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[1] Resigned 31 December 2022. [2] Term ended 31 December 2022. [3] Term ended 31 December 2022.
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[11] Appointed 13 January 2023.

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1. Effective 1 February 2023, the Supreme Court of North Carolina rescinded a prior order, 373 N.C. 605 (2019), that adopted a universal parallel citation form. *Order Rescinding "Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form,"* 384 N.C. __ (2024).

2. Unpublished cases appear in *Italics.*

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

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA
v.
NIKITA V. MACKEY

No. COA22-348

Filed 20 December 2022

1. Indictment and Information—uttering forged instrument—obtaining property by false pretenses—facially valid

The indictments charging defendant with uttering a forged instrument and obtaining property by false pretenses—based on defendant having signed his ex-wife's name to her check in order to deposit it into his personal bank account—were facially valid where they asserted each necessary element of both offenses.

2. Forgery—uttering forged instrument—obtaining property by false pretenses—no variance between indictments and evidence

In a trial for uttering a forged instrument and obtaining property by false pretenses—based on defendant having signed his ex-wife's name to her check in order to deposit it into his personal bank account—there was no fatal variance between the indictments and the evidence where the State presented evidence supporting each material element of both offenses.

3. Criminal Law—recordation—private bench conferences—no request

In a trial for uttering a forged instrument and obtaining property by false pretenses, the trial court did not violate defendant's right to recordation under N.C.G.S. § 15A-1241 by failing to record several

private bench conferences between the trial judge and the attorneys where defendant never requested that the subject matter of the bench conference conversations be reconstructed for the record.

Appeal by defendant from judgment entered 4 June 2021 by Judge William Anderson Long, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for the State.

Shawn R. Evans for the defendant-appellant.

TYSON, Judge.

¶ 1 Nikita V. Mackey, a disbarred lawyer, ("Defendant") appeals from the judgment entered upon the jury's verdict from his two felony convictions of uttering a forged instrument and obtaining property by false pretenses. Our review discloses no error.

I. Background

¶ 2 Defendant married Yvette Stewart in September 2016. The couple separated two years later and divorced in 2021. Defendant and Stewart always maintained separate bank accounts, even while married. After the separation, Stewart moved to Tennessee and took her vehicle with her.

¶ 3 Stewart's vehicle needed repairs in March 2019. After Stewart had paid for the repairs, she realized her vehicle was still under a third-party maintenance warranty. She sought a reimbursement from the company issuing the warranty. The company agreed to reimburse Stewart in the amount of $1,200.92.

¶ 4 Stewart waited for the check, but it never arrived. She contacted the warranty company to inquire about her reimbursement. During that conversation, the company informed Stewart the check had been issued to Stewart as payee, mailed to Defendant's address, and the check had been deposited into a bank. Stewart asked for more information. The company sent her a copy of the cancelled check. Upon examination, she noticed the check issued in her name had been signed. She recognized her name, signed in Defendant's handwriting, on the endorsement line.

¶ 5 Stewart sought a replacement check because she believed Defendant had forged her signature. The company informed Stewart

they could not issue another check unless she notified law enforcement. Stewart reported the incident and provided handwriting samples to the Charlotte-Mecklenburg Police Department.

¶ 6 The officer in charge of investigating Stewart's claim subpoenaed the bank for all records related to the check. Bank records revealed Defendant had deposited the check into his personal bank account on 18 June 2019. Video footage from the bank also showed Defendant visiting the bank on the same day the check was deposited.

¶ 7 Defendant was charged with uttering a forged instrument, obtaining property by false pretenses, and forgery of an instrument on 2 March 2020. At trial, the State entered the bank records and video footage into evidence. On 4 June 2021, a jury found Defendant guilty of obtaining property by false pretenses and of uttering a forged instrument. The jury failed to reach a unanimous verdict regarding forgery of an instrument after questioning the definition of the words "infer" and "forgery" as used in the jury's instructions. Defendant moved for a mistrial. The court granted Defendant's motion regarding the forgery charge.

¶ 8 The trial court consolidated the remaining two convictions into one judgment. Defendant was sentenced as a level I offender and received an active sentence of 5 to 15 months, followed by 24 months of supervised probation. Defendant filed a timely notice of appeal on 9 June 2021.

II. Issues

¶ 9 Defendant argues: (1) the indictments for uttering a forged instrument and obtaining property by false pretenses are fatally defective; (2) a fatal variance exists between the indictments for uttering and obtaining property by false pretenses and the evidence entered at trial; and, (3) he is entitled to a new trial because eighteen bench conversations were omitted from the transcript despite the trial judge ordering a complete recordation.

III. Fatal Defect

¶ 10 **[1]** Defendant argues the indictments for uttering a forged instrument and obtaining property by false pretenses contained a fatal defect.

A. Standard of Review

¶ 11 Trial courts do not possess jurisdiction over a criminal defendant without a valid bill of indictment. *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). "[W]hen a fatal defect is present in the indictment charging the offense, a motion in arrest of judgment may be made at any time in any court having jurisdiction over the

matter, even if raised for the first time on appeal." *State v. Phillips*, 162 N.C. App. 719, 720, 592 S.E.2d 272, 273 (2004) (citation and internal quotation marks omitted).

B. Analysis

¶ 12 An indictment "is fatally defective if it fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (citation and quotation marks omitted).

¶ 13 "The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another." *State v. Conley*, 220 N.C. App. 50, 60, 724 S.E.2d 163, 170 (2012) (citation and internal quotation marks omitted).

¶ 14 "The elements of obtaining property by false pretenses are (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *Id.* (citation and internal quotation marks omitted).

¶ 15 The indictment charging Defendant with uttering a forged check provided:

> [T]he defendant named above unlawfully, willfully, and feloniously did utter, publish, pass, and deliver as true to SunTrust Bank a falsely made and forged check #072993 written by Caregard warranty service, made out to Yvette Stewart for the amount of $1,200.92. The defendant acted for [the] sake of gain and with the intent to injure and defraud and with the knowledge that the instrument was falsely made and forged.

¶ 16 The indictment charging Defendant with obtaining property by false pretenses provided:

> [T]he defendant named above unlawfully, willfully, and feloniously did knowingly and designedly, with the intent to cheat and defraud, obtain $1,200.92 US currency from SunTrust Bank by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: the defendant passed a forged check in order to obtain the funds.

¶ 17 The indictments included the necessary elements for the crimes of uttering a forged check and obtaining property by false pretenses. *Conley*, 220 N.C. App. at 60, 724 S.E.2d at 170. Defendant's argument is without merit and overruled.

IV. Fatal Variance

¶ 18 **[2]** Defendant argues the State's evidence at trial fatally varied from the indictment for the charge of obtaining property by false pretenses because "the indictment erroneously alleged that the check itself was a forgery in direct contradiction to all evidence presented." According to Defendant, the "evidence showed at best that [Defendant] presented a check which may have contained a forged endorsement."

¶ 19 Defendant also argues the State's evidence presented at trial fatally varied from the indictment charging him with uttering a forged check. Defendant asserts the "uttering indictment drafted and obtained by the State is based on the first part of N.C. Gen. Stat. § 14-120[,] which deals with forged and counterfeit instruments," yet the "evidence presented at trial was in reference to the second part of N.C. Gen. Stat. § 14-120 regarding false, forged or counterfeited endorsements."

A. Standard of Review

¶ 20 Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure delineates the procedures for preserving errors on appeal:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, *stating the specific grounds for the ruling the party desired the court to make* if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (emphasis supplied).

¶ 21 Rule 10(a)(1) thus requires a defendant to "preserve the right to appeal a fatal variance." *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012) (first citing *State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) ("Regarding the alleged variance between the indictment and the evidence at trial, defendant based his motions at trial solely on the ground of insufficient evidence and thus has failed to preserve this argument for appellate review."); then citing *State v. Roman*, 203 N.C. App. 730, 731-32, 692 S.E.2d 431, 433 (2010); and then citing N.C. R. App. P. 10(a)(1)).

¶ 22 Our state courts have recognized consistent application of the rules of appellate procedure is paramount. *See State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007) ("Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority."); *see also State v. Ricks*, 378 N.C. 737, 741, 2021-NCSC-116, ¶ 6, 862 S.E.2d 835, 839 (2021) (explaining how suspending certain rules of appellate procedure, such as requiring timely filing of a notice of appeal, "would render meaningless the rules governing the time and manner of noticing appeals") (citation omitted).

¶ 23 Our Supreme Court, nevertheless, has held a defendant's motion to dismiss at the close of the state's evidence and renewed again at the close of all the evidence "*preserves all issues related to sufficiency of the State's evidence*" arguments for appellate review. *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020) (emphasis supplied) ("Because our case law places an affirmative duty upon the trial court to examine the sufficiency of the evidence against the accused for every element of each crime charged, . . . under Rule 10(a)(3), a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review.").

¶ 24 Post-*Golder*, our Supreme Court has not affirmatively held whether a general motion to dismiss preserves a defendant's fatal variance objection for appeal as a "sufficiency of the State's evidence" objection under *Golder*. *Id.*; *State v. Smith*, 375 N.C. 224, 228, 846 S.E.2d 492, 494 (2020) (explaining this Court in *State v. Smith*, 258 N.C. App. 698, 812 S.E.2d 205 (2018), "concluded [ ] defendant's *fatal variance argument was not preserved* because it was not expressly presented to the trial court[,]" while also acknowledging this Court had reached its decision before our Supreme Court issued *Golder*) (emphasis supplied) (citation omitted). The Supreme Court in *Smith*, "assum[ed] without deciding that defendant's fatal variance argument was preserved[.]" *Id.* at 231, 846 S.E.2d at 496.

¶ 25 Since *Smith* and *Golder*, criminal defendants before this Court assert "the Supreme Court in *Golder* [had] 'assumed without deciding' that 'issues concerning fatal variance are preserved by a general motion to dismiss.' " *See State v. Brantley-Phillips*, 278 N.C. App. 279, 286, 2021-NCCOA-307, ¶ 21, 862 S.E.2d 416, 422 (2021). In *Brantley-Phillips*, this Court explained:

> Although *Golder* did not address this specific question, our Court has noted, in light of *Golder*: "any fatal

> variance argument is, essentially, an argument regarding the sufficiency of the State's evidence." *State v. Gettleman*, 275 N.C. App. 260, 271, 853 S.E.2d 447, 454 (2020) (citation omitted). We further reasoned: "[o]ur Supreme Court made [it] clear in *Golder* that 'moving to dismiss at the proper time . . . preserves all issues related to the sufficiency of the evidence for appellate review.' " *Id.* (quoting *Golder*, 374 N.C. at 249, 839 S.E.2d at 790). Specifically, in *Gettleman* we determined the defendant failed to preserve an argument that the jury instructions and indictment in that case created a fatal variance precisely because the Defendant failed to move to dismiss the charge in question. *Id.* Here, unlike in *Gettleman*, Defendant did timely move to dismiss all charges, and thus, under the rationale of *Gettleman*, it would appear Defendant did preserve this argument. *See id. Without so deciding, and for purposes of review of this case*, we employ de novo review. *See id.*

Id. at 287, ¶ 22, 862 S.E.2d at 422 (emphasis supplied).

¶ 26 Here, Defendant did not mention the words "fatal," "defective," or "variance" in his motion to dismiss, to provide the trial court with notice of any purported error at the close of the State's evidence. Defendant moved to dismiss at the close of the State's evidence, and again at the close of all the evidence. In accordance with *Brantley-Phillips*, we again presume "[w]ithout so deciding, and for purposes of review of this case," Defendant's generic motion to dismiss for "*sufficiency of the evidence*" preserved his fatal variance objections. *Id.* (emphasis supplied).

B. Analysis

> A motion to dismiss for a variance is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.
>
> In order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to the gist of the offense.

Pickens, 346 N.C. at 646, 488 S.E.2d at 172 (citations, quotation marks, and alterations omitted).

¶ 27 "In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *State v. Tarlton*, 279 N.C. App. 249, 253, 2021-NCCOA-458, ¶ 12, 864 S.E.2d 810, 813 (2021) (quoting *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002)).

¶ 28 Here, the State offered substantial and sufficient evidence of each material element of both charges. The State tendered evidence Stewart never received the check issued to her as payee, and it was mailed to Defendant's residence. Stewart testified she recognized Defendant's handwriting forging her name on the endorsement line. The State also entered into evidence bank records indicating Defendant had deposited the check into his sole personal account. Video footage showed Defendant entering the bank on the same day the check was deposited into his account.

¶ 29 Viewing the evidence in the light most favorable to the State and all inferences thereon, the evidence presented at trial did not fatally vary from the essential elements or "gist" of the indictments charging Defendant with uttering a forged check and obtaining property by false pretenses. *Conley*, 220 N.C. App. at 60, 724 S.E.2d at 170; *Pickens*, 346 N.C. at 645, 488 S.E.2d at 172; *Tarlton*, 279 N.C. App. at 253, ¶ 12, 864 S.E.2d at 813. Defendant's argument is without merit and is overruled.

