provide appropriate refunds as just compensation.

¶ 12 The Amended Complaint also states "If the claims for breach of contract . . . fail, then Plaintiffs" and other students in the proposed classes "lack any sort of state remedy." As part of this paragraph, the Amended Complaint states, "But for the doctrine of sovereign immunity, Plaintiffs and the other students would have claims against [Defendant]" or its constituent institutions "for the intentional tort of conversion or for unjust enrichment." Finally, as to the *Corum* claim, Plaintiffs allege they are "entitled to" money damages.

¶ 13 On 2 March 2021, Defendant filed a "Motion to Dismiss [the] Amended Complaint" based on North Carolina Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). (Capitalization altered.) First, Defendant argued "Plaintiffs' claims are barred by sovereign immunity." Next, Defendant contended the Amended Complaint failed to state claims for relief for breach of contract and for a state constitutional violation. Finally, Defendant's Motion to Dismiss claimed Plaintiffs "lack standing to assert the claims in the Amended Complaint on behalf of other students" and fail to show "Defendant's alleged conduct proximately caused Plaintiffs' alleged damages."

¶ 14 Following a hearing on 10 May 2021, the trial court entered an order on Defendant's Motion to Dismiss on 18 June 2021. The order granted the Motion to Dismiss Plaintiffs' *Corum* claim, but it denied the Motion to Dismiss Plaintiffs' contract claims. On or about 23 June 2021, Defendant filed a notice of appeal from that order.

¶ 15 On 29 June 2021, Plaintiffs filed a "Motion to Amend [the] Order." (Capitalization altered.) Plaintiffs' Motion to Amend requested the trial court amend its order on Defendant's Motion to Dismiss to make clear the *Corum* claim was "properly pled" in general and only failed because Plaintiffs "had an adequate state-law remedy" via the contract claims such that "the court of appeals would have jurisdiction to review the dismissal of the *Corum* claim as an alternative basis for denying the Motion to Dismiss." Plaintiffs also requested, "[i]n the alternative," the order be amended "to certify the dismissal of the *Corum* claim as a final judgment and that there is no just reason for delaying the appeal of that dismissal."

¶ 16 The trial court entered an "Amended Order" on 30 June 2021. (Capitalization altered.) The trial court still granted Defendant's Motion to Dismiss as to the *Corum* claim and denied it as to the contract claims. It then added language "conclud[ing] that there is no just reason to delay the appeal of the dismissal of the Corum claim and that Order is hereby certified for immediate appeal," as Plaintiffs had requested. On 1 July 2021, Plaintiffs filed written notice of appeal from the Amended Order's dismissal of their *Corum* claim. Defendant filed a notice of appeal from the Amended Order's denial of its Motion to Dismiss the contract claims on 6 July 2021.

II. Analysis

¶ 17 This case presents three issues for our review arising from Defendant's appeal and Plaintiffs' cross-appeal of the Amended Order. First, Defendant argues "the doctrine of sovereign immunity bars Plaintiffs' claims," so the trial court should have dismissed Plaintiffs' contract claims. (Capitalization altered.) Second, Defendant argues the trial court should have dismissed the contract claims "pursuant to Rule [of Civil Procedure] 12(b)(6) for failure to plead a claim for breach of contract upon which relief may be granted." Third, in their cross-appeal, Plaintiffs argue to the extent they "have no remedy for breach of contract . . ., then, in the alternative, their *Corum* claims state claims for relief" such that the trial court erred by dismissing that claim.[3] (Capitalization altered.) We first discuss our jurisdiction to review each of these issues and then discuss the merits.

A. Appellate Jurisdiction

¶ 18 **[1]** An appellate court cannot hear an appeal if it does not have jurisdiction, so we must first confirm we have jurisdiction. *See Dogwood Development and Management Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364 (2008) ("It is axiomatic that courts of law must have their power properly invoked by an interested party."); *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980) (explaining appellate courts must always ensure they have jurisdiction to hear an appeal); *see also RPR & Associates, Inc. v. State*, 139 N.C. App. 525, 527, 534 S.E.2d 247, 249–50 (2000) (explaining this Court had to "determine whether th[e] appeal [was] properly before" it in a case involving a denial of a motion to dismiss based on sovereign immunity). Generally, appellate courts only have jurisdiction to hear appeals from

3. Plaintiffs refer to multiple *Corum* claims in their appellate briefing, but the Amended Complaint only includes one *Corum* claim. Thus we refer to a singular *Corum* claim during this appeal.

a final judgment, not from an interlocutory order. *See* N.C. Gen. Stat. § 7A-27 (2021) (permitting appeals as a matter of right to this Court from final judgments and from a limited set of interlocutory orders); *Can Am South, LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014) ("Generally, there is no right of immediate appeal from interlocutory orders and judgments." (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990))); *see also Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) (defining final judgment and interlocutory order).

¶ 19 This general rule barring appeals from interlocutory orders has two exceptions:

> First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. N.C.G.S. § 1A–1, Rule 54(b) (1990). Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381; *see also* N.C.G.S. § 1–277 (1996); N.C.G.S. § 7A–27 (1995); *Tridyn Indus., Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979).

Department of Transp. v. Rowe, 351 N.C. 172, 174–75, 521 S.E.2d 707, 709 (1999); *see also Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 360, 363, 731 S.E.2d 245, 246–48 (2012) (describing same two exceptions in case related to immunity and state constitutional claims).

¶ 20 Here, as both parties recognize, the Amended Order on Defendant's Motion to Dismiss is an interlocutory order. Since the Order dismissed Plaintiffs' *Corum* claim but not its contract claims, it did not "dispose of the case, but [left] it for further action by the trial court in order to settle and determine the entire controversy." *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381 (so defining an interlocutory order). This Court has also repeatedly explained, in general, "the denial of a motion to dismiss is not immediately appealable because it is an interlocutory order." *E.g.*, *RPR*, 139 N.C. App. at 527, 534 S.E.2d at 249; *Can Am South*, 234 N.C. App. at 122, 759 S.E.2d at 307. Therefore, we must determine whether either of the exceptions applies to allow us to review each of the parties' issues on appeal. *See Richmond County Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 568–69 (2013) (allowing immediate

appeal of sovereign immunity issue but not allowing review of denial of Rule 12(b)(6) motion on separate issue).

1. Sovereign Immunity

¶ 21 As to Defendant's sovereign immunity argument, we agree with both parties that "an order denying a dismissal motion predicated upon the doctrine of sovereign immunity . . . is immediately appealable 'because it represents a substantial right.' " *State ex rel. Stein v. Kinston Charter Academy*, 379 N.C. 560, 2021-NCSC-163, ¶ 23 (quoting *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351 (2009)).

¶ 22 "Sovereign immunity protects the State and its agencies from suit absent waiver or consent." *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008) (quoting *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001)). Defendant Board of Governors is an agency of the State.[4] *See* N.C. Gen. Stat. § 116-3 (2021) (establishing the Board "as a body politic and corporate"). As a result, it can claim the protection of sovereign immunity.

¶ 23 The protection of sovereign immunity extends beyond just a mere "defense in a lawsuit"; a "valid claim . . . is in essence immunity from suit." *RPR*, 139 N.C. App. at 527, 534 S.E.2d at 250. This characteristic of sovereign immunity explains why our caselaw allows immediate appeal of orders denying motions to dismiss on sovereign immunity grounds. If the case is "erroneously permitted to proceed to trial, immunity would be effectively lost." *Doe*, 222 N.C. App. at 364, 731 S.E.2d at 248 (quotations and citations omitted); *see also RPR*, 139 N.C. App. at 527–28, 534 S.E.2d at 250 (explaining ability to lose benefits of immunity means denial of motion to dismiss based on sovereign immunity affects a substantial right). Because Defendant's loss of the protection provided by sovereign immunity affects a substantial right, we have jurisdiction to hear Defendant's appeal on this issue.

2.* Corum *Claim

¶ 24 As Plaintiffs argue, their *Corum* claim falls under the other exception to the bar on interlocutory appeals, Rule of Civil Procedure 54(b)

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4. This Court has also previously found the two constituent Universities covered in the Amended Complaint, UNC-CH and NCSU, *see* N.C. Gen. Stat. § 116-4 (2021) (listing constituent universities of the University of North Carolina), are state agencies for the purpose of sovereign immunity. *Kawai America Corp. v. University of North Carolina at Chapel Hill*, 152 N.C. App. 163, 165, 567 S.E.2d 215, 217 (2002) (stating UNC-CH "is a state agency to which the doctrine of sovereign immunity applies"); *Wood*, 147 N.C. App. at 338, 556 S.E.2d at 40 (stating "NCSU is a State agency" in a paragraph on sovereign immunity).

certification. In relevant part, Rule 54(b) allows a trial court to certify for immediate appeal a final judgment on one claim in a multi-claim action:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, 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) (2021).

¶ 25 Here, in the Amended Order ruling on Defendant's Motion to Dismiss, the trial court included the following language about the *Corum* claim: "The Court concludes that there is no just reason to delay the appeal of the dismissal of the Corum claim and that Order is hereby certified for immediate appeal." The trial court properly certified the dismissal of the *Corum* claim, so we have jurisdiction to review Plaintiffs' cross-appeal as to the trial court's dismissal of the *Corum* claim.

3. Motion to Dismiss Contract Claims under Rule 12(b)(6)

¶ 26 Finally, we must consider appellate jurisdiction to review the trial court's denial of Defendant's Motion to Dismiss the contract claims under Rule 12(b)(6). Defendant argues we can also review this issue because it is "inextricably intertwined" with immediately appealable issues. Defendant argues the 12(b)(6) issue is inextricably intertwined with the sovereign immunity issue because Plaintiffs' argue sovereign immunity has been waived because a contract exists and to assess that argument we "must analyze and determine whether the Amended Complaint sufficiently identifies a valid contract." Defendant also contends the 12(b)(6) issue is inextricably intertwined with the *Corum* issue because: (1) a *Corum* claim is only available when there is no adequate state remedy and the existence of a contract claim is such an adequate remedy; or (2) the constitutional claim underlying Plaintiffs' *Corum* claim is an unconstitutional taking under the Law of the Land Clause and that also requires a valid contract.[5] In the alternative, Defendant asks we grant its

5. Defendant technically includes these arguments about the *Corum* issue being inextricably intertwined with the 12(b)(6) issue as a reason we should issue a Petition for Writ of Certiorari ("PWC") to hear the issue of whether Plaintiffs' pleaded a breach of contract claim. This contrasts with Defendant's treatment of the inextricably intertwined nature of the sovereign immunity issue and 12(b)(6) issue where Defendant argued

Petition for Writ of Certiorari ("PWC") to review "all grounds involved in" its Motion to Dismiss.

¶ 27 As Defendant argues, a valid contract is a pre-requisite for each of the three issues in dispute. A valid contract is necessary to waive sovereign immunity. *See Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976) ("[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract" such that "the doctrine of sovereign immunity will not be a defense to the State."). A valid contract is necessary to survive a motion to dismiss under Rule 12(b)(6) for a contract claim. *E.g.*, *Montessori Children's House of Durham v. Blizzard*, 244 N.C. App. 633, 636, 781 S.E.2d 511, 514 (2016) ("The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." (quoting *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000))). And, as relevant to Plaintiffs' claim under *Corum*, a valid contract is required to bring a suit under our state Constitution's Law of the Land Clause because that provides the vested property right the State cannot take without just compensation. *See Adams v. State*, 248 N.C. App. 463, 470, 790 S.E.2d 339, 344 (2016) (although recognizing "vested contractual rights are property and are protected by the Law of the Land Clause of our Constitution," rejecting argument because plaintiffs failed to show vested contractual right (citing *Bailey v. State*, 348 N.C. 130, 154, 500 S.E.2d 54, 68 (1998))). Thus, if we agree with Defendant on the merits and find there is not a valid contract, all the issues are linked by this common thread.

"issues inextricably intertwined with immediately appealable issues may also be immediately appealed."

Our caselaw also has not consistently treated the inextricably intertwined nature of issues on appeal as a reason to grant a PWC as opposed to an additional way to have a right to appeal. *Compare Carl*, 192 N.C. App. at 550, 665 S.E.2d at 793 ("Although the denial of their Rule 12(b)(6) defense is interlocutory, we agree with the State that the issue is inextricably intertwined with the issues before this Court as of right. Accordingly, we grant the Writ of Certiorari and address the State's argument in this appeal.") *with State v. Carver*, 277 N.C. App. 89, 2021-NCCOA-141, ¶ 23 ("[A] right to appeal those other issues exists only if this Court finds those issues 'inextricably intertwined with the issues before this Court as of right.' " (quoting *Carl*, 192 N.C. App. at 550, 665 S.E.2d at 793)).

For the purpose of this discussion, we assume without deciding an issue inextricably intertwined with another issue where there is an appeal of right can also be appealed as a matter of right. If two issues are intertwined such that addressing one addresses the other, *see Carver*, ¶ 24 (summarizing this Court's application of "the 'inextricably intertwined' rule" in *State v. Howard*, 247 N.C. App. 193, 783 S.E.2d 786 (2016) by explaining all three issues were just based on the first issue), it makes little sense to require a party to file a PWC rather than just having a right to appeal. Still, we need not decide the issue because we grant the PWC on separate grounds.

¶ 28 But, if we do not agree with Defendant on the validity of the contract, all the issues suddenly become untethered; once there is a valid contract, we could still rule for either side on a separate ground. On the waiver of sovereign immunity, we could still rule for Defendant if a valid implied-in-fact, as opposed to an "express," contract is not sufficient, as Defendant and Plaintiffs contest on the merits and we discuss more below. On the Rule 12(b)(6) ground to dismiss the contract claims, we could still rule for Defendant if Plaintiffs failed to adequately plead breach. *See Montessori Children's House*, 244 N.C. App. at 636, 781 S.E.2d at 514 (requiring "a valid contract and . . . breach"). On the *Corum* claim, we could still rule for Defendant if Plaintiffs have an alternate adequate remedy. *See Taylor v. Wake County*, 258 N.C. App. 178, 183, 811 S.E.2d 648, 652 (2018) ("A *Corum* claim is available to a plaintiff who is able to establish that (1) her state constitutional rights have been violated, and (2) she lacks any sort of 'adequate state remedy.' " (quoting *Corum*, 330 N.C. at 782, 413 S.E.2d at 289)). We should not have to determine part of the merits of a case in this way to determine if we have jurisdiction to reach the merits issues. Thus, the issues are not so inextricably intertwined that jurisdiction over either the sovereign immunity issue or the *Corum* issue grants us jurisdiction over the Rule 12(b)(6) issue.

¶ 29 At the same time, these links between the issues convince us to grant Defendant's PWC to review the 12(b)(6) issue. As Defendant indicates, our appellate courts can grant a PWC when doing so "will serve the expeditious administration of justice . . . ." *North Carolina Department of Transportation v. Laxmi Hotels of Spring Lake, Inc.*, 259 N.C. App. 610, 618, 817 S.E.2d 62, 69 (2018). Here, once we determine the validity of the contract for sovereign immunity, we have already conducted a major part of the Rule 12(b)(6) analysis, and it would save judicial resources to finish that analysis rather than leave it for review after final judgment in this case when the court may also have to deal with an additional myriad of issues. Therefore, in our discretion, we grant Defendant's PWC to review the trial court's denial of Defendant's Motion to Dismiss the contract claims for failure to state a claim under Rule 12(b)(6).

B. Sovereign Immunity

¶ 30 Defendant argues "the doctrine of sovereign immunity bars Plaintiffs' claims." (Capitalization altered.) Specifically, Defendant contends "Plaintiffs have not adequately pled waiver of sovereign immunity" because they have not pled a "valid and express contract" as required. Within this argument, Defendant has two points. First, Defendant argues Plaintiffs fail to plead an express contract. On this point, Plaintiffs

respond an express contract is not required because "an implied-in-fact contract overcomes sovereign immunity" too. Second, Defendant asserts Plaintiffs failed "to allege a [valid] contract." Plaintiffs respond they "pleaded a valid contract implied-in-fact." (Capitalization altered.)

¶ 31 Thus, Defendant's sovereign immunity argument presents us with two issues. As both parties agree, a valid contract can waive sovereign immunity. *Smith*, 289 N.C. at 320, 222 S.E.2d at 423–24. First, we must decide if a valid implied-in-fact contract, as opposed to an express contract, can waive sovereign immunity. Then, if an implied-in-fact contract can waive sovereign immunity, we consider whether Plaintiffs pled a valid implied-in-fact contract sufficient to effect such a waiver. After addressing the standard of review, we discuss each issue in turn.

1. Standard of Review

¶ 32 Our Supreme Court recently explained an appellate 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*, ¶ 23 (citing *White v. Trew*, 366 N.C. 360, 362–63, 736 S.E.2d 166 (2013)); *see also Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 898 (2017) ("[Q]uestions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo." (quoting *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016))).

¶ 33 To the extent the question of whether Plaintiffs' pled a valid contract should be reviewed under the standard for orders on motions to dismiss under Rule 12(b)(6), the standard is the same, i.e. de novo. *See State ex rel. Stein*, ¶ 25 n.2 (explaining standard is the same because "the only factual materials presented for the trial court's consideration were those contained in the complaint"); *see also Wray*, 370 N.C. at 46–47, 802 S.E.2d at 898 (stating appellate courts "review appeals from dismissals under Rule 12(b)(6) de novo" immediately before stating same standard for sovereign immunity (quotations and citations omitted)). In conducting such a review of the complaint, appellate courts treat as true the complaint's allegations. *Deminski on behalf of C.E.D. v. State Board of Education*, 377 N.C. 406, 2021-NCSC-58, ¶ 12 ("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.' " (quoting *Coley v. State*, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006))); *see also State ex rel. Stein*, ¶ 25. An appellate court "is not, however, required to accept mere conclusory allegations, unwarranted deductions of fact, or

unreasonable inferences as true." *Estate of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 493, 751 S.E.2d 227, 233 (2013).

2. Whether an Implied-In-Fact Contract Can Waive Sovereign Immunity

¶ 34 **[2]** The first issue for our de novo review is whether an implied-in-fact contract can waive sovereign immunity. "As a general rule, under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Wray*, 370 N.C. at 47, 802 S.E.2d at 898 (quotations, citations, and alterations omitted). But, as we explained above, the State—which includes Defendant Board of Governors, *see* N.C. Gen. Stat. § 116-3 (establishing the Board "as a body politic and corporate")—"waives that immunity when it enters into a valid contract, to the extent of that contract." *Wray*, 370 N.C. at 47, 802 S.E.2d at 899 (citing *Smith*, 289 N.C. at 320, 222 S.E.2d at 423–24 and *Whitfield v. Gilchrist*, 348 N.C. 39, 42–43, 497 S.E.2d 412, 414 (1998)). As such, for contract claims, "[t]he State will occupy the same position as any other litigant." *Smith*, 289 N.C. at 320, 222 S.E.2d at 424.

¶ 35 Our Supreme Court held the State waives its sovereign immunity by entering into a contract based on five "considerations":

> (1) To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process;
>
> (2) To hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny;
>
> (3) To attribute to the General Assembly the intent to retain to the state the right, should expedience seem to make it desirable, to breach its obligation at the expense of its citizens imputes to that body 'bad faith and shoddiness' foreign to a democratic government;
>
> (4) A citizen's petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party; and

> (5) The courts are a proper forum in which claims against the state may be presented and decided upon known principles.

Id., 289 N.C. at 320, 222 S.E.2d at 423 (spacing altered to start each consideration on a new line).

¶ 36 *Smith* spoke of the waiver of sovereign immunity in broad terms, only requiring a valid contract, in a case where the employment contract was based on statute. *See id.*, 389 N.C. at 309, 320, 222 S.E.2d at 417, 423–24 ("We hold, therefore, that whenever the State of North Carolina, through its authorized officers and agencies, enters into a *valid* contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." (emphasis added)); *see also Data General Corp. v. County of Durham*, 143 N.C. App. 97, 102, 545 S.E.2d 243, 247 (2001) (emphasizing the requirement for a *valid* contract from *Smith*). In the decades since *Smith*, our appellate courts have continued to refine the contours of *Smith*'s sovereign immunity waiver, explaining how it applies, or does not apply, to the "three variations of contract theory." *See Waters Edge Builders, LLC v. Longa*, 214 N.C. App. 350, 353, 715 S.E.2d 193, 196 (2011) (quotations and citation omitted) ("There are at least three variations of contract theory: express contract, contract implied in fact, and contract implied in law." (quotations, citation, and alterations omitted)). The courts have first applied the waiver in cases where there are express, written contracts. *See, e.g.*, *Kawai America Corp.*, 152 N.C. App. at 167–68, 567 S.E.2d at 218–19 (recounting complaint allegations about the written terms of the agreement before saying the claim is "based on allegations of contract" so it is not barred by sovereign immunity).

¶ 37 Our caselaw has also clarified contracts implied in law, which are also called quasi contracts and which permit recovery based on *quantum meruit*, do not waive sovereign immunity. *See Whitfield*, 348 N.C. at 41–42, 497 S.E.2d at 414 (court agreeing with statement "sovereign immunity bars recovery on the basis of *quantum meruit* in an action against the State upon a quasi contract or contract implied in law"); *see also Eastway Wrecker Service, Inc. v. City of Charlotte*, 165 N.C. App. 639, 643, 599 S.E.2d 410, 412 (2004) (affirming dismissal of *quantum meruit* claim "because such a claim when brought against an arm of the State is barred by sovereign immunity"). In *Whitfield*, our Supreme Court explained *Smith* found the State waived sovereign immunity when entering into contracts "*authorized by law*" because in those instances the State is "voluntarily" entering the contract and thereby "authoriz[ing] its liability." *Whitfield*, 348 N.C. at 42, 497 S.E.2d at 415

(emphasis in original) (quoting *Smith*, 289 N.C. at 322, 222 S.E.2d at 425). "Furthermore, the State may, with a fair degree of accuracy, estimate the extent of its liability for a breach of contract." *Id.* (quoting *Smith*, 289 N.C. at 322, 222 S.E.2d at 425). Based on that reasoning, the *Whitfield* Court was unwilling to "imply a contract in law where none exists in fact"—since "[a] quasi contract or a contract implied in law is not a contract," *see id.* (quoting *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988)) (explaining it would not imply a contract in law after previously discussing a contract in law is not an actual contract)—and "then use that implication to support the further implication that the State has intentionally waived its sovereign immunity and consented to be sued for damages for breach of the contract it never entered in fact." *Id.*, 348 N.C. at 42–43, 497 S.E.2d at 415. As a result, the *Whitfield* Court "conclude[d] that a contract implied in law is insufficient to constitute a waiver of sovereign immunity." *Id.*, 348 N.C. at 40, 497 S.E.2d at 413.

¶ 38 As Defendant highlights, *Whitfield* and other cases from this line around contracts implied in law sometimes include broad language that when read literally, and taken out of context, could also exclude contracts implied in fact from the waiver of sovereign immunity. For example, *Whitfield* says, "Only when the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach." 348 N.C. at 43, 497 S.E.2d at 415 (emphasis in original). Later, *Whitfield* explains, "A contract implied in law—as opposed to an express valid contract—simply will not form a sufficient basis for a court to make a reasonable inference that the State has intended to waive its sovereign immunity." 348 N.C. at 45, 497 S.E.2d at 416. And in *Eastway Wrecker Service*, this Court stated, "Without both an express contract and a valid contract, the State has not waived its sovereign immunity." 165 N.C. App. at 644, 599 S.E.2d at 413.

¶ 39 But these overly broad statements do not change the fact that *Whitfield* and *Eastway Wrecker Service* concern contracts implied in law *only*. In addition to our above discussion of *Whitfield*'s focus on contracts implied in law, we note the two broad statements still emphasize the need to enter into a *valid* contract and state a contract implied in law is not enough without mention of a contract implied in fact, 348 N.C. at 43, 45, 497 S.E.2d at 415–16, which is a valid contract. *See Snyder v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980) (stating, in a paragraph about contracts implied in fact, "An implied contract is valid and enforceable as if it were express or written"); *Sanders v. State Personnel Com'n*, 183 N.C. App. 15, 21, 644 S.E.2d 10, 14 (2007)

(explaining *Archer v. Rockingham County*, 144 N.C. App. 550, 548 S.E.2d 788 (2001) established "contracts implied from the facts . . . involve actual contracts").

¶ 40 *Eastway Wrecker Service* likewise was limited to contracts implied in law. First, directly after the statement we pointed out above, this Court explained, "This dual requirement necessarily precludes any recovery in *quantum meruit* against the State . . . ." *Eastway Wrecker Service*, 165 N.C. App. at 644, 599 S.E.2d at 413. And these statements came after the court explained "dismissal of the *quantum meruit* claim was still appropriate because *such a claim* when brought against an arm of the State is barred by sovereign immunity." *Id.*, 165 N.C. App. at 643, 599 S.E.2d at 412 (emphasis on "such a claim" added). *Eastway Wrecker Service* also distinguished another case, *Archer*, because *Archer* involved a "valid employment contract." 165 N.C. App. at 643, 599 S.E.2d at 413. Notably, *Archer* was a case involving a contract implied in fact. *See Archer*, 144 N.C. App. at 557, 548 S.E.2d at 793 (explaining *Smith*'s "reasoning is equally sound when applied to implied oral contracts"); *Sanders*, 183 N.C. App. at 21, 644 S.E.2d at 14 (explaining *Archer* was referring to contracts implied in fact when it discussed implied contracts by stating "*Archer* establishe[d]" contracts "implied from the facts . . . involve actual contracts").

¶ 41 We conclude *Whitfield* and *Eastway Wrecker Service* only allow the State to defend itself based on sovereign immunity against contracts implied in law, not contracts implied in fact. This conclusion is bolstered by another line of cases holding the State waives its sovereign immunity when it enters into a contract implied in fact. *See Sanders*, 183 N.C. App. at 21, 644 S.E.2d at 14 (stating "even if the existence of a contract must be implied from the circumstances and relationship between the parties, the analysis of *Smith* still applies" before going on to clarify that was a description of "contracts implied from the facts"). This line of cases starts with *Archer*. In that case, this Court explained *Smith* is not limited to express or written contracts because "its reasoning is equally sound when applied to implied oral contracts." *See* 144 N.C. App. at 557, 548 S.E.2d at 793 (explaining in terms of written contracts shortly after saying contracts in the employment context at issue in the case "may be express or implied"). *Archer* then defined an "implied contract" as "an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." *Id.*

¶ 42 In *Sanders*, this Court further explained *Archer*. First, the *Sanders* Court clarified *Archer* was referring to contracts implied in fact when it discussed implied contracts. *See* 183 N.C. App. at 21, 644 S.E.2d at 14 (explaining *Archer* established "contracts implied from the facts . . .

involve actual contracts"). In that case, the defendants "confused contracts implied from the facts—which, as *Archer* establishes, involve actual contracts—with contracts implied in law, which do not involve a contract." *Id.* After that explanation of the difference, *Sanders* clarified cases including *Whitfield* and *Eastway Wrecker Service* only applied to contracts implied in *law* and thus had no bearing on the question of whether a contract implied in *fact* waived sovereign immunity. *See id.*, 183 N.C. App. at 21–22, 644 S.E.2d at 14 (stating *Whitfield* "is inapposite" because it involved a contract implied in law whereas the instant case involved "an actual employment contract" before also citing *Eastway Wrecker Service*).

¶ 43 And since *Sanders*, this Court has continued to apply *Smith*'s sovereign immunity waiver to contracts implied in fact. For example, in *Lake v. State Health Plan for Teachers and State Employees*, this Court rejected the defendants' argument their Rule 12(b)(2) motion based on sovereign immunity "should have been granted because [the p]laintiffs failed to allege an express agreement" on the grounds that, as in *Sanders*, the plaintiffs alleged "something 'in the nature of a contractual obligation' which would still amount to a valid contract under *Archer*." 234 N.C. App. 368, 371, 374, 760 S.E.2d 268, 271, 273 (2014) (quoting *Sanders*, 183 N.C. App. at 21, 644 S.E.2d at 13)).

¶ 44 Defendant argues these cases do not apply here because they all arise from the "employment context" where "there is no doubt that the governmental entity intentionally employed the complainant and that a contract of some sort exists." (Emphasis in original.) By contrast, according to Defendant, "[i]n the educational context . . . the relationship between school and student is not inherently contractual." (Emphasis in original.) While in its briefing Defendant never identified what relationship exists between school and student if not a contractual one, at oral argument Defendant said the relationship is statutory in nature. Defendant pointed us to provisions in North Carolina General Statute § 116-143 requiring Defendant to "fix the tuition and fees, not inconsistent with the actions of the General Assembly . . . in such amount or amounts as it may deem best . . .," with each constituent institution collecting them from students, and prohibiting "the giving of tuition and fee waivers, or especially reduced rates," at least to the extent this "represent[s] in effect a variety of scholarship awards, . . . except when expressly authorized by statute." N.C. Gen. Stat. § 116-143 (a), (c) (2019). Defendant's argument does not persuade us.[6]

6. Defendant also cites a decision from the U.S. District Court in Maryland that, according to it, "rejected arguments identical to Plaintiffs' arguments in this case and

¶ 45 Defendant is correct the cases extending *Smith* to implied in fact contracts are all from the employment context. *See Archer*, 144 N.C. App. at 552, 548 S.E.2d at 790 ("[T]he County has waived any immunity it had by entering into an implied employment contract with the EMTs."); *Sanders*, 183 N.C. App. at 19, 644 S.E.2d at 13 ("In the amended complaint, plaintiffs allege that the State entered into employment contracts with the plaintiffs, incorporating state personnel regulations . . . ."); *Lake*, 234 N.C. App. at 371, 760 S.E.2d at 271 ("Plaintiffs pled that they each had a contract of employment with the State . . . ."). But the reasoning of those cases extends beyond the employment context. Those cases turned on the similarities of express and implied in fact contracts and how, as a result, the reasoning of *Smith* applied equally to implied in fact contracts. *See Archer*, 144 N.C. App. at 557, 548 S.E.2d at 793 (discussing difference between express and implied contracts and then stating, "We do not limit *Smith* to written contracts; its reasoning is equally sound when applied to implied oral contracts"); *Sanders*, 183 N.C. App. at 21–22, 644 S.E.2d at 14 (explaining, "In short, even if the existence of a contract must be implied from the circumstances and relationship between the parties, the analysis of *Smith* still applies" before rejecting the defendants' arguments because "contracts implied from the facts . . . involve actual contracts"); *Lake*, 234 N.C. App. at 372, 374, 760 S.E.2d at 272–73 (emphasizing *Archer*'s language about *Smith* applying equally to implied contracts and then relying on *Archer* and *Sanders* to find the plaintiffs survived a motion to dismiss based on sovereign immunity because they "alleged something 'in the nature of a contractual obligation' " (quoting *Sanders*, 183 N.C. App. at 21, 644 S.E.2d at 13).

¶ 46 Contrary to Defendant's argument, the employment context and the educational context are not so different that we can disregard the cases addressing contracts implied in fact in the employment context. *See Archer*, 144 N.C. App. at 552, 548 S.E.2d at 790; *Sanders*, 183 N.C. App. at 19, 644 S.E.2d at 13; *Lake*, 234 N.C. App. at 371, 760 S.E.2d at 271. In the employment cases, an employee agrees to work for the employer, and the employer agrees to pay the employee; based upon these facts, the terms of the implied contract are clear, even without an express written contract. In the educational context, as alleged by Plaintiffs' Amended Complaint, the educational institutions agreed to accept and enroll the students, and the students have agreed to pay certain fees for particular services to be provided as part of the educational program. The

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dismissed the students' contract claims." (Citing *Student "A" v. Hogan*, 513 F. Supp. 3d 638, 645 (D. Md. 2021).) But Defendant indicates the court's decision turned on Maryland's requirement of a written contract for a waiver of sovereign immunity, and our caselaw, as discussed above, does not contain any such limitation.

parameters of the alleged implied contract are quite clear, and as noted by the *Whitfield* Court, "the State may, with a fair degree of accuracy, estimate the extent of its liability for a breach of contract." 348 N.C. at 42, 497 S.E.2d at 415 (quoting *Smith*, 289 N.C. at 322, 222 S.E.2d at 425).

¶ 47 Extending *Archer* and its progeny beyond the employment context is consistent with our treatment of implied in fact contracts in general. Our Supreme Court has long held "[a]n implied [in fact] contract is valid and enforceable as if it were express or written." *See Snyder*, 300 N.C. at 217, 266 S.E.2d at 602 (stating in a paragraph about contracts implied in fact). "Except for the method of proving the fact of mutual assent, there is no difference in the legal effect of express contracts and contracts implied in fact." *Creech v. Melnik*, 347 N.C. 520, 526–27, 495 S.E.2d 907, 911 (1998) (citing *Snyder*, 300 N.C. at 217, 266 S.E.2d at 602). And that difference in the method of proving mutual assent has no effect at this pleading stage of proceedings. "Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact." *Snyder*, 300 N.C. at 217, 266 S.E.2d at 602 (citing *Storey v. Stokes*, 178 N.C. 409, 100 S.E. 689 (1919) and *Devries v. Haywood*, 64 N.C. 83 (1870)). At the pleading stage, "consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by the State of sovereign immunity." *Can Am South*, 234 N.C. App. at 126, 759 S.E.2d at 310 (quoting *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005)); *see also Smith*, 289 N.C. at 322, 222 S.E.2d at 424 (noting the court had "no knowledge, opinion, or notion as to what the true facts" were and those would be established later).

¶ 48 In a similar vein, this Court has defined an "implied in fact contract" as "an agreement between parties, but the terms of the agreement have not been fully expressed in words and, instead, are established by the parties' conduct." *Thompson-Arthur Paving Co., a Div. of APAC-Carolina, Inc. v. Lincoln Battleground Associates*, 95 N.C. App. 270, 280, 382 S.E.2d 817, 823 (1989). The terms of a contract implied in fact are also "questions for the trier of fact" because mutual assent covers "the terms of the agreement so as to establish a meeting of the minds" based on "the actions of the parties showing an implied offer and acceptance." *See Snyder*, 300 N.C. at 217–18, 266 S.E.2d at 602 (so explaining after saying mutual assent is a question for the trier of fact). Again, the trier of fact plays no role at the pleading stage. *See Smith*, 289 N.C. at 322, 222 S.E.2d at 424 (leaving question of "true facts" for later trial).

¶ 49 As noted above, at oral argument Defendant also proposed an alternative classification of the relationship between the student and

university as it relates to fees as a statutory relationship but not a form of contract. To the extent we can even review this contention raised for the first time at oral argument, *see* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned."), we reject Defendant's alternative classification of the relationship between the student and university as it relates to fees as statutory. First, Defendant did not submit any caselaw or other authority defining the concept of a statutory relationship.[7] Further, the statutory requirements for Defendant to set fees to be collected from students and not waive them except when authorized by statute, *see* N.C. Gen. Stat. § 116-143(a), (c), do not create any particular relationship between students and the University of North Carolina system. Under the statute, Defendant must require students to pay certain fees to be able to enroll. *Id.*, § 116-143(a). And one of the most basic forms of contract is an agreement for one party to pay money to another party in return for some form of goods or services.

¶ 50 Finally, the General Assembly envisioned Defendant could be sued for this type of claim because it passed a statute granting "institution[s] of higher education . . . immunity" from claims related to "tuition or fees paid" for the Spring 2020 semester when the claim is based on "an act or omission" related to COVID-19. N.C. Gen. Stat. § 116-311 (eff. 1 July 2020). There would be no need for this separate immunity statute if the General Assembly believed sovereign immunity already prevented such a claim.

¶ 51 Thus, we conclude a contract implied in fact can waive sovereign immunity under the contractual waiver holding in *Smith*. As a result, we must determine whether Plaintiffs here, who rely on such a contract, sufficiently pled such waiver.

3. Whether Plaintiffs Pled a Valid Implied-In-Fact Contract

¶ 52 **[3]** Beyond arguing an implied-in-fact contract cannot waive sovereign immunity, Defendant asserts Plaintiffs failed "to allege a [valid] contract." Defendant initially makes a general argument "[e]ducational law in North Carolina is inconsistent with implied-in-fact contracts." Defendant then has three specific reasons in support of this argument. First, Defendant argues Plaintiffs pled "there was no meeting of the minds" because they allege they "were told prior to the start of the

7. Defendant also did not submit any additional authorities, which "may be brought to the attention of the court by filing a memorandum thereof" even after a party has filed its briefing. N.C. R. App. P. 28(g).

semester that the fees would not be refunded in the event the mode of instruction changed." Second, Defendant contends a meeting of the minds did not occur because Plaintiffs alleged "the fees were paid in exchange for the right to enroll and remain in good standing, rather than the right to obtain services." Third, Defendant asserts Plaintiffs failed to plead Defendant promised any services and "[e]very contract requires a promise."

¶ 53 An allegation of a valid contract matters because "when the plaintiff pleads a contract claim" a waiver of sovereign immunity is "effectively alleged." *See Wray*, 370 N.C. at 47–48, 802 S.E.2d at 898–99 (stating in terms of governmental immunity after defining governmental immunity as "that portion of the State's sovereign immunity which extends to local governments"); *see also Fabrikant*, 174 N.C. App. at 38, 621 S.E.2d at 25 ("[A]s long as the complaint contains sufficient allegations to provide a reasonable forecast of waiver, precise language alleging that the State has waived the defense of sovereign immunity is not necessary."); *Can Am South*, 234 N.C. App. at 126, 759 S.E.2d at 310 (holding the plaintiff "sufficiently pleaded waiver of [the] defendants' sovereign immunity" because they pleaded "their entry into three facially valid contracts"). Our system of notice pleading means the bar to plead a valid contract is "low." *Wray*, 370 N.C. at 50, 802 S.E.2d at 900 (explaining there is a "low bar for notice pleading under Rule 12(b)(6), as well as the waiver of governmental immunity that is inferred from the pleading of a contract claim").

¶ 54 While our caselaw does not explicitly set out the requirements to plead a valid implied in fact contract,[8] we can use the pleading requirements for an express contract as a starting point because an implied in fact contract "is valid and enforceable as if it were express or written." *See Snyder*, 300 N.C. at 217, 266 S.E.2d at 602 (so stating in terms of "implied contract" and then clarifying in the next sentence court meant implied-in-fact contract). For an express contract, "[t]he 'elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms.' " *Society for Historical Preservation of Twentysixth North Carolina Troops, Inc. v. City of*

8. None of *Archer*, *Lake*, or *Sanders* involved an argument on the nuances of whether the plaintiff pled a valid contract implied in fact. *See Lake*, 234 N.C. App. at 374, 760 S.E.2d at 273 (determining the plaintiffs had sufficiently "alleged something in the nature of a contractual obligation" without going into further detail (quotations and citation omitted)); *Sanders*, 183 N.C. App. at 20, 644 S.E.2d at 13 (rejecting the defendants arguments that the "alleged contract" was not valid because they went "to the merits of plaintiffs' breach of contract claim").

Asheville, 2022-NCCOA-218, ¶ 30 (quoting *Se. Caissons, LLC v. Choate Const. Co.*, 247 N.C. App. 104, 110, 784 S.E.2d 650, 654 (2016) (in turn citing *Snyder*, 300 N.C. at 218, 266 S.E.2d at 602)). *Snyder* explains "mutual assent . . . is normally accomplished through the mechanism of offer and acceptance," thereby rolling the last element into the first two, and for "a contract implied in fact, one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance." 100 N.C. at 218, 266 S.E.2d at 602. Thus, to plead a valid implied-in-fact contract, Plaintiffs needed to plead offer, acceptance, and consideration.

¶ 55 Looking at the Amended Complaint, Plaintiffs properly pled each of those three elements. On offer, the Amended Complaint alleges the constituent institutions "offered Plaintiffs and members of the" pertinent classes the "services, benefits, and opportunities" listed and billed to them as student fees and "offered to sell optional parking permits . . . which would permit the purchaser to park a motor vehicle in an on-campus parking lot during the Fall 2020" Term. As to acceptance, the Amended Complaint alleges "Plaintiffs and class members accepted Defendant's offer and agreed to pay, and did, in fact, pay, the Student Fees" for the listed services and Plaintiffs and "certain other Fall 2020 Term students accepted" the offer to purchase parking permits. These allegations are based on earlier pleaded facts laying out the specific student fees and their amount, services, benefits, and purposes as the constituent institutions "represented in writing on their respective websites and in written communications to each student" as well as that Plaintiffs and the proposed class members had accepted the offer for such services and paid the fees for the Fall 2020 semester. The Amended Complaint includes a similar prior explanation of the parking fees allegation.

¶ 56 Finally, Plaintiffs properly pled consideration because those allegations detail an exchange of money (i.e. the fees) for "services, benefits, and opportunities" or a parking permit. *See, e.g.*, *Elliott v. Enka-Candler Fire and Rescue Dept., Inc.*, 213 N.C. App. 160, 163, 713 S.E.2d 132, 135 (2011) ("Consideration sufficient to support a contract consists of 'any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee.' " (quoting, *inter alia*, *Brenner v. School House, Ltd.*, 302 N.C. 207, 215, 274 S.E.2d 206, 212 (1981))). Thus, Plaintiffs adequately pled a valid contract implied in fact.

¶ 57 None of Defendant's arguments persuade us Plaintiffs failed to plead a valid, implied-in-fact contract. As to Defendant's general argument contracts implied in fact cannot exist in the educational context, Defendant only cites two binding cases and neither one states or even implies support for its argument. (Citing *Ryan v. University of North*

Carolina Hospitals, 128 N.C. App. 300, 302, 494 S.E.2d 789, 791 (1998) and *Montessori Children's House*, 244 N.C. App. 633, 781 S.E.2d 511). *Ryan* was a case about contract claims challenging the "general quality of [an] educational program" and held only one aspect of the written contract in that case could survive dismissal because it "would not involve an inquiry into the nuances of educational processes and theories." 128 N.C. App. at 301–03, 494 S.E.2d at 790–91. To the extent *Ryan* stated the plaintiff had to "point to an identifiable contractual promise that the University failed to honor," it did so in the context of explaining how courts generally disfavor claims about the "general quality of the educational program." *Id.*, 128 N.C. App. at 302, 494 S.E.2d at 791. Here, Plaintiffs' claims are not about the quality of the educational program.

¶ 58 *Montessori Children's House* also involved a written contract, and this Court upheld the trial court's ruling because statements on the school's webpage were not "expressly incorporated by reference" into the written contract with the school. 244 N.C. App. at 634, 641–42, 781 S.E.2d at 513, 517. Here, there was no written contract, so the statements on the school websites to which Plaintiffs point could not have been incorporated into one. Thus, we are not persuaded by Defendant's general argument.

¶ 59 Turning to Defendant's specific arguments, we are similarly unconvinced. Defendant's first two specific arguments—that there was no meeting of the minds because the students "were told prior to the start of the semester that the fees would not be refunded in the event the mode of instruction changed" and because Plaintiffs alleged the fees were paid in exchange for enrollment, not services—suffer from a common flaw. Both arguments challenge whether there was a meeting of the minds, but that question is left for the trier of fact, as we explained above. *See Snyder*, 300 N.C. at 217–18, 266 S.E.2d at 602 (explaining, "[w]hether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact" before going on to equate mutual assent to a meeting of the minds). As a result, it will be for the trier of fact to determine on what terms there was a meeting of the minds and thus what terms are included in the alleged contract on which Plaintiffs will ultimately need to demonstrate breach to prevail. We do not express any opinion on that merits question at this stage; we only decide Plaintiffs have validly pled a contract sufficient to waive sovereign immunity. *See Can Am South*, 234 N.C. App. at 127, 759 S.E.2d at 310 ("This Court has consistently held that we are not to consider the merits of a claim when addressing the applicability of sovereign immunity as a potential defense to liability." (citing *Archer*, 144 N.C. App. at

558, 548 S.E.2d at 793 and *Smith*, 289 N.C. at 322, 222 S.E.2d at 424)); *see also Wray*, 370 N.C. at 50, 802 S.E.2d at 900 ("Although we hold that dismissal of the complaint was not warranted, like the Court of Appeals, we express no opinion on the merits of [the] plaintiff's contract action.").

¶ 60 We further note Plaintiffs specifically pled a meeting of the minds, at least as to student fees:

> There was a meeting of the minds between Plaintiffs and the Class Members on the one hand, and UNC on the other hand, on this point: Plaintiffs and the Class Members paid their Fall Term 2020 Student Fees in full, and, in return, UNC promised to provide to Plaintiffs and the Class Members the benefits, services, and opportunities of the Earmarked Components in full for the duration of the Fall 2020 Terms.

Although the allegation of the meeting of the minds is sufficient at this stage, ultimately whether there was a meeting of the minds is a question for the trier of fact. *Snyder*, 300 N.C. at 217–18, 266 S.E.2d at 602.

¶ 61 Defendant finally argues Plaintiff failed to plead Defendant promised any services and "[e]very contract requires a promise." We cannot reconcile Defendant's argument with the allegations in the Amended Complaint because Plaintiffs repeatedly included pleadings about promises for services. For example, as to each Plaintiff, the Amended Complaint lists "specific categories of services and benefits" they were "entitled" to receive from the university by providing the student fees, which were broken down in various listed categories. Further, the Amended Complaint specifically states:

> Further, before the beginning of their respective Fall 2020 Terms, NCSU and UNC-CH provided each student enrolled for their Fall 2020 Terms, including Plaintiffs, an itemized bill which labeled, in writing, the services, benefits, and opportunities which NCSU and UNC-CH *promised* to provide in exchange for each student's, including each Plaintiff's, payment of Fall 2020 Term Student Fees; those bills also specified the amount that each Plaintiff and each other NCSU and UNC-CH student was required to pay for those services, benefits, and opportunities.

(Emphasis added.) As to the parking fees, the Amended Complaint alleges Plaintiffs and other students in the proposed class purchased

"optional motor vehicle parking permits, which permitted the purchasers to park their motor vehicle[s]" in the constituent Universities' "convenient on-campus parking lots."

¶ 62 Defendant argues these were not enough because the Amended Complaint included "no specific statements in any university documents or communications that ever promised" these fees would be used for these purposes and the referenced "websites and billing information" do not support a contract on their own and were not incorporated into any such contract relying on *Montessori Children's House*. We have already explained how that case is not applicable here because it involved a situation where there was a separate written contract. Here, the specific billing statements, lists of fees, etc. do not need to be specifically incorporated into a contract because Plaintiffs allege they are the contract. While the fees do not specifically say Defendant or the constituent Universities promise to do anything, Plaintiffs' contention is, in essence, the circumstances and relationship they had with the institutions meant a contract could be implied. That is a contract implied in fact, *e.g.*, *Sanders*, 183 N.C. App. at 21, 644 S.E.2d at 14, and Plaintiffs did not need to plead anything further.

¶ 63 We therefore conclude Plaintiffs adequately pled a valid contract implied in fact. Because a valid contract implied in fact waives sovereign immunity, we hold, after our de novo review, Plaintiffs properly pled such a waiver and the trial court did not err in denying Defendant's motion to dismiss on the grounds of sovereign immunity.

C. Motion to Dismiss under Rule 12(b)(6) as to Contract Claims

¶ 64 **[4]** In its final argument in its appeal from the Amended Order, Defendant contends the trial court erred by not dismissing the contract claims "pursuant to Rule [of Civil Procedure] 12(b)(6) for failure to plead a claim for breach of contract upon which relief may be granted." Specifically, Defendant argues "Plaintiffs do not allege that any of the services for which the fees were purportedly charged stopped when the institutions changed the mode of instruction" and they "fail[ed] to identify *any* instance where they requested a service and were denied" such that their claims "are speculative at best." (Emphasis in original.)

1. Standard of Review

¶ 65 An appellate court "reviews de novo a trial court's order on a motion to dismiss." *Deminski*, ¶ 12. "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.' " *Id.* (quoting *Coley*, 360 N.C. at 494–95, 631 S.E.2d at 123); *see also State ex rel. Stein*, ¶ 25. When conducting that analysis:

> "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." *Davis v. Hulsing Enterprises, LLC*, 370 N.C. 455, 457, 810 S.E.2d 203 (2018) (quoting *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611 (1979)). N.C.G.S. § 1A-1, "Rule 12(b)(6), generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201 (2005) (quoting *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441 (2000)) (cleaned up).

State ex rel. Stein, ¶ 25. Applying this standard of review, we must determine if Plaintiffs adequately pled their contract claims to survive a Rule 12(b)(6) motion.

2. Pleading of Breach

¶ 66 Since we have already determined above Plaintiffs pled a valid contract, we only need to address whether Plaintiffs adequately pled breach to address the trial court's Rule 12(b)(6) ruling. *See Montessori Children's House*, 244 N.C. App. at 636, 781 S.E.2d at 514 (listing elements of breach of contract claim as "(1) existence of a valid contract and (2) breach of the terms of that contract"). We determine Plaintiffs properly pled breach of the contract.

¶ 67 As to the student fees claim, Plaintiffs pled the Universities "voluntarily and permanently stopped, or severely curtailed providing many of the services, benefits, and opportunities" that they allege were promised in return for many of the student fees and those conditions "persisted for the duration of the Fall 2020 Term." One example is illustrative. Plaintiffs allege both Universities charged them a student health fee, and then allege the Universities "curtailed student health services and advised Fall 2020 Term students that they should obtain health services from private health providers and not from the student health services which were paid for in the Fall 2020 Term Student Fees." In more general terms, Plaintiffs allege they paid for a service and then the other party to the alleged contract did not allow them to access that service.

Taking the alleged facts as true, as we must at this stage, *State ex rel. Stein*, ¶ 25, Plaintiffs have properly alleged breach.

¶ 68 Turning to the parking fees claim, Plaintiffs allege they paid for parking permits that allowed them to park in the Universities' "convenient on-campus parking lots" and they were not "properly rebated those permit fees" after they were "evicted . . . from on-campus housing" and the Universities cancelled in-person, on-campus instruction. Specifically, they allege their removal from on-campus housing and lack of on-campus instruction "rendered worthless those on-campus parking passes." The Amended Complaint also includes additional allegations on the precise amount of damages Plaintiffs and the proposed classes they represent would be seeking based on rebates provided by the Universities. Again, Plaintiffs have pled they paid for a service and the constituent institutions took actions that prevented them from using those services, at least the same way they would have had campus been open as normal.

¶ 69 Defendant's only argument is Plaintiffs failed to identify "*any* instance where they requested a service and were denied," so their claims "are speculative at best." (Emphasis in original.) This argument does not conform with how a reasonable person would act. Taking the same student health fee example from above, Defendant is correct the Plaintiffs do not allege they tried to access student health services after being advised "they should obtain health services from private health providers and not from the student health services," but requiring Plaintiffs to go to student health just to get denied services per the previous communication would make little sense. Further, Plaintiffs allege in past terms they and other students "had regularly used the services and had enjoyed the services, benefits, and opportunities" each of the student fees allegedly provided, and, as a result, they "would have continued to use and enjoy the services, benefits, and opportunities." Likewise, on-campus parking would be of no use to students who are not allowed either to attend class on campus or to live on campus.

¶ 70 The only two cases Defendant cites in support of this proposition, *Estate of Vaughn*, 230 N.C. App. at 493, 751 S.E.2d at 233 and *McCrann v. Pinehurst, LLC*, 225 N.C. App. 368, 377, 737 S.E.2d 771, 777 (2013), are of no help to its argument. Defendant appears to cite *Estate of Vaughn* for the proposition an appellate court "is not . . . required to accept mere conclusory allegations, unwarranted deductions of fact, or unreasonable inferences as true." 230 N.C. App. at 493, 751 S.E.2d at 233. Similarly, *McCrann*'s main point in the relevant section is an appellate court "may ignore plaintiffs' legal conclusions" when reviewing a motion to dismiss

on Rule 12(b)(6) grounds. 225 N.C. App. at 377, 737 S.E.2d at 777. While we agree with both of these statements of law, they do not change our conclusion here. Focusing only on the non-conclusory factual allegations, Plaintiffs adequately allege a breach even though they do not specifically say they explicitly asked for and then were denied services; according to the allegations, they paid for services and then Defendant barred them from accessing such services. Defendant cites no case law supporting their argument a pleading fails to state a claim for breach of contract if the breaching party tells the non-breaching party it cannot engage in the contracted service and the non-breaching party takes the breaching party at its word.

¶ 71 After our de novo review, the trial court did not err in denying Defendant's motion to dismiss Plaintiffs' contract claims for failure to state a claim under Rule 12(b)(6).

D. *Corum* Claim

¶ 72 **[5]** Turning to Plaintiffs' cross-appeal, they argue "to the extent" they "have no remedy for breach of contract to recover student fees or parking fees, then, in the alternative, their *Corum* claims state claims for relief." (Capitalization altered.) Specifically, Plaintiffs argue they properly pled a constitutional claim under the Law of the Land Clause in Article I, § 19 of our Constitution because they allege a vested property interest arising from the contract with Defendant and that the constituent institutions took that interest when they accepted Plaintiffs' money but did not provide services or a refund.[9] Plaintiffs acknowledge their *Corum* claim and contract claims "are mutually exclusive—the *Corum* claim[] exist[s] only if the contract claims are not viable."

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9. Plaintiffs also argue "but for sovereign immunity" they "would have valuable choses-in-action against Defendant for the tort of conversion or unjust enrichment; a chose-in-action is a constitutionally protected property." (Capitalization altered.) The Amended Complaint only includes a conclusory allegation Plaintiffs would have those claims absent sovereign immunity; it does not detail the facts necessary to show Defendant committed either tort nor does it explain those claims would give rise to a constitutionally protected property right. We are not required to accept such a conclusory allegation as true, *Estate of Vaughn*, 230 N.C. App. at 493, 751 S.E.2d at 233, and even if we were, the Amended Complaint still does not say these claims could be transformed into a valid constitutional claim. This failure to plead a valid constitutional claim based on these grounds is fatal to Plaintiffs' *Corum* claim based on these grounds because a valid *Corum* claim requires establishing "state constitutional rights have been violated." *Taylor*, 258 N.C. App. at 183, 811 S.E.2d at 652. Even if that were not the case, we would also affirm the trial court's dismissal of this part of Plaintiffs' *Corum* claim because Plaintiffs have an adequate state remedy via the contract claims, as we discuss in more detail below.

1. Standard of Review

¶ 73 As both parties agree, Defendant moved to dismiss Plaintiffs' *Corum* claim based on Rule 12(b)(6) for failure to state a claim. As a result, we apply the same de novo standard of review we applied above to Defendant's argument Plaintiffs' failed to state contract claims. *Deminski*, ¶ 12 (explaining an appellate court "reviews de novo a trial court's order on a motion to dismiss" and "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' " (quoting *Coley*, 360 N.C. at 494–95, 631 S.E.2d at 123)); *Carl*, 192 N.C. App. at 555, 665 S.E.2d at 796 (when reviewing the dismissal of a *Corum* claim stating, "In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." (quoting *Newberne*, 359 N.C. at 784, 618 S.E.2d at 203)).

2. Viability of Corum *Claim*

¶ 74 As this Court recently explained:

> A *Corum* claim allows a plaintiff to recover compensation for a violation of a state constitutional right for which there is either no common law or statutory remedy, or when the common law or statutory remedy that would be available is inaccessible to the plaintiff. By allowing an otherwise common law or statutory claim to proceed as a direct constitutional claim, the North Carolina Supreme Court fashioned an avenue to bypass certain defenses such as sovereign or governmental immunity. A *Corum* claim is available to a plaintiff who is able to establish that (1) her state constitutional rights have been violated, and (2) she lacks any sort of "adequate state remedy." C*orum*, 330 N.C. at 782, 413 S.E.2d at 289.

Taylor, 258 N.C. App. at 183, 811 S.E.2d at 652. Our Supreme Court has explained "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.*, 258 N.C. App. at 184, 811 S.E.2d at 653 (quoting *Craig*, 363 N.C. at 339–40, 678 S.E.2d at 355). A remedy must also address "the alleged constitutional injury" to be considered adequate. *Id.*, 258 N.C. App. at 185, 811 S.E.2d at 654 (citing *Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 789, 688 S.E.2d 426, 429 (2010)).

This second requirement means "a plaintiff must be allowed to pursue claims for the same alleged wrong under both the constitution and state law where one could produce only equitable relief and the other could produce only monetary damages, thus 'complet[ing] [the plaintiff's] remedies[.]' " *Carl*, 192 N.C. App. at 555–56, 665 S.E.2d at 796 (alterations in original) (quoting *Corum*, 330 N.C. at 789, 413 S.E.2d at 294).

¶ 75 Here, as Plaintiffs recognize when they argue "the *Corum* claims exist only if the contract claims are not viable," Plaintiffs fail to state a *Corum* claim because they do not lack an adequate state remedy; they have the contract claims we addressed above. Since above we found sovereign immunity did not bar the Plaintiffs' contract claims, they can "enter the courthouse doors and present [their] claim." *Taylor*, 258 N.C. App. at 184, 811 S.E.2d at 653. Further, the remedy for those contract claims, namely money damages, is identical to the Plaintiffs' requested remedy for the alleged constitutional violation as part of the *Corum* claim, so the contract claims redress "the alleged constitutional injury. *Id.*, 258 N.C. App. at 185, 811 S.E.2d at 654; *see Carl*, 192 N.C. App. at 555–56, 665 S.E.2d at 796 (explaining a *Corum* claim and another state law claim can co-exist if one provides equitable relief and the other provides only monetary damages).

¶ 76 This case resembles *Carl*. There, the plaintiffs, on behalf of a proposed class, sued the State Health Plan for an alleged breach of a contractual obligation to not raise insurance premiums unless certain specific requirements were met, and they added a claim based on Article I, § 19 of our Constitution because taking away the same contractual right amounted to an unconstitutional taking without just compensation. 192 N.C. App. at 545–46, 665 S.E.2d at 790–91. This Court held sovereign immunity did not bar the contract claims. *See id.*, 192 N.C. App. at 555, 665 S.E.2d at 796 (stating in the section on the *Corum* claim "we have concluded that sovereign immunity does not bar [the p]laintiffs' breach of contract claim"). Then, because the breach of contract claim would "vindicate the same rights as their constitutional argument, . . . namely, monetary damages," this Court held the plaintiffs had "an adequate alternative remedy under state law" such that their "takings claim under N.C. Constitution Article I, Section 19 should have been dismissed." *Id.*, 192 N.C. App. at 556, 665 S.E.2d at 797 (quotations, citations, and alterations omitted). Faced with identical types of claims here and also determining sovereign immunity does not bar Plaintiffs' contract claims, we similarly hold Plaintiffs have an "adequate alternative remedy under state law" so their *Corum* claim based on Article I, § 19 of our Constitution should be dismissed. *Id.* Therefore, after our de novo review, the trial court did not err by dismissing Plaintiffs' *Corum* claim.

III. Conclusion

¶ 77 Having reviewed both the appeal and cross-appeal, we affirm. We first determine we have appellate jurisdiction over the sovereign immunity issue related to the contract claims because it affects a substantial right, over the *Corum* issue because of the trial court's Rule of Civil Procedure 54(b) certification, and over the Rule 12(b)(6) issue related to the contract claims because we grant Defendant's PWC as to that issue. Turning to the merits, the trial court properly denied Defendant's Motion to Dismiss the contract claims on sovereign immunity grounds because Plaintiffs adequately pled a valid implied-in-fact contract and such a contract can waive sovereign immunity. The trial court also properly denied the Motion as to the contract claims on 12(b)(6) grounds because Plaintiffs' Amended Complaint properly pleads breach of contract claims. Finally, the trial court correctly granted the Motion to Dismiss Plaintiffs' *Corum* claim because Plaintiffs' contract claims are an adequate alternative remedy.

AFFIRMED.

Judges DILLON and JACKSON concur.

STATE OF NORTH CAROLINA
v.
ALJARIEK FREEMAN, DEFENDANT

No. COA22-218

Filed 4 October 2022

Sentencing—presumptive range—mitigating factors—trial court's discretion

The Court of Appeals denied defendant's petition for writ of certiorari—which claimed that the trial court erred during his sentencing by not finding two mitigating factors supported by uncontradicted and credible evidence—where, because the trial court sentenced defendant in the presumptive range, it was not required to find mitigating factors or sentence defendant to a mitigated sentence.

Appeal by defendant from judgment entered 30 September 2021 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 23 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph R. Shuford, for the State-appellee.

Dysart Willis, by Andrew Nelson, for defendant-appellant.

GORE, Judge.

¶ 1 Defendant petitions for writ of certiorari claiming the trial court erred during sentencing by not finding two mitigating factors supported by uncontradicted and credible evidence to mitigate his sentence on one count of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon. Defendant is limited to petitioning for writ of certiorari since he has no right of appeal under Section 15A-1444 of the North Carolina General Statutes. For the following reasons, we deny defendant's petition for writ of certiorari and dismiss the appeal.

I.

¶ 2 Defendant was involved in a robbery on 10 December 2016. During the robbery, one of defendant's co-conspirators shot a drug dealer in the back of the head, killing him. Defendant pled guilty to two offenses: (1) robbery with a dangerous weapon, and (2) conspiracy to commit robbery with a dangerous weapon. Defendant agreed to testify for the State against his co-conspirator and cooperated accordingly. On 28 January 2021, defendant was charged with two counts of trafficking heroin and pled guilty to both on 8 July 2021.

¶ 3 Defendant was set for sentencing on all four offenses on 9 September 2021, but he failed to appear. Defendant's prior record was a level III due to prior convictions in multiple counties during 2014, 2016, and 2017. On 30 September 2021, at the rescheduled sentencing hearing, the State agreed defendant cooperated by testifying against his co-conspirator at the co-conspirator's first-degree murder trial. Defendant requested the trial court mitigate his sentence based upon his cooperation with the State. The trial court considered the evidence of mitigating factors and chose to sentence defendant within the presumptive range for the two robbery convictions. The State and defendant stipulated that defendant agreed to provide substantial assistance to the Raleigh Police Department after pleading guilty to the trafficking charges. The trial court took this substantial assistance into account and issued a reduced sentence for defendant of 41 to 59 months rather than 70 to 93 months. Because defendant pled guilty to all his charged offenses, he has no right

to appeal unless his petition for writ of certiorari is granted. Defendant orally appealed in open court.

II.

¶ 4 Defendant claims he has a meritorious issue that deserves this Court's consideration such that we should grant his petition for writ of certiorari. We disagree.

¶ 5 Under Section 15A-1444, a defendant who enters a guilty plea is only entitled to appeal of right when the minimum sentence handed down does not fall within the presumptive range based upon defendant's prior record and offense class. N.C. Gen. Stat. § 15A-1444(a1) (2021). Otherwise, the defendant has no right of appeal and is limited to petition for review via writ of certiorari for any sentencing issue. *Id.* "A petition for the writ must show merit or that error was probably committed below . . . . *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). "A trial court's weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion." *State v. Rogers*, 157 N.C. App. 127, 129, 577 S.E.2d 666, 668 (2003).

¶ 6 In claiming a meritorious issue for appeal, defendant cites to *State v. Jones*, for the proposition that a sentencing judge errs "if he fails to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible." 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983). However, this statement made by our Supreme Court was to give effect to the Fair Sentencing Act, which has since been repealed. *See* N.C. Gen. Stat. § 15A-1340.1 to 15A-1340.7, *repealed by* Structured Sentencing Act, ch. 538, sec. 14, 1993 N.C. Sess. Laws 2298, 2318. The Structured Sentencing Act replaced the Fair Sentencing Act and under the Structured Sentencing Act, "[t]he court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences . . . ." N.C. Gen. Stat. § 15A-1340.16(c) (2021). This is the case "even if the evidence of mitigating factors is uncontroverted." *State v. Garnett*, 209 N.C. App. 537, 550, 706 S.E.2d 280, 288 (2011); *see State v. Dorton*, 182 N.C. App. 34, 43, 641 S.E.2d 357, 363, *disc. rev. denied*, 361 N.C. 571, 651 S.E.2d 225 (2007) (Mem.) ("[T]he court did not err by declining to formally find or act on defendant's proposed mitigating factors, regardless whether evidence of their existence was uncontradicted and manifestly credible.").