V. Recordation

¶ 30 **[3]** Criminal defendants have a statutory right to recordation of their trial. N.C. Gen. Stat. § 15A-1241 provides:

> (a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:
>
> (1) Selection of the jury in noncapital cases;
>
> (2) Opening statements and final arguments of counsel to the jury; and
>
> (3) Arguments of counsel on questions of law.
>
> . . .
>
> (c) When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, *upon motion of either party* the judge must

> reconstruct for the record, as accurately as possible, the matter to which objection was made.

N.C. Gen. Stat. § 15A-1241 (2021) (emphasis supplied).

¶ 31 Our Supreme Court in *State v. Cummings* contrasts the disparate treatment of statements made in open court before a jury and those made in private bench conferences under N.C. Gen. Stat. § 15A-1241. 332 N.C. 487, 498, 422 S.E.2d 692, 698 (1992). The Court in *Cummings* concluded N.C. Gen. Stat. § 15A-1241 "appears to be designed to ensure that any statement by the trial judge, in open court and within earshot of jurors or others present in the courtroom, be available for appellate review." *Id.*

¶ 32 Statements made in private bench conferences, however, are only required to be transcribed if "either party requests that the subject matter of a private bench conference be put on the record for possible appellate review." *Id.* If a party requests a bench conference to be transcribed per N.C. Gen. Stat. § 15A-1241, "the trial judge should comply by reconstructing, as accurately as possible, the matter discussed." *Id.* (citing N.C. Gen. Stat. § 15A-1241(c)).

¶ 33 "This Court has repeatedly held that [N.C. Gen. Stat. §] 15A–1241 does not require recordation of 'private bench conferences between trial judges and attorneys.' " *State v. Blakeney*, 352 N.C. 287, 307, 531 S.E.2d 799, 814 (2000) (first quoting *Cummings*, 332 N.C. at 497, 422 S.E.2d at 697; then citing *State v. Speller*, 345 N.C. 600, 605, 481 S.E.2d 284, 287 (1997)). In *Blakeney*, the defendant argued the "unrecorded bench conferences violated his statutory right to recordation under [N.C. Gen. Stat.] § 15A[-]1241 and deprived him of his constitutional right to due process by rendering appellate review impossible." *Id.* at 306, 531 S.E.2d at 814. Our Supreme Court held the trial court did not err by failing to record the bench conferences because the "defendant never requested that the subject matter of a bench conference be reconstructed for the record." *Id.* at 307, 531 S.E.2d at 814.

¶ 34 Defendant asserts the trial court had ordered a complete recordation. This assertion is unfounded. The transcript shows Defendant only requested a complete recordation of the *voir dire* of an expert witness. Here, the trial court did not err for the same reasons our Supreme Court held the trial court did not err in *Blakeney*: Defendant "never requested that the subject matter of a bench conference be reconstructed for the record." *Blakeney*, 352 N.C. at 307, 531 S.E.2d at 814. Defendant's argument is without merit.

VI. Conclusion

¶ 35 Defendant has failed to show a fatal defect existed in his indictments for uttering a forged check and obtaining property by false pretenses. Each of the indictments alleged the "essential and necessary elements of the offense[s]." *Ellis*, 368 N.C. at 344, 776 S.E.2d at 677.

¶ 36 Presuming without holding Defendant's fatal variance argument was preserved by his blanket motion to dismiss, Defendant failed to demonstrate a fatal variance between his indictments and the evidence presented at trial. *Brantley-Phillips*, 278 N.C. App. at 287, ¶ 22, 862 S.E.2d at 422. Any purported variance between the indictment and the evidence at trial was "not material, and is therefore not fatal, [as] it d[id] not involve an essential element of the crime charged." *Tarlton*, 279 N.C. App. at 253, ¶ 12, 864 S.E.2d at 813.

¶ 37 Defendant has also failed to show the trial court committed plain error by failing, in the absence of a request, to make a complete recordation of the eighteen bench conference conversations. Defendant never requested the trial court to reconstruct the bench conversations for the record, despite asking the trial court to make a complete recordation of the *voir dire* of an expert witness at another point during the trial.

¶ 38 Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges ZACHARY and HAMPSON concur.

AUTRY v. BILL CLARK HOMES, LLC

[287 N.C. App. 11, 2022-NCCOA-833]

JACKIE W. AUTRY, SHARON J. AUTRY, ROBERT BLACKWELL, CARL B. CAREY, DANIEL DENSTON, ROBERT GRAHAM, LORI L. MONEYMAKER, JAMES JONES, JENNI H. JONES, JASON P. HERRING, CINDY P. HERRING, JASON R. LAMBERT AS ADMINISTRATOR OF THE ESTATE OF CHARLES R. LAMBERT, RONNIE S. NORTON, JR., JOYCE M. NORTON, MARTIN B. TAYLOR, MATTI McMURRAY AND JESSICA L. WAGGONER, Plaintiffs

v.

BILL CLARK HOMES, LLC, BILL CLARK HOMES OF WILMINGTON, LLC, BILL CLARK HOMES OF GREENVILLE, LLC, BILL CLARK CONSTRUCTION COMPANY, INC., AND WILLIAM H. CLARK, Defendants

No. COA22-293

Filed 20 December 2022

Statutes of Limitation and Repose—negligence—improvement to real property—drainage pipe—six-year limitation—from date of substantial completion

Plaintiff homeowners' negligence claim against subdivision developers for an alleged failure to maintain an off-premises drainage pipe (which plaintiffs alleged resulted in flooding after a hurricane) was barred by the six-year statute of repose in N.C.G.S. § 1-50(a)(5)(b) where plaintiffs' complaint was filed more than ten years after the pipe was substantially completed and where plaintiffs provided no support for any of the statutory exceptions to the time limit.

Appeal by Plaintiffs from order entered 21 June 2021 by Judge R. Kent Harrell and from order entered 24 November 2021 by Judge Phyllis Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 7 September 2022.

Reiss & Nutt, PLLC, by Kyle J. Nutt, for Plaintiffs-Appellants.

McAngus Goudelock & Courie, by Jeffery I. Stoddard and Walt Rapp, and Hamlet & Associates, PLLC, by H. Mark Hamlet and Suzanne E. Brown, for Defendants-Appellees.

COLLINS, Judge.

¶ 1 This appeal stems from a negligence action filed by Plaintiffs, subdivision homeowners, against Defendants, subdivision developers, alleging that Defendants' failure to maintain a drainage pipe that extended beyond the subdivision boundaries resulted in property damage due to

flooding from Hurricane Florence. Plaintiffs appeal from orders granting Defendants summary judgment on Plaintiffs' claims for negligence and punitive damages.[1] Plaintiffs argue that the trial court[2] erred by granting Defendants summary judgment on Plaintiffs' negligence claim because Defendants owed both a statutory and common-law duty to maintain the off-premises drainage pipe. Plaintiffs argue that the trial court erred by granting Defendants summary judgment on Plaintiffs' punitive damages claim because the trial court applied the wrong standard when evaluating Defendants' motion for summary judgment, and because a genuine issue of material fact exists as to whether Defendants' failure to maintain the off-premises drainage pipe was "willful or wanton conduct" as defined in N.C. Gen. Stat. § 1D-5.

¶ 2 Because Plaintiffs filed their complaint more than six years after the off-premises drainage pipe was substantially completed, the statute of repose bars Plaintiffs' negligence claim, and summary judgment was proper. Additionally, because Plaintiffs' negligence claim is barred, we do not address Plaintiffs' arguments regarding their punitive damages claim. The trial court's orders are affirmed.

I. Factual Background

¶ 3 The record evidence, viewed in the light most favorable to Plaintiffs, indicates that the following series of events took place between 1994 and 2018:

¶ 4 In October 1994, Defendants applied to the North Carolina Department of Environment, Health, and Natural Resources ("DENR")[3] for a stormwater permit for Tidalholm Subdivision in New Hanover County. The application included a description of the subdivision; a proposed plan for managing stormwater runoff in eleven vegetated swales and one pond, located between lots 129 and 130; a certification that certain restrictions would be included in the recorded deeds limiting the allowable built-upon area; and a stormwater maintenance plan indicating that "[i]t shall be the responsibility of the Tidalholm Home Owners

1. Plaintiffs label their claims "Negligence" and "Gross Negligence/Willful and Wanton Conduct/Punitive Damages."

2. Plaintiffs appeal from separate orders entered by two different superior court judges. We refer to the judges collectively as the trial court.

3. The Department's health functions were removed in 1997 and it became known as the North Carolina Department of Natural Resources. In 2015, the Department's name was changed to the Department of Environmental Quality, as it is now known. At all relevant times the Department was titled DENR.

Association to provide [certain enumerated] inspections and maintenance of the stormwater systems[.]"

¶ 5 DENR approved Defendants' application and issued a certification of compliance in December 1994 that stated:

> Based on our review of the project plans and specifications, we have determined that the Tidalholm Subdivision stormwater control system complies with the Stormwater Regulations set forth in Title 15A NCAC 2H.1003(a)(3) and (i).
>
> . . . .
>
> Any modification of the plans submitted to this Office or further development of this contiguous project will require an additional Stormwater Submittal/ Modification and approval prior to initiation of construction . . . . Modifications include but are not limited to; project name changes, transfer of ownership, redesign of built-upon surfaces, addition of built-upon surfaces, redesign or further subdivision of the project area.
>
> This certification shall be effective from the date of issuance until rescinded. The project shall be constructed and maintained in accordance with the plans and specifications approved by the Wilmington Regional Office.

¶ 6 In December 1995, Tidalholm Homeowners Association, Inc. ("Tidalholm HOA"), filed articles of incorporation with the North Carolina Secretary of State. Pursuant to these articles, "the specific purposes for which it is formed are to provide for maintenance, preservation and architectural control of the residence Lots and Common Area" of Tidalholm Subdivision, to "exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain Declaration of Covenants, Conditions and Restrictions," and to "maintain . . . real or personal property in connection with the affairs of the Association[.]" However, because Tidalholm HOA was incorporated after Defendants submitted the stormwater permit application, Tidalholm HOA did not assume the responsibilities under the certificate of compliance.

¶ 7 In July 1999, a Tidalholm Subdivision resident experienced flooding and hired an architect to investigate the issue. After completing his investigation, the architect wrote a letter to Defendants stating:

> After reviewing the documents, maps, and the pictures of this area, [my firm] has come to the conclusion that the problem of the flooding comes from the thirty foot (30') drainage ditch behind lot 128. This drainage ditch needs to be dredged so the storm water detention discharge pipe can do its job.

¶ 8 In November 1999, DENR performed a compliance inspection at Tidalholm Subdivision and found the project in violation of the certification of compliance issued in 1994. DENR sent a letter to Defendants stating that the swales and pond had not been properly maintained in various ways, and that "[t]he recorded deed restrictions for this development have not been received by this Office." The letter did not mention a drainage ditch behind lot 128. DENR directed Defendants to "[p]rovide a written 'Plan of Action' which outlines the actions you will take to correct the violation(s) and a time frame for completion of those actions, on or before December 17, 1999."

¶ 9 DENR performed another compliance inspection in April 2000 and found the project in violation of the 1994 certification of compliance. DENR sent a letter to Defendants noting, among other things, that "the recent flooding problems at the detention pond in Tidalholm [are attributable to] a high water table, however, the offsite drainage area into the detention pond has been found to be well in excess of the 600,000 square feet accounted for in [the original] design calculations." DENR directed Defendants to "[p]rovide a written 'Plan of Action' which outlines the actions [Defendants] will take to correct the violations and a time frame for completion of those actions, on or before May 18, 2000[,]" and reminded Defendants that "offsite runoff must either be routed around the system or accounted for in the design of the pond."

¶ 10 By letter dated 5 May 2000, Defendants acknowledged receipt of letters dated 11[4] and 18 April 2000 indicating violations of the certification of compliance and requested additional time to develop a plan of action. Defendants submitted a Stormwater Management Permit Application Form in July 2000, seeking to modify their 1994 permit. Among the proposed modifications included the installation of a weir box under Lipscomb Drive and a reinforced concrete bypass pipe between lots 127 and 128 of the subdivision. Defendants' plan did not show the bypass pipe extending beyond Tidalholm Subdivision boundaries. By letter dated 28 August 2000, DENR acknowledged receipt of Defendants' application and responded, in part:

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4. An 11 April letter is not in the record.

> Because of the as-built condition, the bypass as proposed is acceptable. The permit to be issued will reserve the right to address the offsite situation again if the check dams in the ditches in [a neighboring subdivision] are removed or if the ditches are piped, or if complaints regarding flooding problems are received.

However, because the application was incomplete, DENR required additional information, including copies of the recorded deed restrictions, to continue its review.

¶ 11 In November 2000, DENR notified Defendants by letter that the recorded deed restrictions for lots sold between 1995 and 1999 did not include language limiting the built-upon area of the subdivision lots, as the 1994 certification of compliance required. DENR directed Defendants to remedy the recorded deed restrictions and reminded Defendants to record the required restrictions prior to selling lots in the future. By 2016, Defendants had yet to correct the recorded deed restrictions.