¶ 7 Although defendant may have presented sufficient evidence of mitigating factors, the trial court, in its discretion, could refuse to mitigate

the sentence. Defendant presented sufficient evidence of mitigating factors 7 and 11 under Section 15A-1340.16(e), of which the State agreed. *See* N.C. Gen. Stat. § 15A-1340.16(e) (2021). The trial court considered the evidence and the mitigating factors but, in its discretion, chose to sentence defendant in the presumptive range. Defendant received an active sentence for the first robbery count within the presumptive range of 84 months minimum to 113 months maximum, and for his second conspiracy to commit robbery count, a sentence within the presumptive range of 33 months minimum to 52 months maximum. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2021). Because the trial court sentenced defendant within the presumptive range, as this Court has stated many times, it was not required to find mitigating factors or sentence defendant to a mitigated sentence. *See State v. Ramirez*, 156 N.C. App. 249, 258–59, 576 S.E.2d 714, 721 (2003) ("Since the court may, in its discretion, sentence defendant within the presumptive range without making findings regarding proposed mitigating factors, we hold the trial court did not err by sentencing defendant within the presumptive range without making findings as to this mitigating factor."); *State v. Taylor*, 155 N.C. App. 251, 267, 574 S.E.2d 58, 69 (2002); *State v. Campbell*, 133 N.C. App. 531, 542, 515 S.E.2d 732, 739 (1999).

¶ 8 Accordingly, because defendant fails to show a meritorious claim or that the result would probably be different, defendant does not meet the standard for granting petition for writ of certiorari.

III.

¶ 9 Defendant's petition for writ of certiorari on the sole issue of sentencing error due to mitigating factors is denied with prejudice. For the foregoing reasons, defendant's petition for writ of certiorari is denied and his appeal is dismissed.

DISMISSED.

Judges DILLON and CARPENTER concur.

STATE v. PARKER

[285 N.C. App. 610, 2022-NCCOA-655]

STATE OF NORTH CAROLINA
v.
KYLE EARL PARKER, DEFENDANT

No. COA21-519

Filed 4 October 2022

1. Search and Seizure—motion to suppress—sufficiency of findings—weight and credibility of evidence—attempted heroin trafficking by possession

In a prosecution for attempted heroin trafficking by possession, the trial court properly denied defendant's motion to suppress where competent evidence supported the court's findings of fact, which described how two law enforcement officers involved in a narcotics investigation followed a suspect to an apartment parking lot where the suspect met with her heroin source (later identified as defendant) to retrieve a heroin sample for a police informant. Although there was some inconsistency between the officers' testimonies regarding whether the suspect traveled alone to the parking lot, it was up to the trial court to determine the weight and credibility of each testimony when entering its factual findings.

2. Search and Seizure—warrantless search of vehicle—automobile exception—public vehicular area—fuel pump at gas station

In a prosecution for attempted heroin trafficking by possession, the trial court did not err in denying defendant's motion to suppress evidence seized during a warrantless search of his car, which took place while the car was parked next to a fuel pump at a gas station. That area next to the fuel pump qualified as a "public vehicular area" under the plain language of N.C.G.S. § 20-4.01(32), and therefore the trial court properly determined that the automobile exception to the Fourth Amendment's warrant requirement applied to the search of defendant's vehicle.

3. Search and Seizure—warrantless search of vehicle—probable cause—plain view and plain smell doctrines

In a prosecution for attempted heroin trafficking by possession, the trial court properly concluded that law enforcement had probable cause to search defendant's car where law enforcement spotted defendant and his car at a gas station near the site of a heroin sale they were investigating, defendant's car was connected to the heroin sale (the buyer's heroin source was seen driving that same car with the same license number during a drug transaction that

occurred earlier that day), and the officers smelled an odor consistent with heroin emanating from the car and observed a heroin-like substance in plain view inside the car. The court properly applied the plain view doctrine to the search because the car was parked in a public area when law enforcement searched it; additionally, the court properly applied the plain smell doctrine where the plain smell of any drug—not just the drugs explicitly mentioned in North Carolina case law—can supply probable cause for a search.

Appeal by defendant from order entered 19 January 2021 by Judge Andrew Heath and from judgments entered 27 January 2021 by Judge William A. Wood II in Superior Court, Guilford County. Heard in the Court of Appeals 10 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Neal T. McHenry, for the State.

Shawn R. Evans for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant Kyle Earl Parker appeals from two judgments for attempted heroin trafficking by possession, possession of a firearm by a felon, and other charges entered following guilty pleas, one of which was an "Alford guilty plea," that preserved his right to appeal an order denying his Motion to Suppress. Pursuant to his plea arrangement, Defendant also appeals the order denying his Motion to Suppress. Because (1) the trial court's Findings of Fact are supported by competent evidence, (2) the area adjacent to a gas pump at a service station is a public vehicular area under North Carolina General Statute § 20-4.01(32) (eff. 12 July 2017 to 20 June 2019) and (3) the trial court's Findings of Fact support its Conclusions of Law finding probable cause, we affirm the trial court's order denying the Motion to Suppress.

I. Background

¶ 2 As to the drug and firearm possession charges at issue in this appeal,[1] the State's evidence from the suppression hearing tended to show Detective King and Master Corporal R.S. Cole of the Guilford County

1. The other conviction consolidated in the judgment is for malicious conduct by a prisoner. This charge was from an "unrelated 2017 case." Since that charge is unrelated to the suppression order and the drug and firearms convictions it supports on appeal here, we do not discuss the malicious conduct charge any further.

Sheriff's Office were part of a narcotics investigation into "several folks" including Defendant and Ms. Dalya Van. The investigation began at the start of May 2019 and initially focused on Ms. Van and others because a "confidential and reliable informant" made a series of "controlled purchases of illegal narcotics," including heroin, "from Ms. Van and possibly others."

¶ 3 As part of this investigation, on 28 May 2019 the informant contacted Ms. Van about purchasing a kilogram of heroin, with Corporal Cole listening on speaker phone. During this conversation, the informant arranged to meet Ms. Van at a hotel to get a sample of the drugs. At the hotel, Ms. Van joined the informant in their car, and they traveled, with police officers including Detective King following, to apartments where a black SUV pulled up to meet them. After other officers told Detective King that Ms. Van had gotten out of her vehicle and into a "black SUV," specifically a 2019 Chevrolet Tahoe, Detective King drove past the black SUV to get its license plate number and reported it to Corporal Cole. Corporal Cole then "ran the registration plate through the system" and connected the black SUV to Defendant. He also had previously received information about Defendant during this drug investigation. Corporal Cole then informed the other officers, including Detective King, of the connection between the black SUV and Defendant as well as the information Corporal Cole had received about Defendant as part of the drug investigation. Ms. Van then got out of the black SUV and into the car she came in, and both vehicles left.

¶ 4 After Ms. Van and the informant got back to the hotel, Ms. Van left, and the police met with the informant to get the sample Ms. Van had given them. Corporal Cole tested the sample and confirmed it was heroin. The informant then arranged with Ms. Van to purchase two kilograms of heroin at the same hotel. At this point, Corporal Cole told the police officers conducting surveillance, including Detective King, to look out for the black SUV. Detective King then set up on the "one main road" leading to the hotel.

¶ 5 During this surveillance, Detective King's car ran low on gas, so he drove across the street from his lookout position to a gas station. At the gas station, Detective King saw Defendant and the black SUV, which he confirmed had the same license plate number, "at or about the same time that the source" with the larger supply of heroin was supposed to arrive at the hotel across the street. Detective King then alerted Corporal Cole, who told Detective King that the police "Special Emergency Response Team" ("SERT") would be there soon to detain Defendant.

¶ 6 Once SERT arrived and detained Defendant, Detective King walked around to the passenger side of Defendant's vehicle because the police "were specifically interested" in the larger supply of heroin they "had ordered" and that they "assum[ed] [Defendant] was bringing." Once there, Detective King smelled vinegar—which in his "training and experience" is what heroin smells like—through the open window and saw "what appeared to be . . . two kilograms of heroin" in a cereal box based on his training and experience about how drugs are packaged. Detective King notified Corporal Cole of the suspected heroin, and Corporal Cole joined him at the gas station. Corporal Cole also observed what appeared to be heroin in a cereal box in the front seat and smelled through the open window "a distinct odor" that "in [his] training and experience . . . smelled like heroin." After taking pictures at the scene, Corporal Cole searched the vehicle and recovered a little more than two kilograms of heroin from the cereal box as well as a loaded gun, cell phones, and paperwork with Defendant's name on it. The police then arrested Defendant based on the items recovered from the search.

¶ 7 On 5 August 2019, Defendant was indicted for possession of a firearm by a felon, possession of a stolen firearm, two counts of trafficking opium or heroin by possession and by transportation, maintaining a vehicle used for keeping and selling a controlled substance, and conspiracy to traffic opium or heroin.

¶ 8 Following his indictment, Defendant filed a Motion to Suppress on 25 November 2020. Specifically, Defendant challenged the search of his vehicle and seizure of property therefrom on the grounds the search was without a warrant or any "other lawful justification" and therefore violated the Fourth Amendment of the United States Constitution as well as the North Carolina Constitution.

¶ 9 On 3 December 2020, the trial court held a hearing on Defendant's Motion to Suppress. At the hearing, the State's two witnesses were Corporal Cole and Detective King. They testified to the events recounted above.

¶ 10 Following this testimony, the trial court heard arguments from Defendant's counsel and from the State. Defendant's attorney argued the officers' testimony conflicted on whether Ms. Van arrived on her own or with the confidential informant, and the police did not have sufficient evidence to link the black SUV to Defendant. Specifically regarding the suppression motion, counsel argued officers did not have probable cause to arrest Defendant for drug trafficking immediately upon seeing him at the gas station—although she conceded the officers could properly

arrest Defendant on outstanding warrants—such that the officers could not search the vehicle for evidence related to an arrest on drug trafficking charges. Defendant's counsel then argued the contraband was not in plain view following Defendant's arrest. Finally, Defendant's attorney argued there were no exigent circumstances so the police could have obtained a search warrant first. Based on these arguments, Defendant contended "the contraband discovered in the vehicle should be suppressed in this case."

¶ 11 The State argued based on the totality of the circumstances, the officers had probable cause to detain Defendant and search the vehicle. The prosecutor also clarified the search was valid under the automobile exception, instead of as a search incident to arrest, so the officers only needed probable cause.

¶ 12 On 19 January 2021, the trial court entered an order denying the Motion to Suppress. Defendant challenges the trial court's Findings of Fact 1, 7–10, and 13–14. In Finding 1, the trial court found the testimony of both officers "to be credible." Findings 7–14 recount Ms. Van meeting with the informant, arranging for a sample that later tested positive as heroin, and the police observing the black SUV associated with Defendant when Ms. Van got in it to retrieve the sample. Defendant does not challenge the remaining Findings of Facts. The unchallenged Findings recount the background of the investigation, the informant ordering the larger quantity of heroin and associated surveillance, Detective King identifying Defendant and the black SUV at the gas station as well as Defendant's subsequent detention, and the smell of vinegar and sight of heroin in the car by both officers leading to the search of the car and recovery of the heroin and other items listed above.

¶ 13 From all the Findings of Fact, the trial court concluded "[t]he search of the vehicle that ultimately led to recovery of the contraband was supported by probable cause." Specifically, the trial court concluded police had probable cause "to conduct a search of the vehicle being driven by the Defendant, including the passenger seat area of the vehicle, the console and other areas where the contraband including the heroin and firearm were found" because of:

> the time and location of the encounter with the Defendant; the Defendant's connection with the Tahoe; the officers' observation of the Tahoe being involved in a heroin transaction earlier in the day; observation of the Defendant driving the Tahoe alone; an odor consistent with heroin emanating

> from the vehicle; and a substance consistent with heroin observed by the officers in plain view inside the vehicle . . . .

On those grounds, the trial court denied Defendant's Motion to Suppress.

¶ 14 Following the trial court's denial of his Motion to Suppress, Defendant accepted a plea deal to reduced charges of: two counts of attempting to traffic by possession of 28 or more grams of heroin, and one count each of possession of a firearm by a felon, conspiracy to possess heroin, and malicious conduct by a prisoner. The prosecutor summarized the facts to support Defendant's guilty plea in a manner that aligned with the testimony at the suppression hearing and the trial court's order denying Defendant's Motion to Suppress. Pursuant to the plea agreement, Defendant "reserve[d] his right to appeal" the denial of the Motion to Suppress. The trial court sentenced Defendant to 60 to 84 months on the first attempt to traffic heroin charge and 60 to 84 months, to run consecutively, on the consolidated remaining charges. Defendant gave notice of appeal as to both the judgments and the denial of his Motion to Suppress in open court.

II. Analysis

¶ 15 Defendant challenges two aspects of the trial court's order denying his Motion to Suppress. First, Defendant contends Findings of Fact 1, 7–10, and 13–14 "are not supported by competent evidence." (Capitalization altered.) Second, Defendant argues the trial court erred in its Conclusion of Law that probable cause supported the police officers' search of the black SUV. After reviewing these arguments, we determine that the trial court did not err and therefore affirm the denial of Defendant's Motion to Suppress.

A. Standard of Review

¶ 16 As our Supreme Court has recently explained:

> When considering on appeal a motion to suppress evidence, we review the trial court's factual findings for clear error and its legal conclusions de novo. S*tate v. Williams*, 366 N.C. 110, 112, 726 S.E.2d 161, 166 (2012). This requires us to examine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)).

State v. Reed, 373 N.C. 498, 507, 838 S.E.2d 414, 421 (2020). When "the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *Biber*, 365 N.C. at 168, 712 S.E.2d at 878.

¶ 17 When the trial court's findings of fact are challenged on appeal and the reviewing court must determine whether they are supported by competent evidence, *Reed*, 373 N.C. at 507, 838 S.E.2d at 421, the court examines whether evidence in the record can support the findings "even where the evidence might sustain findings to the contrary." *State v. Hall*, 268 N.C. App. 425, 428, 836 S.E.2d 670, 673 (2019). This reflects the standard that "[e]ven if 'evidence is conflicting,' the trial judge is in the best position to 'resolve the conflict.' " *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (quoting *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971)). "Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision." *State v. Derbyshire*, 228 N.C. App. 670, 673, 745 S.E.2d 886, 889 (2013) (alteration omitted) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619–20 (1982)).

B. Challenged Findings of Fact

¶ 18 **[1]** Defendant first challenges seven Findings of Fact (Findings 1, 7–10, 13–14) from the trial court's order denying the Motion to Suppress. We review the challenged Findings to determine whether they are supported by competent evidence. *Reed*, 373 N.C. at 507, 838 S.E.2d at 421.

¶ 19 Finding of Fact 1 states: "The Court finds the testimony of Detective King ('King') and Master Corporal Cole ('Cole'), to be credible." Defendant claims "[t]his finding disregards the inconsistent testimony of the two officers about how Ms. Van arrived in the parking lot where the black [SUV] was first observed, how she entered the vehicle, and how she returned to meet with the informant." Essentially, Defendant argues that if there is any inconsistency between the testimonies of Detective King and Master Corporal Cole, the trial court cannot consider *both* to be credible; the trial court must pick one to believe and must disbelieve the other. But determinations of credibility are not so simplistic, and two witnesses can be "credible" even if there are slight factual differences in their testimonies. Different witnesses may have different knowledge and viewpoints and may present facts in a slightly different way, but differences in the details of their testimony alone do not render one or both the witnesses not "credible." The trial court has the role of sorting

out the evidence and testimony, including any variations between the facts as stated by one witness and another, and making findings as to any facts relevant to the issues presented in the case. This Court does not resolve issues with the credibility of witnesses; that is the trial court's role. *See State v. Veazey*, 201 N.C. App. 398, 402, 689 S.E.2d 530, 533 (2009) ("Weighing the credibility of witnesses and resolving conflicts in their testimony is precisely the role of the superior court in ruling on a motion to suppress." (citing *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982))); *see also Williams*, 362 N.C. at 632, 669 S.E.2d at 294 ("Even if evidence is conflicting, the trial judge is in the best position to resolve the conflict." (quotations and citation omitted)).

¶ 20 Finding of Fact 7 states: "Without knowing that the informant was working with law enforcement, Van met with the informant and agreed to retrieve the sample heroin to bring back to the informant so that the informant could confirm the quality of the heroin before ordering a substantial amount." Both Detective King and Corporal Cole testified about police setting up a meeting with Ms. Van through the confidential informant to purchase drugs. Both officers also testified about Ms. Van meeting with the informant and going to get a sample of the drug with the plan to then buy a larger amount. This Finding is supported by the evidence.

¶ 21 Finding of Fact 8 states: "After meeting with the informant, Van drove to the location of the heroin source to retrieve the sample and return it to the informant. King followed and surveilled Van as she completed this task." Detective King testified that he followed and surveyed Ms. Van. Corporal Cole also testified about Ms. Van driving to get the sample of the heroin, giving it to informant, and the police surveillance in effect at the time.

¶ 22 Finding of Fact 9 states:

> King followed Van to the parking lot of an apartment building where Van was to meet her heroin source. Several other officers positioned themselves throughout the area conducting their own surveillance and covering the entire lot. King was in radio contact with Cole and the other officers throughout this portion of the investigation.

Corporal Cole and Detective King testified about King following Ms. Van's vehicle to an apartment parking lot, several other officers conducting surveillance of the area, and the constant radio contact between the officers.

¶ 23 Finding of Fact 10 states:

> Once in the parking lot of the apartment building, Van exited her vehicle and entered a black SUV. Believing that the black SUV was the location from which Van was retrieving the sample of heroin, King observed the black SUV's vehicle registration plate displaying [number redacted] and communicated the same to Cole.

Detective King testified he could see Ms. Van's vehicle pull into the parking lot and other officers told him she got "into a black SUV." Based on other officers' "assumption" the black SUV was "who [Van] was meeting with to retrieve the sample," he drove by and noted the SUV's license plate number. Corporal Cole also testified Van got into the black SUV and another officer told him the license plate number, which was the same as Detective King had testified.

¶ 24 Finding of Fact 13 states:

> After a short time, Van exited the Tahoe and returned to her vehicle. The officers attempted to follow both vehicles and were able to maintain constant physical surveillance on Van back to a predetermined location arranged by the informant. The officers were unable to maintain constant physical surveillance on the Tahoe.

Corporal Cole testified after "a very short period of time" Ms. Van left the black SUV and got back into the vehicle in which she came. Both he and Detective King testified about the attempt to follow both vehicles before losing track of the Tahoe.

¶ 25 Finally, Finding of Fact 14 states: "After Van and the informant met, the informant brought the sample heroin retrieved by Van to Cole and other officers, who field tested and confirmed the sample to be heroin." Both Detective King and Corporal Cole testified about the police getting the sample from the informant, with King testifying he originally received this information from Cole. Corporal Cole testified a field test on the sample was positive for heroin.

¶ 26 Defendant argues Findings 7–10, 13–14 "are concerning because all factually determine that Ms. Van traveled alone when she went to the parking lot of the apartment complex where she entered and exited the black [SUV]," which conflicts with testimony from Detective King and Corporal Cole. As we have explained, competent evidence supports

each of the challenged Findings, and the trial judge is in the best position to resolve conflicting evidence. *Williams*, 362 N.C. at 632, 669 S.E.2d at 294. Further, it is not even clear to us these Findings conflict with the evidence as to whether Ms. Van was alone in her vehicle. The Findings of Fact do not specifically say Ms. Van traveled alone, only that, for example, she "drove to the location of the heroin source to retrieve a sample and return it to the informant." This could have occurred with the informant in the same vehicle as Detective King and Corporal Cole testified. And even if there is an inconsistency between the versions of how Ms. Van traveled, the trial court also must determine the weight of the evidence. *See Derbyshire*, 228 N.C. App. at 673, 745 S.E.2d at 889 ("Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision."). The evidence supports the trial court's Findings, even if there is some inconsistency between the facts as to Ms. Van in the testimony of the two officers. Therefore, we reject all of Defendant's challenges to the Findings of Fact.

C. Conclusion of Law Regarding Search as Supported by Probable Cause

¶ 27 In addition to his argument challenging certain Findings of Fact, Defendant contends "the Conclusions of Law regarding the search of the black [SUV] are not supported by probable cause." (Capitalization altered.)

¶ 28 Although generally searches without warrants violate the Fourth Amendment, certain circumstances allow for warrantless searches. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454–55, 29 L. Ed. 2d 564, 576 (1971) ("Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.' " (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967))). One such doctrine is the automobile exception, which states, "A search of a motor vehicle which is on a public roadway or in a public vehicular area is not in violation of the [F]ourth [A]mendment if it is based on probable cause, even though a warrant has not been obtained."[2] *State v. Isleib*, 319 N.C. 634, 637–38, 356 S.E.2d

2. Defendant also argues another exception to the warrant requirement, search incident to arrest, *State v. Carter*, 200 N.C. App. 47, 50–51, 682 S.E.2d 416, 419 (2009) ("[A] well-recognized exception to the warrant requirement is a search incident to a lawful arrest." (quotations and citation omitted)), "is invalid" here. *See also Arizona v. Gant*,

573, 576 (1987) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 595, 41 L. Ed. 2d 325, 338 (1974)). The automobile exception to the warrant requirement "is founded upon two separate but related reasons: the inherent mobility of motor vehicles which makes it impracticable, if not impossible, for a law enforcement officer to obtain a warrant for the search of an automobile while the automobile remains within the officer's jurisdiction, [*Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543 (1925)], and the decreased expectation of privacy which citizens have in motor vehicles, *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)." *Isleib*, 319 N.C. at 637, 356 S.E.2d at 575–76.

¶ 29 While the automobile exception does not require a warrant, it requires that the vehicle be in a public vehicular area and the police have probable cause. *Id.*, 319 N.C. at 638, 356 S.E.2d at 576. "Probable cause exists where the facts and circumstances within . . . the officers' knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *State v. Downing*, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005) (quotations, citations, and alterations from original omitted); *see also Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983) (stating probable cause can also relate to a belief "that contraband or evidence is located in a particular place"). As part of the probable cause determination, courts can consider "plain" observations made by police officers based on their senses. *See Downing*, 169 N.C. App. at 796, 613 S.E.2d at 39 ("Plain smell of drugs by an officer is evidence to conclude there is probable cause for a search."); *cf. Carter*, 200 N.C. App. at 54, 682 S.E.2d at 421 (explaining "plain view" as a separate exception to the warrant requirement (quotations and citation omitted)).

¶ 30 Within this framework, Defendant contends the trial court erred in two ways. First, Defendant argues the automobile exception to the warrant requirement should not apply because his vehicle was not "stopped in a public vehicular area." Second, Defendant challenges the trial court's conclusion the officers had probable cause. As part of his challenge to the trial court's probable cause determination, Defendant argues the trial court improperly relied on the plain view and smell doctrines. We review each argument in turn.

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556 U.S. 332, 351, 173 L. Ed. 2d 485 (2009) ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."). But as Defendant himself admits the trial court did not analyze this exception, and we will not review this argument.

1. Applicability of Automobile Exception

¶ 31 **[2]** Defendant argues the trial court should not have applied the automobile exception because it only applies to vehicles in a "public vehicular area" and the black SUV was parked next to a fuel pump, which Defendant contends is not such an area. In North Carolina, "public vehicular area" is defined by statute. N.C. Gen. Stat. § 20-4.01(32) (eff. 12 July 2017 to 20 June 2019). Because the definition is provided in the statute, this issue presents a question of statutory interpretation, which we review *de novo*. *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014) ("Issues of statutory construction are questions of law, reviewed de novo on appeal." (quotations and citation omitted)).

¶ 32 Our statutes in effect at the time of Defendant's offense defined "Public Vehicular Area" in pertinent part as:

> Any area within the State of North Carolina that meets one or more of the following requirements:
>
> a. The area is used by the public for vehicular traffic at any time, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:
>
> 1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.
>
> 2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.
>
> 3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13).

N.C. Gen. Stat. § 20-4.01(32).

¶ 33 This Court recently noted our Supreme Court's guidance on statutory interpretation as follows:

> [t]he intent of the Legislature controls the interpretation of a statute. When a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction. [C]ourts must give [an unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

Jamison, 234 N.C. App. at 238, 758 S.E.2d at 671 (alterations in original) (quoting *State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010)).

¶ 34 Defendant contends that "[a] fuel pump is not a driveway, road, alley, or parking lot, and is therefore not a public vehicular area." Defendant is certainly correct the "fuel pump" at a service station is not "a driveway, road, alley, or parking lot." But Defendant misstates the issue by substituting the areas listed in the statute "by way of illustration and not limitation" as the only areas defined as "public vehicular area." N.C. Gen. Stat. § 20-4.01(32).

¶ 35 North Carolina General Statute § 20-4.01(32) defines "public vehicular area" as

> [t]he area [ ] used by the public for vehicular traffic at any time . . . upon the grounds and premises of any of the following:
>
> . . . .
>
> 2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.

¶ 36 The statute's list of types of areas "by way of illustration and *not limitation*" includes "any drive, driveway, road, roadway, street, alley, or parking lot," N.C. Gen. Stat. § 20-4.01(32) (emphasis added), but these areas are not the definition of "public vehicular area"; they are illustrations of the types of areas which may be included, but "public vehicular area" is not limited to these areas.

¶ 37 Defendant's SUV was parked beside a fuel pump at a gas station on the paved area open to the public for drivers to park close enough to the

fuel pump to reach the car with the hose from the pump. Thus, the question presented is whether the parking and driving area adjacent to a fuel pump where Defendant's SUV was parked is an area "used by the public for vehicular traffic at any time" and is on the premises of "[a]ny service station," "store" or "any other business . . . establishment . . . providing parking space." Phrased correctly, this question answers itself.

¶ 38 The plain meaning of "service station" is a gas station. Gas stations sell gas dispensed from fuel pumps to the public, so by its plain meaning the definition of "public vehicular area" includes the area for driving or parking adjacent to gas pumps. In fact, the primary purpose of the area adjacent to gas pumps at a service station is to be "used by the public for vehicular traffic"; gas pumps provide fuel for vehicles. We are bound by this plain meaning. *Jamison*, 234 N.C. App. at 238, 758 S.E.2d at 671 ("Courts must give an unambiguous statute its plain and definite meaning . . . ." (alterations in original omitted)).

¶ 39 Several other factors further reinforce our interpretation of the plain meaning of this statute, indicating the legislature's intent that the public vehicular areas at a "service station" should include the paved area adjacent to the fuel pumps. *See id.* ("The intent of the legislature controls the interpretation of a statute." (alteration in original omitted)). The definition specifically notes "driveway[s]" and "parking lot[s]" on the premises of stores generally and service stations specifically are included, N.C. Gen. Stat. § 20-4.01(32), so these portions of the definition would apply to the area between the entry to the service station property, off the roadway, up to the area adjacent to the gas pumps. Thus, the inclusion of a more specific reference to "service station" in the definition in addition to "stores" and other business or retail establishments with parking areas indicates that the only remaining unique aspect of a service station, the driving/parking area near gas pumps, is also included. *See State v. Ramos*, 193 N.C. App. 629, 637, 668 S.E.2d 357, 363 (2008) ("We are guided by the principle of statutory construction that a statute should not be interpreted in a manner which would render any of its words superfluous. We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation." (quotations, citation, and alterations omitted)); *see also State v. Conley*, 374 N.C. 209, 215, 839 S.E.2d 805, 809 (2020) ("It is presumed that the legislature did not intend any provision to be mere surplusage." (quotations, citation, and alterations omitted)); *State v. Ricks*, 237 N.C. App. 359, 366, 764 S.E.2d 692, 696 (rejecting State's argument on the grounds it would make part of § 20-4.01(32) "superfluous").

¶ 40 Here, according to unchallenged Findings of Fact, police searched Defendant's car when it was stopped by a gas pump at a gas station, where Defendant was pumping gas into the car. As we have explained, the area used for public vehicular traffic adjacent to the gas pumps on the premises of the service station is included in the definition of public vehicular area. N.C. Gen. Stat. § 20-4.01(32)(a). Because Defendant's car was in a public vehicular area, the automobile exception can apply. *See Isleib*, 319 N.C. at 638, 356 S.E.2d at 576 (explaining one of the requirements for the automobile exception to apply is that the vehicle is "in a public vehicular area").

¶ 41 After acknowledging § 20-4.01(32)(a) includes "service stations," Defendant argues the statute only covers "driveways, roads, alleys, and parking lots at a service station" and therefore "read[ing] the statute to include a fuel pump area" would be an impermissible expansion of the statute in violation of *Ricks*. But our interpretation does not expand *Ricks* at all; it is entirely consistent with *Ricks*. *Ricks* was decided upon the lack of evidence that a vacant lot was open for public vehicular traffic at all. 237 N.C. App. at 366, 764 S.E.2d at 696. In *Ricks*, the defendant was stopped for driving while impaired on his moped while crossing a vacant lot on a dirt path. 237 N.C. App. at 360, 764 S.E.2d at 693. The State's evidence showed the "cut through on the vacant lot" had been used by pedestrians and bicyclists, it was wide enough for the police cruiser to enter, and there were "no signs, fences, or shrubs" to keep the public out. *Id.*, 237 N.C. App. at 361, 764 S.E.2d at 694. This Court held the State failed to present evidence the vacant lot was a public vehicular area because there was no evidence of ownership of the lot or that it was generally open to the public for vehicular traffic:

> In the present case, there is no evidence concerning the ownership of the vacant lot; nor is there evidence that the vacant lot had been designated as a public vehicular area by the owner. Moreover, a vacant lot is dissimilar to any of the examples provided in N.C. Gen. Stat. § 20–4.01(32)(a) that are generally open to the public. The fact that people walk and bicycle across the vacant lot as a shortcut does not turn the lot into a public vehicular area. In order to show an area meets the definition of public vehicular area in N.C. Gen. Stat. § 20–4.01(32)(a), we hold there must be some evidence demonstrating the property is similar in nature to those examples provided by the

> General Assembly in the statute. There was no such evidence in this case.

Id., 237 N.C. App. at 366, 764 S.E.2d at 696.

¶ 42 The area adjacent to the gas pumps here is "similar in nature to those examples provided by the General Assembly in the statute," *id.*, specifically driveways and parking areas. N.C. Gen. Stat. § 20-4.01(32)(a). The area adjacent to a gas pump at a service station is entirely different from a dirt path used by bicycles and pedestrians on a vacant lot. A service station's raison d'être is to be open to the public for vehicular traffic to and from the gas pumps; its primary purpose is to invite drivers of vehicles onto the property to drive in and park their vehicles next to the gas pumps to buy gas.

¶ 43 Defendant also argues a fuel pump is an area "where toxic flammable liquids are stored and dispensed" and one where "currency and private credit card information is exchanged, and goods are sold." Defendant appears to be arguing this makes a fuel pump private, but that argument cannot stand against the statutory definition of public vehicular area including service stations, N.C. Gen. Stat. § 20-4.01(32)(a)(2), which we have already concluded includes the area adjacent to fuel pumps.

¶ 44 We hold the driving or parking area adjacent to a fuel pump at a service station is a "public vehicular area" as defined by North Carolina General Statute § 20-4.01(32)(a).

2. Plain View and Plain Smell Doctrines

¶ 45 **[3]** Beyond our conclusion Defendant's truck was in a public vehicular area, the automobile exception also requires the officers to have had probable cause for their search. *Isleib*, 319 N.C. at 638, 356 S.E.2d at 576. Defendant challenges the trial court's conclusion the officers had probable cause. As part of his challenge to the trial court's probable cause determination, Defendant argues the trial court improperly relied on the plain view and plain smell doctrines. We review the trial court's Conclusions of Law *de novo* and ask whether the Findings of Fact support the Conclusions of Law. *Reed*, 373 N.C. at 507, 838 S.E.2d at 421.

¶ 46 As we explained above, "[p]robable cause exists where the facts and circumstances within . . . the officers' knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Downing*, 169 N.C. App. at 795, 613 S.E.2d at 39; *see also Gates*, 462 U.S. at 230, 76 L. Ed. 2d at 543 (stating probable

cause can also relate to a belief "that contraband or evidence is located in a particular place"). "In the context of the motor vehicle exception, 'a police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials.' " *State v. Parker*, 277 N.C. App. 531, 2021-NCCOA-217, ¶ 25 (alteration omitted) (quoting *State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018)), *disc. rev. denied*, 860 S.E.2d 917 (2021). "The existence of probable cause is a commonsense, practical question that should be answered using a totality-of-the-circumstances approach." *Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 335 (quoting *State v. McKinney*, 361 N.C. 53, 62, 637 S.E.2d 868, 874 (2006)).

¶ 47 Here, the trial court properly considered the totality of the circumstances, determining police had probable cause "to conduct a search of the vehicle being driven by the Defendant, including the passenger seat area of the vehicle, the console and other areas where the contraband including the heroin and firearm were found" because of:

> the time and location of the encounter with the Defendant; the Defendant's connection with the Tahoe; the officers' observation of the Tahoe being involved in a heroin transaction earlier in the day; observation of the Defendant driving the Tahoe alone; an odor consistent with heroin emanating from the vehicle; and a substance consistent with heroin observed by the officers in plain view inside the vehicle . . . .

¶ 48 The trial court had Findings of Fact to support each factor within its Conclusion of Law on probable cause. As to the time and location of the encounter with Defendant, the Findings establish the drug deal was supposed to happen at a "Howard Johnson hotel" and Detective King saw Defendant at the gas station "directly across from the Howard Johnson hotel" and "at approximately the time the suspected drug transaction was to take place between Van and her source." The trial court also found, "Based on the time, location and the other information gathered during the course of the day throughout the investigation, King, Cole and other officers reasonably believed Defendant was in that general location to deliver two kilograms of heroin to Van and the informant."

¶ 49 As to the "the officers' observation of the [black SUV] being involved in a heroin transaction earlier in the day" and "Defendant's connection to the" black SUV, the Findings recounted how Ms. Van got into a black SUV to get the heroin sample and how police searched the license

plate of the black SUV that returned "an alert" indicating "Defendant was driving" the SUV when a "domestic incident . . . occurred five days prior" to the date of the events in this case. Further, as to the officers' "observation of the Defendant driving the Tahoe alone," the trial court found when Defendant pulled into the gas station by Detective King, "Defendant was the driver of the vehicle, and was alone."

¶ 50 Finally, as to the factors about "an odor consistent with heroin emanating from the vehicle" and "a substance consistent with heroin observed by the officers in plain view inside the vehicle," the Findings recount:

> 21. After Defendant was detained, King exited his vehicle and walked around the outside of the Tahoe, which Defendant left with the windows down. As King walked around the Tahoe, he noticed the vehicle was emanating an odor of vinegar. Based on King's training and experience, such an odor is associated with heroin.
>
> 22. Upon walking around the Tahoe driven by Defendant, King observed in plain sight what he believed, based on his training and experience, to be two kilograms of heroin sticking out of the top of an open cereal box located on the front passenger seat. King reported this to Cole, who likewise smelled and saw what he believed to be heroin in plain view in the Tahoe recently driven by Defendant.

Thus, the trial court's Findings of Fact support its Conclusions of Law on probable cause.

¶ 51 Defendant first contests the Conclusions on probable cause by arguing about the strength (or lack thereof) of the evidence supporting the trial court's determination. First, as we have discussed, the trial court correctly followed the totality of the circumstances test in making its probable cause determination. Second, the trial court's Findings of Fact support its Conclusions of Law on probable cause. We only review those two components on appeal. *See Reed*, 373 N.C. at 507, 838 S.E.2d at 421 (explaining we review conclusions of law *de novo*, which "requires us to examine . . . whether the findings of fact support the conclusions of law." (quotations and citation omitted)). We do not reweigh the evidence as Defendant now asks us to do. *See Derbyshire*, 228 N.C. App. at 673, 745 S.E.2d at 889 (explaining how an appellate court gives "great deference to the trial court . . . because it is entrusted with the duty to hear

testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision.").

¶ 52 Defendant also argues the trial court improperly relied upon the heroin being in plain view in the vehicle and the odor consistent with heroin coming from the vehicle. As to plain view, Defendant first argues for plain view to apply "the initial intrusion must also be valid," and he contends that was not the case here because he was not parked in a public vehicular area. While Defendant is correct that a police officer must have been "in a place where he had a right to be when the evidence was discovered" for plain view to apply, *Carter*, 200 N.C. App. at 54, 682 S.E.2d at 421 (quoting *State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999)), we have already concluded Defendant's black SUV was in a public vehicular area. Defendant also argues "[t]he location and packaging of the material that law enforcement suspected to be heroin . . . is also problematic" as to the plain view doctrine. But we do not reweigh the evidence, and an unchallenged Finding of Fact explains both officers saw what they believed, based upon their training and experience, to be heroin in the SUV.

¶ 53 Finally, Defendant argues the plain smell doctrine cannot apply as "[t]here is no appellate authority in North Carolina specifically authorizing the search of a vehicle based on the odor of heroin." Defendant contends the plain smell doctrine has been used only for marijuana, not heroin. But this Court has previously explained "[p]lain smell of *drugs* by an officer is evidence to conclude there is probable cause for a search." *Downing*, 169 N.C. App. at 796, 613 S.E.2d at 39 (emphasis added). In *Downing*, the drug the officers smelled was cocaine, not marijuana. *Id.* And as Defendant recognizes, we have caselaw holding the smell of marijuana alone provides probable cause. *E.g.*, *State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981). We see no reason to treat the plain smell of heroin any differently than the plain smell of marijuana or cocaine based upon the unchallenged Findings of Fact. Detective King "noticed the vehicle was emanating an odor of vinegar" and in his "training and experience, such an odor is associated with heroin."

¶ 54 In *Downing*, this Court addressed a similar situation where law enforcement officers had stopped the defendant's van while conducting a narcotics investigation based upon information from a confidential informant regarding sales of marijuana and cocaine. 169 N.C. App. at 792, 613 S.E.2d at 37. Upon searching the defendant, they found only some marijuana and a pipe, but the officers then needed to move the defendant's van out of the roadway where it was stopped. *Id.*, 169 N.C. App. at 793, 613 S.E.2d at 37. The defendant consented for one of the

officers to move the van out of the roadway. *Id.*, 169 N.C. App. at 793, 613 S.E.2d at 37–38.

> While moving the van, Sergeant Johnson "smelled a strong odor of what smelled like cocaine." Officers then searched the vehicle, although Defendant did not consent, and located a Wendy's restaurant food bag between the driver's seat and front passenger seat. Inside the food bag was a plastic bag containing approximately six ounces of cocaine. The officers then placed Defendant under arrest.

Id., 169 N.C. App. at 793, 613 S.E.2d at 38.

¶ 55 This court held the officers had probable cause for the search of a vehicle based upon plain smell of cocaine. *Id.*, 169 N.C. App. at 796, 613 S.E.2d at 39 ("Plain smell of drugs by an officer is evidence to conclude there is probable cause for a search.").

¶ 56 Because the Findings support the trial court's Conclusions of Law on probable cause, we hold the trial court did not err in its probable cause determination and therefore properly denied Defendant's Motion to Suppress.

III. Conclusion

¶ 57 We affirm the trial judge's denial of Defendant's Motion to Suppress. The Findings of Fact are supported by competent evidence, so we reject Defendant's challenges to them. Further, those Findings support the trial court's Conclusions of Law police had probable cause to search Defendant's vehicle. Within those Conclusions, the trial court did not err in applying the plain view and plain smell doctrines to heroin, based upon the evidence presented by the State. Finally, the driving and parking area adjacent to fuel pumps at a service station is a public vehicular area under the definition provided in North Carolina General Statute § 20-4.01(32)(a). Therefore, the automobile exception to the warrant requirement applied to the search of Defendant's SUV parked at the gas pumps and the officers only needed probable cause to search Defendant's vehicle.

AFFIRMED AND NO ERROR.

Judges COLLINS and CARPENTER concur.

STATE v. SINGLETON

[285 N.C. App. 630, 2022-NCCOA-656]

STATE OF NORTH CAROLINA
v.
CHARLES SINGLETON, DEFENDANT

No. COA22-114

Filed 4 October 2022

1. Indictment and Information—fatally defective indictment—second-degree rape—no allegation that defendant knew or should have known victim was physically helpless

The trial court lacked jurisdiction to convict defendant of second-degree rape because the indictment failed to allege that defendant knew or should have known that the victim, who was under the influence of alcohol during the events that gave rise to charges of rape and kidnapping, was physically helpless. Therefore, the portion of the judgment convicting defendant of rape was vacated and the indictment dismissed.

2. Kidnapping—first-degree—severely impaired victim—removal by car—lack of consent—victim released in secluded area

The State presented sufficient evidence to support each element of first-degree kidnapping, including evidence from which the jury could infer that the victim was not released in a safe place, where the State showed that when defendant came upon the victim, who was severely impaired from the effects of alcohol, he put her in his car, she fell asleep, and he drove her away from a busy area to a more secluded location for the purpose of committing rape. When the victim eventually left defendant's car on foot, she was still impaired and in a secluded area where she could not immediately obtain assistance.

Appeal by Defendant-Appellant from judgment entered 5 August 2021 by Judge Jeffery B. Foster in Wake County Superior Court. Heard in the Court of Appeals 23 August 2022.

Attorney General Josh H. Stein, by Assistant Attorney General Benjamin Szany, for the State.

Danielle Blass for the Defendant-Appellant.

DILLON, Judge.

¶ 1 On 5 August 2021, Charles Singleton ("Defendant") was found guilty of second-degree forcible rape and first-degree kidnapping in connection with an encounter he had when he was 63 years old with an intoxicated, 18-year-old female college student (hereinafter "Jane") during the early morning hours of 26 November 2017.

I. Background

¶ 2 On Saturday 25 November 2017, Jane went to a restaurant-bar on Fayetteville Street in downtown Raleigh with a group of friends. At the time, Jane was in her freshman year in college and was home for Thanksgiving break. That evening and into the early morning hours of Sunday 26 November 2017, she consumed several alcoholic beverages, becoming highly impaired.

¶ 3 Around 2:00 a.m. that Sunday morning, Jane was dancing with her older sister and a friend inside the restaurant-bar. She testified that her next memory was from about 3 1/2 hours later, at 5:25 a.m., when she found herself inside of Defendant's car in a parking lot several blocks from Fayetteville Street with Defendant on top of her engaging in sexual intercourse with her.

¶ 4 Security video cameras in downtown Raleigh show that at about 2:25 a.m. Defendant helped Jane into the passenger seat of his car, then got into the driver's seat, and drove away.

¶ 5 Jane testified as follows: When she became aware that she was in Defendant's car at around 5:25 a.m., she told Defendant to get off her. Defendant complied. She tried to locate her cell phone and asked Defendant to call her number from his cell phone number. Defendant complied. Almost immediately after realizing that her cell phone was nowhere to be found, she fled the scene on foot. Defendant did not try to prevent her from fleeing. Around 6:00 a.m., she arrived at a gas station and called her sister for help.

¶ 6 Over the next few hours, Jane was taken to a police station, where she reported that she was raped by an older man, and then to InterAct, where she underwent a physical exam. She remained impaired by the alcohol that she had consumed several hours earlier. Blood and hair samples were taken during the exam.

¶ 7 At 8:27 a.m,, three hours after running from Defendant's car, Jane took a breath test, which showed her alcohol content to be .13.

¶ 8 Defendant testified as follows concerning his encounter with Jane: A little after 2:00 a.m., he came upon Jane lying on the sidewalk near

Fayetteville Street. He woke her up. He asked her if she would like to get in his car to get out of the cold. She consented. He helped her to his car. They engaged in small talk. Eventually, she fell asleep in his car. He drove around, away from the busyness of Fayetteville Street, to a secluded parking lot. At some point, she woke up and asked Defendant to have sex with her. He complied. They rested for about 30 minutes and then engaged in consensual sex again. Jane then asked Defendant to help her find her phone and to call her phone. She then "took off." He did not see her again.

¶ 9 Defendant was tried for second-degree rape and first-degree kidnapping. He was sentenced to two terms of 73-148 months to run consecutively. Defendant appeals, challenging both convictions.

II. Analysis

A. Second-Degree Rape

¶ 10 **[1]** Defendant was convicted for violating Section 14-27.22(a)(2) of our General Statutes, which provides that a person commits second-degree forceable rape when he "engages in vaginal intercourse with another person" who is "physically helpless" and he "knows or should reasonably know that the other person [is] physically helpless." N.C. Gen. Stat. § 14-27.22(a)(2) (2017).

¶ 11 Defendant contends the superior court lacked jurisdiction to try him for this crime because the charging indictment from the grand jury failed to allege one of the essential elements; namely, that he knew or reasonably should have known that Jane was physically helpless when he engaged in sexual intercourse with her. For the reasoning below, we must agree with Defendant.

¶ 12 In this case, the grand jury alleged as follows in its indictment against Defendant for second-degree rape:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about November 26, 2017, in Wake County, the defendant named above unlawfully, willfully, and feloniously did engage in vaginal intercourse with [Jane], who was at the time, physically helpless. This act was done in violation of NCGS § 14-27.22.

Though there was sufficient evidence presented *at the trial* from which the jury could find that Defendant knew or reasonably should have

known that Jane was physically helpless, this indictment contains no such allegation.

¶ 13 A key purpose of an indictment is to give "reasonable notice of the charge against him . . . so that he may prepare his defense and protect himself against double jeopardy." *State v. Spivey*, 368 N.C. 739, 744, 782 S.E.2d 872, 875 (2016).

¶ 14 But another purpose of an indictment in North Carolina is to confer upon the superior court jurisdiction to try a defendant. Indeed, the Declaration of Rights contained in our North Carolina Constitution require the grand jury to indict and a petit jury to convict for the offenses charged by the grand jury. N.C. Const. art. I, § 22. As our Supreme Court has noted, "Every [citizen] . . . has a right to the decision of twenty-four of his fellow citizens upon the question of his guilt; first, by a grand jury, and secondly, by a petty jury of good and lawful [citizens]." *State v. Moss*, 47 N.C. 66, 69 (1854).

¶ 15 In some jurisdictions, the failure to allege an essential element of a crime in the indictment is not jurisdictional and can be waived. *See*, *e.g.*, *United States v. Cotton*, 535 U.S. 625, 631 (2002) (failure of an indictment to charge a federal crime is not a jurisdictional defect but rather "only goes to the merits of the case.") Treating this defect as non-jurisdictional appears to be the majority view. *See State v. Dunn*, 375 P.3d 332, 355, 304 Kan. 773 (2016) ("Indeed, the view that a failure to include an essential element in the charging document is a jurisdictional defect [has] quickly become the minority view in state and federal jurisdictions.").

¶ 16 However, North Carolina continues to follow the minority view, that the failure to allege each element of the crime is a jurisdictional defect which can be raised for the first time on appeal. *State v. Williams*, 368 N.C. 620, 622, 781 S.E.2d 268, 270 (2016) ("Where an indictment is alleged to be invalid on its face, thereby depriving the trial court of jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.").

¶ 17 The State argues that the indictment in this case is, nonetheless, sufficient under Section 15-144.1(c), which allows a so-called "short form" indictment in the prosecution of second-degree rape. That statute provides, in relevant part, that:

> If the victim is . . . physically helpless, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person . . . who was . . . physically helpless . . . ."

N.C. Gen. Stat. § 15-144.1 (2017). Though such allegations do not detail the facts supporting the crime alleged, they do touch on all the elements of Section 14-27.22(3).

¶ 18 And our Supreme Court has held that an indictment is not necessarily fatal if its language does not use the precise language of a statute allowing for short form indictment language, so long as the indictment uses language that is synonymous with the statutory language. *See State v. Tart*, 372 N.C. 73, 77, 824 S.E.2d 837, 840 (2019). In *Tart*, our Supreme Court analyzed a short form murder indictment which used the phrase "slay . . . with malice aforethought" instead of the word "murder" as required by statute. *Id.* at 76, 824 S.E.2d at 839. While recognizing that the words "slay" and "murder" are not interchangeable, the Court held that the word "slay" coupled with "with malice aforethought" was sufficient. *Id.* at 79, 824 S.E.2d at 841 ("We hold that the use of the term "slay" instead of "murder" in an indictment that also includes an allegation of "malice aforethought" complies with the relevant constitutional and statutory requirements for valid murder offense indictments[.]").

¶ 19 The indictment here uses the phrase "engaged in vaginal intercourse" where the statute requires the phrase "carnally know and abuse." While the phrase used in the indictment is a sufficient substitute for "carnally know," it is not a sufficient substitute for the word "abuse". The verb "abuse" (or some equivalent) is required as a means of describing the essential element that was omitted from the indictment here, that Defendant "knew or reasonably should have known" that Jane was physically helpless. The inclusion of "abuse" is necessary to describe that Defendant knew and took advantage of Jane's physical inability to resist his advances.

¶ 20 Again, there was sufficient evidence presented at trial that Defendant raped Jane. However, the indictment simply fails to allege the crime. We have no choice but to vacate the portion of the judgment convicting Defendant of second-degree rape and dismiss the indictment.

B. First-Degree Kidnapping

¶ 21 **[2]** Defendant argues the trial court erred by failing to dismiss the charge of first-degree kidnapping for insufficiency of the evidence.

¶ 22 To survive a motion to dismiss, there must be substantial evidence of each essential element of the crime and that the defendant is the perpetrator. *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015). When reviewing the evidence to determine whether it is substantial enough to survive a motion to dismiss, evidence must be considered

in the light most favorable to the State, and the State is entitled to every reasonable inference from the evidence. *Id.* at 574, 780 S.E.2d 826. "Whether the State presented substantial evidence of each essential element is a question of law", which we review *de novo*. *State v. Phillips*, 365 N.C. 103, 133-34, 711 S.E.2d 122, 144 (2011).

¶ 23 We note that the indictment charging Defendant with first-degree kidnapping alleges the wrong date. Where the events occurred in November 2017 – and the portion of the indictment alleging Defendant with rape alleges the correct date – the portion of the indictment charging him with kidnapping alleges that he committed the act in November 2018. This defect, however, is not fatal, as the date is not an essential element and as there is no indication that Defendant was prejudiced thereby. *See*, *e.g.*, *State v. Price*, 310 N.C. 596, 599, 313 S.E.2d 556, 559 (1984).

¶ 24 In any event, the essential elements of the offense of first-degree kidnapping relevant to this case are that the defendant (1) "confined, restrained, or removed" the victim, (2) without the consent of the victim, (3) to facilitate the commission of a felony, and (4) the defendant did not release the victim in a safe place. N.C. Gen. Stat. § 14–39 (2017).

¶ 25 We conclude the evidence, when viewed in the light most favorable to the State, is sufficient to support the jury's verdict.

¶ 26 There was evidence that Defendant removed Jane from the busy part of downtown Raleigh when he placed her in his car and drove away with her.

¶ 27 There was evidence that Defendant removed Jane without her consent, as there was evidence that Jane was severely impaired. Even if Jane consented to get in Defendant's car to get out of the cold, as he testified, there is evidence that she fell asleep, and that Defendant (without her consent) drove her away to a more secluded spot. And there is evidence that Defendant removed Jane to the secluded parking lot for the purpose of committing second-degree rape on a physically helpless person. *See State v. White*, 307 N.C. 42, 48-49, 296 S.E.2d 267, 271 (1982).

¶ 28 Finally, there was evidence from which the jury could infer that Defendant did not release Jane in a safe place. It may be that Defendant allowed Jane to escape and therefore "released" her. However, there is sufficient evidence that the location of the release was not a "safe place", given her condition. Jane was severely impaired. The area was secluded, away from the area that she was familiar with. It was more than an hour before sunrise on a Sunday morning, when very few places were open. She was some distance from a place where she could get help in her

impaired state. Defendant did not attempt to follow her to make sure she found help.

¶ 29 Accordingly, we find no error regarding Defendant's kidnapping conviction.

III. Conclusion

¶ 30 The portion of the indictment charging Defendant with second-degree rape is fatally defective, as it fails to allege that Defendant knew or reasonably should have known that Jane was physically helpless and thus failed to convey jurisdiction on the court to adjudicate this offense. Due to the trial court's lack of jurisdiction, Defendant was never placed in jeopardy as to second-degree rape. Therefore, we vacate the portion of the judgment convicting Defendant of that crime without prejudice to the State to re-indict Defendant or to Defendant to challenge a new indictment under N.C. Gen. Stat. § 15A-926(c) or other law.

¶ 31 Regarding the portion of the judgment convicting Defendant of first-degree kidnapping, we conclude Defendant received a fair trial, free from reversible error. Defendant, of course, may seek relief in the trial court to have his credit for time served which was applied to his rape conviction applied to his kidnapping conviction.

NO ERROR IN PART; VACATED & DISMISSED IN PART.

Judges CARPENTER and GORE concur.

STATE v. SISK

[285 N.C. App. 637, 2022-NCCOA-657]

STATE OF NORTH CAROLINA
v.
STEVEN MICHAEL SISK, JR., DEFENDANT

No. COA22-154

Filed 4 October 2022

Larceny—jury instructions—lesser-included offense—evidence positive as to each element of charged offense

The trial court did not err in defendant's prosecution for larceny by declining to instruct the jury on the lesser-included offense of attempted larceny where the State presented clear and positive evidence as to each element of larceny and there was no evidence supporting the commission of attempted larceny. Defendant satisfied each element of larceny when he pushed a shopping cart full of unpaid merchandise out of a Tractor Supply store—despite an employee calling after him to stop and the store anti-theft alarm sounding—and then hurriedly unloaded the unpaid merchandise into his vehicle. The larceny had already been completed by the time defendant changed his mind and dumped the merchandise back out of the vehicle into the parking lot after an apparent disagreement with the vehicle's driver.

Appeal by defendant from judgment entered 18 August 2021 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 7 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General William A. Smith, for the State.

Stephen G. Driggers, PLLC, by Stephen G. Driggers, for the Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Steven Michael Sisk, Jr. ("Defendant") appeals from judgment after a jury convicted him of felony larceny, and after he pled guilty to attaining habitual felon status. On appeal, Defendant argues the trial court erred in refusing to provide the jury with an instruction on attempted larceny. After careful review, we find no error.

I. Factual & Procedural Background

¶ 2 The State's evidence presented at trial tended to show: On 10 September 2018, Lauren Hudgins was working the morning shift as a cashier in the Marion, North Carolina "Tractor Supply" retail store. Ms. Hudgins testified that typically only three employees work in this Tractor Supply store at a given time: a cashier, a manager, and a receiver. That day, Ms. Hudgins observed a man walking quickly out the front doors of the store pushing a shopping cart containing a Traveller truck winch, Ariat boots, and a battery. At trial, Ms. Hudgins identified Defendant as the man she observed on 10 September 2018.

¶ 3 The merchandise in Defendant's shopping cart had not been purchased and was therefore property of Tractor Supply. The anti-shoplifting devices attached to the unpaid merchandise triggered the door alarms to sound. As she was ringing up another customer, Ms. Hudgins called out to Defendant while he walked out of the store, "[h]ey, you did not pay for that." Ms. Hudgins called over the intercom for the manager on duty, Elizabeth Cadwell, the assistant store manager. Ms. Hudgins then called police as she followed Defendant out the door to obtain the tag number from his vehicle. Defendant headed towards a white Suzuki Reno that was parked in a handicap zone twenty to twenty-five feet from the front of the store.

¶ 4 As Defendant approached the vehicle, he opened the rear driver's side door of the vehicle and "th[rew the] items into the back of the car as fast as he could." A man was sitting in the driver's seat of the vehicle. Defendant got into the vehicle, and "a commotion" ensued between Defendant and the driver. Defendant got out of the vehicle and "threw the items back on the ground and left." Defendant got back inside the vehicle, and the driver drove away. Using her cell phone, Ms. Hudgins took photographs of the license plate on the Suzuki Reno.

¶ 5 Ms. Cadwell testified that she was in the back of the store when she heard the alarm sound and received a call from Ms. Hudgins. She immediately headed to the front of the store to disable the alarm, and then proceeded outside to the parking lot as Defendant was removing the merchandise from the vehicle. As manager on duty, Ms. Cadwell took over Ms. Hudgins' call with the 911 operator, consistent with Tractor Supply's policy. As part of a report that she was compiling for the store's corporate office, Ms. Cadwell took photographs of the items Defendant removed from the store. Approximately ten minutes after being dispatched, Officer Travis Maltba ("Officer Maltba") of the Marion Police Department arrived at the store.

¶ 6 Christy King testified that she was parked in the parking lot of Tractor Supply when she witnessed a man about twenty feet away, whom she identified as Defendant at trial, running out of the store with a shopping cart and a store employee chasing after him. Ms. King observed Defendant: (1) throw the items in the vehicle, (2) jump in the vehicle where he sat for several seconds, (3) exit the vehicle; (4) throw the items down in the parking lot, and (5) get back in the vehicle. Ms. King took photographs of Defendant from her cell phone, depicting him discarding the items on the parking lot and getting into the vehicle.

¶ 7 Officer Maltba testified he observed an employee wearing a red vest whom he later identified as Ms. Cadwell. He also observed the merchandise on the ground in the parking lot. Officer Maltba then took statements from Ms. Cadwell and Ms. King. Ms. Cadwell and Ms. King turned over to Officer Maltba the photographs they had each taken, and the State admitted these photographs as exhibits at trial. Officer Maltba had encountered Defendant "several times" in the past, and Officer Maltba had no doubt the person in the photographs taken by the witnesses was Defendant. After generating a report and completing his investigation, Officer Maltba sought and received a warrant for Defendant's arrest for misdemeanor larceny.

¶ 8 On 18 September 2018, Defendant was indicted on the charges of misdemeanor larceny, in violation of N.C. Gen. Stat § 14-72(a), and attaining habitual felon status, in violation of N.C. Gen. Stat. § 14-7.1. On 17 May 2021, a McDowell County grand jury returned a superseding indictment for the charge of felony larceny, pursuant to N.C. Gen. Stat. § 14-72(b)(6). The superseding indictment alleged Defendant had unlawfully, willfully, and feloniously been convicted of four misdemeanor larceny offenses prior to committing the 10 September 2018 offense.

¶ 9 On 17 August 2021, a jury trial commenced before the Honorable J. Thomas Davis in McDowell County Superior Court. During the charge conference, counsel for Defendant "ask[ed] the court to allow the jury to consider the lesser charge of attempted larceny," considering Defendant was not apprehended on Tractor Supply property. The trial court denied the request, finding there was "no conceivable way that the jury could, based on th[e] evidence, not find that the State has not shown substantial evidence as to each of the elements of the completed [larceny]." Defense counsel objected to the ruling.

¶ 10 The jury returned a unanimous verdict of guilty as to the misdemeanor larceny charge. Defendant admitted to having four prior misdemeanor larceny convictions, and he pled guilty to attaining the

status of habitual felon. The trial court sentenced Defendant to a minimum of 100 months and a maximum of 132 months with the North Carolina Department of Correction. After the judgment was announced, Defendant gave oral notice of appeal in open court.

II. Jurisdiction

¶ 11 The Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2021) and N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issue

¶ 12 The sole issue before this Court is whether the trial court erred in refusing to include a jury instruction on the lesser included offense of attempted larceny where there is clear and positive evidence as to each element of larceny.

IV. Standard of Review

¶ 13 The Court "review[s] the trial court's denial of the request for an instruction on the lesser included offense *de novo*." *State v. Laurean*, 220 N.C. App. 342, 345, 724, S.E.2d 657, 660 (2012) (emphasis added), *disc. rev. denied*, 366 N.C. 241, 731 S.E.2d 416. "Under a *de novo* review, [this C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

V. Analysis

¶ 14 On appeal, Defendant argues that in viewing the evidence in the light most favorable to Defendant, "a rational juror could conclude from the evidence presented at trial that his actions fell short of a completed larceny" where Defendant left the items in the parking lot of Tractor Supply, approximately twenty-five feet from the front door of the store. He further argues there would have been evidence that the larceny was completed if he had been apprehended in the parking lot. The State contends "the evidence was clear and positive as to the charge of larceny," and thus, the trial court properly declined to include a jury instruction for attempted larceny. After careful review, we agree with the State.

¶ 15 "In North Carolina, a trial judge must submit lesser included offenses as possible verdicts, even in the absence of a request by the defendant, where sufficient evidence of the lesser offense is presented at trial." *State v. Lowe*, 150 N.C. App. 682, 686, 564 S.E.2d 313, 316 (2002) (citation omitted). However, "[w]here the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing

the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense." *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985) (citation omitted); *see also State v. Broome*, 136 N.C. App. 82, 88, 523 S.E.2d 448, 453 (1999) (explaining an attempt charge is not required where "the State's evidence tends to show completion of the offense" and "there is no conflicting evidence relating to the elements of the crime charged"), *disc. rev. denied*, 351 N.C. 362, 543 S.E.2d 136 (2000). "When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, [this Court] view[s] the evidence in the light most favorable to the defendant." *State v. Ryder*, 196 N.C. App. 56, 64, 674 S.E.2d 805, 811 (2009) (citation omitted).

¶ 16 In this case, the trial court instructed the jury only on the offense of larceny and declined to instruct on any lesser included offense. "Larceny has been defined as a wrongful taking and carrying away of the personal property of another without his consent, . . . with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently." *State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978) (citation and quotation marks omitted). The elements of common law larceny are that the defendant: "(1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled in part on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010).

¶ 17 The element of "taking" requires the accused have the goods "in his possession, or under his control, even if only for an instant." *Carswell*, 296 N.C. at 104, 249 S.E.2d at 429 (citation omitted) (defining "taking" as the "severance of the goods from the possession of the owner"). Our Supreme Court has made clear that "proof of asportation[, or carrying away,] is required for [a] larceny charge," although proof that the defendant is in possession of the stolen property after the larceny was completed is not required. *Perry*, 305 N.C. at 234, 287 S.E.2d at 815. Asportation, does not require "that the property be completely removed from the premises of the owner." *State v. Walker*, 6 N.C. App. 740, 743, 171 S.E.2d 91, 93 (1969). Rather, "[a] bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away." *Carswell*, 296 N.C. at 103, 249 S.E.2d at 428 (citation omitted).

¶ 18 Here, Defendant quickly passed Tractor Supply's last point of sale and walked out of the front doors pushing a shopping cart containing unpaid merchandise. Defendant unloaded the items into his vehicle.

During this period, Defendant possessed and controlled the goods, thereby severing the goods from the possession of Tractor Supply for a duration of time. *See id.* at 104, 249 S.E.2d at 429. Thus, the element of "taking" was completed. *See Perry*, 305 N.C. at 233, 287 S.E.2d at 815.

¶ 19 Defendant's carrying away of the goods is evidenced by his pushing the shopping cart out the door after a store cashier told him that the goods were not paid for and after an anti-theft alarm sounded. *See id.* at 233, 287 S.E.2d at 815. To satisfy the element of "carrying away," it was not required that Defendant leave Tractor Supply's premises with the items or that he continued to possess the items after he completed the larceny. *See Walker*, 6 N.C. App. at 743, 171 S.E.2d at 93; *Perry*, 305 N.C. at 234, 287 S.E.2d at 815.

¶ 20 Tractor Supply did not give Defendant permission to leave with the unpaid goods. Conversely, the record tends to show Ms. Hudgins called after Defendant to pay for the items as he left the store and chased him when he did not respond. Therefore, the element of "without the owner's consent" was satisfied. *See Perry*, 305 N.C. at 233, 287 S.E.2d at 815.