¶ 12 Meanwhile, the developers of Kirkwood at Arrondale ("Kirkwood"), an adjacent subdivision, were developing stormwater management plans to be approved by the North Carolina Department of Transportation ("NCDOT").[5] As part of this work, engineers for Kirkwood met with Defendants, and, in December 2001, submitted proposed plans to NCDOT. The plans depicted the weir box and bypass pipe that Defendants had proposed as well as a connection from the bypass pipe to a drainage pipe that extended beyond Tidalholm Subdivision boundaries and into a wooded ravine behind lot 128.

¶ 13 In August 2003, engineers for Kirkwood sent letters to the residents of Tidalholm Subdivision lots 127 and 128 stating:

> As part of an agreement between the developers for Kirkwood at Arrondale subdivision and the North Carolina Department of Transportation, we will be installing a stormwater discharge pipe through an existing easement along your southern and western property line. This line will provide drainage relief during major storm events. Please note the work should commence within the next 30 days and be completed within 30 days thereafter. . . .

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5. Kirkwood dealt with NCDOT rather than DENR because part of the subdivision's stormwater discharged through public streets.

The project was completed by 2007. The completed project included a drainage pipe that extends beyond Tidalholm Subdivision boundaries and terminates in a wooded ravine behind lot 128 on property owned by Armstrong Developers, Inc., a now dissolved corporation.

¶ 14 In September 2016, upon discovering that the stormwater permit had not been transferred to Tidalholm HOA in 1994, Defendants submitted to DENR a stormwater permit ownership change form to change ownership of the stormwater permit from Defendants to Tidalholm HOA and Tidalholm Village Homeowner's Association, Inc. ("Tidalholm Village HOA").[6] Ownership of the permit was not successfully transferred until 9 October 2019. In September 2018, Hurricane Florence struck Wilmington, and Plaintiffs' homes experienced severe flooding. An engineer for New Hanover County investigated the flooding and discovered that the drainage pipe in the wooded ravine behind Tidalholm Subdivision lot 128 "was approximately 80% blocked." The engineer believed the blockage to be "the cause of the flooding experienced in the Tidalholm neighborhood . . . ."

II. Procedural History

¶ 15 Plaintiffs filed a complaint against Defendants on 4 December 2019 asserting claims for negligence and punitive damages. Defendants answered in February 2021 and joined Tidalholm HOA and Tidalholm Village HOA as third-party defendants. On 1 June 2021, Defendants filed a motion for partial summary judgment, requesting that the court dismiss Plaintiffs' punitive damages claim. After reviewing the forecast of evidence and hearing arguments, the trial court entered partial summary judgment in favor of Defendants on that claim.

¶ 16 Defendants voluntarily dismissed their third-party complaint in July and filed an amended motion for summary judgment in September on Plaintiffs' remaining negligence claim. After reviewing the forecast of evidence and hearing arguments, the trial court granted summary judgment in favor of Defendants and dismissed Plaintiffs' complaint. Plaintiffs timely appealed both orders.

III. Discussion

¶ 17 Plaintiffs argue that the trial court erred by granting summary judgment to Defendants on Plaintiffs' claims for negligence and punitive damages.

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6. Articles of incorporation for Tidalholm Village HOA are not in the record. However, the record indicates that Tidalholm HOA was responsible for lots 1-49 of Tidalholm Subdivision, and Tidalholm Village HOA was responsible for lots 50-137.

A. Standard of Review

¶ 18 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). "A genuine issue of material fact is one that can be maintained by substantial evidence." *Curlee v. Johnson*, 377 N.C. 97, 2021-NCSC-32, ¶ 11 (quotation marks and citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference[.]" *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 335, 777 S.E.2d 272, 278-79 (2015) (quotation marks and citations omitted).

¶ 19 We review a trial court's order granting summary judgment de novo, taking the evidence in the light most favorable to the non-moving party. *Da Silva v. WakeMed*, 375 N.C. 1, 10, 846 S.E.2d 634, 640-41 (2020). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

B. Negligence

¶ 20 Plaintiffs argue that the trial court erred by granting Defendants summary judgment on Plaintiffs' negligence claim. Specifically, Plaintiffs argue that Defendants owed both a statutory and common-law duty to maintain the drainage pipe that extended beyond Tidalholm Subdivision boundaries. Defendants dispute that they owed a duty to Plaintiffs and argue that, even if a duty was owed to Plaintiffs, the statute of repose bars Plaintiffs' claims.

¶ 21 The applicable statute of repose provides, "No 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 the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement." N.C. Gen. Stat. § 1-50(a)(5)(a) (2021).

> For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> . . . .
>
> 5. Actions in contract or in tort or otherwise;

. . . .

> 9. Actions against . . . any person who develops real property or who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

N.C. Gen. Stat. § 1-50(a)(5)(b) (2021). The statute of repose "serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue[.]" *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985) (citations omitted). "If the action is not brought within the specified period, the plaintiff literally has no cause of action." *Hargett v. Holland*, 337 N.C. 651, 655, 447 S.E.2d 784, 787 (1994) (quotation marks, emphasis, and citations omitted). "Summary judgment is proper if the pleadings or proof show without contradiction that the statute of repose has expired." *Glens of Ironduff Prop. Owners Ass'n v. Daly*, 224 N.C. App. 217, 220, 735 S.E.2d 445, 447 (2012) (quotation marks and citation omitted).

¶ 22 Effectively, a statute of repose "creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained." *Hargett*, 337 N.C. at 654, 447 S.E.2d at 787 (citation omitted). Thus, a plaintiff has the burden of showing that they brought the action within six years of either (1) the substantial completion of the improvement or (2) the specific last act or omission of defendant giving rise to the cause of action. *See Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 76, 518 S.E.2d 789, 791 (1999) (citation omitted).

1. Substantial Completion

¶ 23 An improvement is substantially complete when it becomes fit for the purpose for which it was intended. *See* N.C. Gen. Stat. § 1-50(a)(5)(c) (2021). The record evidence indicates that Defendants developed a plan to install a weir box and a concrete bypass pipe between lots 127 and 128 in July 2000. By December 2001, the plan had been amended to include a drainage pipe that extended beyond Tidalholm Subdivision boundaries. A 2003 letter to the residents of Tidalholm Subdivision lots 127 and 128 indicated that a project would take place near the end of the year that included installation of the weir box and bypass pipe. The weir box, bypass pipe, and off-premises drainage pipe were installed by 2007, more than ten years before Plaintiffs filed their complaint and well outside the six-year period of repose.

2. Last Act or Omission

¶ 24 This Court has interpreted the phrase "the later of the last act or omission or date of substantial completion" in N.C. Gen. Stat. § 1-50(a)(5)(a) to mean "the date at which time the party (contractor, builder, etc.) has completed performance of the improvement contract." *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 241, 515 S.E.2d 445, 450 (1999). In the absence of an improvement contract, this Court has "no basis for determining that the 'last act' . . . occurred later than the date of substantial completion." *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 495, 764 S.E.2d 203, 215 (2014).

¶ 25 In *Monson*, plaintiff sued defendant Paramount Homes, Inc. ("Paramount") in 1996 for defective construction of a home built in 1990. 133 N.C. App. at 235, 515 S.E.2d at 446. In 1997, Paramount filed a third-party complaint against Carolina Builders Corporation ("CBC") who had provided the original windows and doors for the home and had repaired them in 1994 at plaintiff's request. *Id.* at 236, 515 S.E.2d at 446. Paramount's third-party complaint was dismissed as outside the applicable period of repose because the home was completed in 1990. *Id.* at 236, 515 S.E.2d at 447. Paramount appealed, arguing that CBC's 1994 repairs were completed pursuant to a warranty and qualified as a last act or omission. *Id.*

¶ 26 This Court rejected Paramount's argument stating, "Assuming *arguendo* that a continuing duty of repair existed pursuant to a warranty [to plaintiff], no evidence indicates that CBC had a continuing duty to repair under the improvement contract with Paramount." *Id.* at 239, 515 S.E.2d at 448. This Court reasoned that "[t]o allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen. Stat. § 1-50(5)." *Id.* at 240, 515 S.E.2d at 449 (citation omitted). Accordingly, this Court held that, although "[a] duty to complete performance may occur after the date of substantial completion, . . . a repair does not qualify as a last act under N.C. Gen. Stat. § 1-50(5) unless it is required under the improvement contract by agreement of the parties." *Id.* at 241, 515 S.E.2d at 450 (quotation marks omitted).

¶ 27 In *Trillium Ridge*, defendant developer contracted to construct homes in a condominium development in 2003. 236 N.C. App. at 484, 764 S.E.2d at 208. In 2010, extensive water damage was discovered and attributed to defects in the original construction of the buildings. *Id.* at 485, 764 S.E.2d at 209. Plaintiff condominium association sued defendant

in 2011 and attempted to avoid the statute of repose by arguing that defendant's last act occurred in 2006 when defendant repaired a resident's deck. *Id.* at 485, 494, 764 S.E.2d at 209, 215. Plaintiff did not produce the original construction contract but argued that the repairs "might have been required as part of the original contract . . . ." *Id.* at 495, 764 S.E.2d at 215. This Court rejected plaintiff's argument, stating that, without the contract, "we have no basis for determining that the 'last act' . . . occurred later than the date of substantial completion[,]" and pointing out that plaintiff "has the burden of showing that he or she brought the action within six years of . . . the specific last act or omission of defendant giving rise to the cause of action." *Id.* at 495, 764 S.E.2d at 215 (quotation marks and citation omitted).

¶ 28 Here, Plaintiffs have not produced a contract related to the off-premises drainage pipe, let alone one that confers maintenance responsibilities on Defendants. Plaintiffs point out that a maintenance plan was required for Defendants to obtain a stormwater permit from DENR. However, Defendants' application for a stormwater permit and the resulting permit issued by DENR to Defendants cannot be construed to be a contract for construction of the off-premises drainage pipe between Plaintiffs and Defendants. Accordingly, the date of substantial completion must be used to determine whether the statute of repose bars Plaintiffs' claim.

3. Exceptions to the Statute of Repose

a. Actual Possession or Control

¶ 29 Plaintiffs rely on N.C. Gen. Stat. § 1-50(a)(5)(d) to argue that the statute of repose is not applicable here because Defendants had a maintenance obligation.

¶ 30 Subsection 1-50(a)(5)(d) provides:

> The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.

N.C. Gen. Stat. § 1-50(a)(5)(d) (2021).

¶ 31 This subsection applies specifically to defendants in actual possession or control of the defective or unsafe condition. Nothing in the subsection indicates that it applies to instances of maintenance obligations generally, and Plaintiffs make no argument to support their position. Additionally, although Plaintiffs' complaint alleges that in September 2018 Defendants were in actual possession or control of the off-premises drainage pipe, the record evidence does not support Plaintiffs' allegation and Plaintiffs have provided no support for this allegation on appeal.

b. Willful or Wanton Negligence

¶ 32 Plaintiffs also argue that the statute of repose is not applicable here because Defendants' conduct was willful or wanton. *See* N.C. Gen. Stat. § 1-50(a)(5)(e) (2021) ("The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of . . . willful or wanton negligence . . . in developing real property . . . or construction of an improvement to real property, or a repair to an improvement to real property . . . ."). " 'Willful or wanton conduct' means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." N.C. Gen. Stat. § 1D-5(7) (2021).

¶ 33 The record evidence, viewed in the light most favorable to Plaintiffs, does not support the conclusion that Defendants' conduct was willful or wanton. Defendants proposed a plan for managing stormwater runoff in eleven vegetated swales and one pond, located between lots 129 and 130, that received a certification of compliance from DENR in 1994. In 1999, an architect hired by a subdivision resident sent a letter to Defendants stating that the drainage ditch behind lot 128 needed to be dredged to alleviate flooding in the subdivision. In 1999 and 2000, DENR notified Defendants that Tidalholm Subdivision was in violation of its certification of compliance because the off-site drainage exceeded Defendants' original calculations, the swales and detention pond had not been properly maintained in various ways, and the recorded deed restrictions for the subdivision had not been received. DENR directed Defendants to develop a plan to correct the violations.

¶ 34 Defendants developed and submitted a plan to resolve the violations, which included the installation of a weir box and a concrete bypass pipe between lots 127 and 128. DENR stated that Defendants' plan as proposed was acceptable; that plan did not show the bypass pipe extending beyond Tidalholm Subdivision boundaries. Meanwhile,

engineers for Kirkwood met with Defendants to develop and submit stormwater management plans to be approved by NCDOT. The plans submitted to NCDOT included the weir box and bypass pipe between lots 127 and 128, as well as the drainage pipe that extended beyond Tidalholm Subdivision boundaries. Although the plans submitted by Kirkwood to NCDOT did not match Defendants' plan that DENR found acceptable, Defendants did not notify DENR of the change.

¶ 35 This evidence shows that Defendants were responsive to DENR's notices of violations but failed to notify DENR that the plans changed due to coordination with a neighboring subdivision. It does not support the conclusion that Defendants' conduct was in "conscious and intentional disregard of and indifference to the rights and safety of others," or that Defendants knew their conduct was "reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7).