¶ 21 Finally, Defendant's intent to permanently deprive Tractor Supply of the items is shown by his refusal to stop when Ms. Hudgins advised he had not paid for the goods and after the door alarms went off. Defendant's intent is further shown by his loading the goods into his companion's vehicle. The intent element was completed even though he ultimately left the items on Tractor Supply's premises, apparently due to the driver's reaction. *See id.* at 233, 287 S.E.2d at 815.

¶ 22 Defendant attempts to distinguish the instant case from the unpublished decision of *State v. Boyd*, No. COA19-543, 2020 N.C. App. LEXIS 156 (N.C. Ct. App. Feb. 18, 2020) (unpublished). In *Boyd*, our Court held the trial court did not err in refusing to instruct on the lesser included offense of attempted larceny. *Id.* at *12. There, the defendant took another's gaming system and dropped it while running away with it. *Id.* We reasoned the defendant's taking and carrying away of the item was sufficient to show the larceny was complete, although the defendant did not know where he lost it. *Id.*

¶ 23 Defendant seemingly argues that because he knowingly left the Tractor Supply merchandise in the parking lot, unlike the defendant in *Boyd* who accidently dropped the stolen item, that Defendant only *attempted* to commit the offense of larceny. We disagree. As discussed above, the larceny was completed *before* Defendant removed the items from the vehicle and abandoned them.

¶ 24 Defendant also asserts this case is factually similar to two unpublished cases in which the State charged the defendants with attempted larceny. *See State v. Evans*, No. COA12-224, 2012 N.C. App. LEXIS 1127 (N.C. Ct. App. Oct. 2, 2012) (unpublished); *State v. Carter*, No. COA09-609, 2010 N.C. App. LEXIS 381 (N.C. Ct. App. Mar. 2, 2010) (unpublished). Defendant further argues *Evans* and *Carter* are on point where the defendants challenged the trial courts' denials of their motions to dismiss, and the evidence was viewed in the light most favorable to the State. Contrary to this assertion, Defendant contends this case is distinguishable from *State v. Carswell* because the defendant in *Carswell* was appealing the denial of a motion for nonsuit, and the evidence was considered in the light most favorable to the State. This argument is without merit.

¶ 25 In *Evans*, our Court considered whether the trial court properly denied the defendant's motion to dismiss based on sufficiency of the evidence. *Evans*, No. COA12-224, 2012 N.C. App. LEXIS 1127, *3. The circumstantial evidence presented by the State tended to show the defendant removed security tags from two comforters in a Macy's department store. *Id.* at *2–3. Defendant was carrying these two comforters in the store when he dropped them and ran out of the store. *Id.* at *2. We held the State presented sufficient evidence that the defendant attempted to steal the comforters; therefore, the trial court properly denied the defendant's motion to dismiss. *Id.* at *7.

¶ 26 Similarly, in *Carter*, the defendant was challenging the trial court's denial of his motion to dismiss the charge of attempted larceny. *Carter*, No. COA09-609, 2010 N.C. App. LEXIS 381, *4. In that case, the defendant opened a vehicle that the local police department was using as a "bait car," stepped inside, and shut the door. *Id.* at *7. The officers approached the vehicle when the brake lights came on and while the defendant was trying to get the vehicle into gear. *Id.* at *3. We held there was sufficient evidence of each element of attempted larceny, and the trial court's dismissal of the defendant's motion to dismiss was proper. *Id.* at *8.

¶ 27 In neither *Evans* nor *Carter* did the State present evidence tending to show a larceny was completed. In *Evans*, the defendant did not leave the store with the comforters, and in *Carter*, the defendant did not take or move the vehicle. Hence, the charge of attempted larceny was appropriate in these cases. The facts in this case are clearly distinguishable because Defendant completed each element of larceny, including taking unpaid merchandise outside of the store and carrying it away to his vehicle. *See Perry*, 305 N.C. at 233, 287 S.E.2d at 815.

¶ 28 Here, Defendant did not present evidence. In viewing the State's evidence in the light most favorable to Defendant, "the evidence is clear and positive as to each element" of larceny, and there is no evidence of Defendant committing a lesser-included offense, including attempted larceny. *See Peacock*, 313 N.C. at 558, 330 S.E.2d at 193. Therefore, we conclude the trial judge did not err in denying Defendant's request for the trial court to instruct on attempted larceny. *See id.* at 558, 330 S.E.2d at 193.

VI. Conclusion

¶ 29 We hold the State presented clear and positive evidence tending to prove each element of larceny. Accordingly, we discern no error in the trial court's refusal to instruct the jury on a lesser included offense.

NO ERROR.

Judges DIETZ and COLLINS concur.

MICHAEL KEITH SULIER, PLAINTIFF
v.
TINA BASTIAN VENESKEY, DEFENDANT

No. COA21-506, 21-523

Filed 4 October 2022

1. Child Custody and Support—Uniform Child Custody Jurisdiction and Enforcement Act—communication between state courts—to determine jurisdiction

Where a grandmother filed a child custody action in Michigan and, after the Michigan judge initiated a phone call with a North Carolina court, that action was dismissed for lack of jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), any issue regarding the Michigan court's procedure for conducting that phone call was for that state's appellate courts to review. At any rate, the grandmother suffered no harm where the parties were able to present their jurisdictional arguments at length in a subsequent hearing held in North Carolina, which did not violate the UCCJEA.

2. Child Custody and Support—Uniform Child Custody Jurisdiction and Enforcement Act—initial custody determination—jurisdiction—grounds

The trial court in a child custody action incorrectly determined that it could exercise "home state" jurisdiction or "significant connection" jurisdiction pursuant to N.C.G.S. § 50A-201(a)—codifying the four grounds for jurisdiction over initial custody determinations under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)—where, although North Carolina was the child's home state and she had significant connections to North Carolina for UCCJEA purposes, the child did not have a parent or "person acting as a parent" living in or having significant connections to North Carolina (her mother had recently died; the father lived in South Carolina; and her stepfather, who did live in North Carolina, neither had legal custody of the child nor claimed a right to legal custody). Nevertheless, the trial court did have jurisdiction by necessity over the matter where no state could claim jurisdiction under the other grounds listed in section 50A-201(a), and where the only other state that could have claimed jurisdiction under the UCCJEA—Michigan, where custody proceedings originated—had already ruled that North Carolina was the more appropriate forum.

3. Child Custody and Support—custody—parental fitness—constitutionally protected status as parent—sufficiency of factual findings

In a child custody dispute between a father and his child's maternal grandmother, the trial court properly awarded full custody to the father after determining that he was a fit and proper parent who had not abdicated his constitutionally protected right to parent his daughter. Notably, the court's findings showed that the father made several attempts to contact the child but that the child's mother took numerous steps to keep him away or to hide her and the child's location from him. Further, the court found that the maternal grandmother tried to secret the child away from the father where, days after the child's mother died, the grandmother took the child out of North Carolina, brought her to Michigan to live with her, and initiated a guardianship proceeding in Michigan without notifying the father (even though she was aware of his efforts to locate his child).

Appeal by defendant from orders entered 23 February 2021 and 3 May 2021 by Judge Mary F. Covington in District Court, Davie County. Heard in the Court of Appeals 22 March 2022.

Michael Keith Sulier, pro-se, plaintiff-appellee.

Homesley & Wingo Law Group PLLC, by Andrew J. Wingo and Victoria L. Stout, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant-maternal Grandmother appeals the trial court's orders determining North Carolina has jurisdiction over the custody of Plaintiff-Father's minor child and awarding him full custody. Because we conclude the trial court had subject-matter jurisdiction under the UCCJEA and its determination Plaintiff-Father is a fit parent who has not abdicated his constitutional rights to the minor child was supported by its findings and the evidence, we affirm.

I. Background

¶ 2 This case involves a custody dispute between Plaintiff Michael Keith Sulier ("Father"), and Defendant Tina Bastian Veneskey, maternal grandmother ("Grandmother") of Andrea,[1] who was born in February 2013.[2] Father and Andrea's late mother ("Mother") were never married but were living together when Andrea was born. Father and Mother separated following Andrea's birth, after which the record reflects Father and Mother had a "tumultuous relationship" during which they "broke up a few times and got back together." During this period of about two years, Father cared for the child and "did engage in parenting activities such as feeding, changing and taking care of the child while the mother was at work." Mother and Father then permanently separated in 2014; Mother moved away, took Andrea with her, got married, and changed her last name. Father did not thereafter have contact with Andrea. The trial court found from Father's and his mother's testimony that Father's lack of contact with Andrea after the separation was a result of having been "led to believe by [Mother] and [Grandmother] that they could no longer have communication with the minor child," in part due to a no-contact order, "consistent with the years between 2014-2020." The trial court found after the no-contact order was lifted in 2016, Father and the paternal grandmother "attempted to locate the minor child through family inquiries and social media," but Mother "had a different last name at that point, and they did not know how to find her." According

1. We refer to the minor child by a pseudonym.

2. The trial court adjudicated Father as the "biological parent of the minor child" in its 23 February 2021 order. Grandmother has not challenged this ruling on appeal.

to Grandmother, Mother moved at least eight times with the child during the five years after Mother and Father separated, throughout North Carolina, Michigan, and Alaska, never staying in one location longer than a year until moving into Mother's final home in North Carolina. Grandmother's pleadings in this action revealed to Father for the first time Andrea's previous whereabouts including her return to North Carolina by August of 2017 and most recently living since October 2018 in a home with Mother, Mother's new husband ("Stepfather"), and another child born to Mother and Stepfather, the minor child's half-sibling, in Mocksville, North Carolina.

¶ 3 Mother passed away on 10 May 2020. At this time, Grandmother lived in Michigan. After Mother's death, on or about 18 May 2020, Grandmother traveled to North Carolina and removed Andrea from North Carolina, bringing her to Michigan to stay with Grandmother and her husband. Grandmother did so without notifying Father and without his consent and has kept Andrea in Michigan since. At the time of Mother's death and at the time this action was filed, Father was residing in Myrtle Beach, South Carolina. Father also has a son with his girlfriend who he has lived with "as a family unit" since his son's birth, and in his briefing on appeal, Father states he "takes care of his [son's] needs [and] he wishes to do the same for his biological daughter . . . ." Father did not learn of Mother's passing until discovering this through a Facebook posting, at which point he "immediately returned to North Carolina to pick up his daughter." Father contacted the police, family members, and neighbors, but was never informed Grandmother took the child to Michigan.

¶ 4 Grandmother initiated a guardianship proceeding in the Delta County Probate Court in Michigan soon after arriving there with Andrea, on 29 May 2020,[3] and on 30 June 2020 the Michigan court entered an

3. Grandmother did not include in the Record on Appeal or in her brief to this Court any indication as to the date she filed the guardianship proceeding in Michigan after arriving there with the child on 18 May 2020. We take judicial notice the Michigan Court of Appeals affirmed the Delta County trial court's order declining to exercise child-custody jurisdiction under the UCCJEA on 26 August 2021. *See Veneskey v. Sulier*, No. 355471, 2021 Mich. App. LEXIS 5147 at *1–2, 2021 WL 3821012 at *1 (Mich. Ct. App. Aug. 26, 2021), *review denied*, 967 N.W.2d 71 (Mich. 2021). The Michigan appeal included only the complaint for custody Grandmother later filed in circuit court. *Id.*, 2021 Mich. App. LEXIS 5147 at *2–3, *14–15, 2021 WL 3821012 at *1, *6. According to the Michigan Court of Appeals's opinion, "[Andrea] was removed from North Carolina on May 18, 2020. [Grandmother] filed the[] petition for guardianship on May 29, 2020. [Grandmother] filed the[] circuit court complaint on July 31, 2020." *Id.*, 2021 Mich. App. LEXIS 5147 at *8, 2021 WL 3821012 at *4. We additionally note the trial court's order here indicated Grandmother filed the permanent-custody action in Michigan on 30 July 2020 instead of 31 July 2020.

emergency temporary guardianship order. Father then filed his verified Complaint for Child Custody two weeks later, on 15 July 2020, in Davie County District Court. On 30 July 2020, Grandmother filed an action for permanent custody in the Michigan State Court. The Delta Probate Court in Michigan granted temporary guardianship to Grandmother and a telephone conference was then held between the Honorable Mary Covington and the Honorable Perry Lund of the Circuit Court for the County of Delta, Michigan ("UCCJEA conference"). Following that conference, on 29 October 2020, the Michigan Court "entered a summary disposition order under MCR 2.116(C)(4), finding that Michigan is not the home state of the minor child and is an inconvenient forum" and dismissing Grandmother's Michigan custody action.

¶ 5 On 30 September 2020, Grandmother filed a motion to dismiss Father's custody complaint and a Motion for UCCJEA Conference and Answer pursuant to Chapter 50A of the North Carolina General Statutes ("UCCJEA"). Father filed a verified Reply and Response to Motion to Dismiss, noting the previous UCCJEA conference held by Judge Covington and Judge Lund. The next day, on 19 November 2020, Father filed a verified Motion to Allow Supplemental Pleading and verified Supplemental Pleading and Motion in the Cause for an order awarding him immediate and temporary custody based upon the Michigan Court's Order declaring it was not Andrea's home state. On 27 January 2021, Grandmother filed her verified Answer and Counterclaims in North Carolina for "permanent primary custody" of Andrea. The matters were noticed for hearing on 23 February 2021 and came on that day before the Honorable Mary Covington in Davie County District Court.[4] Judge Lund, in Michigan, also presided virtually at the 23 February 2021 hearing.

¶ 6 By Order on Jurisdiction entered 23 February 2021, Judge Covington concluded North Carolina had subject-matter jurisdiction over Andrea's custody because North Carolina was her "home state" as defined by the UCCJEA; and, as an alternative basis for jurisdiction, a parent or person acting as a parent had significant contacts with North Carolina and North Carolina was a convenient forum for the custody proceeding. The trial court found as fact Grandmother and her husband owned real property located in Davie County, where Grandmother previously resided, and Andrea and Mother were residing in North Carolina continuously

4. It appears from the 23 February 2021 hearing transcript there was some question among the attorneys for the Parties regarding the scope of what was noticed for hearing that day, but Grandmother has not raised any argument on appeal regarding the notice of hearing.

for three years prior to Mother's passing. The trial court also found for purposes of the UCCJEA Stepfather "was acting as a parent to [the child] at the time of [Mother's] death . . ." and was living in the North Carolina home with Andrea and her half-sibling. Father filed a verified Motion to Dismiss Grandmother's Second Answer and Counterclaims the same day the trial court entered its Order on Jurisdiction.[5]

¶ 7 By Temporary Custody Order entered 3 May 2021,[6] Judge Covington reaffirmed North Carolina's subject-matter jurisdiction over Andrea's custody and concluded Father did not abdicate his constitutionally protected rights as a parent, was fit and proper to have care, custody, and control, and was therefore entitled to full custody of the child. The trial court dismissed Grandmother's claim for custody and ordered Andrea be immediately returned to Father. On 5 May 2021, Grandmother filed written notice of appeal from the trial court's custody order.

II. Discussion

¶ 8 Grandmother makes many arguments on appeal challenging the trial court's award of custody to Father and dismissal of her claim for custody. She argues the conference Judges Covington and Lund held prior to the court's Order on Jurisdiction violated the UCCJEA; the trial court erred in concluding North Carolina was Andrea's home state, there also existed significant-connection jurisdiction, and North Carolina was a convenient forum; and the trial court erred in awarding custody to Father because the evidence she presented established as a matter of law that Father abdicated his constitutional rights as a parent. Grandmother also takes exception to the trial court's decision not to admit certain evidence from the child's Michigan therapist.

A. Standard of Review

¶ 9 We review *de novo* a trial court's conclusion it has subject-matter jurisdiction over a custody dispute pursuant to the UCCJEA. *In re J.H.*, 244 N.C. App. 255, 260, 780 S.E.2d 228, 233 (2015); *see also In re M.R.J.*, 378 N.C. 648, 2021-NCSC-112, ¶ 19 ("[S]ubject-matter jurisdiction is a question of law . . . ." (quotations and citation omitted)).

¶ 10 In custody determinations, "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the

5. On 24 March 2021, Grandmother filed written Notice of Appeal from the trial court's 23 February 2021 Order on Jurisdiction.

6. It is not clear why the order is entitled "Temporary Custody Order," but the title is not controlling. The order is in substance a final and appealable order granting Father full custody of Andrea and dismissing Grandmother's claim for custody.

evidence might sustain findings to the contrary." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (quotations and citations omitted). However, "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." *Id.*; *In re I.K.*, 377 N.C. 417, 2021-NCSC-60, ¶ 20 ("The 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."). "The trial court's findings of fact are conclusive on appeal if unchallenged, or if supported by competent evidence in the record." *In re I.K.*, ¶ 20 (citations omitted).

B. Procedure for UCCJEA Conference

¶ 11 **[1]** We first address Grandmother's arguments the trial court violated the UCCJEA in the procedure it followed in communicating with the Michigan Court. Grandmother argues she suffered "significant harm" as a result of the trial court's application of N.C. Gen. Stat. § 50A-110 during its initial phone conference with Judge Lund.[7] That section provides, in part:

> (a) A court of this State may communicate with a court in another state concerning a proceeding arising under [the UCCJEA].
>
> (b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
>
> . . . .
>
> (d) . . . [A] record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

N.C. Gen. Stat. § 50A-110 (2021).

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7. This telephone conference originated in the Michigan proceeding; Michigan has the same provision in its UCCJEA statute. *Compare* Mich. Comp. Laws § 722.1110 (2020) *with* N.C. Gen. Stat. § 50A-110 (2021).

¶ 12 Grandmother here takes issue with the telephone call Judge Lund and Judge Covington had during the Michigan proceeding, prior to the North Carolina hearing regarding jurisdiction. After the telephone conference between Judge Lund and Judge Covington, the Michigan Court dismissed Grandmother's *Michigan* custody action on the ground Michigan was not Andrea's home state or a convenient forum. That call originated with Judge Lund in Michigan based upon the custody proceeding Grandmother filed in Michigan. Grandmother acknowledges there was also a full hearing in the North Carolina action on 23 February 2021 "where the Trial Court of North Carolina, the Circuit Court of Michigan, and the attorneys for both parties from both states were present," and at that hearing both Judges "heard from all attorneys regarding how N.C. Gen. Stat. § 50A-110 was applied . . . and discussed the procedural history of both the Michigan guardianship action and the North Carolina custody action." Grandmother complains the result of the North Carolina hearing "did not change the outcome" of the Judges' earlier phone call in the Michigan proceeding, but that does not change the fact Grandmother had the full UCCJEA hearing in this North Carolina action. The Judges from both States attended a hearing in North Carolina and heard and discussed at length counsels' jurisdictional arguments, and then the trial court entered an Order on Jurisdiction, and a second Temporary Custody Order again finding facts affirming its jurisdiction. Any issue Grandmother takes with the procedure the Michigan Court followed in Grandmother's case there would be for the Michigan Courts to decide, and in fact, the Michigan Court of Appeals affirmed the dismissal of Grandmother's Michigan child-custody proceeding, concluding North Carolina was the child's home state and Michigan was an inconvenient forum for her custody determination. *See Veneskey*, *supra*, 2021 Mich. App. LEXIS 5147 at *8-10, 2021 WL 3821012 at *4 ("[A]n individual who removes a minor child from the home state should not obtain a benefit between the removal date and date of a filing of a custody petition in Michigan by claiming that this period destroyed the prior occupancy period and relationship to the home state.").

C. Jurisdiction Under UCCJEA

¶ 13 **[2]** Grandmother contends the trial court erred in its ultimate determination North Carolina has subject-matter jurisdiction as Andrea's home state, or in the alternative, significant-connection jurisdiction. Grandmother argues both conclusions were erroneous based on the evidence, but she does not challenge any of the trial court's findings of fact, so we are bound by these findings. *In re K.N.*, 378 N.C. 450, 2021-NCSC-98, ¶ 17 ("Unchallenged findings are deemed to be supported by the evidence and are binding on appeal.").

¶ 14 The trial court made the following findings in support of its determination in its 23 February 2021 Order on Jurisdiction:

> 2. The Defendants [(Grandmother and her husband)] are the maternal grandparents of the minor child and reside in Michigan, although they own real property located in Davie County, North Carolina, where the minor child was living at the time of biological [M]other's death.
>
> 3. Within moments of the biological [M]other's death, [Grandmother] removed the minor child from the jurisdiction of her home state. The minor child has resided in North Carolina continuously [from] 2017-2020 when her [M]other passed away.
>
> 4. There is credible evidence that the minor child lived in multiple places with . . . [Mother]. And although the minor child was born in the State of Michigan, she resided in North Carolina continuously for approximately three years prior to her [M]other's passing in . . . North Carolina.
>
> 5. [Grandmother] has previously resided in Davie County, North Carolina.
>
> 6. [Mother] was residing in North Carolina six months prior to her death in May 2020. She married and had a child with [Stepfather]. The minor child has a half-sibling that currently lives in North Carolina.
>
> 7. [Stepfather] . . . was acting as a parent to . . . [Andrea] at the time of the [M]other's death and when he turned the minor child over to [Grandmother]. He currently still resides in North Carolina.
>
> . . . .
>
> 9. Although the child was removed from the state of North Carolina, she and at least one parent or persons acting as a parent, have significant contact with the state of North Carolina.
>
> 10. The State of Michigan did assume emergency temporary jurisdiction for the purposes of establishing a temporary guardianship when the child was taken to North Carolina [sic] after the [M]other's

> death, by [Grandmother]. [Father] did not give consent to the child being removed from North Carolina.
>
> 11. On October 29, 2020, in the Circuit Court for the County of Delta, in the State of Michigan, the Honorable Perry Lund entered a summary disposition order . . . finding that Michigan is not the home state of [Andrea] and is an inconvenient forum. . . .
>
> 12. As of the date of this hearing, Michigan's only jurisdiction pertained to the temporary guardianship ordered by the Delta County Probate Court in Case No. 20-GM-22549.
>
> . . . .
>
> 14. [Father] filed his action for custody in . . . North Carolina, the child's home state, on July 15, 2020. [Grandmother] filed her custody action in Michigan on July 30, 2020.
>
> . . . .
>
> 17. The Court has determined that North Carolina has jurisdiction over the subject matter in the case and personal jurisdiction over the parties because of [Grandmother] and the minor child's significant contacts within the state of North Carolina.
>
> 18. Furthermore, the court finds that North Carolina is the more convenient forum for the minor child and for [Father] and at least one contestant has significant connections within the state of North Carolina.
>
> . . . .

(Parentheticals added). The trial court also made the following relevant findings in its 3 May 2021 custody order:

> 3. At the time of [M]other's death, the minor child was residing in Mocksville, NC, in a home owned by [Grandmother], with her [M]other and her new husband of less than a year, [Stepfather] . . . .
>
> . . . .
>
> 6. Neither party in this action currently reside in the State of North Carolina, however, after . . .

conducting a jurisdictional hearing with the juvenile Judge in the State of Michigan, it was determined that North Carolina is the home state. That jurisdictional ruling is currently on appeal in Michigan.[8]

7. The Court finds that North Carolina is the home state of the minor child at the time of the filing of this action. [Andrea] was living at least six months prior to the death of her [M]other and prior to the filing of this action by [Father].

. . . .

9. [Father] learned of [Mother's death] on the social media page of a family member of the decedent and he immediately returned to North Carolina to pick up [Andrea] . . . .

. . . .

11. The Court finds that within a few days of [Mother's death], [Grandmother] came to North Carolina from Michigan and removed the child from the jurisdiction of North Carolina and took her back to Michigan. . . . .

12. [Grandmother] and [Stepfather] had an attorney draw up a consent agreement to allow [Grandmother] to take the child back to Michigan without [Father's] consent. . . . .

13. . . . [Father] had family in the area where [Andrea] was residing [(in North Carolina)] and [his mother,] the paternal grandmother, and [Grandmother] had previous communications by phone to discuss the minor child and exchanged photos . . . .

. . . .

20. According to the verified pleadings of [Grandmother], [Mother] resided at 6 different addresses although she moved 8 times in 5 years. . . . .

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8. As noted above, the Michigan Court of Appeals affirmed the Delta County trial court's order on 26 August 2021. *See Veneskey*, *supra*, 2021 Mich. App. LEXIS 5147 at *1–2, 2021 WL 3821012 at *1.

> 21. After the no-contact order . . . and the charges were dismissed, [Father and his mother] attempted to locate [Andrea] . . . . [Mother] did not appear in court to testify because she had left the state with [Andrea] and never informed [Father] where she was going.
>
> 22. [Father] . . . . sent [gifts and cards for Andrea] to [Grandmother's] residence in Michigan as [Mother] had a habit of returning to her mother's residence when she needed help from her. . . . .
>
> . . . .
>
> 26. . . . . [Grandmother's] testimony that she moved from her home into a different home right after her daughter's death because the memories of her were too painful, is not credible. It once again appears to the court that it was another way to hide or secret the child from [Father] now that she was appointed guardian in an emergency hearing in Michigan. In fact, it would seem to be more comforting to the grieving child to be around her [M]other's memories and personal belongings, rather than be moved into a place with no memories.
>
> . . . .

(Parentheticals and footnote added).

¶ 15 Grandmother has not challenged any of these findings as unsupported by the evidence, so these findings are binding upon this Court. *In re K.N.*, ¶ 17; *In re I.K.*, ¶ 20; *see also In re M.R.J.*, ¶ 38 ("The trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites in the Act were satisfied when the court exercised jurisdiction." (quotations and citation omitted)). We also note that some of the findings, particularly regarding North Carolina's status as Andrea's home state, are actually conclusions of law, so we will review those "findings" *de novo*. *See Walsh v. Jones*, 263 N.C. App. 582, 589–90, 824 S.E.2d 129, 134 (2019) ("If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' *de novo*." (quotations and citation omitted)); *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) ("[A]ny determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law." (quotations and citation omitted)).

¶ 16 "Whenever one of our district courts holds a custody proceeding in which one contestant or the children appear to reside in another state, the court must initially determine whether it has jurisdiction over the action." *In re J.H.*, 244 N.C. App. at 262, 780 S.E.2d at 234–35 (quotations and citation omitted). Subject-matter jurisdiction over child custody actions is governed by N.C. Gen. Stat. § 50A-101 *et seq.*, North Carolina's codification of the UCCJEA. As this Court has previously noted, "Michigan and North Carolina have codified the UCCJEA in virtually identical terms," which, in Article 2, Part 2, establishes several "modes" of jurisdiction. *See In re A.L.L.*, 254 N.C. App. 252, 262, 802 S.E.2d 598, 605–06 (2017) ("The UCCJEA recognizes four modes of subject-matter jurisdiction: (1) initial child-custody jurisdiction, N.C. Gen. Stat. § 50A-201; (2) exclusive, continuing jurisdiction, N.C. Gen. Stat. § 50A-202; (3) jurisdiction to modify determination, N.C. Gen. Stat. § 50A-203; and (4) temporary emergency jurisdiction, N.C. Gen. Stat. § 50A-204.").

¶ 17 The first "mode," North Carolina General Statute § 50A-201, is at issue here. *Id.* That section provides:

> (a) . . . [A] court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care,

> protection, training, and personal relationships;
>
> (3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or
>
> (4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).
>
> (b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.
>
> (c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

N.C. Gen. Stat. § 50A-201 (2021).

¶ 18 This section thus establishes jurisdiction over initial child custody determinations in various scenarios. First, the court must identify the child's "home state" as defined in North Carolina General Statute § 50A-102. Next, the court must determine whether North Carolina has jurisdiction under any subsection of § 50A-201. If North Carolina is the "home state" and "a parent or person acting as a parent continues to live in this State," jurisdiction falls under subsection (a)(1). Here, the trial court, and the Michigan Court, determined North Carolina is Andrea's home state. *See Veneskey*, *supra*, 2021 Mich. App. LEXIS 5147 at *9–10, 2021 WL 3821012 at *4 (explaining Michigan is not the home state before stating "even if North Carolina does not qualify as the home state" implying North Carolina is the home state). The trial court also found that a person acting as a parent, Stepfather, continues to live in this state.

1. Home State

¶ 19 We begin the "home state" analysis with the date of commencement of the initial child custody proceeding. In both North Carolina and Michigan, " '[c]ommencement' means the filing of the first pleading in a proceeding." N.C. Gen. Stat. § 50A-102(5) (2021); Mich. Comp. Laws § 722.1102(e) (2021). And in both states, a "child custody proceeding" includes a proceeding for guardianship. N.C. Gen. Stat. § 50A-102(4); Mich. Comp. Laws § 722.1102(d). As noted by the Michigan Court of Appeals,

> "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue. *Child-custody proceeding includes a proceeding for . . . guardianship*, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear.

Veneskey, *supra*, 2021 Mich. App. LEXIS 5147 at *9, 2021 WL 3821012 at *4 (emphasis in original) (quoting Mich. Comp. Laws § 722.1102(d)). The Michigan Court of Appeals continued:

> The May 29, 2020 guardianship petition was filed only several days after [Andrea] left North Carolina. Regardless of the time period during which [Andrea] was removed from North Carolina and [Grandmother's] filings in Michigan to secure guardianship and custody, we conclude that it did not render Michigan as [Andrea's] home state for purposes of plaintiffs' and defendant's claims for custody. Indeed, in the six-month time period preceding [Andrea's] move to Michigan and the commencement of legal proceedings here, [Andrea] resided in North Carolina with her family.

Id., 2021 Mich. App. LEXIS 5147 at *9-10, 2021 WL 3821012 at *4.

¶ 20 Michigan's analysis is consistent with North Carolina law. Moreover, the definition of "home state" in the UCCJEA notes that a "period of temporary absence" of a parent or child is included in the statutory six-month period immediately before commencement of a child custody proceeding. *See* N.C. Gen. Stat. § 50A-102(7) ("A period of temporary absence of any of the mentioned persons is part of the period.").

¶ 21 As noted by the Michigan Court of Appeals, "in the six-month time period preceding [Andrea's] move to Michigan and the commencement of legal proceedings here, [Andrea] resided in North Carolina with her family." *Veneskey*, *supra*, 2021 Mich. App. LEXIS 5147 at *9-10; 2021 WL 3821012 at *4. After her Mother's death, Andrea remained with "her family," specifically her Stepfather, who was "a person acting as a parent," and her sibling, until Grandmother took Andrea to Michigan on 18 May 2020. On 29 May 2020, Grandmother filed the temporary guardianship proceeding, which was the "commencement of a child custody proceeding," as correctly noted by the Michigan Court of Appeals.

Veneskey, *supra*, 2021 Mich. App. LEXIS 5147 at *8, 2021 WL 3821012 at *4. The trial court found Grandmother took Andrea to Michigan "to hide or secret the child from [Father] . . . ."

¶ 22 Under the UCCJEA, North Carolina was Andrea's home state on the date of the commencement of the proceeding in Michigan, which is the date of commencement of the initial child-custody proceeding. Andrea had lived in North Carolina continuously for more than six months prior to 18 May 2020, when Grandmother took her to Michigan. Thus, Andrea had been in Michigan for only 11 days when a proceeding was filed. We conclude this period of 11 days in Michigan with Grandmother was a temporary absence from North Carolina for purposes of the statutory definition of "home state."

> While the issue of whether an absence from a state amounted to a temporary absence has previously come before this Court, we have decided this issue on a case-by-case basis. Some courts in sister states have adopted certain tests for determining whether an absence from a state was a temporary absence. These tests include (1) looking at the duration of absence, (2) examining whether the parties intended the absence to be permanent or temporary, and (3) adopting a totality of the circumstances approach to determine whether the absence was merely a temporary absence. We deem the third option to be the most appropriate choice for several reasons. First, it comports with the approach taken by North Carolina courts in determining the issue of whether an absence was temporary on the basis of the facts presented in each case. Second, it incorporates considerations, such as the parties' intent and the length of the absence, that courts of sister states have found important in making this determination. Third, it provides greater flexibility to the court making the determination by allowing for consideration of additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise.

Chick v. Chick, 164 N.C. App. 444, 449–50, 596 S.E.2d 303, 308 (2004) (citations omitted).