¶ 36 Plaintiffs also argue that Defendants' continued failure to include the required deed restrictions, along with their failure to transfer the stormwater permit to Tidalholm HOA and Tidalholm Village HOA, "is evidence that [Defendants] deliberately chose not to discharge their duties in violation of the law and in reckless disregard of the Plaintiffs' rights." Even if these failures are viewed as an intentional disregard for regulatory requirements, Plaintiffs have forecast no evidence indicating that these administrative failures were "reasonably likely to result in injury, damage, or other harm." *Id.*

¶ 37 According to DENR's November 2000 letter to Defendants, the consequence for failing to include the required deed restrictions was that "the subdivision cannot be considered as maintaining a low density[;]" the letter makes no mention that the deed restrictions are necessary for safety reasons. Although Defendants' conduct, viewed in the light most favorable to Plaintiffs, could demonstrate an intentional disregard of and indifference to DENR's regulations, it does not demonstrate an "intentional disregard of and indifference to the rights and safety of others." *Id.*

¶ 38 Because the record evidence indicates that the off-premises drainage pipe was substantially completed in 2007, far more than six years before Plaintiffs filed their complaint, and because no exception to the statute of repose applies, the "pleadings or proof show without contradiction that the statute of repose has expired," and summary judgment was properly granted. *Glens of Ironduff*, 224 N.C. App. at 220, 735 S.E.2d at 447.

C. Punitive Damages

¶ 39 Plaintiffs also argue that the trial court erred by granting Defendants summary judgment on Plaintiffs' claim for punitive damages. Specifically, Plaintiffs argue that the trial court applied the wrong standard when evaluating Defendants' motion for summary judgment on this claim, and that the forecast of evidence could support an award of punitive damages.

¶ 40 Punitive damages may only be awarded "when a cause of action otherwise exists in which at least nominal damages are recoverable by the plaintiff." *Shugar v. Guill*, 304 N.C. 332, 335, 283 S.E.2d 507, 509 (1981) (citation omitted). Because Plaintiffs' negligence claim is barred by the statute of repose, Plaintiffs may not recover punitive damages. Accordingly, we do not address Plaintiffs' arguments.

IV. Conclusion

¶ 41 Because the record shows proof without contradiction that the drainage pipe that extended beyond Tidalholm Subdivision boundaries was substantially completed more than six years before Plaintiffs filed their complaint, Plaintiffs' complaint is barred by the statute of repose. The trial court's orders are affirmed.

AFFIRMED.

Judges DIETZ and CARPENTER concur.

DEVORE v. SAMUEL

[287 N.C. App. 24, 2022-NCCOA-834]

FRED W. DEVORE, III AS GUARDIAN AD LITEM FOR AZARIA HORTON, A MINOR, PLAINTIFF
v.
CHARLES LAMONTE SAMUEL, JR., STACY V. SAMUEL, KINDERCARE EDUCATION, LLC AND KINDERCARE LEARNING CENTERS, LLC, DEFENDANTS

KINDERCARE EDUCATION, LLC AND KINDERCARE LEARNING CENTERS, LLC, DEFENDANTS/THIRD-PARTY PLAINTIFFS
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, AND KEYERA GORDON, THIRD-PARTY DEFENDANTS

No. COA22-305

Filed 20 December 2022

1. Immunity—school bus negligence court proceeding—joinder of local school board as third-party defendant—limited waiver—Industrial Commission only

In a school bus negligence case, in which one of the defendants (an afterschool childcare center) filed a third-party complaint against the local school board in order to pursue claims of contribution and indemnity, there was no merit to defendant's assertion that N.C.G.S. § 143-300.1 (regarding the liability of local school boards in school bus negligence cases) operated to give the local school board the same status as the State Board of Education such that it could be joined as a third-party defendant under Civil Procedure Rule 14 and N.C.G.S. § 1B-1(h) in a court proceeding. Section 143-300.1 provides for a limited waiver of governmental immunity to permit these types of claims only in the Industrial Commission. Therefore, the trial court erred by denying the local school board's motion to dismiss and its order of denial was reversed.

2. Immunity—governmental—waiver—local school board—purchase of excess liability insurance

In a school bus negligence case, in which one of the defendants (an afterschool childcare center) filed a third-party complaint against the local school board in order to pursue claims of contribution and indemnity, where the school board's purchase of excess liability coverage did not constitute a waiver of its immunity—based on the terms of the insurance policy, including an express statement that the board did not intend to waive its immunity—any reliance on this theory of waiver by the trial court when it denied the board's motion to dismiss was in error.

DEVORE v. SAMUEL

[287 N.C. App. 24, 2022-NCCOA-834]

Appeal by third-party defendant from order entered 7 January 2022 by Judge Jesse Caldwell, IV, in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 October 2022.

Shumaker, Loop & Kendrick, LLP, by Steven A. Meckler and Daniel R. Hansen, for third-party plaintiffs-appellees.

J. Melissa Woods and Hope A. Root for third-party defendant-appellant Charlotte-Mecklenburg Board of Education.

DIETZ, Judge.

¶ 1 This case presents an issue of first impression concerning the waiver of governmental immunity for local school boards in school bus negligence cases. As explained below, we hold that the limited waiver of governmental immunity in these bus negligence cases does not permit a defendant to join a local school board as a third-party defendant in a court proceeding on claims of indemnity or contribution.

¶ 2 Although our State's case law permits parties to join the State and state agencies in these third-party proceedings, the applicable statutes and rules do not unambiguously permit joinder of local governmental entities. Accordingly, applying the principle that we must strictly construe these immunity provisions against waiver, we hold that these indemnification and contribution claims are permissible only in the Industrial Commission.

Facts and Procedural History

¶ 3 In June 2018, a Charlotte-Mecklenburg Schools bus dropped off an elementary school student at an afterschool childcare center operated by Defendants KinderCare Education, LLC, and KinderCare Learning Centers, LLC (collectively, "KinderCare"). As the child crossed the street to the KinderCare center, Defendant Charles Samuel struck the child with his SUV.

¶ 4 Plaintiff brought this negligence action on behalf of the injured child against a number of defendants, including KinderCare. Plaintiff did not assert claims against the school bus driver or the Charlotte-Mecklenburg Board of Education, who employed the bus driver. KinderCare later filed a third-party complaint against the Charlotte-Mecklenburg Board of Education and the bus driver, alleging claims for contribution and indemnity.

¶ 5 The school board moved to dismiss on the ground that the third-party claims were barred by governmental immunity. After a hearing, the trial court denied the motion. The school board timely appealed. Although the trial court's order is interlocutory, we possess appellate jurisdiction because the challenged order concerns an issue of governmental immunity. *Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605 (2018).

Analysis

¶ 6 "Counties and other municipalities, as governmental agencies, enjoy the protections of governmental immunity." *Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 606 (2018). This governmental immunity applies to a local school board because it "is a governmental agency, and is therefore not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority." *Magana v. Charlotte-Mecklenburg Bd. of Educ.*, 183 N.C. App. 146, 148, 645 S.E.2d 91, 92 (2007).

¶ 7 We review claims of governmental immunity *de novo*. *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 898 (2017). Waivers of governmental immunity "may not be lightly inferred" and statutes purportedly waiving this immunity "must be strictly construed." *Guthrie v. N. Carolina State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983); *Magana*, 183 N.C. App. at 149, 645 S.E.2d at 92.

I. Waiver of immunity for indemnity/contribution claims

¶ 8 **[1]** We begin by examining KinderCare's argument that the school board may be joined as a third party in this court proceeding because a series of statutes waive the school board's governmental immunity for this type of third-party claim in the court system.

¶ 9 Importantly, the parties do not dispute that KinderCare's third-party claims could be asserted against the school board in the Industrial Commission under the Tort Claims Act. In other words, this dispute is not about whether governmental immunity totally bars these claims. Instead, the issue is whether the school board's statutory waiver of immunity is limited to claims in the Industrial Commission, or whether it is broader and applies to third-party claims asserted in court.

¶ 10 To understand KinderCare's argument, we must first examine the series of statutes and rules on which it is based. We begin with Rule 14 of the North Carolina Rules of Civil Procedure. Rule 14 "permits a defendant in the State courts to sue a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 329,

293 S.E.2d 182, 185 (1982). Subsection (c) of the rule provides that, notwithstanding the Tort Claims Act, the State of North Carolina and state agencies may be joined as third parties in tort actions:

> Rule applicable to State of North Carolina. – Notwithstanding the provisions of the Tort Claims Act, the State of North Carolina may be made a third party under subsection (a) or a third-party defendant under subsection (b) in any tort action. In such cases, the same rules governing liability and the limits of liability of the State and its agencies shall apply as is provided for in the Tort Claims Act.

N.C. Gen. Stat. § 1A-1, Rule 14(c).

¶ 11 Similarly, the Uniform Contribution Among Tort-Feasors Act states that the right to contribution "shall apply to tort claims against the State. However, in such cases, the same rules governing liability and the limits of liability shall apply to the State and its agencies as in cases heard before the Industrial Commission." N.C. Gen. Stat. § 1B-1(h).

¶ 12 Our Supreme Court has interpreted Rule 14 and N.C. Gen. Stat. § 1B-1(h) as a waiver of sovereign immunity that permits the State to "be joined as a third-party defendant, whether in an action for contribution or in an action for indemnification, in the State courts," subject to the limitations set out in those provisions. *Teachy*, 306 N.C. at 332, 293 S.E.2d at 187. In other words, *Teachy* interpreted these rules as expanding the limited waiver in the Tort Claims Act—one which requires the claims to be brought in the Industrial Commission—to permit third party claims in court proceedings.

¶ 13 Thus, as the parties acknowledge, the *State* and *state agencies* can be joined as third-party defendants in court proceedings for claims of contribution or indemnification under *Teachy*. The critical question in this appeal is whether a *local school board* likewise may be joined in these court proceedings.

¶ 14 It is well settled that a local school board is not "the State of North Carolina" for ordinary legal purposes. There is a difference between the State and state agencies—which possess sovereign immunity—and local government entities such as local school boards—which possess only governmental immunity, not sovereign immunity. *See*, *e.g.*, *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 2021-NCSC-163, ¶¶ 22, 26 (distinguishing between state agencies and local governmental school entities).

¶ 15 But KinderCare points to a provision of the Tort Claims Act governing claims "against county and city boards of education for accidents involving school buses or school transportation service vehicles." N.C. Gen. Stat. § 143-300.1. In Section 143-300.1, the General Assembly provided that the liability of a local school board in school bus negligence cases "shall be the same in all respects" as a similar claim against the State Board of Education:

> Claims against county and city boards of education for accidents involving school buses or school transportation service vehicles.
>
> (a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education [for school bus negligence] when:
>
> (1) The driver is an employee of the county or city administrative unit of which that board is the governing body, and the driver is paid or authorized to be paid by that administrative unit . . .
>
> . . . *The liability of such county or city board of education*, the defenses which may be asserted against such claim by such board, the amount of damages which may be awarded to the claimant, and the procedure for filing, hearing and determining such claim, the right of appeal from such determination, the effect of such appeal, and the procedure for taking, hearing and determining such appeal *shall be the same in all respects as is provided in this Article with respect to tort claims against the State Board of Education* except as hereinafter provided.

N.C. Gen. Stat. § 143-300.1 (emphasis added).

¶ 16 KinderCare relies on this statutory language to assert that "the process for determining a local school board's liability for negligent school-bus operation" must be "undertaken just as it would be if the local board were the State Board of Education." It follows, according to KinderCare, that for purposes of school bus negligence claims, a local school board is the State Board of Education. And, because the State Board of Education is a state agency, KinderCare further argues that the

local school board in this case can be joined as a third-party defendant under Rule 14 and N.C. Gen. Stat. § 1B-1(h) even though those provisions only apply to the State and state agencies.

¶ 17 The flaw in this argument is that the statute does not actually say that, in school bus negligence cases, a local school board is considered the State Board of Education. Instead, the statute explains that a local school board's *liability*, together with other aspects of the case such as the "amount of damages," the "procedure for filing, hearing and determining such claim," and "the right of appeal from such determination," shall be the same as provided "with respect to tort claims against the State Board of Education." N.C. Gen. Stat. § 143-300.1.

¶ 18 This language suggests that the General Assembly understood these local school boards are *not* the State Board of Education. But because these local entities now employ most bus drivers, the State chose to waive these local entities' governmental immunity, as it did with the State Board of Education's sovereign immunity, and to apply the same framework for suits against these local entities that apply if the school bus driver were employed by the State Board of Education. This waiver, though, is a limited one. Section 143-300.1 requires the claim to be brought in the Industrial Commission and does not (at least, on its own) permit a school bus negligence claim to be brought in the court system.

¶ 19 As noted above, in interpreting this provision, and the corresponding provisions of Rule 14 and N.C. Gen. Stat. § 1B-1(h), we are governed by the well-settled rule that waiver of governmental immunity "may not be lightly inferred" and that statutes purporting to waive this immunity "must be strictly construed." *Guthrie*, 307 N.C. at 537–38, 299 S.E.2d at 627; *Magana*, 183 N.C. App. at 149, 645 S.E.2d at 92. Applying this principle here, we hold that the language of N.C. Gen. Stat. § 143-300.1 does not unambiguously provide that local school boards are considered a state agency (that is, considered the State Board of Education) for purposes of third-party actions under Rule 14 and N.C. Gen. Stat. § 1B-1(h). Strictly construing Section 143-300.1, it is a limited waiver that permits these claims only in the Industrial Commission.