¶ 23 We therefore consider the "totality of the circumstances to determine whether the absence was merely a temporary absence." *Id.* As part of this analysis, we consider the parties' intent, length of the absence, and the particular factual circumstances of this case. *Id.* The length of absence was extremely short, only 11 days, and the factual circumstances of this case are tragic, as this custody dispute arose upon the death of Andrea's mother and has continued, in two states, because Grandmother sought to "hide or secret the child from [Father]" and establish custody herself in Michigan. Under the totality of the circumstances, her presence in Michigan was a "temporary absence" from North Carolina and North Carolina is Andrea's home state under the UCCJEA. Andrea lived here with her Mother, Stepfather, and sibling more than six months prior to 18 May 2020. She was moved to Michigan only due to her Mother's death. No doubt Grandmother intended this move to be permanent, not temporary, but Grandmother is not Andrea's parent and did not have custody of Andrea. Thus, Andrea's absence from North Carolina was temporary, only several days, before the commencement of the proceeding. She had resided in North Carolina with Mother and Stepfather for more than six months before the commencement of the proceeding in Michigan. The trial court did not err by concluding North Carolina is Andrea's "home state."

2. Presence of Parent or Person Acting as a Parent

¶ 24 Under subsection (a)(1), the next issue is whether "a parent or person acting as a parent continues to live in this State." N.C. Gen. Stat. § 50A-201(a)(1). Grandmother contends Stepfather was not a "person acting as a parent" for purposes of § 50A-201(a)(1). She argues

> even though after [Mother's] death [Stepfather] was acting as a parent to the minor child, that status ceased when [Stepfather] signed the agreement to allow Defendant-Appellant to take the minor child to Michigan and Defendant-Appellant did take the minor child to Michigan. Therefore, at the time Plaintiff-Appellee filed his complaint, [Stepfather] was not a person acting as a parent to the minor child because [Stepfather] did not have physical custody of the minor child for six consecutive months immediately before the commencement of the action since Defendant-Appellant had the minor child for approximately two months and prior to that [Mother] had custody of the minor child as her parent. In addition, [Stepfather] has not been awarded custody

> nor is he seeking custody of the minor child as evidenced by his signing of the agreement that gave away any parental rights he possessed at the time to Defendant-Appellant. (04/29/2021 T pp 48, 79).

¶ 25 The trial court found that Andrea's Stepfather was a person "acting as a parent" who continues to live in North Carolina, but this finding is actually a conclusion of law and we review it accordingly. *Walsh*, 263 N.C. App. at 589–90, 824 S.E.2d at 134; *In re Everette*, 133 N.C. App. at 85, 514 S.E.2d at 525. Thus, we must consider whether Stepfather was a "person acting as a parent" under the UCCJEA.

¶ 26 North Carolina General Statute § 50A-102(13) defines a "person acting as a parent" as "a person, other than a parent, who:

> a. Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and
>
> b. Has been awarded legal custody by a court or claims a right to legal custody under the law of this State.

N.C. Gen. Stat. § 50A-102(13) (2021).

¶ 27 The Uniform Law Comment for UCCJEA § 50A-102 notes:

> The term "person acting as a parent" has been slightly redefined. It has been broadened from the definition in the UCCJA to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding as well as a person who currently has physical custody of the child. *In addition, a person acting as a parent must either have legal custody or claim a right to legal custody under the law of this State.* The reference to the law of this State means that a court determines the issue of whether someone is a "person acting as a parent" under its own law.

N.C. Gen. Stat. Ann. § 50A-102 (West 2021) (emphasis added).

¶ 28 We have been unable to find any North Carolina case addressing whether a stepparent who lives with a minor child and her other parent for more than six months prior to the commencement of the child

custody proceeding may be considered as a "person acting as a parent" under North Carolina General Statute § 50A-102, particularly where that stepparent is *not* claiming a right to legal custody. Before the trial court, Grandmother argued Stepfather could not be a "person acting as a parent" under the UCCJEA because he was not claiming any right to legal custody; instead, he had executed a "consent agreement to allow [Grandmother] to take the child back to Michigan without [Father's] consent."[9]

¶ 29 Since the UCCJEA is a uniform act, in the absence of any North Carolina cases addressing this issue in detail, we find the analysis by other courts instructive. The North Dakota Supreme Court has summarized treatment of this issue by many states in *Schirado v. Foote*, 785 N.W.2d 235 (N.D. 2010). In *Schirado*, in a custody dispute between the child's parents, the trial court had determined the Fort Berthold Indian Reservation was the child's home state because the child had resided there with his grandparents, as "a person acting as a parent." 785 N.W.2d at 237–38. The North Dakota Supreme Court remanded for additional findings of fact but addressed the analysis of whether the grandparents may be persons "acting as a parent" under the UCCJEA:

> The alternative basis for the district court's dismissal of Schirado's action was that the child lived with Foote's parents. If the home state determination was based in whole or in part on the child living with his grandparents, the grandparents would need to be persons acting as parents to the child. Under our version of the UCCJEA, a "[p]erson acting as a parent" is a nonparent who
>
> > "a. Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and
> >
> > b. Has been awarded legal custody by a court or claims a right to legal custody under the law of this state."

9. The terms of this document are not in our record. It is referred to at one point as a "power of attorney" and the trial court referred to it as a "consent agreement," but the import of the document was to grant Grandmother permission to take the child to Michigan and presumably to allow Grandmother to exercise some sort of parental authority over the child.

N.D.C.C. § 14–14.1–01(11). The grandparents cared for the child from September 2006 to December 2007, arguably satisfying the first requirement of being "a person acting as a parent" if the jurisdictional decision was not based on J.L.F. living with Foote. N.D.C.C. § 14–14.1–01(6). However, jurisdiction depends on the circumstances that exist at the time the proceeding is commenced. *Id*. The grandparents had not been awarded legal custody by a court before Schirado commenced this action in North Dakota court. Therefore, the dispositive issue for determining jurisdiction, based on the child living with the grandparents, is whether the grandparents qualified as persons acting as parents by claiming a right to legal custody under the laws of North Dakota. *See* N.D.C.C. § 14–14.1–01(11)(b). We will proceed to discuss the applicable law on this issue because its analysis is likely to arise on remand. *In re Voisine*, 2010 ND 17, ¶ 13, 777 N.W.2d 908 (citing *Dosland v. Netland*, 424 N.W.2d 141, 142 (N.D.1988)).

[¶ 17] This Court has not interpreted what it means to claim a right to legal custody under North Dakota law. A survey of judicial decisions in other states reveals there is no consistent interpretation of the requirement. However, national case law consistently presents three elements considered in determining if a person claims a right to legal custody under the laws of a state: 1) formality, 2) timing and 3) plausibility.

A

[¶ 18] Our sister states require a nonparent's claim of legal custody to conform with differing levels of formality under the UCCJEA. Pennsylvania and Texas require nonparents seeking "person acting as a parent" status to formally apply for legal custody from a court before they are deemed to have claimed a right to legal custody under the UCCJEA. *Wagner v. Wagner*, 887 A.2d 282, 287 (Pa.Super.Ct.2005) (holding parent's mother needed to seek legal custody of the child from a court to claim a right to legal custody under UCCJEA); *In re S.J.A.*, 272 S.W.3d 678, 684 (Tex.App.2008) (holding stepmother needed to seek

legal custody of child from a court to claim a right to legal custody under UCCJEA). On the other end of the spectrum, Delaware requires no formal application for legal custody, instead requiring only that the prospective "person acting as a parent" have "the right to claim legal custody" to qualify as a person claiming a right to legal custody of a child. *Adoption House, Inc. v. A.R.*, 820 A.2d 402, 408–09 (Del.Fam. Ct.2003) (holding adoption agency claimed right to legal custody of child by having "the right to claim legal custody").

[¶ 19] In *Hangsleben v. Oliver*, 502 N.W.2d 838, 842–43 (N.D.1993), this Court addressed the term "a person acting as a parent" under the UCCJEA's predecessor, the UCCJA. *See* N.D.C.C. ch. 14–14 (repealed 1999). In *Hangsleben* and under the UCCJA, "[a] 'person acting as a parent' is defined as a 'person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody.' " 502 N.W.2d at 842. In *Hangsleben* we concluded "the common-sense definition of a 'person acting as a parent' " included grandparents who "fed, clothed, and cared for" their granddaughter at the request of the child's mother and without a court order. *Id.* at 843. Other jurisdictions have reached similar results. *See In re A.J.C.*, 88 P.3d 599, 606–07 (Colo.2004) (finding adoptive parents to be persons acting as parents under UCCJA where they had "exercised all parental rights and responsibilities" since the child's birth); *Reed v. Reed*, 62 S.W.3d 708, 713 (Mo.Ct.App.2001) (finding maternal grandmother was person acting as parent under the plain meaning of the term in the UCCJA); *In re B.N.W.*, No. M2004–02710–COA–R3–JV, 2005 WL 3487792, **25–26 (Tenn. Ct.App. Dec.20, 2005) (finding paternal grandmother providing care for child was person acting as a parent under UCCJEA); *Ruffier v. Ruffier*, 190 S.W.3d 884, 890 (Tex.App.2006) (finding maternal grandmother caring for child in Belarus was a person acting as a parent under UCCJEA).

[¶ 20] As between the UCCJA and the UCCJEA, the UCCJEA has changed the pertinent portion of the

definition of a "person acting as a parent" to mean a person who "[h]as been awarded legal custody by a court or claims a right to legal custody under the law of this state." N.D.C.C. § 14–14.1–01(11)(b). We note the different words used in the definitions in the UCCJEA and the UCCJA. However, we have not been asked by the parties to this appeal to deviate from the level of formality applied in *Hangsleben*. Nor do we perceive a clear majority position among other jurisdictions addressing this point so that we are willing to change course without the benefit of full briefing and argument by parties with a stake in the outcome of the issue.

[¶ 21] Here, the grandparents did not formally claim a right to legal custody until they petitioned the tribal court to grant them temporary custody of the child. But their extended care and custody of the child appears to satisfy the "common-sense" definition in *Hangsleben* that the grandparents are persons acting as a parent. *See also* N.D.C.C. § 14–10–05 (parent may place child in home of grandparent). Therefore, for purposes of this case, if jurisdiction is based upon the grandparents, the formality requirement can be considered satisfied for purposes of determining whether the Fort Berthold Indian Reservation is the home state.

B

[¶ 22] The next factor is timing of the nonparent's claim. A small number of jurisdictions allow nonparents to assert their claim to legal custody at any point in the pending litigation. *See, e.g.*, *Patrick v. Williams*, 952 So.2d 1131, 1139 n. 9 (Ala.Civ.App.2006) (applying Alabama's modified version of UCCJEA and holding no formal claim to legal custody need be made in cases where grandparents have physical custody of child at time of proceedings); *Adoption House, Inc.*, 820 A.2d at 408–09 (waiving timing element from consideration by allowing nonparents to claim a right to legal custody under UCCJEA by merely having the right to do so). Most jurisdictions addressing this issue require a nonparent's claim of legal custody, whether formal or informal, to be asserted prior

to or simultaneous with the initiation of the pending action. *See*, *e.g.*, *In re Sophia G.L.*, 229 Ill.2d 143, 321 Ill.Dec. 748, 890 N.E.2d 470, 482 (2008) (holding maternal grandparents were persons acting as parents under UCCJEA where grandparents petitioned Indiana court for custody of children before father initiated pending proceeding in Illinois); *Plemmons v. Stiles*, 65 N.C.App. 341, 309 S.E.2d 504, 506 (1983) (holding grandparents were persons acting as parents under UCCJA where grandparents initiated pending proceeding by petitioning for custody of child); *Draper v. Roberts*, 839 P.2d 165, 173–74 (Okla.1992) (holding under UCCJA that "[t]he critical time for testing whether the custodians were 'acting as parents' and 'claim a right to custody' was the point in time when the [pending action] was filed"); *O'Rourke v. Vuturo*, 49 Va.App. 139, 638 S.E.2d 124, 128 (2006) (holding nonbiological father was a person acting as a parent under UCCJEA where he requested custody at outset of pending divorce proceeding); *In re A.C.*, 165 Wash.2d 568, 200 P.3d 689, 692 (2009) (holding foster parents were persons acting as parents under UCCJEA where they petitioned for nonparental custody at outset of pending action).

[¶ 23] Giving priority to a child's home state is the central provision of the UCCJEA, and the UCCJEA is intended to "[a]void jurisdictional competition and conflict with courts of other States in matters of child custody." Uniform Child Custody Jurisdiction and Enforcement Act § 101 cmt.1, 9 U.L.A. 657; *Kelly*, 2009 ND 20, ¶ 21, 759 N.W.2d 721. It has long been held that subject matter jurisdiction is determined at the time a suit is initiated, and to hold otherwise would undermine one of the UCCJEA's central functions by allowing participants to divest a state of jurisdiction by changing the analysis after proceedings have begun. *In re Mannix*, 97 Or.App. 395, 776 P.2d 873, 875 (1989). We therefore conclude that to qualify as a "person acting as a parent" under the UCCJEA, a nonparent's claimed right to legal custody must occur prior to, or simultaneous with, the initial filing related to the instant litigation. To hold otherwise would be

> contrary to the function of the UCCJEA and contrary to the principles of "certainty, predictability and uniformity of result." *Daley v. American States Preferred Ins. Co.*, 1998 ND 225, ¶ 14 n. 4, 587 N.W.2d 159 (enumerating goals in choice of law analysis).

Schirado, 785 N.W.2d at 240–43 (alterations in original).

¶ 30 Thus, the North Dakota Supreme Court determined the factors normally considered in the analysis of whether a person is "a person acting as a parent" under the UCCJEA are the 1) formality, 2) timing and 3) plausibility of the person's claimed right to legal custody of the child. *Id.* at 241. The relevant time is immediately prior to or simultaneously with the commencement of the child custody proceeding. *Id.* at 243. We hold this analysis is consistent with the "function of the UCCJEA" and "principles of 'certainty, predictability and uniformity of result.' " *Id.* (quoting *Daley v. American States Preferred Ins. Co.*, 587 N.W.2d 159, 162 n.4 (N.D. 1998)).

¶ 31 Here, these factors make our analysis quite simple. We need not analyze the formality or plausibility of any claim to custody by Stepfather under North Carolina law, because he made no such claim. At the time of commencement of the proceeding, Stepfather was not making any claim to custody. To the contrary, he had executed a document purporting to give Grandmother permission to take the child to Michigan. We need not consider whether Stepfather would have had any right to a claim for custody under North Carolina law because he clearly did not make such a claim but instead declared his opposite intention. Under the UCCJEA, Stepfather was not a "person acting as a parent," and the trial court's conclusion to this effect was not supported by its findings of fact.

¶ 32 Thus, North Carolina is Andrea's "home state," but no parent or person acting as a parent remains in North Carolina. Subject matter jurisdiction does not fall under subsection (a)(1). We must proceed to consider subsection (a)(2).

3. Significant Connection Jurisdiction

¶ 33 The trial court concluded North Carolina would have significant connection jurisdiction, but part of this determination was based upon its conclusion that Stepfather was a "person acting as a parent" and we have already addressed this issue. There was no "person acting as a parent" in this case, and Father is the only parent.

¶ 34 North Carolina General Statute § 50A-201(a)(2) provides this State may have jurisdiction if:

> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child *and* the child's parents, or the child *and at least one parent or a person acting as a parent*, have a significant connection with this State other than mere physical presence; *and*
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

N.C. Gen. Stat. § 50A-201(a)(2) (emphasis added).

¶ 35 As we have already addressed, Father lives in South Carolina. There is no parent or "person acting as a parent" who lives in North Carolina or who has significant connections with North Carolina. Stepfather was not a "person acting as a parent," and based upon the trial court's findings of fact, Grandmother was not a "person acting as a parent" either. At the time of the commencement of the proceeding, she did not have "physical custody of the child" and had not "had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding." N.C. Gen. Stat. § 50A-102(13). Based on the trial court's findings, the *child* had "significant connection" to North Carolina, but subsection (2) requires that *both* the child and "at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence." N.C. Gen. Stat. § 50A-201(a)(2)(a). Here, there is no parent in North Carolina or with significant connections to North Carolina. Thus, jurisdiction cannot fall under subsection (a)(2), despite the trial court's findings regarding "substantial evidence . . . available in this State concerning the child's care, protection, training, and personal relationships." *Id.*, § 50A-201(a)(2)(b). We must proceed to subsection (a)(3).

4. More Appropriate Forum Jurisdiction

¶ 36 North Carolina General Statute § 50A-201(a)(3) allows jurisdiction where "[a]ll courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208."

¶ 37 Here, Grandmother claimed Michigan should have subject matter jurisdiction, but Michigan determined it was not the child's home state and that North Carolina is the more appropriate forum to determine custody. *See Veneskey*, *supra*, 2021 Mich. App. LEXIS 5147 at *9–13, 2021 WL 3821012 at *4–6 (Michigan court finding it would be an inconvenient forum and then determining North Carolina would have jurisdiction). There is no state other than North Carolina or Michigan which might have initial child custody jurisdiction under the UCCJEA. Although Father lives in South Carolina, Andrea has never lived there. But this case does not fall clearly under subsection (a)(3) because no other state "*having jurisdiction under subdivision (1) or (2)* . . . declined to exercise jurisdiction on the ground that a court of this State [North Carolina] is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208." N.C. Gen. Stat. § 50A-201(a)(3) (emphasis added). Michigan determined it did not have jurisdiction under subdivisions (1) or (2), although it did determine North Carolina would be the more appropriate forum. *Veneskey*, *supra*, 2021 Mich. App. LEXIS 5147 at *9–13, 2021 WL 3821012 at *4–6. We must proceed to subdivision (a)(4).

5. Jurisdiction by Necessity

¶ 38 North Carolina General Statute § 50A-201(a)(4) provides that a court of this State has jurisdiction to make an initial child-custody determination only if "[n]o court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)." N.C. Gen. Stat. § 50A-201(a)(4).

¶ 39 Due to the unusual circumstances of this case, North Carolina has jurisdiction by necessity under § 50A-201(a)(4). As we have already discussed, no other state would have jurisdiction to make an initial child custody determination under subdivisions (1), (2), or (3). North Carolina is the child's home state, and as demonstrated by the trial court's unchallenged findings of fact, the child has significant connections to North Carolina. She lived here prior to her Mother's death, and she has a sibling in North Carolina with her Stepfather. As noted by the trial court's findings, there is substantial evidence regarding the child's welfare in North Carolina. The only other state which could have possibly had jurisdiction under the UCCJEA, Michigan, has determined it is not the child's home state and that North Carolina is the more appropriate forum. *Veneskey*, *supra*, 2021 Mich. App. LEXIS 5147 at *9–13, 2021 WL 3821012 at *4–6. Therefore, although the trial court relied upon the wrong subdivision of 50A-201(a) to conclude it had jurisdiction, on

de novo review, we conclude North Carolina does have jurisdiction to make an initial child custody determination under subdivision (a)(4).

D. Custody Determination

¶ 40 **[3]** Finally, Grandmother argues the trial court erred in dismissing her claim for custody and in awarding Father full custody because it concluded Father was a fit parent who has not abdicated his constitutionally protected rights as a parent to Andrea.

¶ 41 Our Supreme Court has long established that "natural parents have a constitutionally protected interest in the companionship, custody, care, and control of their [biological] children." *Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997); *David N. v. Jason N.*, 359 N.C. 303, 305, 608 S.E.2d 751, 752–53 (2005) (reaffirming "the paramount right of parents to the custody, care, and control of their children"). "[T]he Due Process Clause would be offended 'if a [court] were to attempt to force the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' " *Adams*, 354 N.C. at 61, 550 S.E.2d at 502 (quoting *Price*, 346 N.C. at 78, 484 S.E.2d at 534) (alterations from original omitted and own alterations added). As our Supreme Court has explained, a fit and natural parent "is presumed to act in the child's best interest and . . . there is normally no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's [child]." *Id.*, 354 N.C. at 60, 550 S.E.2d at 501 (quotations and alterations from original omitted) (citing *Troxel v. Granville*, 530 U.S. 57, 68–69, 147 L.E.2d 49, 58 (2000)).

¶ 42 "[W]hile a fit and suitable parent is entitled to the custody of his child, it is equally true that where fitness and suitability are absent he loses this right." *David N.*, 359 N.C. at 305, 608 S.E.2d at 753 (quotations and citations omitted); *Adams*, 354 N.C. at 61, 550 S.E.2d at 502 ("[A] parent's right to custody is not absolute."). Indeed, the protection afforded to biological parents comes "with similar recognition that some facts and circumstances, typically those created by the parent, may warrant abrogation of those interests." *Price*, 346 N.C. at 75, 484 S.E.2d at 532; *id.*, 346 N.C. at 79, 484 S.E.2d at 534 ("[A] parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child."). "Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy." *Id.*, 346 N.C. at 79, 484 S.E.2d at 534. This is in addition to "[o]ther

types of conduct, which must be viewed on a case-by-case basis . . . ." *Id.*, 346 N.C. at 79, 484 S.E.2d at 534–35. Ultimately, the test our Supreme Court lays out is that "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." *David N.*, 359 N.C. at 307, 608 S.E.2d at 753; *see also Price*, 346 N.C. at 73, 484 S.E.2d at 531 (stating the interest of natural parents "must prevail against a third party unless the court finds that the parents are unfit or have neglected the welfare of their children"). A finding of either must be supported by clear and convincing evidence. *David N.*, 359 N.C. at 307, 608 S.E.2d at 753.

¶ 43 Here, the trial court determined Father was both a fit and proper parent and he had not abdicated his constitutionally protected right to parent Andrea. Grandmother argues this determination is erroneous because she presented clear and convincing evidence showing Father "did not partake in much of the child rearing including taking the child to her many doctors' appointments, only paid child support twice in 2015 in the over five years that he did not have custody of the child, . . . did not visit with the minor child upon the end of [his and Mother's] relationship in approximately 2015[,]" or thereafter attempt to seek custody; and that he drinks alcohol. According to Grandmother, this clear and convincing evidence mandated the trial court conclude Father had abdicated his right to Andrea's custody and award custody to Grandmother.

¶ 44 We note a trial court is not bound to render any determination propounded by a party simply because there is sufficient evidence before it which could tend to support that determination. *Cf. Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (explaining a "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*" (emphasis added; quotations and citations omitted)). Again, Grandmother challenges the trial court's custody determination but does not argue there was insufficient evidence to support the findings of fact upon which it relied in reaching its conclusion. Our inquiry thus is to "determine whether the trial court's findings support its legal conclusion that" Father did not abdicate his constitutional rights by acting inconsistent therewith. *Id.*, 354 N.C. at 65, 550 S.E.2d at 504.

¶ 45 The following findings of fact relevant to the trial court's custody determination are unchallenged as supported by the evidence and are thus binding on us:

9. [Father] learned of the death of [Mother] on the social media page of a family member of [Mother] and he immediately returned to North Carolina to pick up his daughter. He made inquiry with the police department as well as family members and neighbors as to her whereabouts.

. . . .

11. The Court finds that within a few days of the unexpected death of [Mother], [Grandmother] came to North Carolina from Michigan and removed the child from the jurisdiction of North Carolina and took her back to Michigan. [Father] was never informed. [Grandmother] testified that the thought to notify [Father] never crossed her mind.

12. [Grandmother] and the [Stepfather] had an attorney draw up a consent agreement to allow [Grandmother] to take the child back to Michigan without [Father's] consent. . . . The court finds that [Father] did not cede any portion of his custody rights to [Stepfather] or [Grandmother] voluntarily as he was never notified of the marriage to [Stepfather] or the consent agreement removing his child from the jurisdiction of the court.

13. [Grandmother] made zero efforts to locate [Father] before secreting the child away. [Father] had family in the area where the child was residing and the paternal grandmother [and Grandmother] had previous communications by phone to discuss the minor child and exchanged photos of the minor child. At no time was [Father] or the paternal grandmother given the opportunity to visit with the minor child while in the care of [Grandmother].

14. It is uncontroverted that [Father] and [Mother] had a tumultuous relationship. They broke up a few times and got back together. It is common for couples who have a traumatic breakup to leave custody arrangements of the child (born of their relationship) open and incomplete as they navigate the issues. The court finds that the gap of time that [Father] went

without communicating with his child was not tantamount to abandonment or neglect.

15. [Father] is a person of limited means financially and educationally. It appears from his testimony and from the testimony of the paternal grandmother, they were both led to believe by [Mother] and [Grandmother] that they could no longer have communication with the minor child. This is consistent with the years between 2014-2020.

16. There is credible evidence by [Father] and the paternal grandmother that [Father] did engage in parenting activities such as feeding, changing and taking care of the child while [Mother] was at work. The parents of this minor child were very young, and both acted as such on multiple occasions, before and after the birth of the child. This does not make [Father] an unfit parent. He was not given the opportunity to parent after [Mother] and child moved away and [Mother] changed her name, through marriage.

17. During one of their breakups, [Father] and [M]other attempted to establish a custody agreement including but not limited to child support. [Father] did actually make two child support payments before the parties reconciled, and the agreement became moot. There was never a child support order entered by any court between the parties subsequently. . . . .

18. There is credible evidence that after the final breakup of [Father] and [Mother], that [Father] was informed he was not allowed to have any contact with the minor child due to a pending charge for breaking and entering which was later dismissed.

19. [Father] remained compliant with the court ordered no-contact order and believed that any contact with [Mother] or the minor child would result in his bond being revoked. This order was in effect between 2015-2016. During that time period, [Father] did not attempt to contact [Mother] or the child. His belief that he couldn't have contact was reasonable based on the facts and circumstances at that time.

. . . .

21. After the no-contact order (pursuant to the domestic charges against [Father]) and the charges were dismissed, [Father] and the paternal grandmother attempted to locate the minor child through family inquiries and social media. [Mother] had a different last name at that point, and they did not know how to find her. [Mother] did not appear in court to testify because she had left the state with the minor child and never informed [Father] where she was going.

22. [Father] and paternal grandmother did purchase and mail gifts, cards and letters for the minor child in an effort to reestablish contact with her. They were sent to [Grandmother's] residence in Michigan as [Mother] had a habit of returning to her mother's residence when she needed help from her. Many, if not all, of the cards and gifts were returned to [Father] by [Grandmother], or "someone" in the State of Michigan. The testimony of [Grandmother] that she never saw any of the gifts, cards and letters which were addressed to the child to her address is not credible.

23. The minor child appeared to be bonded with the paternal grandmother as well, prior to the child being moved around by [Mother] and [Grandmother]. In fact, [Father] (with the help of the paternal grandmother) and child's [M]other were able to make amenable arrangements for visitations each time the couple broke up.

24. [Grandmother] has not allowed [Father] to have any contact with the minor child since the death of her [M]other, even though [Grandmother] has been aware that he has attempted to locate the child and have a relationship with her.

25. The minor child has never been informed that [Stepfather] is not her biological father or that her real [F]ather even exists. It appears that the intent of [Grandmother] was to thwart any potential relationship that the minor child could have with [Father].

> 26. The Court finds that [Grandmother] has intentionally tried to hide the minor child from [Father]. [Grandmother's] testimony that she moved from her home into a different home right after her daughter's death because the memories of her were too painful, is not credible. It once again appears to the court that it was another way to hide or secret the child from [Father] now that she was appointed guardian in an emergency hearing in Michigan. In fact, it would seem to be more comforting to the grieving child to be around her [M]other's memories and personal belongings, rather than be moved into a place with no memories.
>
> 27. There is no credible evidence that [Father] voluntarily permitted the minor child to remain in the custody of [Grandmother] or agreed to allow [Grandmother] to act in loco parentis to the child. It would appear from the evidence that long before the [M]other passed away, [Mother] was moving around excessively in an effort to alienate the child from her [F]ather and [Grandmother] was funding those moves. . . .
>
> 28. There is credible evidence to indicate that there were gaps in time when [Father] did not pursue the minor child's whereabouts, however, the court does not find that brief gaps of time are tantamount to abandonment of the minor child. [Mother] moved multiple places and got married with a name change. She never informed [Father] of any of those moves or changes.
>
> 29. . . . [Mother] intentionally left the child with [Grandmother] for months at a time after [Father] and [M]other finally split. [Father] was never given the opportunity to agree or disagree with said placement.
>
> . . . .
>
> 32. The minor child has a sibling who is in the custody of [Father] whom she has never met, and a sibling who resides with her [Stepfather] . . . .

¶ 46 We note that "[i]n considering whether disruption of custody over an extended period of time may result in a possible displacement of a

parent's constitutionally protected interests," our Supreme Court has "recognized the danger of a fact situation . . . in which the custodian[] obtained custody unlawfully[:]"

> the resolution of cases must not provide incentives for those likely to take the law into their own hands. Thus, those who obtain custody of children unlawfully, particularly by kidnapping, violence, or flight from the jurisdiction of the courts, must be deterred. Society may not reward, except at its peril, the lawless because the passage of time has made correction inexpedient.

Price, 346 N.C. at 81–82, 484 S.E.2d at 536 (quotations, citations, and alterations from original omitted; own alteration added).

¶ 47 The trial court's findings of fact fully support its conclusions that Father did not act inconsistently with his constitutionally protected status as a natural parent and was fit to have custody. *Cf. Adams*, 354 N.C. at 66, 550 S.E.2d at 505 ("The trial court's findings of fact are sufficient, when viewed cumulatively, to support its conclusion that [the natural parent's] conduct was inconsistent with his protected interest in the child."). Grandmother's argument is based on her contentions regarding the evidence she presented which she believes would support different findings of fact and also regarding the best interests of the child. However, the trial court is the sole judge of credibility of the witnesses. "[T]he trial court sees the parties in person and listens to all the witnesses. This allows the trial court to detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges." *Id.*, 354 N.C. at 63, 550 S.E.2d at 503 (quotations and citations omitted). And where the natural parent is not unfit and has not acted inconsistently with his constitutionally protected rights as a parent, even if Grandmother may have a greater ability to provide for the child, the government may not, "over the objections of the parent," remove a child from her natural parent "solely to obtain a better result for the child."[10] *Id.*, 354 N.C. at 61–62, 550 S.E.2d at 502–503 (quotations and citation omitted). We conclude the evidence and the trial court's

10. The evidence from the child's therapist appointments in Michigan following her Mother's death, which Grandmother sought to introduce and argues was erroneously excluded, was not proffered for the record. In any event, evidence from Andrea's therapy in Michigan would not address Father's circumstances or fitness as a parent under the circumstances of this case but could relate only to the best interests of the child—an issue neither the trial court nor we can address.

findings, unchallenged and binding on appeal, support the trial court's determination that Father is fit and proper and has not abdicated his constitutionally protected right to parent Andrea. *Cf. In re Gibbons*, 247 N.C. 273, 281, 101 S.E.2d 16, 22 (1957) ("Since the death of his wife there is little evidence that he has had any great yearning to have his child with him . . . . Instead he surrendered this high privilege to the grandmother . . . ." (quotations and citation omitted)). Accordingly, the trial court did not err in its dismissal of Grandmother's claim or in its award of full custody to Father.

III. Conclusion

¶ 48 Although the trial court relied upon the wrong subsection of North Carolina General Statute § 50A-201(a) to conclude North Carolina has jurisdiction under the UCCJEA, the trial court's findings of fact support a conclusion that North Carolina has subject matter jurisdiction over custody under the UCCJEA and Father is a fit and proper parent who has not abdicated his constitutional rights as a parent. We therefore affirm the trial court's orders as to subject matter jurisdiction and custody. Grandmother's motion for sanctions under the appellate rules is denied.

AFFIRMED.

Judges HAMPSON and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 OCTOBER 2022)

BROWN v. CARUSO HOMES, INC. 2022-NCCOA-659 No. 22-226	Wake (19CVS500511)	Affirmed
IN RE C.C. 2022-NCCOA-660 No. 21-758	Scotland (21JA1)	Affirmed
IN RE C.L.K. 2022-NCCOA-661 No. 22-8	Randolph (20JA106) (20JA107) (20JA108) (20JA109)	Affirmed
IN RE D.L.S. 2022-NCCOA-662 No. 22-88	Franklin (21JA46)	Affirmed
IN RE M.E.M. 2022-NCCOA-663 No. 22-23	Surry (20JT122) (20JT123)	Affirmed
IN RE T.G. 2022-NCCOA-664 No. 22-42	Cumberland (21JA125)	Affirmed
LAWING v. MILLER 2022-NCCOA-665 No. 22-99	Guilford (18CVS1024)	Affirmed
SISOUKRATH v. SISOUKRATH 2022-NCCOA-666 No. 21-703	Watauga (15CVD556)	Affirmed
STATE v. ABDULLAH 2022-NCCOA-667 No. 22-66	Guilford (19CRS80930-31)	Affirmed
STATE v. BRINDLE 2022-NCCOA-668 No. 22-133	Rowan (20CRS54033)	No Plain Error; Remanded for Resentencing
STATE v. McBRYDE 2022-NCCOA-669 No. 22-122	Montgomery (17CRS50405)	Appeal Dismissed

STATE v. RHOM 2022-NCCOA-670 No. 22-68	McDowell (20CRS345) (20CRS347) (20CRS50384-85)	No Error
STATE v. RIGGINS 2022-NCCOA-671 No. 22-64	Columbus (18CRS52078) (20CRS89)	Remanded
STATE v. STARNES 2022-NCCOA-672 No. 22-43	Union (19CRS54537)	Affirmed
STATE v. WARD 2022-NCCOA-673 No. 22-219	Richmond (16CRS52685)	Remanded

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ALIENATION OF AFFECTIONS

Criminal conversation—unidentified lover—summary judgment—evidence of post-separation conduct—corroborative of pre-separation conduct—After plaintiff's wife admitted to having sexual intercourse with an unidentified coworker while still married to plaintiff, the trial court erred in granting summary judgment for defendant on plaintiff's alienation of affection and criminal conversation claims where the circumstantial evidence—viewed in the light most favorable to plaintiff—was sufficient for a jury to infer that defendant was the coworker at issue, including evidence that defendant and plaintiff's wife were coworkers, maintained a friendship and communicated frequently during plaintiff's marriage, and began openly dating less than four months after plaintiff and his wife separated. Importantly, it was permissible for plaintiff to meet his burden of production at the summary judgment phase by using evidence of defendant's post-separation conduct (his dating relationship with plaintiff's wife) to corroborate evidence of any pre-separation acts (the extramarital affair between plaintiff's wife and the unidentified coworker). **Beavers v. McMican, 31.**

APPEAL AND ERROR

Abandonment of issues—necessary reasons or arguments—prejudice—On appeal from the trial court's domestic violence protective order (DVPO) issued against defendant in favor of his ex-wife, defendant's Rule 404(b) argument that the trial court erred by considering a prior DVPO issued against him in favor of his sister was deemed abandoned because defendant failed to argue—as necessary to prevail on appeal—that the alleged error prejudiced him. **Keenan v. Keenan, 133.**

Interlocutory order—denial of motion to dismiss—personal jurisdiction—substantial right—An interlocutory order denying defendants' motions to dismiss a set of consolidated wrongful death actions for lack of personal jurisdiction was immediately appealable as affecting a substantial right. **Bartlett v. Est. of Burke, 249.**

Interlocutory order—denial of motions to dismiss—assertion of sovereign immunity—adverse ruling on personal jurisdiction—In an action for declaratory and injunctive relief—initiated by plaintiffs against the State for allegedly breaching the public trust doctrine—where the State filed motions to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), (2), and (6), based on the defense of sovereign immunity, the trial court's interlocutory order denying the State's motions was immediately appealable pursuant to N.C.G.S. § 1-277 with regard to Rules 12(b)(2) (which constituted an adverse ruling on personal jurisdiction) and 12(b)(6) (as affecting a substantial right), but not with regard to Rule 12(b)(1). **Coastal Conservation Ass'n v. State of N.C., 267.**

Interlocutory order—one of two claims dismissed—substantial right—Rule 54 certification—In a breach of contract action asserted by plaintiffs (students) against defendant (a state university), the trial court's interlocutory order was immediately appealable because its denial of defendant's motion to dismiss plaintiffs' breach of contract claim on sovereign immunity grounds affected a substantial right, and because the trial court certified (pursuant to Civil Procedure Rule 54(b)) its dismissal of plaintiffs' constitutional claim for immediate appeal. Further, the Court of Appeals granted certiorari to review the denial of defendant's motion to dismiss based on Rule 12(b)(6), which was closely related to the other appealable issues. **Lannan v. Bd. of Governors of the Univ. of N.C., 574.**

Interlocutory orders—motion to dismiss denied—not immediately appealable—certiorari—judicial efficiency—Where the trial court denied defendants'

APPEAL AND ERROR—Continued

motions to dismiss in a medical malpractice action based upon the statute of limitations, although the trial court's interlocutory order was not immediately appealable, the Court of Appeals granted defendants' petition for a writ of certiorari to review the order because interlocutory review of this dispositive question of law would be more efficient than deferring the issue until final judgment at the trial level, and it would prevent unnecessary delay in the administration of justice. **Morris v. Rodeberg, 143.**

Interlocutory orders—motions to dismiss—multiple defendants—final judgment—In an action filed by a county board of education against four companies that worked on the development of a public high school, the trial court's interlocutory order dismissing with prejudice all claims against two defendants—and certifying that portion of the order for immediate review pursuant to Civil Procedure Rule 54(b)—constituted a final judgment, and therefore the appellate court had jurisdiction to hear the appeal. However, the portion of trial court's interlocutory order denying the other two defendants' motions to dismiss did not constitute a final judgment, and it did not affect a substantial right because it was an adverse determination on those defendants' statute of repose defenses, and therefore the appellate court dismissed their appeals. **Gaston Cnty. Bd. of Educ. v. Shelco, LLC, 80.**

Jurisdiction to hear appeal—late notice of appeal—waiver by appellee—The Court of Appeals had jurisdiction to hear plaintiff's appeal from the trial court's order granting defendant's motion to dismiss where plaintiff filed his notice of appeal more than four months after entry of the trial court's order (which would normally be untimely pursuant to Appellate Rule 3(c)), because defendant failed to argue that the appeal was untimely or to offer proof of actual notice—indeed, defendant conceded that "Plaintiff timely appealed." **Blaylock v. AKG N. Am., 72.**

Preservation of issues—admissibility of evidence—timing of objection—plain error review—In a first-degree murder prosecution, defendant failed to preserve for appellate review his objection to the admission of evidence—specifically, expert testimony regarding the locations of the victim's and defendant's cell phones before and after the victim's death—where defendant's counsel filed a motion in limine to exclude the testimony and objected to the testimony at voir dire outside the jury's presence but did not object at the time the testimony was actually introduced at trial. Consequently, defendant was entitled only to plain error review of his challenge on appeal. **State v. McIver, 205.**

Preservation of issues—constitutional argument—admission of blood test in criminal case—In a prosecution for felony death by vehicle and driving while impaired, defendant failed to preserve for appellate review her argument that the trial court erred by admitting her blood alcohol test results into evidence—based on her contention that her consent to the blood draw was not knowing, voluntary, or intelligent, in violation of the federal and state constitutions—where defense counsel did not raise the constitutional argument at trial. Further, the Court of Appeals declined to invoke Appellate Rule 2 to review this argument in defendant's appeal from her convictions. **State v. See, 413.**

Preservation of issues—constitutional challenge to Habitual Felon Act—not raised at trial—In a prosecution for multiple charges arising from an armed robbery, defendant failed to preserve for appellate review his argument that his sentences under the Habitual Felon Act violated his federal and state constitutional rights to be free from cruel and unusual punishment, where he did not raise the argument before the trial court. **State v. Williams, 215.**

APPEAL AND ERROR—Continued

Preservation of issues—constitutional objection to evidence—apparent from context—In a prosecution for multiple charges arising from an armed robbery, defendant preserved for appellate review his argument that the trial court violated his constitutional due process right to the presumption of innocence by permitting the jury to view a video showing him in shackles during a police interrogation. Although defendant's constitutional argument was not immediately apparent from his initial objection at trial (that the video was "substantially prejudicial"), it became apparent where defense counsel requested a curative instruction clarifying that the jurors are "not to make any inference from the fact that he's in those chains," and where the court subsequently instructed the jury not to make any inferences about defendant's guilt or innocence based on the shackling. **State v. Williams, 215.**

Record on appeal—lack of transcript or narrative—basis of ruling unclear—appellate review frustrated—In a dispute concerning restrictive covenants, where defendants filed a motion to dismiss pursuant to Rule 12(b)(6) (failure to state a claim), the trial court's written order granted defendants' motion to dismiss pursuant to Rule 12(b)(2) (lack of personal jurisdiction), the parties stipulated that the trial court had personal jurisdiction over them, and the parties failed to include a transcript of the hearing in the record or to file a narrative pursuant to Appellate Rule 9(c)(1), the Court of Appeals was unable to engage in meaningful appellate review. The order was vacated and remanded. **Gouch v. Rotunno, 559.**

Rule 11(c) supplement—depositions—neither proffered to nor considered by trial court—When reviewing plaintiff's appeal from an order granting summary judgment for defendant in an alienation of affection and criminal conversation case, the Court of Appeals declined to consider two depositions (of the parties' respective ex-wives) that plaintiff had filed as an Appellate Rule 11(c) supplement to the record on appeal. Although both parties referenced the depositions during the summary judgment hearing, neither deposition had been certified at that time, and the trial court later confirmed in an amended summary judgment order that it did not consider either deposition when reaching its ruling; therefore, the depositions were never "before the trial court" for purposes of Rule 11(c) and could not be considered on appeal. **Beavers v. McMican, 31.**

Waiver of appellate review—invited error—jury instructions—failure to object—express agreement—A criminal defendant waived appellate review of his argument that the trial court erred by not instructing the jury on justification or excuse as defenses to the charge of resisting, delaying, or obstructing a public officer where, at trial, defendant never requested a jury instruction on justification or excuse, failed to object to the court's jury instructions both before and after the jury heard them, and expressly agreed to the instructions as given—actions which, taken together, constituted invited error. **State v. Harper, 507.**

ARBITRATION AND MEDIATION

Arbitration award—vacatur—where arbitrator exceeds delegated powers—"essence of the contract" doctrine—In a legal dispute between parties to a car loan agreement, in which plaintiff-borrower alleged that the agreement's terms violated the North Carolina Consumer Finance Act (NCCFA), the trial court properly vacated an arbitration award issued in plaintiff's favor on grounds that the award failed to draw its essence from the loan agreement where the arbitrator disregarded the agreement's plain and unambiguous choice-of-law provision favoring Virginia law and instead applied North Carolina law—specifically, the NCCFA—to resolve

ARBITRATION AND MEDIATION—Continued

plaintiff's claims. Under § 10(a)(4) of the Federal Arbitration Act (permitting vacatur of arbitration awards where "the arbitrators exceeded their powers"), an arbitrator's failure to draw from the "essence of a contract" is a valid ground on which to vacate an arbitration award, and therefore plaintiff's argument that the court impermissibly reviewed the award de novo was meritless. **Snipes v. TitleMax of Va., Inc., 176.**

Federal Arbitration Act—vacatur of award—dismissal of underlying case—improper —In a legal dispute between parties to a car loan agreement, in which the trial court properly vacated an arbitration award issued in plaintiff-borrower's favor, the court erred by subsequently dismissing all of plaintiff's claims with prejudice where the Federal Arbitration Act (FAA) did not authorize the court to do so. Rather, the FAA provides that if a trial court vacates an award, it may either—in its discretion—order a rehearing by the arbitrator or decide the issues originally referred to the arbitrator. **Snipes v. TitleMax of Va., Inc., 176.**

Motion to confirm arbitration award—amount of damages—authority to grant equitable relief—In a dispute between a construction company (defendant) and a subcontractor (plaintiff), the arbitration panel did not exceed its authority by fashioning an equitable remedy to compensate plaintiff subcontractor—who had been improperly terminated for default—since, although the terms of the parties' subcontracts provided for the award of the "actual direct cost" of the subcontract work, there was no evidence of such cost in the record and an equitable remedy estimating that cost was both authorized by state law and not unequivocally precluded by the subcontracts' terms. The subcontracts explicitly adopted the rules of the American Arbitration Association, which allowed for the grant of equitable remedies. **R.E.M. Constr., Inc. v. Cleveland Constr., Inc., 167.**

ASSAULT

Law enforcement agency animal—attempt—serious harm—lesser-included offense—jury instructions—In defendant's prosecution for attempting to cause serious harm to a law enforcement agency animal (N.C.G.S. § 14-163.1(b)), the trial court did not err by declining defendant's request that the jury be instructed on the lesser-included offense of attempting to harm a law enforcement agency animal (N.C.G.S. § 14-163.1(c)). Although defendant argued that he wielded his makeshift spear in a defensive attempt to keep the police dog at bay, his purportedly defensive actions did not negate or conflict with the evidence that he intended serious harm, through his verbal threats that he would kill the police dog and his wielding of the makeshift spear and knife against the dog in a way that caused the dog's handler to fear for the dog's safety. **State v. Pierce, 520.**

Law enforcement agency animal—jury instructions—self-defense—lawful performance of official duties—In defendant's prosecution for attempting to cause serious harm to a law enforcement agency animal (N.C.G.S. § 14-163.1(b)), the trial court did not commit plain error by not giving a jury instruction on self-defense. The self-defense instruction was inapplicable where defendant's purportedly defensive actions were taken against a law enforcement officer lawfully acting in the performance of his official duties—here, responding to a request for emergency assistance with an armed person locked inside his home threatening self-harm. **State v. Pierce, 520.**

Law enforcement agency animal—jury instructions—willfulness—plain error analysis—In defendant's prosecution for attempting to cause serious harm

ASSAULT—Continued

to a law enforcement agency animal (N.C.G.S. § 14-163.1(b)), the trial court did not commit plain error by not including willfulness in its instruction on the elements of the crime charged. Even assuming the trial court erred, defendant could not show prejudice where the evidence showed unequivocally that defendant's actions were willful—specifically, defendant threatened to kill the police dog and then wielded a makeshift spear and a knife against the dog in a dangerous manner. **State v. Pierce, 520.**

ATTORNEY FEES

Motion to set aside foreclosure sale of home—to collect homeowner's association fees—Planned Community Act—In a case where a homeowner's association sold petitioners' home in a foreclosure sale to collect petitioners' unpaid association fees, after which the trial court granted petitioners' motion under Civil Procedure Rule 60(c) to set aside the sale, the court erred in denying petitioners' subsequent request for attorney fees where petitioners qualified as the "prevailing party" in a "civil action relating to the collection of assessments" for purposes of the Planned Community Act. **In re Foreclosure of George, 288.**

ATTORNEYS

Discipline—attempted sexual relations with current client—evidence of intent—The State Bar Disciplinary Hearing Commission did not err by concluding that defendant attorney violated the Rules of Professional Conduct where the findings of fact supported the conclusion that defendant attempted to engage in sexual relations with a current client in violation of Rule 8.4(a). There was substantial evidence that defendant intended to have sexual relations with his client, as inferred through his overt acts—such as meeting with her in her home rather than at a neutral location because he felt they had a "mutual attraction" and by kissing and touching her and her underclothes—and by the fact that they did not have sexual intercourse on that occasion only because the client said they could not "go any further." **N.C. State Bar v. Merritt, 534.**

Discipline—dispositional phase—sexual relations with divorce client—finding that attorney had inadequate boundaries—In a disciplinary matter in which the State Bar Disciplinary Hearing Commission (DHC) concluded that defendant attorney had attempted to engage in sexual relations and did engage in a sexual relationship with a current client, there was substantial evidence to support the DHC's finding in the dispositional phase that defendant "had inadequate boundaries between his professional and personal relationships" where defendant met with his divorce client outside of business hours and at her home despite his usual practice of meeting clients in a neutral location during certain hours, he acted on a belief that there was a mutual attraction between them, he asked his client if he could kiss her, he conducted lengthy late-night phone calls with her, and he began a sexual relationship with her while she was still a client. **N.C. State Bar v. Merritt, 534.**

Discipline—dispositional phase—sexual relations with divorce client—harm to fiduciary relationship—After the State Bar Disciplinary Hearing Commission (DHC) determined that defendant attorney had attempted to engage in sexual relations and did engage in a sexual relationship with a current client, the DHC's conclusion in the dispositional phase that defendant intentionally caused harm to the client and to the profession was supported by substantial evidence where, since defendant was hired to represent the client in her family matters (including divorce, child

ATTORNEYS—Continued

custody, and child support), it was reasonably foreseeable that an affair would undermine the fiduciary relationship that arose from the attorney-client relationship and cause emotional harm to the vulnerable client. **N.C. State Bar v. Merritt, 534.**

Discipline—engaged in sexual relationship with current client—evidence of attorney-client relationship—The State Bar Disciplinary Hearing Commission did not err by concluding that defendant attorney violated the Rules of Professional Conduct where the findings of fact supported the conclusion that defendant engaged in a sexual relationship with a current client in violation of Rule 1.19(a). During the time in question, there was substantial evidence from which an attorney-client relationship could be inferred where defendant's actions—including entering into formal representation agreements with the woman, drafting and filing a divorce complaint and summary judgment motion on her behalf, communicating to opposing counsel that he would be filing the complaint, and representing the woman at the motion hearing—constituted the practice of law. **N.C. State Bar v. Merritt, 534.**

Discipline—sexual relations with divorce client—one-year suspension from practicing law—abuse of discretion analysis—After the State Bar Disciplinary Hearing Commission (DHC) determined that defendant attorney had attempted to engage in sexual relations and did engage in a sexual relationship with a current client, there was no abuse of discretion in the imposition of a one-year suspension of defendant's license to practice law where substantial evidence supported the DHC's findings and, in turn, those findings supported its conclusions, and where the DHC demonstrated its consideration of lesser sanctions as well as the factors that justified suspension. The DHC's finding that defendant exhibited a selfish motive was supported by the evidence and, even if another finding—that there existed a pattern of misconduct—was not supported by evidence, there was no prejudicial error. **N.C. State Bar v. Merritt, 534.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Misdemeanor child abuse—parents fighting over physical possession of child—pulling opposite ends of child—sufficiency of evidence—The State presented sufficient evidence to convict defendants of committing misdemeanor child abuse (N.C.G.S. § 14-318.2) against their four-year-old son where, during a custody exchange, defendant-father and defendant-mother engaged in a "tug of war" over the child, in which the parents violently pulled opposite ends of the child, placing him at substantial risk of being injured—even if they did not intend to hurt him. Although defendant-mother argued that she was trying to protect the child because the father was in an irate and dangerous state of mind, the State was not required to rule out every hypothesis of innocence to survive the motion to dismiss. **State v. Adams, 379.**

Permanency planning—cessation of reunification efforts—non-accidental injuries to one child—lack of progress on case plan—The trial court did not abuse its discretion by directing DSS to cease reunification efforts between a mother and her two children where the children had been removed from the home as a result of unexplained non-accidental injuries to one of the children when he was less than six months old, including multiple fractures, other internal injuries, and retinal hemorrhages in both eyes. Sufficient competent evidence supported the trial court's unchallenged findings of fact addressing each of the factors in N.C.G.S. § 7B-906.2(d), and the court made a reasoned decision based on the mother's lack of an adequate explanation for all of the child's injuries and on the mother's incomplete progress on her case plan. **In re M.T., 305.**

CHILD CUSTODY AND SUPPORT

Custody—parental fitness—constitutionally protected status as parent—sufficiency of factual findings—In a child custody dispute between a father and his child's maternal grandmother, the trial court properly awarded full custody to the father after determining that he was a fit and proper parent who had not abdicated his constitutionally protected right to parent his daughter. Notably, the court's findings showed that the father made several attempts to contact the child but that the child's mother took numerous steps to keep him away or to hide her and the child's location from him. Further, the court found that the maternal grandmother tried to secret the child away from the father where, days after the child's mother died, the grandmother took the child out of North Carolina, brought her to Michigan to live with her, and initiated a guardianship proceeding in Michigan without notifying the father (even though she was aware of his efforts to locate his child). **Sulier v. Veneskey, 644.**

Modification of visitation—substantial change in circumstances—increased time with father—dysfunctional behavior—The trial court did not err in reducing a father's visitation with his preschool-aged sons based on a substantial change in circumstances adversely affecting the sons' welfare where the sons' behavior had become dysfunctional—as evidenced by their cursing and screaming, throwing objects, threatening a child at school, saying they hated their mother, disowning their mother's last name, and saying they wanted their mother to die—after a prior child custody order increased their visitation time with the father. The trial court's findings were supported by competent evidence in the form of videos of the sons' behavior, witness testimony, the father's behavior and statements at the hearing, and circumstantial evidence (such as the inference that neither their school nor their mother's family would teach the children to disown their mother's last name), and the findings supported the trial court's conclusions of law. **Davidson v. Tuttle, 426.**

Uniform Child Custody Jurisdiction and Enforcement Act—communication between state courts—to determine jurisdiction—Where a grandmother filed a child custody action in Michigan and, after the Michigan judge initiated a phone call with a North Carolina court, that action was dismissed for lack of jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), any issue regarding the Michigan court's procedure for conducting that phone call was for that state's appellate courts to review. At any rate, the grandmother suffered no harm where the parties were able to present their jurisdictional arguments at length in a subsequent hearing held in North Carolina, which did not violate the UCCJEA. **Sulier v. Veneskey, 644.**

Uniform Child Custody Jurisdiction and Enforcement Act—initial custody determination—jurisdiction—grounds—The trial court in a child custody action incorrectly determined that it could exercise "home state" jurisdiction or "significant connection" jurisdiction pursuant to N.C.G.S. § 50A-201(a)—codifying the four grounds for jurisdiction over initial custody determinations under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)—where, although North Carolina was the child's home state and she had significant connections to North Carolina for UCCJEA purposes, the child did not have a parent or "person acting as a parent" living in or having significant connections to North Carolina (her mother had recently died; the father lived in South Carolina; and her stepfather, who did live in North Carolina, neither had legal custody of the child nor claimed a right to legal custody). Nevertheless, the trial court did have jurisdiction by necessity over the matter where no state could claim jurisdiction under the other grounds listed in section 50A-201(a), and where the only other state that could have claimed jurisdiction

CHILD CUSTODY AND SUPPORT—Continued

under the UCCJEA—Michigan, where custody proceedings originated—had already ruled that North Carolina was the more appropriate forum. **Sulier v. Veneskey, 644.**

CONSTITUTIONAL LAW

Due process—presumption of innocence—video of defendant in shackles—harmless error—There was no prejudicial error in a prosecution for multiple charges arising from an armed robbery, where defendant argued on appeal that the trial court violated his constitutional due process right to the presumption of innocence by permitting the jury to view a video showing him in shackles during a police interrogation. Even if the court had erred in admitting the video into evidence, defendant could not show prejudice because the court gave a limiting instruction to the jury directing them not to make any inferences about defendant's guilt or innocence based on the shackling and because overwhelming evidence of defendant's guilt existed beyond the video. **State v. Williams, 215.**

North Carolina—Art. I, sec. 38—right to harvest fish—applicability of immunity defenses—colorable claim—In an action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the State's alleged mismanagement of North Carolina's coastal fisheries, which plaintiffs asserted violated their constitutional right to harvest fish, the State was not entitled to the defenses of governmental or sovereign immunity where plaintiffs raised a colorable constitutional claim directly under Art. I, sec. 38 of the North Carolina Constitution (right to hunt, fish, and harvest wildlife) for which no other adequate state remedy existed. **Coastal Conservation Ass'n v. State of N.C., 267.**

North Carolina—Art. XIV, sec. 5—conservation of coastal fisheries—applicability of immunity defenses—colorable claim—In an action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the State's alleged mismanagement of North Carolina's coastal fisheries, which plaintiffs asserted violated their constitutional right to harvest fish, the State was not entitled to the defenses of governmental or sovereign immunity where plaintiffs raised a colorable constitutional claim directly under Art. XIV, sec. 5 of the North Carolina Constitution (conservation of natural resources) for which no other adequate state remedy existed. **Coastal Conservation Ass'n v. State of N.C., 267.**

Right to counsel—knowing, intelligent, and voluntary waiver—written waiver—rebuttable presumption—At a trial for resisting, delaying, or obstructing a public officer, the superior court did not err in allowing defendant to waive his right to counsel and represent himself where defendant had previously signed a written waiver of counsel that was certified by the district court during district court proceedings, thereby creating a rebuttable presumption that the waiver was executed knowingly, intelligently, and voluntarily pursuant to N.C.G.S. § 15A-1242 and rendering additional inquiries by the superior court unnecessary. Further, nothing in the record adequately rebutted this presumption. **State v. Harper, 507.**

State constitutional claim—taking of vested property interest—adequate state law remedy against state university—breach of contract—In an action in which plaintiff students alleged that when defendant university shut down its campus during a pandemic, it breached its contract to provide the services and benefits that it agreed to provide in exchange for plaintiffs' payment of student and parking fees, plaintiffs had an adequate remedy under state law for breach of contract which

CONSTITUTIONAL LAW—Continued

was not barred by sovereign immunity. Therefore, the trial court properly dismissed their alternative claim, pursuant to *Corum v. Univ. of North Carolina*, 330 N.C. 761 (1992), that defendant violated their state constitutional right (under the Law of the Land Clause) by taking vested property rights without just compensation. **Lannan v. Bd. of Governors of the Univ. of N.C., 574.**

CONTRACTS

Breach—sufficiency of allegations—contract implied in fact—based on payment of student and parking fees in exchange for services—In a breach of contract action brought by students (plaintiffs) against a state university (defendant), plaintiffs adequately pled the existence of a contract implied in fact by claiming that they paid student and parking fees in exchange for certain benefits and services offered by defendant. Defendant's argument that no meeting of the minds took place was for the trier of fact and did not preclude the suit from going forward. Since a contract implied in fact can waive sovereign immunity, the complaint effectively pled waiver and, therefore, the trial court did not err by denying defendant's motion to dismiss on the grounds of sovereign immunity. **Lannan v. Bd. of Governors of the Univ. of N.C., 574.**

Breach—sufficiency of allegations—payment of student and parking fees in exchange for services—campus shutdown precluded access to services—Plaintiff students adequately pled their breach of contract action against defendant university by alleging that, in exchange for the payment of student and parking fees, defendant promised to provide various specified services and parking permits but a campus shutdown due to a pandemic rendered certain services unavailable and the parking spaces unnecessary. Based on these allegations, the trial court did not err by denying defendants' motion to dismiss under Civil Procedure Rule 12(b)(6) (failure to state a claim). **Lannan v. Bd. of Governors of the Univ. of N.C., 574.**

CRIMES, OTHER

Felonious cruelty to animals—acting intentionally and maliciously—sufficiency of evidence—In a prosecution for arson and felonious cruelty to animals, where defendant was charged with setting fire to another man's home while the man's four-month-old puppy was still inside, the trial court properly denied defendant's motion to dismiss the animal cruelty charge for insufficiency of the evidence. The State met its burden at trial of showing that defendant acted intentionally and maliciously by starting the fire which proximately caused the puppy's death, and it was irrelevant whether defendant actually knew the puppy was inside the home when he set fire to it. **State v. Charles, 494.**

CRIMINAL LAW

Courtroom restraints—statutory authority—mandatory factual findings—inapplicable to video of shackled defendant—In a prosecution for multiple charges arising from an armed robbery, where the trial court permitted the jury to view a video showing defendant in shackles during a police interrogation, defendant's argument that the court failed to make mandatory factual findings under N.C.G.S. § 15A-1031 regarding whether defendant needed to be restrained during police questioning (and instead simply took "the prosecutor's word" for it) lacked merit and was rejected on appeal. Section 15A-1031 addresses a trial judge's

CRIMINAL LAW—Continued

authority to subject a defendant to "physical restraint in the courtroom;" defendant was not physically restrained in the courtroom, and therefore the statute did not apply. **State v. Williams, 215.**

Courtroom restraints—statutory procedure—waiver—prejudice—Defendant waived review of any error in the trial court's order that he be restrained in leg shackles during his trial for attempted murder where he was given the opportunity to object but failed to do so. Even if defendant had objected, any error in the trial court's failure to instruct the jury that it should not consider the restraints in its deliberations was not prejudicial because the trial court primarily followed its statutory mandate and nothing in the record indicated that the jury was affected by, or was even aware of, defendant's restraints. **State v. Slaughter, 529.**

Effective assistance of counsel—conflict of interest—no adverse effect on performance—prejudice not otherwise shown—In a prosecution for multiple charges arising from an armed robbery, where the trial court failed to adequately inquire into a potential conflict of interest that defendant's attorney carried from previously representing one of the State's witnesses, who happened to be one of the robbery victims, defendant was still not entitled to a new trial because he could neither show that an "actual conflict of interest" adversely affected his counsel's performance (the record showed that defense counsel objected to the State's main evidence in the case, repeatedly impeached the witness's credibility during cross-examination, and had objectively sound strategic reasons for not questioning the witness about his mental health history and his deal with the State to testify) nor otherwise show prejudice where he was acquitted of the most serious charges he faced at trial, including attempted first-degree murder. **State v. Williams, 215.**

Jury instruction—felonious cruelty to animals—malicious act—proximately causing animal's death—In a prosecution for arson and felonious cruelty to animals, where defendant was charged with setting fire to another man's home while the man's four-month-old puppy was still inside, the trial court did not err when it instructed the jury that, to find defendant guilty of the animal cruelty charge, the State only had to prove that defendant intentionally and maliciously started the house fire that proximately caused the puppy's death. Under the plain language of the animal cruelty statute (N.C.G.S. § 14-360(b)), it was unnecessary for the jury to find that defendant knew the puppy was inside the home and intended to kill it at the time he started the fire. **State v. Charles, 494.**

Motion for appropriate relief—notice of appeal—appellate jurisdiction—Where the record on appeal contained no evidence that defendant had timely filed notice of appeal from the trial court's order denying his motion for appropriate relief, the Court of Appeals dismissed defendant's appeal for lack of jurisdiction. **State v. Slaughter, 529.**

Prosecutor's closing argument—felony animal cruelty—reading of case law—not grossly improper—The prosecutor's closing argument in a trial for felony animal cruelty—during which the prosecutor read to the jury, without objection, the facts of a prior animal cruelty case and opined that since the facts were similar to the instant case, the element of intent was established beyond a reasonable doubt—was not so grossly improper as to require a new trial, given the overwhelming evidence presented by the State. **State v. Lawson, 404.**

DAMAGES AND REMEDIES

Restitution—voided foreclosure sale of home—buyer—unclean hands—unjust enrichment—After the trial court granted petitioners' motion under Civil Procedure Rule 60(c) to set aside the foreclosure sale of their home for lack of proper notice, the court did not abuse its discretion in declining to award restitution to the buyer for the purchase price of the home. Specifically, the buyer was barred from recovering under the doctrine of unclean hands where the record showed the buyer knew about the defective notice of the sale, proceeded to buy the home for very little money, refused to allow petitioners to repurchase the home for the auction price, and then sold the home to a third party at a much higher price. Further, the buyer's unclean hands precluded it from recovering on a theory that the homeowner's association that sold petitioners' home was unjustly enriched by the voided sale. **In re Foreclosure of George, 288.**

Restitution—voided foreclosure sale of home—damage to home—ejection-related expenses—In a case where a homeowner's association sold petitioners' home in a foreclosure sale to collect petitioners' unpaid association fees, after which the trial court granted petitioners' motion under Civil Procedure Rule 60(c) to set aside the sale, the court abused its discretion in declining to award petitioners any restitution after their home had been partially demolished while in the buyer's possession and where plaintiffs were subjected to a variety of expenses following their ejection from the home. **In re Foreclosure of George, 288.**