¶ 20 This result stems not only from the plain language of N.C. Gen. Stat. § 143-300.1, but also the fact that it was enacted by the General Assembly *before* Rule 14 and N.C. Gen. Stat. § 1B-1(h)—meaning the legislature could not have crafted this language with the intent to permit local school boards to be joined in third party actions under these later-enacted statutes. Moreover, when the legislature enacted Rule 14 and N.C. Gen. Stat. § 1B-1(h), it chose not to include school boards or

other local governmental entities in the language of these provisions, instead limiting them to the State and state agencies.

¶ 21 This result is reinforced by the Supreme Court's holding in *Teachy*. There, the Supreme Court acknowledged that "there exists in North Carolina a common law right to indemnification of a passively negligent tort-feasor from an actively negligent tort-feasor." *Teachy*, 306 N.C. at 332, 293 S.E.2d at 186–87. The Court further observed that the "right to indemnification arises out of a tort claim, the State's immunity to which was abrogated by the Tort Claims Act." *Id.* at 332, 293 S.E.2d at 187.

¶ 22 Thus, the Court held, because the State waived immunity for tort claims, it had also waived immunity for corresponding third-party indemnification and contribution claims. But, importantly, the Court went on to observe that the "only controversy is whether the State courts are *the proper forum* for such actions." *Id.* (emphasis added). The Court made this observation because, ordinarily, tort claims against the State can be brought *only* in the Industrial Commission.

¶ 23 Simply put, the ultimate holding in *Teachy*—that the third-party claims against the State could be asserted in the court system—is governed by two factors: (1) that the Tort Claims Act waives immunity for the State and state agencies for tort claims, and (2) that because of this waiver of immunity, the express reference to the State in the language of Rule 14 and N.C. Gen. Stat. § 1B-1(h) authorizes litigants to join the State and its agencies as third parties in claims of contribution or indemnity sounding in tort.

¶ 24 With school bus negligence claims against local school boards, by contrast, we have only the first of these two factors—the waiver of immunity under the Tort Claims Act. The second factor—an express statutory authorization to pursue the claim outside the Industrial Commission—does not exist. Without that statutory authorization, *Teachy* and its progeny do not permit these claims to be brought in any forum other than the Industrial Commission.

¶ 25 We acknowledge that our strict construction of these provisions means KinderCare must assert its contribution and indemnity claims against the school board in the Industrial Commission. That will create a second, parallel proceeding and consume judicial resources that could be spared if the school board were joined as a third party in this action. But this Court has no authority to expand the limited waiver of immunity enacted by the General Assembly, which confines these claims to the Industrial Commission. Strictly construing these provisions, as we must, local school boards are not "the State" for purposes of Rule 14 and

N.C. Gen. Stat. § 1B-1(h). If this result is not intended, then the General Assembly can amend N.C. Gen. Stat. § 143-300.1, or amend Rule 14 and N.C. Gen. Stat. § 1B-1(h), to clarify that these third-party claims against local school boards may be brought in a court proceeding as well.

¶ 26 In sum, we hold that the limited waiver of governmental immunity for school bus negligence claims against local school boards applies only to claims brought in the Industrial Commission. To the extent the trial court relied on this theory of waiver to deny the school board's motion to dismiss, the ruling was error.

II. Waiver of immunity through purchase of insurance

¶ 27 **[2]** KinderCare also argues that the school board waived its governmental immunity through the purchase of insurance.

¶ 28 Under N.C. Gen. Stat. § 115C-42, "local boards can elect to waive their governmental immunity from tort actions in North Carolina's superior courts by purchasing liability insurance." *Martinez v. Wake Cty. Bd. of Educ.*, 258 N.C. App. 466, 471, 813 S.E.2d 658, 662 (2018). The waiver of immunity through liability insurance applies only to the extent that the school board "is indemnified by the insurance contract from liability for the acts alleged." *Hinson v. City of Greensboro*, 232 N.C. App. 204, 210, 753 S.E.2d 822, 827 (2014). "If the liability policy, by its plain terms, does not provide coverage for the alleged acts, then the policy does not waive governmental immunity." *Ballard*, 257 N.C. App. at 565, 811 S.E.2d at 606. As with other claims of waiver, when this Court "examines policy provisions allegedly waiving governmental immunity, we must strictly construe the provision against waiver." *Id.*; *Magana*, 183 N.C. App. at 149, 645 S.E.2d at 92.

¶ 29 Here, the school board purchased an excess liability policy that applies above the school board's $1,000,000 self-insured retention. The policy expressly states that it provides no coverage unless the school board first becomes liable for, and pays, the full amount of the self-insured retention. The policy further states that "this policy is not intended by the Insured to waive its governmental immunity" and that "this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses are asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable."

¶ 30 As KinderCare acknowledges, this Court repeatedly has held that this type of excess liability coverage does not waive governmental immunity. *See, e.g.*, *Magana*, 183 N.C. App. at 148–49, 645 S.E.2d at 92–93;

Doe v. Charlotte-Mecklenburg Bd. of Educ., 222 N.C. App. 359, 731 S.E.2d 245 (2012). KinderCare asserted in its appellee's brief that our Supreme Court has never addressed this question and that this Court's precedent "are ripe for overturning as illogical, against public policy, and unfair to every family with public-school-aged children." At oral argument, KinderCare further explained that it sought to preserve this argument for further review in the Supreme Court.

¶ 31 We must follow *Magana* and its progeny as these cases are indistinguishable and controlling. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Thus, to the extent that the trial court relied on this theory of waiver to deny the school board's motion to dismiss, the ruling was error. We acknowledge that KinderCare has preserved its challenge to this line of cases should it seek further appellate review on this issue.

¶ 32 Having concluded that there was no basis in the record before us to find a waiver of the school board's governmental immunity for these third-party claims in the court system, we reverse the trial court's order and remand for entry of an order granting the school board's motion to dismiss.

Conclusion

¶ 33 We reverse the trial court's order and remand for entry of an order granting the Charlotte-Mecklenburg Board of Education's motion to dismiss.

REVERSED AND REMANDED.

Judges CARPENTER and GRIFFIN concur.

DILLREE v. DILLREE

[287 N.C. App. 33, 2022-NCCOA-835]

VERONICA JANE DILLREE, BY AND THROUGH HER GENERAL GUARDIAN, EMILY TOBIAS, PLAINTIFF
v.
HARRY DILLREE, AND HIS ATTORNEY-IN-FACT, LISA WILCOX, DEFENDANTS

No. COA22-423

Filed 20 December 2022

Guardian and Ward—incompetent spouse—guardian's authority —to cause legal separation—equitable distribution claim

In a case involving an elderly husband and wife who were both experiencing cognitive decline, where the clerk of superior court adjudicated the wife as incompetent and appointed her a general guardian, who then separated the wife from her husband and placed her in an assisted living facility, the general guardian lacked the authority to cause a legal separation on behalf of the incompetent wife for the purpose of bringing an equitable distribution claim. Therefore, the trial court lacked subject matter jurisdiction to hear the equitable distribution claim and should have dismissed the action pursuant to Civil Procedure Rule 12(b)(1).

Appeal by Defendants-Appellants from orders entered 1 November 2021 by Judge Warren McSweeney in Moore County District Court. Heard in the Court of Appeals 15 November 2022.

Wilson, Reives, Silverman & Doran, PLLC, by Jonathan Silverman, for Plaintiff-Appellee.

Wyrick Robbins Yates & Ponton LLP, by Charles W. Clanton, K. Edward Greene, and Jessica B. Heffner, for Defendants-Appellants.

INMAN, Judge.

¶ 1 This appeal presents an issue not previously decided by this Court: whether a general guardian has the power to cause a legal separation on behalf of an incompetent spouse for the purpose of bringing an equitable distribution claim. Construing our General Statutes and applying precedent from the divorce context, we hold a guardian is not so authorized.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 The record tends to show the following:

¶ 3 Defendant-Appellant Harry Dillree and Jane Dillree, originally college sweethearts in the 1950s, eventually married in the 1980s, after both had children from previous marriages. For decades, the Dillrees had a loving marriage: they shared common interests, golfed and travelled together, and were affectionate toward each other. The couple owned and lived in a home in Pinehurst, North Carolina, and Mr. Dillree retired early so he could spend more time with his wife.

A. Ms. Dillrees' Mental Decline and Guardianship Proceedings

¶ 4 In 2014, Ms. Dillree was diagnosed with Alzheimer's disease. As her condition deteriorated, Mr. Dillree stepped away from his hobbies to care for her. According to Mr. Dillree's adult daughter, Defendant-Appellant Laura Wilcox, the Dillrees' relationship remained loving during this time and neither of them indicated they wanted to leave the marriage. Ms. Wilcox never saw verbal or physical abuse or any other indication the two were unhappy.

¶ 5 However, in January 2017, one of Ms. Dillree's adult daughters, Susan Allen, observed Mr. Dillree making disparaging comments to Ms. Dillree because of her condition. On 19 January 2017, Ms. Dillree's other adult daughter, Valerie Hunter, filed with the Moore County Clerk of Superior Court a petition to declare Ms. Dillree incompetent. The petition, accompanied by a letter from Ms. Dillree's treating physician, alleged that Mr. Dillree was incapable of providing his wife with proper care because he failed to administer her Alzheimer's medication, fed her once a day at most, and neglected to take her to medical appointments, in part because of his own cognitive decline. It further alleged that Mr. Dillree was verbally and physically abusive toward Ms. Dillree. The clerk appointed a guardian *ad litem* to investigate the allegations in the petition and to represent Ms. Dillree's interest in the proceeding. The guardian *ad litem* visited the Dillrees' home that afternoon, spoke with both Mr. and Ms. Dillree, and filed an affidavit with the clerk reporting her observations.

¶ 6 The next day, on the pretense of taking them out for lunch, Ms. Hunter drove the Dillrees to the Moore County Courthouse to appear for a hearing on the motion. The clerk adjudicated Ms. Dillree incompetent and appointed Plaintiff-Appellee Emily Tobias as the interim guardian of Ms. Dillree's person and estate. Ms. Tobias took custody of Ms. Dillree immediately following the hearing.

¶ 7 Ms. Dillree was initially hospitalized and then transferred to a care facility to ensure her well-being and to keep her physically separate from Mr. Dillree. Ms. Tobias determined the separation was necessary, in part, because Ms. Dillree did not have the capacity to consent to sex

with her husband but expressed that she enjoyed sexual activity with him. By the end of the month, Ms. Tobias had Ms. Dillree transferred to Penick Village, an assisted living facility with a memory care unit in Pinehurst. The Dillrees have lived apart since then.

¶ 8 In March 2017, the trial court appointed Ms. Tobias as her general guardian. The order found that Ms. Dillree's "medical and mental condition requires more care, attention, and safety control than her 80-year-old husband is capable of providing without professional assistance," that the Dillrees "have substantial financial assets, but it is not in the best interests of [Ms. Dillree] to dissolve all of her assets for division into a Guardianship account," and that the general guardian shall approve visitation schedules for Mr. Dillree with Ms. Dillree at Penick Village in accord with her "best interests" and "wishes." Ms. Dillree has not been restored to competency, and she has remained at Penick Village.

B. Mr. Dillree's Mental Decline

¶ 9 Mr. Dillree became distraught after his wife's removal from their marital home, and his mental condition deteriorated. Ms. Tobias allowed Mr. Dillree limited visits with his wife for one to two hours at a time despite his requests to spend the day with her. Mr. Dillree's behavior made Penick Village staff and visitors uncomfortable, and he threatened to harm staff if they did not let him see his wife. He was then prohibited from the facility. In April 2018, after Mr. Dillree told his neuropsychologist about a plan to kidnap his wife from Penick Village, he was involuntarily committed to a psychiatric facility and a petition was filed by Penick Village staff to have him declared incompetent.

¶ 10 In exchange for dismissal of the involuntary commitment and incompetency proceedings, Ms. Wilcox moved her father to a care facility in Libertyville, Illinois where she lives. Mr. Dillree has since then been diagnosed with Alzheimer's disease, and Ms. Wilcox was appointed his guardian to represent his interests in this litigation. Mr. Dillree, through counsel, requested that Ms. Dillree be moved to the same facility or area so that they could be together or near each other. Ms. Tobias did not respond. In January 2019, and again in November 2019, counsel for Mr. Dillree filed motions to alter the guardianship and to have Ms. Dillree moved to Illinois. The trial court denied each of those motions.

C. Disputes Regarding Mr. Dillree's Financial Support of Ms. Dillree

¶ 11 The parties disagree about Mr. Dillree's financial support of his wife and her care since she was removed from their home.

¶ 12 In the four years between January 2017 and January 2021, Ms. Tobias had received a total of $1,090,803 for Ms. Dillree's benefit from various sources, including approximately $7,000 per month in proceeds from a long-term care insurance policy.

¶ 13 Years before the Dillrees' cognitive decline, they had planned their estates together, with each being the beneficiary of the other's separate will and trust. But in July 2017, a few months after Ms. Dillree was deemed incompetent, Mr. Dillree amended the Declaration of the Harry D. Dillree Trust to remove Ms. Dillree as the beneficiary and Ms. Allen, her daughter, as a co-trustee.

¶ 14 In August 2020, while preparing tax returns, Ms. Tobias learned of a Morgan Stanley account jointly owned by Mr. and Ms. Dillree worth over four million dollars. She asked Mr. Dillree's attorney to evenly divide and distribute funds in the account. One month later, the parties agreed via e-mail that Mr. Dillree would pay $15,000 per month for Ms. Dillree's 24-hour care as well as guardian fees then accrued in the amount of $77,000, and Ms. Tobias would not pursue distribution of funds from the joint brokerage account.

¶ 15 In addition to the jointly titled Morgan Stanley account, Ms. Dillree and Mr. Dillree each hold separate brokerage accounts in trust in values exceeding $8,000,000. Because of Mr. and Ms. Dillree's incapacity, their respective children are now successor trustees of their trusts. Ms. Tobias contends the brokerage accounts held by these trusts constitute marital and divisible property subject to equitable distribution. Since entry of the orders appealed from, the trial court has allowed joinder of the Harry D. Dillree Trust and the Veronica Jane Dillree Trust to this action.

D. Equitable Distribution Proceeding

¶ 16 In January 2021, four years after Ms. Dillree was adjudicated incompetent and removed from the marital home, Ms. Tobias filed a complaint on behalf of Ms. Dillree against Mr. Dillree and his attorney-in-fact and daughter, Ms. Wilcox (collectively "Defendants-Appellants"), seeking, pursuant to N.C. Gen. Stat. §§ 50-20, 50-22 (2021), interim distribution of marital property, equitable distribution, and injunctive relief. The trial court entered a temporary restraining order ("TRO") to enjoin and restrain Defendants-Appellants from engaging in any conduct that would cause the disappearance, waste, or conversion of the Dillrees' joint Morgan Stanley brokerage account. One month later, the trial court entered orders continuing and modifying the TRO to allow Defendants-Appellants to spend funds necessary to care for Mr. Dillree.

¶ 17 In March 2021, Defendants-Appellants filed motions to dismiss the complaint pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6), for lack of subject matter jurisdiction, standing, and failure to state a claim upon which relief can be granted. Ms. Tobias, Ms. Allen, Ms. Wilcox, a staff member at Penick Village, and Nolan Hill, a close family friend, testified at the hearing on the motions. The trial court took the matter under advisement, and in November 2021 denied both motions to dismiss. Defendants-Appellants filed timely written notice of appeal.

II. ANALYSIS

A. Appellate Jurisdiction

¶ 18 "Interim equitable distribution orders are by nature preliminary to entry of a final equitable distribution judgment and thus are interlocutory." *Hunter v. Hunter*, 126 N.C. App. 705, 707, 486 S.E.2d 244, 245 (1997) (citing *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Pursuant to our General Statutes, however, a party may appeal from an interlocutory order that affects a substantial right. N.C. Gen. Stat. § 7A-27(b)(3)a. (2021). "A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." *Estate of Redden v. Redden*, 179 N.C. App. 113, 116, 632 S.E.2d 794, 797 (2006) (citation and quotation marks omitted). "[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted). The appellant has the burden to establish that a substantial right will be affected unless the appellant is allowed immediate appeal from an interlocutory order. *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 804 (2002).

¶ 19 Defendants-Appellants acknowledge their appeal is interlocutory in nature, but they allege the trial court's restraining orders and injunction affect a substantial right and work injury to them in several ways: (1) the orders deprive them of their right to freely manage and use the property in the joint brokerage account; (2) Plaintiff-Appellee's other pending motions for joinder of both spouses' trusts and interim distribution would require Defendants-Appellants to pay and deplete assets in the fund; (3) the pending motion for attorney's fees would require a not insignificant payment; (4) payment of statutory guardian fees, up to five percent of assets, would constitute burdensome litigation costs; (5) the

orders create the possibility of inconsistent verdicts; and (6) the orders interfere with Mr. Dillree's constitutional right to marry.

¶ 20 In the alternative, Defendants-Appellants request we exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits of this appeal. Rule 2 allows this Court to suspend its rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2 (2022). Plaintiff-Appellee does not object to this Court reaching the issues presented in this interlocutory appeal to promote judicial economy and ensure an expeditious resolution of this case. Plaintiff-Appellee also notes the trial court certified this matter as affecting a substantial right pursuant to Section 7A-27(b)(3)a., but that certification does not appear in the record on appeal.

¶ 21 Because, as explained below, Defendants-Appellants' challenge to the trial court's subject matter jurisdiction is meritorious and our decision will result in final resolution of this matter and is in the public interest, we invoke Rule 2 to hear this appeal.

B. 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction

¶ 22 Defendants-Appellants contend the trial court erred in denying their 12(b)(1) motion to dismiss for lack of subject matter jurisdiction because Mr. and Ms. Dillree never legally separated, and, if they did, Ms. Dillree's guardian did not have the authority to cause the separation. Our General Statutes and precedent support reversing the trial court's denial of Defendant's motion to dismiss on this ground.

1. Standard of Review

¶ 23 The plaintiff bears the burden of demonstrating subject matter jurisdiction. *Harper v. City of Asheville*, 160 N.C. App. 209, 217, 585 S.E.2d 240, 245 (2003). We review a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction *de novo*. *Morgan-McCoart v. Matchette*, 244 N.C. App. 643, 645, 781 S.E.2d 809, 811 (2016). On *de novo* review of a 12(b)(1) motion for lack of subject matter jurisdiction, this Court "considers the matter anew," including matters outside the pleadings, "and freely substitutes its own judgment for that of the trial court." *Bradford v. Bradford*, 279 N.C. App. 109, 2021-NCCOA-447, ¶ 9 (2021) (citation omitted). Statutory construction is also a question of law reviewed *de novo* on appeal. *Id.*

2. Equitable Distribution & Separation Law

¶ 24 A party may file an equitable distribution claim at any time after a husband and wife begin living separate and apart from each other. N.C. Gen. Stat. § 50-21(a) (2021). *See also id.* § 50-20(k) ("The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of respective parties vesting at the time of the parties' separation."). A trial court does not have subject matter jurisdiction over an equitable distribution claim before the date of separation. *See Standridge v. Standridge*, 259 N.C. App. 834, 836-38, 817 S.E.2d 463, 465-66 (2018) (vacating an order for equitable distribution because both parties raised a claim for equitable distribution prior to the date of separation).

¶ 25 The same test employed to determine the date of separation in divorce proceedings applies in the equitable distribution context. *Hall v. Hall*, 88 N.C. App. 297, 299, 363 S.E.2d 189, 191 (1987). Separation "begins on the date the parties physically separate *with the requisite intention that the separation remain permanent*[.]" *Bruce v. Bruce*, 79 N.C. App. 579, 582, 339 S.E.2d 855, 858 (1986) (emphasis added). Living separate and apart "implies the living apart for such a period in such a manner that those in the neighborhood may see that the husband and wife are not living together." *Dudley v. Dudley*, 225 N.C. 83, 86, 33 S.E.2d 489, 491 (1945) (quotation marks and citations omitted). "When the parties objectively have held themselves out as man and wife and the evidence is not conflicting, we need not consider the subjective intent of the parties." *Schultz v. Schultz*, 107 N.C. App. 366, 373, 420 S.E.2d 186, 190 (1992). However, if the evidence is conflicting, the trial court must consider subjective intent. *See id.* at 372, 420 S.E.2d at 190; *Byers v. Byers*, 222 N.C. 298, 304, 22 S.E.2d 902, 906 (1942) ("There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the time alleged as the beginning of the separation period[.]").

a. At best, there is conflicting evidence of a public showing that the Dillrees were legally separated.

¶ 26 Defendants-Appellants contend Finding of Fact 35, that "there has been a public showing of separation between the Dillrees" based on specified events occurring after Ms. Dillree was adjudicated incompetent, is unsupported by the evidence and amounts to legal error. Although Ms. Tobias had custody of Ms. Dillree's person as her guardian as of 20 January 2017 and ultimately removed Ms. Dillree from the marital

home, Defendants-Appellants argue this physical separation did not establish a legal separation for the purposes of equitable distribution.

¶ 27 Though neither party addressed the nature of Finding 35 in their appellate briefs, at oral argument, counsel for Defendants-Appellants contended the determination that the parties held themselves out as separated is a conclusion of law, based on a summary of findings in the trial court's order. To the extent the trial court applied legal principles to the facts, its determination is a mixed question of law and fact, fully reviewable on appeal. *Hinton v. Hinton*, 250 N.C. App. 340, 347, 792 S.E.2d 202, 206 (2016).

¶ 28 Our Court has concluded that living under different roofs and ceasing sexual relations do not, absent other evidence, constitute a separation. *Lin v. Lin*, 108 N.C. App. 772, 775-76, 425 S.E.2d 9, 10-11 (1993). Further, there is no separation "when the association between [spouses] has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase." *In re Estate of Adamee*, 291 N.C. 386, 392, 230 S.E.2d 541, 546 (1976).

¶ 29 The trial court's order appointing Ms. Tobias as general guardian provided visitation for Mr. Dillree with Ms. Dillree at Penick Village in accordance with her "best interests" and "wishes." Ms. Tobias testified that she physically separated the Dillrees because Mr. Dillree could no longer provide proper care for Ms. Dillree and Ms. Dillree was unable to consent to sex as an incompetent person. No evidence in the record reflects that, prior to commencing this action, Ms. Tobias indicated the Dillrees were legally separated. Nolan Hill, a close friend of the couple, testified that Mr. Dillree became upset and sad when he could not visit his wife, and Mr. Hill did not understand the Dillrees to be legally separated.

¶ 30 Plaintiff-Appellee cites several other of the trial court's findings to support the conclusion that there has been a public showing of the Dillrees' separation. She enumerates the following examples listed in Finding 35: (1) Mr. Dillree changed his estate plans; (2) counsel negotiated Ms. Dillree's financial support; and (3) the "proceedings between Mr. Dillree and those acting on Ms. Dillree's behalf" were adversarial in nature. It is not apparent from the record that any member of the public, including those in the Dillrees' community, knew this information, much less that either Mr. or Ms. Dillree brought it to anyone else's attention. Plaintiff-Appellee has cited no legal authority to support the trial court's determination based on the evidence of record.

¶ 31 Because, at best, there is conflicting evidence about whether the Dillrees objectively held themselves out as legally separated while they were physically separated as a result of their guardianships and medical conditions, we must consider the subjective intent of the parties. *See Schultz*, 107 N.C. App. at 372, 420 S.E.2d at 190.

b. A guardian may not substitute subjective intent for an incompetent spouse and cause a separation for purposes of equitable distribution.

¶ 32 Defendants-Appellants argue: (1) there is no evidence Ms. Dillree formed the subjective intent to permanently separate from Mr. Dillree before she was adjudicated incompetent; and (2) Ms. Tobias, as Ms. Dillree's guardian, does not have the statutory authority to cause a marital separation for the purposes of equitable distribution on behalf of Ms. Dillree. Construing our General Statutes together and applying our precedent, we agree.

¶ 33 Ms. Tobias testified that she physically separated the Dillrees because Mr. Dillree could no longer provide proper care for Ms. Dillree and because she could not consent to sexual activity: "[Mr. Dillree]'s behavior was such that we needed to keep her safe. . . Issues developed from the interim hearing where she was unable to give consent and she didn't recognize him, and so we had to keep him physically separate from her as far as a marital sexual nature." Staff from Penick Village echoed Ms. Tobias' concern. Ms. Tobias further testified Ms. Dillree had "no capacity to participate in a decision" about her placement. In March 2017, two months after Ms. Dillree was removed from the marital home, the trial court found that her "current medical and mental condition requires more care, attention, and safety control than her 80-year-old husband is capable of providing without professional assistance." The guardian *ad litem* report detailed Ms. Dillree's cognitive difficulties. Because Ms. Dillree was deemed incompetent, she could not form the requisite subjective intent to separate from Mr. Dillree for purposes of equitable distribution. *See Moody v. Moody*, 253 N.C. 752, 757, 117 S.E.2d 724, 727 (1961) (holding a husband was not capable of forming the requisite intent to separate for a divorce based on mutual consent because he was "not then rational" after a serious brain injury); *Hall*, 88 N.C. App. at 299, 363 S.E.2d at 191.

¶ 34 It is well settled that general guardians are prohibited from maintaining an action for *divorce* on behalf of an incompetent person based on a year-long separation. *Freeman v. Freeman*, 34 N.C. App. 301, 304, 237 S.E.2d 857, 859 (1977) ("The majority rule that a suit for divorce is

so personal and volitional that it cannot be maintained by a guardian on behalf of an incompetent is sound."). Chapter 50 of our General Statutes has incorporated this general prohibition: "a guardian appointed in accordance with Chapter 35A of the General Statutes . . . may commence, defend, maintain, arbitrate, mediate, or settle any action authorized by this Chapter on behalf of an incompetent spouse. However, only a competent spouse may commence an action for absolute divorce." N.C. Gen. Stat. § 50-22 (2021). Subsection 50-21(a) of Chapter 50 sets forth the general procedures for equitable distribution: "At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated[.]" However, neither this statute nor any other expressly grants a guardian the power to cause a separation for the purposes of equitable distribution or divorce.