DISCOVERY

Voluntary discovery—criminal case—laboratory records—procedures for blood alcohol analysis—In a prosecution for felony death by vehicle and driving while impaired, where a chemical analysis of defendant's blood by the City-County Bureau of Identification laboratory indicated that defendant was drunk when she fatally struck a pedestrian with her car, the trial court did not abuse its discretion in denying defendant's request for voluntary discovery of the laboratory's audit, nonconformity, and corrective-action records, which defendant argued might contain information demonstrating possible user error in the operation of the machine used to analyze her blood. The State provided sufficient information to familiarize defendant with the laboratory's testing procedures, which she used to effectively cross-examine the doctor who analyzed her blood sample. Further, on appeal from her convictions, defendant failed to cite any authority or assert any legal basis for her claim that the denial of her discovery request violated her due process rights under the state constitution. **State v. See, 413.**

DIVORCE

Equitable distribution—business valuation—market value approach—recent arms-length transaction—goodwill—In an equitable distribution proceeding, the trial court did not err in its valuation of defendant's stake in her dental practice by employing a market-value approach—which is an accepted, reliable method of valuation—based on an arms-length transaction that occurred two years before the parties separated and based on the court's determination that there were no changes to the business in the interim that might have substantially impacted its market value. It was reasonable for the trial court to find that the goodwill value of the business had not changed since the arms-length transaction, even though the senior dentist was transitioning out of the practice, and the trial court was not required to base its goodwill valuation on expert testimony where it was employing

DIVORCE—Continued

the market-value approach and simply determining whether the goodwill calculation—which had been calculated by outside experts at the time of the arms-length transaction—remained applicable. **Logue v. Logue, 461.**

Equitable distribution—delay in entry of order—prejudice analysis—In an equitable distribution matter, where the husband did not assert how he was harmed by the trial court's fifteen-month delay in entering its order after the equitable distribution hearing, he failed to demonstrate that the delay was prejudicial. **Mosiello v. Mosiello, 468.**

Equitable distribution—unequal—statutory distributional factors—There was no abuse of discretion in the trial court's determination that an unequal distribution of marital property was equitable, where the court made its decision after considering several distributional factors set forth in N.C.G.S. § 50-20(c), including the duration of the marriage, the relative health of the parties, the husband's intentional acts which left the marital home uninhabitable for at least six months, and the wife's financial outlay to repair the damage to the home. **Mosiello v. Mosiello, 468.**

Equitable distribution—unequal—valuation of property—sufficiency of evidence—In an equitable distribution matter in which the trial court determined that an unequal division of the marital property was equitable, the court's findings of fact that were challenged by the husband—regarding the marital home's value, the value of two cars, whether the husband intentionally set fire to the home, and the parties' date of separation—were supported by competent evidence in the record. It was within the trial court's province to weigh the evidence and assess the witnesses' credibility and to resolve any discrepancies. **Mosiello v. Mosiello, 468.**

DOMESTIC VIOLENCE

Protective order—fear of continued harassment—single act—legitimate purpose—mowing lawn—The trial court did not err by granting plaintiff's petition for a domestic violence protective order (DVPO) and denying defendant's motion to dismiss for insufficiency of the evidence where defendant mowed plaintiff's lawn even though plaintiff warned him ahead of time not to do so and told him to leave at the time he trespassed on her property to mow. The trial court did not err by using defendant's single act of mowing plaintiff's lawn as the basis for the DVPO, and it did not err by finding that his conduct in mowing plaintiff's lawn did not serve a legitimate purpose. **Keenan v. Keenan, 133.**

Protective order—prior DVPO—relevance—considered alongside current act—In a hearing on plaintiff's petition for a domestic violence protective order (DVPO) against defendant, the trial court did not err by considering a prior DVPO issued against defendant in favor of plaintiff where the prior DVPO was relevant and was considered alongside defendant's current act of trespassing on plaintiff's property to mow her lawn. **Keenan v. Keenan, 133.**

DRUGS

Felony possession of marijuana—jury instructions—actual knowledge—plain error analysis—In a prosecution for felony possession of marijuana, the trial court did not commit plain error by not providing a jury instruction ex mero motu on actual knowledge where, in light of the totality of the circumstances—in which officers found a vacuum-sealed bag of marijuana hidden under one of the vehicle's

DRUGS—Continued

seats, digital scales, more than one thousand dollars of cash, and a flip cell phone—the absence of an actual knowledge instruction did not have a probable impact on the jury's finding that defendant was guilty. For the same reason, even assuming trial counsel rendered deficient performance by failing to request the instruction, defendant failed to establish that he received ineffective assistance of counsel. **State v. Highsmith, 198.**

Jury instructions—possession—actual or constructive—plain error review—In defendant's drug prosecution, even assuming the trial court erred by instructing the jury on the theory of constructive possession where the theory was not supported by the evidence, there was no plain error because the trial court also instructed the jury on actual possession—and the State presented overwhelming evidence of defendant's actual possession of the cocaine, including the testimony of the undercover officer who conducted the undercover transaction, the testimony of other officers who surveilled the transaction, and the audio and video recording of the transaction. **State v. Campbell, 480.**

ESTATES

Elective share—statute amended during appeal to superior court—remand for application of new statute—In an estate proceeding, where the portion of the clerk of court's order awarding an elective share of the estate to decedent's wife was appealed to the superior court, the superior court erred by sua sponte raising the issue of whether the clerk had used the correct values in its calculation and issuing a new order awarding a different elective share. Because a new version of the applicable statute went into effect while the matter was on appeal to the superior court (and the estate proceeding was not final), the clerk's order was no longer based on good law and the superior court should have remanded the matter to the clerk for application of the amended statute. **In re Est. of Gerringer, 296.**

EVIDENCE

Expert testimony—drugs—Rule 702 gatekeeping—plain error analysis—In defendant's prosecution for drug offenses, even assuming the trial court erred under Evidence Rule 702(a)—by failing to properly exercise its gatekeeping function—in admitting the expert opinion of the State's forensic chemist that the substance sold by defendant was cocaine, there was no plain error because the expert testified that he used a "gas chromatography mass spectrometry test" and that, based on the test results, his opinion was that the substance was cocaine. **State v. Campbell, 480.**

HOMICIDE

First-degree—evidence locating victim's and defendant's cell phones—jury instruction on flight—no plain error—The trial court in a first-degree murder prosecution did not commit plain error when it allowed an expert to testify about the locations of the victim's and defendant's cell phones before and after the victim's death and when it instructed the jury on flight. Even if the court had erred, any error could not have had a probable impact on the jury's verdict given the ample evidence of defendant's guilt: namely, the testimony of a friend who drove defendant and another man to the victim's house, heard gunshots a few minutes later from the direction defendant had walked, and saw the other man hand a gun to defendant as they reentered the car; and testimony from the victim's mother, who also heard

HOMICIDE—Continued

gunshots coming from her daughter's house, saw defendant and the other man run away from the house and drive away, and found her daughter lying on the sidewalk in front of the house. **State v. McIver, 205.**

IDENTITY THEFT

Knowing use of another person's identifying information—actual person—insufficiency of evidence—The trial court erroneously denied defendant's motion to dismiss an identity theft charge for insufficiency of the evidence where, although the State's evidence indicated that defendant checked himself into a hospital under a false name and birthdate to avoid arrest for another criminal charge, none of the evidence linked the false identifying information to a real person. **State v. Faucette, 501.**

IMMUNITY

Sovereign—breach of contract action—contract implied in fact—waiver applied—In a breach of contract action brought by students against a state university involving student and parking fees, in which the alleged contract at issue was one implied in fact, the Court of Appeals determined that, unlike contracts implied in law, contracts implied in fact could waive sovereign immunity because they constituted valid and enforceable contracts as if they were express or written. **Lannan v. Bd. of Governors of the Univ. of N.C., 574.**

INDICTMENT AND INFORMATION

Fatally defective indictment—second-degree rape—no allegation that defendant knew or should have known victim was physically helpless—The trial court lacked jurisdiction to convict defendant of second-degree rape because the indictment failed to allege that defendant knew or should have known that the victim, who was under the influence of alcohol during the events that gave rise to charges of rape and kidnapping, was physically helpless. Therefore, the portion of the judgment convicting defendant of rape was vacated and the indictment dismissed. **State v. Singleton, 630.**

Felony animal cruelty—name of horse—surplusage—In an indictment charging defendant with felony animal cruelty, the trial court properly allowed the State to amend the indictment by removing the name of the horse, which was not an essential element of the offense and therefore was not required to render the indictment facially valid. Further, the remaining description of the animal as a "chestnut mare horse" was sufficiently clear to allow defendant the ability to prepare an adequate defense and to protect himself from being twice put in jeopardy for the same offense. **State v. Lawson, 404.**

Sufficiency—felonious cruelty to animals—malice—intent—In a prosecution for arson and felonious cruelty to animals, where defendant was charged with setting fire to another man's home while the man's four-month-old puppy was still inside, the indictment was not fatally defective where it sufficiently alleged the malice element of the animal cruelty charge (by alleging under the accompanying arson charge that defendant "did maliciously burn the dwelling" where the puppy died) and the intent element of the charge (by alleging that defendant "willfully" killed an animal). **State v. Charles, 494.**

JUDGES

Improper delegation of statutory authority—introduction of criminal case to jury—impermissible expression of opinion—no prejudice shown—In a prosecution for multiple charges arising from an armed robbery, where the trial court improperly delegated to the prosecutor its statutory obligation under N.C.G.S. § 15A-1213 to introduce the case to the jury, defendant's argument that the court's error constituted an improper intimation as to his guilt was rejected on appeal because defendant could not show the error prejudiced him where the trial court instructed the jury on the presiding judge's impartiality—saying the jury must not infer from what the judge did or said that the evidence is to be believed or disbelieved or that a fact has been proved or disproved—and where the jury acquitted defendant of the most serious charges he faced at trial, including attempted first-degree murder. **State v. Williams, 215.**

JURISDICTION

Personal—action "arising out of or relating to" defendant's contacts—stream of commerce—no purposeful availment—In a set of consolidated wrongful death actions filed after four people died in a helicopter crash in North Carolina, the trial court erred by denying motions to dismiss for lack of personal jurisdiction filed by the helicopter manufacturer and the manufacturer of the helicopter engines that overheated during the accident where plaintiffs (the crash victims' estates) failed to show that their lawsuits "arose out of or related to" the manufacturers' contacts with North Carolina. The German helicopter manufacturer and French engine manufacturer, neither of whom sold their products directly to North Carolina, did not purposefully avail themselves of the privilege of conducting business in North Carolina where they merely injected their products into the "stream of commerce" through actions directed at an international market (including the United States generally) rather than at North Carolina specifically. **Bartlett v. Est. of Burke, 249.**

Personal—lack of service—general appearance—removal to federal court— In a civil action filed by plaintiff against his former employer, the trial court did not err by dismissing plaintiff's claims for lack of personal jurisdiction based on plaintiff's failure to properly serve defendant with process where, by statute, defendant's filings requesting extensions of time did not constitute general appearances and where defendant's removal of the case to federal court (and filing of the required notice in the state court) also did not constitute a general appearance. **Blaylock v. AKG N. Am., 72.**

JURY

Criminal trial—voir dire—reopening—trial court's discretion—In a prosecution for misdemeanor child abuse, the trial court did not abuse its discretion by denying defendant-parents' motions to reopen voir dire of a juror who, after he had been passed upon by counsel but before the jury was impaneled, stated that he believed defendants should be required to testify. The trial court carefully instructed the juror on defendants' right not to testify, heard arguments from counsel, considered the matter overnight, considered the negative impact that reopening voir dire could have on the orderly disposition of defendants' charges, and was satisfied that the juror would follow the law as the court instructed him. **State v. Adams, 379.**

JUVENILES

Delinquency—indirect contempt—prior adjudication of undisciplined—notice—allowable disposition—There was no error in the trial court's adjudication of delinquency for indirect contempt based on a juvenile's failure to meet various school attendance and performance conditions imposed by the court after a prior adjudication of undisciplined. The juvenile's due process and statutory rights were not violated where the juvenile was given several warnings regarding contempt prior to the delinquency petition being filed, and the disposition of delinquency for indirect contempt was expressly allowed by the applicable statutes. **In re B.W.C., 284.**

Delinquency—privilege against self-incrimination—statutory warnings—In an adjudication hearing on a juvenile delinquency petition arising from a robbery by a group of teenagers in a convenience store parking lot, the trial court violated N.C.G.S. § 7B-2405 by failing to advise the juvenile of his constitutional right against self-incrimination before he testified on his own behalf. The error was prejudicial, as the State conceded, where the juvenile testified that he had taken the victim's wallet and there was otherwise no evidence about the identity of the person who took the wallet. **In re A.O., 565.**

KIDNAPPING

First-degree—severely impaired victim—removal by car—lack of consent—victim released in secluded area—The State presented sufficient evidence to support each element of first-degree kidnapping, including evidence from which the jury could infer that the victim was not released in a safe place, where the State showed that when defendant came upon the victim, who was severely impaired from the effects of alcohol, he put her in his car, she fell asleep, and he drove her away from a busy area to a more secluded location for the purpose of committing rape. When the victim eventually left defendant's car on foot, she was still impaired and in a secluded area where she could not immediately obtain assistance. **State v. Singleton, 630.**

LARCENY

Jury instructions—lesser-included offense—evidence positive as to each element of charged offense—The trial court did not err in defendant's prosecution for larceny by declining to instruct the jury on the lesser-included offense of attempted larceny where the State presented clear and positive evidence as to each element of larceny and there was no evidence supporting the commission of attempted larceny. Defendant satisfied each element of larceny when he pushed a shopping cart full of unpaid merchandise out of a Tractor Supply store—despite an employee calling after him to stop and the store anti-theft alarm sounding—and then hurriedly unloaded the unpaid merchandise into his vehicle. The larceny had already been completed by the time defendant changed his mind and dumped the merchandise back out of the vehicle into the parking lot after an apparent disagreement with the vehicle's driver. **State v. Sisk, 637.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—motion to set aside—trustee neutrality—statutory requirements not met—Where a trustee in a foreclosure under power of sale failed to include a notice of trustee neutrality in the notice of the foreclosure hearing as required by N.C.G.S. § 45-21.16(c) and acted as attorney for the noteholders throughout

MORTGAGES AND DEEDS OF TRUST—Continued

the foreclosure process in violation of N.C.G.S. § 45-10(a), the trial court erred by denying plaintiffs' motion to set aside the foreclosure. **In re Foreclosure of Simmons, 569.**

MOTOR VEHICLES

Insurance—underinsured motorist coverage—interpolicy stacking—multiple claimant exception—In a declaratory judgment action to determine the underinsured motorist (UIM) coverage available to defendant, who sought to recover under his own policy (as owner of the car in which he was riding as a passenger at the time of a two-car accident) and his parents' policy, the trial court properly granted judgment on the pleadings for defendant, thereby allowing him to recover under both policies. Since the multiple claimant exception of the Financial Responsibility Act (N.C.G.S. § 20-279.21(b)(4)) did not apply, defendant was not prevented from stacking multiple UIM policies. **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Hebert, 159.**

NEGLIGENCE

Fatal car accident—negligent entrustment theory of liability—legal owner did not have control or authority over vehicle—Where a used car dealer unintentionally remained the legal owner of a vehicle after its sale—despite processing the sale and title transfer paperwork and relinquishing authority and control over the vehicle to the buyer's relative who drove it off the lot—due to the title transfer being rejected by the Department of Motor Vehicles because of a missing piece of information, the dealer was not liable for a fatal accident that occurred two months later under a negligent entrustment theory where there was undisputed evidence that, at the time of the accident, the buyer's relative (who drove the car while impaired and with a suspended license) was entrusted with the car by the buyer, not the dealer. **Biggs v. Brooks, 64.**

Fatal car accident—proof of ownership theory of liability—no agency relationship between vehicle's legal owner and driver—Where a used car dealer unintentionally remained the legal owner of a vehicle after its sale—despite processing the sale and title transfer paperwork and relinquishing authority and control over the vehicle to the buyer's relative who drove the car off the lot—due to the title transfer being rejected by the Division of Motor Vehicles because of a missing piece of information, the dealer was not liable for negligence under a proof of ownership theory for a fatal accident two months later where there was undisputed evidence that no agency relationship existed between the dealer and the buyer's relative (who was driving the car while impaired and with a suspended license at the time of the accident). **Biggs v. Brooks, 64.**

Gross contributory negligence—voluntary intoxication—The trial court properly dismissed—pursuant to Civil Procedure Rule 12(b)(6)—a wrongful death action against a retail, dining, and recreational complex where, one night, the decedent arrived at the complex already drunk, consumed more alcohol on the premises until his blood alcohol concentration was nearly five times the legal limit, and then drowned after jumping into a nearby lake. The decedent's voluntary intoxication amounted to gross contributory negligence barring his estate's recovery from any negligence by the complex. **Lovett v. Univ. Place Owner's Ass'n, 366.**

Sudden emergency—intoxicated driver in wrong lane—school bus—no contribution to emergency—Where an intoxicated driver traveled into an oncoming

NEGLIGENCE—Continued

lane of traffic and crashed into a school bus, killing the intoxicated driver's passenger, the appellate court affirmed the decision of the Industrial Commission applying the doctrine of sudden emergency and concluding that the school bus driver did not act negligently in her attempt to avoid the collision. The doctrine applied because the bus driver had fewer than five seconds to act after realizing that the oncoming vehicle would not correct its path, and the bus driver did not contribute to or cause the emergency—despite plaintiff's argument that the bus driver should have maneuvered to the right (into a ditch) rather than to the left (although the bus remained fully within its own lane). **Est. of Johnson v. Guilford Cnty. Sch. Bd., 124.**

POLICE OFFICERS

Resisting a public officer—elements—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of resisting, delaying, or obstructing a public officer where substantial evidence showed that a police officer briefly detained defendant at a gas station to investigate a disturbance call—in which the caller reported being verbally harassed by defendant at the gas station—and defendant repeatedly refused to provide identification. The officer was lawfully discharging a duty of his office by detaining defendant where he had a reasonable suspicion that defendant was the subject of the disturbance call (when the officer arrived at the scene, the caller identified defendant and the officer saw defendant yelling at a gas station attendant), and defendant willfully obstructed the investigation by refusing the officer's requests for verifiable identification (defendant did provide a card with initials, a last name, and a telephone number, but there was no way to confirm that the information was accurate). **State v. Harper, 507.**

PROBATION AND PAROLE

During pendency of appeal—requirement to complete conditions of probation—stayed—In its judgments entered upon jury verdicts finding defendant guilty of misdemeanor child abuse, the trial court erred by ordering defendant to fulfill conditions of his probation during the pendency of his appeal. Defendant's probation was stayed by N.C.G.S. § 15A-1451 upon his notice of appeal. **State v. Adams, 379.**

SATELLITE-BASED MONITORING

Jurisdiction—recidivist status—sufficiency of findings—Where, in light of *State v. Grady*, 327 N.C. 509 (2019), the trial court vacated a previous order imposing lifetime satellite-based monitoring (SBM) on defendant and issued a new order requiring him to enroll in SBM for a period of 30 years, the appellate court rejected defendant's argument that the trial court lacked subject matter jurisdiction to do so, as the trial court continued jurisdiction over the original order and could modify it pursuant to defendant's motion for appropriate relief. Further, the trial court had statutory authority to impose SBM because defendant's offense was committed against a minor; and finally, the trial court made sufficient findings to support its determination that defendant required the "highest possible level of supervision and monitoring" for a term of 30 years. **State v. Cheers, 394.**

Lifetime—imposition after lengthy prison term—aggravated offender—reasonableness—The imposition of lifetime satellite-based monitoring (SBM) on an aggravated offender—to be imposed upon the completion of his fifteen- to twenty-year sentence for statutory rape, indecent liberties with a child, and other charges—was affirmed as a reasonable search under the Fourth Amendment given the limited

SATELLITE-BASED MONITORING—Continued

intrusion into the diminished privacy expectation of aggravated offenders when weighed against the State's paramount interest in protecting the public—especially children—from sex crimes and the efficacy of SBM in promoting that interest. Further, the State was not required to demonstrate the reasonableness of SBM at the time of its effectuation in the future; rather, the State was required to show reasonableness at the time in which it requested the imposition of SBM (i.e. at sentencing). **State v. Gordon, 191.**

SEARCH AND SEIZURE

Motion to suppress—sufficiency of findings—weight and credibility of evidence—attempted heroin trafficking by possession—In a prosecution for attempted heroin trafficking by possession, the trial court properly denied defendant's motion to suppress where competent evidence supported the court's findings of fact, which described how two law enforcement officers involved in a narcotics investigation followed a suspect to an apartment parking lot where the suspect met with her heroin source (later identified as defendant) to retrieve a heroin sample for a police informant. Although there was some inconsistency between the officers' testimonies regarding whether the suspect traveled alone to the parking lot, it was up to the trial court to determine the weight and credibility of each testimony when entering its factual findings. **State v. Parker, 610.**

Sufficiency of findings and conclusions—marijuana—similarity to hemp—totality of circumstances—In denying defendant's motion to suppress, the trial court made sufficient findings and conclusions regarding the seizure of marijuana from a vehicle in which defendant was a passenger, despite defendant's novel argument that, because illegal marijuana and legal hemp look and smell the same, the appearance and scent of a marijuana-like substance alone cannot provide probable cause. Under the totality of the circumstances—where officers found a vacuum-sealed bag of what appeared to be marijuana hidden under a seat, digital scales, more than one thousand dollars of cash, and a flip cell phone, and where defendant did not claim that the substance was hemp—the trial court properly concluded that defendant's Fourth Amendment rights were not violated by the seizure. **State v. Highsmith, 198.**

Warrantless search of vehicle—automobile exception—public vehicular area—fuel pump at gas station—In a prosecution for attempted heroin trafficking by possession, the trial court did not err in denying defendant's motion to suppress evidence seized during a warrantless search of his car, which took place while the car was parked next to a fuel pump at a gas station. That area next to the fuel pump qualified as a "public vehicular area" under the plain language of N.C.G.S. § 20-4.01(32), and therefore the trial court properly determined that the automobile exception to the Fourth Amendment's warrant requirement applied to the search of defendant's vehicle. **State v. Parker, 610.**

Warrantless search of vehicle—probable cause—plain view and plain smell doctrines—In a prosecution for attempted heroin trafficking by possession, the trial court properly concluded that law enforcement had probable cause to search defendant's car where law enforcement spotted defendant and his car at a gas station near the site of a heroin sale they were investigating, defendant's car was connected to the heroin sale (the buyer's heroin source was seen driving that same car with the same license number during a drug transaction that occurred earlier that day), and the officers smelled an odor consistent with heroin emanating from the car and

SEARCH AND SEIZURE—Continued

observed a heroin-like substance in plain view inside the car. The court properly applied the plain view doctrine to the search because the car was parked in a public area when law enforcement searched it; additionally, the court properly applied the plain smell doctrine where the plain smell of any drug—not just the drugs explicitly mentioned in North Carolina case law—can supply probable cause for a search. **State v. Parker, 610.**

SENTENCING

Drugs—conditional discharge—joined convictions—The trial court erred by imposing a supervised probation sentence on defendant's conviction for possession of cocaine, rather than a conditional discharge pursuant to N.C.G.S. § 90-96, because his joined conviction of sale of cocaine did not count as a previous conviction under section 90-96. The matter was remanded for a new sentencing hearing for the trial court to determine whether conditional discharge was appropriate. **State v. Campbell, 480.**

Presumptive range—mitigating factors—trial court's discretion—The Court of Appeals denied defendant's petition for writ of certiorari—which claimed that the trial court erred during his sentencing by not finding two mitigating factors supported by uncontradicted and credible evidence—where, because the trial court sentenced defendant in the presumptive range, it was not required to find mitigating factors or sentence defendant to a mitigated sentence. **State v. Freeman, 606.**

SEXUAL OFFENDERS

Registration—out-of-state conviction—substantially similar to North Carolina offense—The trial court did not err by ordering defendant to register as a sex offender based on defendant's conviction in Pennsylvania of second-degree statutory sexual assault since that offense was substantially similar to the North Carolina reportable offense of statutory rape of a person fifteen or younger (N.C.G.S. § 14-27.25(a)) despite a minor variation regarding the minimum age difference between victim and defendant. The rule of lenity did not apply where there was no ambiguity with regard to which North Carolina statute should be used as comparison, and where there was no ambiguity in either of the statutes under comparison. **In re Pellicciotti, 451.**

STATUTES OF LIMITATION AND REPOSE

Medical malpractice—minor plaintiff—thirteen years old at time of accrual of claim—ordinary three-year limitations period—A medical malpractice action alleging that defendants negligently performed plaintiff's appendectomy was time-barred by the statute of limitations where plaintiff's action accrued at the time of the appendectomy, when he was thirteen years old, and he filed his complaint more than five years later (before he reached the age of nineteen). N.C.G.S. § 1-17(c) controlled, as the subsection regarding medical malpractice actions, and according to its plain language the three-year statute of limitations that ordinarily applied to medical malpractice actions applied here because plaintiff did not fall within the exception for minors for whom the limitations period expires before they reach the age of ten. **Morris v. Rodeberg, 143.**

Minor plaintiff—as-applied constitutional challenge—rational basis review—In a medical malpractice action in which plaintiff was a minor at the time his claim

STATUTES OF LIMITATION AND REPOSE—Continued

accrued, assuming without deciding that plaintiff's as-applied constitutional challenge to N.C.G.S. § 1-17(c) was properly before the trial court and preserved for appellate review, the Court of Appeals held that his challenge lacked merit because statutes of limitations do not affect any fundamental right and therefore are not subject to strict scrutiny—rather, rational basis review applied. Because plaintiff failed to argue or cite any authority to demonstrate that subsection 1-17(c) did not pass rational basis review, his constitutional challenge was rejected. **Morris v. Rodeberg, 143.**

Statutes of repose—Rule 12(b)(6) dismissal—no burden on plaintiff—facts alleged in complaint—defective retaining wall—In an action filed by a county board of education arising from defendants' work on an allegedly defective retaining wall, the trial court erred by granting defendants' Rule 12(b)(6) motions to dismiss based on the statute of repose where the facts alleged in the complaint did not conclusively show that it was not filed within the applicable statute of repose—because plaintiff did not allege both the date when defendants performed their last "specific last act" and the date of the "substantial completion of the improvement" pursuant to N.C.G.S. § 1-50(a)(5)(a). Plaintiff had no burden at the pleading stage to allege facts showing that its complaint was filed within the statute of repose. **Gaston Cnty. Bd. of Educ. v. Shelco, LLC, 80.**

TERMINATION OF PARENTAL RIGHTS

Best interests of the child—dispositional factors—bond between parent and child—The trial court did not abuse its discretion in terminating a mother's parental rights to her daughter after considering the statutory factors regarding the best interests of the child contained in N.C.G.S. § 7B-1110, where its finding that there was no bond between the mother and her daughter was supported by competent evidence and was not the sole factor supporting the conclusion that termination was in the child's best interests. **In re H.B., 1.**

Disposition phase—parent's expert witness—exclusion of testimony—In the disposition phase of a termination of parental rights proceeding, the trial court did not abuse its discretion by excluding testimony from one of the mother's expert witnesses where it made a reasoned decision that the expert's opinion would not be helpful or relevant because she lacked information about the mother or the specific facts of the case, she did not know how social services operated in North Carolina, and her data on families and child welfare was not based on research from North Carolina. **In re M.T., 305.**

Grounds for termination—abuse or neglect—non-accidental injuries to one child—likelihood of future neglect—The trial court properly terminated a mother's parental rights to her two children on the grounds of abuse (one child) and neglect (both children) where the children had been removed from the home due to unexplained non-accidental injuries to one of the children when he was less than six months old, including multiple fractures, other internal injuries, and retinal hemorrhages in both eyes. Competent evidence supported the court's findings of fact, which in turn supported its conclusions of law that there would be a repetition of neglect if the children were returned to the mother's care based on the mother's lack of a reasonable explanation for all of her son's injuries and on her lack of progress in addressing the issues that led to the children's removal. **In re M.T., 305.**

Grounds for termination—failure to make reasonable progress—findings of fact—unsupported by evidence—The trial court improperly terminated a father's

TERMINATION OF PARENTAL RIGHTS—Continued

parental rights in his daughter for failure to make reasonable progress to correct the conditions leading to the child's removal (N.C.G.S. § 7B-1111(a)(2)), where several of the court's key factual findings were unsupported by the evidence, which showed that—although the father did not fully satisfy all elements of his family services case plan—he made adequate progress toward each element where he obtained stable full-time employment, suitable housing, and reliable transportation (by purchasing a vehicle and taking the necessary steps to have his driver's license reinstated); acted appropriately during visits with his daughter, which he attended more consistently after moving across the state to be closer to her; took parenting classes and signed up for additional classes on his own initiative; completed substance abuse and mental health assessments; made efforts to schedule therapy sessions that accommodated his work schedule; and submitted to multiple drug tests, all of which came out negative or inconclusive. **In re A.D., 88.**

Grounds for termination—failure to make reasonable progress—minimally sufficient findings—The trial court's order contained minimally sufficient findings to support its conclusion that a mother's parental rights to her daughter were subject to termination due to the mother's failure to make reasonable progress in correcting the conditions that led to the child's removal from the home. The trial court's finding that the mother willfully left her daughter for a specified period of time in the custody of the department of social services (DSS) without making reasonable progress was based on competent evidence regarding the inadequacy of the mother's efforts, including the underlying juvenile file, of which the court took judicial notice, and corroborating documentary evidence submitted by DSS and testimony from social workers and the GAL district administrator. **In re H.B., 1.**

Grounds for termination—failure to pay a reasonable portion of the cost of care—evidence of income but not of amount—The trial court did not err by terminating respondent-father's parental rights in his children on the grounds of failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) where the trial court's findings that respondent was employed yet paid nothing in support while his children were in foster care were supported by clear and convincing evidence, in the form of a social worker's testimony that, during the determinative time period, respondent provided zero financial support despite reporting that he was earning some income—even though respondent did not specify the amount he was receiving. **In re A.C., 114.**

WATERS AND ADJOINING LANDS

Public trust doctrine—coastal fisheries management—sovereign immunity doctrine—An action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the State's alleged breach of the public trust doctrine for failing to adequately manage North Carolina's coastal fisheries was not barred by the doctrine of sovereign immunity where plaintiffs were not asserting rights of ownership or attempting to enforce public trust rights against a private party, but sought judicial review of the State's alleged obligations to manage public trust lands. **Coastal Conservation Ass'n v. State of N.C., 267.**

WORKERS' COMPENSATION

Compensability—death—work relatedness unknown—presumption of work relatedness—In a workers' compensation case, where an employee died in a vehicle collision while driving a dump truck for his employer, the subsequent autopsy

WORKERS' COMPENSATION—Continued

indicated that the employee died of a heart attack, and neither the autopsy nor the remaining evidence in the record confirmed whether the heart attack caused the employee to crash the truck during the accident or whether the circumstances of the accident caused the heart attack, the Industrial Commission properly awarded death benefits to the employee's children and next of kin under the rule that, where the work relatedness of an employee's death is unknown but the employee died in the course and scope of his employment, that death is presumptively work-related and therefore compensable under the Workers' Compensation Act. **Frye v. Hamrock, LLC, 440.**

Termination of benefits—misconduct related to compensable injury—constructive refusal of suitable employment—inapplicable—An opinion and award ordering an employer (defendant) to pay temporary total disability benefits to one of its truck drivers (plaintiff) was affirmed where, after plaintiff initially received benefits for a back injury he sustained on the job in a single-vehicle accident, defendant fired plaintiff for cause and then terminated his benefits on grounds that, because he was fired for misconduct (falling asleep at the wheel during the accident), plaintiff had made himself ineligible for rehire through defendant's return-to-work program and therefore had constructively refused suitable post-injury employment. The Industrial Commission properly declined to apply the test for constructive refusal of suitable employment articulated in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228 (1996), which only applies to employees who are fired for misconduct that is unrelated to their work-related injury, where applying the test to plaintiff would have created a fault-based bar to workers' compensation, which would cut against the underlying principles of the workers' compensation system. **Richards v. Harris Teeter, Inc., 370.**