¶ 35 Chapter 35A of our General Statutes provides for incompetency and guardianship. A general guardian is "[a] guardian of both the estate and the person." N.C. Gen. Stat. § 35A-1202(7) (2021). A guardian of the person is "appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward." *Id.* § 35A-1202(10). Section 35A-1241 confers the guardian of the person the power to take custody of the person of the ward and to establish the place of abode of the ward. § 35A-1241(a)(1)-(2). A guardian of the estate, by contrast, is "appointed solely for the purpose of managing the property, estate, and business affairs of a ward." § 35A-1202(9). A general guardian or guardian of the estate has the "power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest," to include: taking possession of the ward's estate; maintaining any appropriate action to recover possession of the ward's property; completing performance of contracts; and continuing any business venture entered into by the ward. § 35A-1251(1),(3),(4),(15).

¶ 36 Interpreting Chapters 50 and 35A to discern a guardian's authority relative to domestic relations law, we are guided by several canons of statutory construction. First, and perhaps most instructive, "[w]hen multiple statutes address a single matter or subject, they must be construed together, *in pari materia*, to determine the legislature's intent. Statutes *in pari materia* must be harmonized, to give effect, if possible, to all provisions without destroying the meaning of the statutes involved." *DTH Media Corp. v. Folt*, 374 N.C. 292, 300, 841 S.E.2d 251, 257 (2020) (citations and quotation marks omitted). While separate chapters

of our General Statutes, Sections 50-22 and 35A-1241, 35A-1251 address the same subject matter—the authority of a guardian to act on behalf of an incompetent person—and Section 50-22 explicitly cross-references Chapter 35A. Interpreting Section 50-22 to prohibit a guardian from causing a separation for purposes of equitable distribution does not otherwise limit the guardian's powers under Sections 35A-1241 and 35A-1251 to maintain an action to recover possession of the ward's property. The Legislature did not provide a mechanism in Chapter 50 for a guardian to seek the incompetent person's assets.

¶ 37 Second, our Legislature is presumed to have full knowledge of prior and existing law. *Polaroid Corp. v. Offerman*, 349 N.C. 290, 303, 507 S.E.2d 284, 294 (1998) *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2001). Relevant here, at the time it enacted Section 50-22 and the prohibition of a guardian filing for absolute divorce on behalf of an incompetent person, in particular, we presume the General Assembly was aware of our precedents that: (1) an incompetent spouse is not capable of forming the requisite intent to separate for a divorce, *Moody*, 253 N.C. at 757, 117 S.E.2d at 727; (2) the separation requirement for divorce is the same for purposes of equitable distribution, *Hall*, 88 N.C. App. at 299, 363 S.E.2d at 191; (3) separation begins at the time of physical separation where one party has formed the intent for the separation to be permanent, *Bruce*, 79 N.C. App. at 582, 339 S.E.2d at 858; and (4) the trial court does not have subject matter jurisdiction over a claim for equitable distribution if it is filed prior to the date of separation, *Standridge*, 259 N.C. App. at 836, 817 S.E.2d at 465.

¶ 38 Next, "words must be given their common and ordinary meaning, nothing else appearing." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974) (citation omitted). Subsection 35A-1251(3) authorizes a guardian "to *maintain* any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property[.]" (Emphasis added). Chapter 35A does not define the term "maintain" in its definitions section. *See* § 35A-1202 (providing definitions for the Subchapter). Merriam-Webster's Dictionary defines "maintain" as "to keep in an *existing state*," "to preserve," or "to continue." We interpret "maintain" in the context of Subsection 35A-1251(3), alongside Section 50-22, to authorize a guardian to continue an action for equitable distribution only when the claim already exists at the time the guardianship is formed, not after. In other words, pursuant to Section 50-22, a guardian would be authorized to bring an action for equitable distribution on behalf of an incompetent person who had been

legally separated prior to incompetency. And a general guardian would be authorized to bring suit for equitable distribution where the other, presumably competent, spouse caused the physical separation with the requisite intent, because subject matter jurisdiction existed prior to the guardianship, so long as the guardian does not allege intent on behalf of the incompetent spouse.

¶ 39 A fourth canon of statutory construction helps us determine whether Chapter 35A or 50 ultimately governs the issue before us. "When two statutes deal with the same subject matter the statute which is addressed to a specific aspect of the subject matter takes precedence over the statute which is general in application unless the General Assembly intended to make the general statute controlling." *In re Greene*, 297 N.C. 305, 310, 255 S.E.2d 142, 146 (1979). Because Section 50-22 applies specifically to divorce and alimony "action[s] on behalf of an incompetent," it "takes precedence over" the general powers granted to guardians under Sections 35A-1251 and 35A-1241. *See id.*

¶ 40 The legislative history of Chapter 50 further bolsters our reading of the statutes that a general guardian lacks the authority to cause marital separation on behalf of an incompetent spouse. Section 50-22 was amended in 2009 to: (1) expand the persons authorized to maintain an action authorized by Chapter 50 to attorneys-in-fact, any guardian appointed under Chapter 35A, and guardians *ad litem;* and (2) remove a provision that the trial court may order equitable distribution on behalf of an incompetent spouse without entering a decree of divorce after the parties have been separated for one year. 2009 N.C. Sess. Laws 366, ch. 224, § 1.

¶ 41 Our interpretation is also consistent with precedent holding that a guardian may not substitute his or her intent for that of an incompetent person as to the disposition of property. *See, e.g.*, *Grant v. Banks*, 270 N.C. 473, 485, 155 S.E.2d 87, 95-96 (1967) (holding a guardian or trustee is without power to rewrite or alter provisions of the will of his ward, such as by commingling funds, so as to destroy the testamentary intent of the testator); *Tighe v. Michal*, 41 N.C. App. 15, 22, 254 S.E.2d 538, 544 (1979) (holding a person ceases to be able to form testamentary intent when a person becomes mentally incompetent).

¶ 42 Plaintiff-Appellee contends that the Legislature could have limited a guardian's ability to pursue equitable distribution or divorce from bed and board pursuant to N.C. Gen. Stat. § 50-7 (2021) on behalf of an incompetent spouse in the same manner it did for absolute divorce pursuant to Section 50-22, had it so intended. But Section 50-7 does not

require the intent necessary for absolute divorce and equitable distribution. As a policy matter, she argues adopting Defendants-Appellants' interpretation of the statutes would "render a [g]eneral [g]uardian's right to maintain an equitable distribution action meaningless to protect her ward's estate [under Chapter 35A] if the guardian could not determine whether her ward was separated." Plaintiff-Appellee relies on an unpublished decision from this Court, *In re: Estate of Lisk*, 250 N.C. App. 507, 793 S.E.2d 286 (2016) (unpublished), in which the *trial court* determined a guardian of the person had legal authority to, and did, cause a marital separation on behalf of an incompetent spouse, to further justify Ms. Tobias' action in this case. But the guardian's authority to cause the separation was not challenged on appeal. *Lisk* is neither binding nor persuasive.

¶ 43 As with divorce, the decision to legally separate from one's spouse for equitable distribution, is deeply "personal and volitional," *Freeman*, 34 N.C. App. at 304, 237 S.E.2d at 859. Based on the plain language of the divorce and guardian provisions and considering the legislative history of Section 50-22, we hold a general guardian lacks the authority to cause a legal separation on behalf of an incompetent spouse for purposes of equitable distribution. Because the guardian could not create a marital separation, Mr. and Ms. Dillree were not legally separated, so the trial court was without subject matter jurisdiction to hear the equitable distribution claim. *See Standridge*, 259 N.C. App. at 836, 817 S.E.2d at 465 ("Where a claim for equitable distribution is filed prior to the date of separation, the trial court does not have subject matter jurisdiction over the claim.") (citing *Atkinson v. Atkinson*, 132 N.C. App. 82, 90, 510 S.E.2d 178, 182 (1999) (J. Greene, dissenting)); N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2021) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); § 50-21(a); § 50-20(k). Thus, we reverse the trial court's denial of Defendants-Appellants' motion to dismiss for lack of subject matter jurisdiction and remand for the trial court to dismiss Plaintiff-Appellee's complaint with prejudice.

¶ 44 Our decision shall not be construed to limit, in any way, a guardian's statutory authority to *physically* separate an incompetent person from their spouse where it is in the incompetent person's best interest. *See* § 35A-1241(a)(1)-(2). And, our decision notwithstanding, general guardians are not altogether foreclosed from accessing marital assets on behalf of an incompetent spouse. For example, a guardian may petition the trial court for a constructive trust. *See generally Bowen v. Darden*, 241 N.C. 11, 13-14, 84 S.E.2d 289, 292 (1954) ("[A] constructive trust ordinarily

arises out of the existence of fraud, actual or presumptive—usually involving the violation of a confidential or fiduciary relation—in view of which equity transfers the beneficial title to some person other than the holder of the legal title."). A guardian may also seek a charging order for the distribution of payments for the incompetent person's health care. *See*, *e.g.*, *McVicker v. McVicker*, 234 N.C. App. 478, 762 S.E.2d 533 (2014) (unpublished) (concluding "a charging order was one, but not the sole, remedy available to plaintiff to enforce the distributive award"). Finally, in the event of spousal abuse, a guardian unequivocally has the authority to take custody of the incompetent person, as Ms. Tobias has done in this case. *See* § 35A-1241(a)(1)-(2).

III. CONCLUSION

¶ 45 Based on the foregoing reasons, we reverse the trial court's orders denying Defendants-Appellants' motions to dismiss because the trial court was without subject matter jurisdiction.

REVERSED.

Judges ARROWOOD and CARPENTER concur.

MATTHEW DUFFY, IN HIS INDIVIDUAL CAPACITY AND, ALTERNATIVELY, IN HIS CAPACITY AS OFFICER AND SHAREHOLDER OF CAMPSIGHT STRATEGIC COMMUNICATIONS, INC., PLAINTIFF

v.

JON CAMP AND AMY SCHUSSLER A/K/A AMY JOHNSON, IN THEIR INDIVIDUAL CAPACITIES, AND CAMPSIGHT STRATEGIES, LLC, DEFENDANTS

CAMPSIGHT STRATEGIC COMMUNICATIONS, INC., NOMINAL DEFENDANT

No. COA22-185

Filed 20 December 2022

1. Corporations—claims asserted by shareholder and officer—direct versus derivative claims

In a business dispute in which plaintiff, who was one of three shareholders in a corporation and who also served as an officer, filed a complaint against the other two shareholders asserting multiple claims both as an individual and derivatively—including breach of fiduciary duty, common-law trademark infringement and conversion—plaintiff was not entitled to assert his claims in his individual name because shareholders in general may not bring

individual actions unless either of two exceptions apply, neither one of which applied in this case. Where the appellate court determined that the trial court should not have granted summary judgment to defendants on all claims, the trial court was directed on remand to consider plaintiff's surviving claims as a derivative suit.

2. Corporations—breach of fiduciary duty—by chief executive officer—evidence of resignation—genuine issue of material fact

In a business dispute in which plaintiff (one of three shareholders of a corporation), asserted that defendant (one of the other shareholders who also served as the corporation's chief executive officer) had breached his fiduciary duties of loyalty and due care to the corporation, the trial court improperly granted summary judgment to defendant. There were genuine issues of material fact regarding the timing and nature of defendant's severance from the corporation, which would determine when his fiduciary duties as an officer ceased and thus whether his activities in contacting existing clients about moving to a newly formed business constituted a breach of those duties.

3. Corporations—breach of fiduciary duty—by majority shareholders—no domination and control over minority shareholder—no fiduciary relationship

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that he was a minority shareholder and that defendants (the other two shareholders) owed him a fiduciary duty based on their majority shareholder status but that they breached that duty by forming a new business entity similarly named to the old one and signing new contracts with existing clients, the trial court properly granted summary judgment to defendants because plaintiff failed to demonstrate that defendants were controlling shareholders who exerted domination and influence over him.

4. Corporations—common-law trademark infringement—new business—similar name—likelihood of confusion

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) committed common law trademark infringement by leaving the corporation, named CampSight Strategic Communications, Inc., and forming a new entity with the name CampSight Strategies, LLC, the trial court properly granted summary judgment in favor of defendants where plaintiff presented no evidence that defendants' actions likely produced actual confusion among customers.

5. Conversion—corporate assets—contracts, orders, payments —not tangible

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) converted corporate assets when they left the existing corporation to form a new business entity and diverted contracts, orders, and payments to the new business, as well as contacting existing customers about moving over to the new business, the trial court properly granted summary judgment to defendants because the property listed by plaintiff consisted of business opportunities, expectancy interests, and contract rights that were not subject to a conversion claim. To the extent plaintiff's allegations about payments and billing could be considered to involve tangible assets, plaintiff failed to identify specific sums in order to support his claim.

6. Unjust Enrichment—business dispute between shareholders—diversion of business to new entity—genuine issue of material fact

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) were liable to him for unjust enrichment—on the basis that they instructed clients to stop making payments or billing the corporation for completed work, they altered contracts to divert business to their newly formed entity, and they instructed clients to cancel existing purchase orders with the corporation—the trial court improperly granted summary judgment to defendants. Where defendants denied plaintiff's allegations in their responses to his interrogatories, a genuine issue of material fact existed regarding plaintiff's claim.

7. Unfair Trade Practices—business dispute between shareholders—diversion of business to new entity—summary judgment improper

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) were liable to him for unfair and deceptive trade practices pursuant to N.C.G.S. § 75-1.1—on the basis that they diverted business to their newly formed business entity, including directing clients to stop making payments to the corporation for completed work—the trial court improperly granted summary judgment to defendants. Plaintiff sufficiently alleged that defendants interrupted the commercial relationship between the corporation and its clients, an activity which was "in or affecting commerce" for purposes of the statute.

8. Conspiracy—civil—business dispute between shareholders—diversion of business to new entity—based on viable underlying claims

In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) committed civil conspiracy—by planning to leave the corporation, setting up a new business entity, and moving corporate assets to the new business, thereby excluding plaintiff and his interests as a shareholder—the trial court improperly granted summary judgment to defendants. Where the conspiracy claim was premised on viable underlying claims (breach of fiduciary duty, unjust enrichment, and unfair and deceptive trade practices) that the appellate court determined had been improperly dismissed by the trial court, summary judgment was not appropriate.

Appeal by plaintiff from order entered 18 November 2021 by Judge Vince M. Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 23 August 2022.

Miller Monroe & Plyler, PLLC, by Robert B. Rader, III, and Jason A. Miller, for plaintiff-appellant.

Stubbs & Perdue, P.A., by Laurie B. Biggs, for defendants-appellees Jon Camp, Amy Johnson, and CampSight Strategies, LLC.

ZACHARY, Judge.

¶ 1 Plaintiff Matthew Duffy appeals from the trial court's order denying his motion for summary judgment and granting summary judgment in favor of Defendants Jon Camp, Amy Johnson, and CampSight Strategies, LLC. After careful review, we affirm in part, reverse in part, and remand.

I. Background

¶ 2 In January 2018, Duffy, Camp, and Johnson formed CampSight Strategic Communications, Inc. ("the Corporation"), with each owning an equal share of the Corporation. Although the shareholders never executed corporate bylaws or a shareholder agreement, Camp acted as the Corporation's CEO and Duffy acted as its COO, "as reflected in the [Corporation]'s filings with the North Carolina Secretary of State." The shareholders also decided that Duffy and Camp would equally split the net profits of the Corporation; although Johnson had an ownership stake, she was not employed by and did not receive wages from the Corporation.

¶ 3 About six months to a year after the Corporation was formed, Camp concluded that Duffy "was not performing his job duties." On 27 February 2020, Camp met with Duffy and informed him that Camp no longer wished to be in business with him. Following this meeting, Camp sent Duffy an email restating "the options [Camp] proposed":

> 1. You stay on as a CampSight employee. I either pay you a $40k/yr salary with incentives or a flat $50k/yr salary. Incentives would be a percentage of business brought in. No healthcare, unfortunately. I agree to take the full tax hit for 2020.
>
> 2. You fire up Duffy Media and I hire you on as a contractor. We keep working together on projects, with pay.. [sic] TBD. Could be hourly. Could be we split projects 50/50 like we, [sic] been doing. Could be you wind up lead in the job and pay me. Here, too, I'll take the 2020 tax hit.
>
> 3. We go our separate ways. You either just leave me CampSight or we dissolve it and wish each other well.

¶ 4 From that day on, Duffy was no longer involved in the day-to-day operations of the Corporation. Communication between the parties ceased for a few weeks; Camp asserts that during this time he nonetheless "repeatedly requested" that Duffy share his "intentions and interests regarding continuing work for the [Corporation] or for direction on the [Corporation]'s future." On 19 March 2020, Duffy's counsel sent Camp and Johnson a letter addressing their actions and "requesting an amicable resolution of Duffy's ownership interest in" the Corporation.

¶ 5 The next day, Camp began notifying the Corporation's clients that he "decided to start working under a new LLC[,]" and once he obtained an IRS Employer Identification Number for CampSight Strategies, LLC ("the New Entity"), he began sharing it with the clients as well. Camp also informed the clients that they would need to execute new contracts with the New Entity, and in response to one client's question about canceling purchase orders from the Corporation, Camp replied: "That would be great. Thanks." Camp additionally instructed the client that the "end date of the previous contract" was 1 March 2020. Camp and Johnson officially formed the New Entity on 2 April 2020.

¶ 6 On 29 April 2020, Duffy demanded in writing that the Corporation, Camp, and Johnson take immediate action against the New Entity to

recover damages for violations of the Corporation's rights and to seek any necessary emergency injunctive relief. *See* N.C. Gen. Stat. § 55-7-42 (2021) (requiring that a shareholder make a written demand upon a corporation as a prerequisite to the filing of a derivative proceeding). Defendants rejected Duffy's demand by letter dated 4 June 2020.

¶ 7 On 21 August 2020, Duffy filed a verified complaint, alleging: (1) breach of fiduciary duty (by Camp as to the Corporation, and by Camp and Johnson "as majority shareholders" as to Duffy "as minority shareholder"); (2) common-law tradename infringement; (3) conversion of corporate assets and opportunities; (4) constructive trust and accounting; (5) civil conspiracy; (6) unjust enrichment; and (7) unfair and deceptive trade practices.[1] Duffy also requested injunctive relief with regard to the tradename infringement claim, and asserted a *Meiselman* claim[2] seeking involuntary dissolution of the Corporation or a mandatory buyout of his minority ownership interest. In the event that the trial court determined that one or more of the previous claims could not be asserted by Duffy in his individual capacity, in the alternative, Duffy asserted all claims derivatively.

¶ 8 On 26 October 2020, Defendants filed their unverified answer, denying Duffy's claims and raising affirmative defenses together with counterclaims for: (1) conversion; (2) breach of fiduciary duty; (3) constructive trust and accounting; and (4) unjust enrichment. On 4 January 2021, Duffy filed his unverified reply to Defendants' counterclaims, generally denying the allegations and setting forth various affirmative defenses.

¶ 9 After conducting discovery, Defendants filed a motion for summary judgment along with a memorandum of law in support of their motion on 1 October 2021. On 14 October 2021, Duffy filed a motion for summary judgment, followed by a memorandum of law in support of his motion. The parties' motions for summary judgment came on for hearing in Wake County Superior Court on 17 November 2021. The next day,

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1. We note that, although Duffy requested that the trial court impose a constructive trust and order an accounting as a separate claim in his complaint, "a constructive trust is a remedy, not a cause of action, and is merely a procedural device by which a court of equity may rectify certain wrongs." *Musselwhite v. Cheshire*, 266 N.C. App. 166, 181, 831 S.E.2d 367, 378 (2019) (citation and internal quotation marks omitted). Similarly, "[a]n accounting is an equitable remedy sometimes pled in claims of breach of fiduciary duty." *Burgess v. Burgess*, 205 N.C. App. 325, 333, 698 S.E.2d 666, 672 (2010). Accordingly, there is no separate claim for a "constructive trust and accounting" to address; nonetheless, on remand the trial court may elect to impose a constructive trust and order an accounting in the exercise of its equitable power.

2. *Meiselman v. Meiselman*, 309 N.C. 279, 300–01, 307 S.E.2d 551, 564 (1983).

the trial court entered an order granting Defendants' motion, denying Duffy's motion, and dismissing all claims against Defendants with prejudice. Defendants' counterclaims remained pending.

¶ 10 The trial court certified its order as a final judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), determining that "there is no just reason for delay." Duffy timely filed notice of appeal.

II. Appellate Jurisdiction

¶ 11 "Not every judgment or order of the Superior Court is appealable . . . . Indeed, an appeal can be taken only from such judgments and orders as are designated by the statute regulating the right of appeal." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). This Court principally entertains appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey*, 231 N.C. at 361–62, 57 S.E.2d at 381. By contrast, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381. Because an interlocutory order is not yet final, with few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

¶ 12 Nevertheless, an interlocutory order may be immediately appealed if "the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment[,]" *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted); *see also* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a), or if "the trial court certifies, pursuant to [N.C. Gen. Stat.] § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal[,]" *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009); *see also* N.C. Gen. Stat. § 1A-1, Rule 54(b).

¶ 13 "Certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties." *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013). Rule 54(b) provides, in relevant part:

> When more than one claim for relief is presented in an action, . . . or when multiple parties are involved,

> the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C. Gen. Stat. § 1A-1, Rule 54(b).

¶ 14 Thus, proper certification of an interlocutory order pursuant to Rule 54(b) requires:

> (1) that the case involve multiple parties or multiple claims; (2) that the challenged order finally resolve at least one claim against at least one party; (3) that the trial court certify that there is no just reason for delaying an appeal of the order; and (4) that the challenged order itself contain this certification.

Asher v. Huneycutt, 2022-NCCOA-517, ¶ 14.

¶ 15 In the instant case, the trial court's order granting summary judgment in favor of Defendants is interlocutory, as it resolved all claims against Defendants but did not dispose of Defendants' counterclaims against Duffy. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Nevertheless, the trial court's Rule 54(b) certification is effective to vest jurisdiction in this Court: at the time of the order, the case involved multiple parties with multiple claims and counterclaims; the order on appeal finally resolved all claims against Defendants; the trial court certified that "there is no just reason for delay"; and Duffy appealed from the order containing this certification. *See Asher*, ¶ 14.

¶ 16 Accordingly, this Court has jurisdiction over Duffy's appeal, and we proceed to the merits of his arguments.

III. Discussion

¶ 17 On appeal, Duffy argues that the trial court erred by granting Defendants' motion for summary judgment and denying his motion for summary judgment. For the following reasons, we reverse the trial court's entry of summary judgment in favor of Defendants with respect to Duffy's derivative claims of: (1) Camp's breach of fiduciary duty to the Corporation; (2) unjust enrichment; (3) unfair and deceptive trade practices; and (4) civil conspiracy. We affirm the trial court's grant of summary judgment on the remaining claims and remand to the trial court for further proceedings.

A. Standard of Review

¶ 18 The "standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted).

> When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

Id. (citation and internal quotation marks omitted).

B. Analysis

¶ 19 Duffy contends that the trial court erred by granting Defendants' motion for summary judgment and denying his motion for summary judgment. We address the trial court's ruling as to each of Duffy's claims in turn.

1. Direct or Derivative Claims

¶ 20 **[1]** As an initial matter, we note that Duffy has "asserted, in the alternative," each claim "of the [c]omplaint on the [Corporation]'s behalf against Camp, Johnson, and the New Entity"; that is, Duffy has alternatively asserted derivative claims.[3] "A derivative proceeding is a civil action brought by a shareholder in the right of a corporation, while an individual action is one a shareholder brings to enforce a right which belongs to him personally." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000) (citation and internal quotation marks omitted), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 14 (2001); *accord* N.C. Gen. Stat. § 55-7-40.1. "It is not always easy to distinguish between a right of the corporation and a right belonging to an individual shareholder. The same wrongful conduct can give rise to both derivative and direct individual claims, for which courts have sometimes allowed shareholders to maintain derivative and direct

3. It is undisputed that Duffy has "complied with all applicable statutory requirements and conditions precedent" and "has proper standing to assert derivative claims on behalf of" the Corporation. *See* N.C. Gen. Stat. §§ 55-7-40 to -42.

actions simultaneously." *Norman*, 140 N.C. App. at 395, 537 S.E.2d at 253 (citation and internal quotation marks omitted).

¶ 21 "As a general rule, shareholders have no right to bring actions in their individual names to enforce causes of action accruing to the corporation, but must assert such claims derivatively . . . ." *Id.* (citation and internal quotation marks omitted); *see also Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 612, 821 S.E.2d 729, 734 (2018) ("[S]hareholders generally may not bring individual actions to recover what they consider their share of the damages suffered by a corporation." (citation omitted)), *reh'g denied*, 372 N.C. 53, 822 S.E.2d 648 (2019). "There are two exceptions to this general rule: shareholders may bring an individual action when (1) the wrongdoer owed them a special duty or (2) they suffered a personal injury distinct from the injury sustained by the corporation itself." *Corwin*, 371 N.C. at 612, 821 S.E.2d at 734 (citation and internal quotation marks omitted).

¶ 22 "The first exception applies when the wrongdoer owes a duty that is personal" to the plaintiff as a shareholder, "separate and distinct from the duty" that the defendant owes to the corporation, "such as a fiduciary duty owed to the stockholders." *Id.* (citation and internal quotation marks omitted). For the reasons discussed in Section III.B.2.b below, Defendants Camp and Johnson, as majority shareholders, did not owe a special fiduciary duty to Duffy as minority shareholder. Accordingly, Duffy may not avail himself of this exception to the general rule.

¶ 23 "The second . . . exception applies when a plaintiff suffers an injury that is distinct from the injury suffered by the corporation itself." *Id.* at 612, 821 S.E.2d at 735 (citation and internal quotation marks omitted). As discussed below, this exception does not apply to any of the claims for which summary judgment was inappropriate. Therefore, on remand, the trial court is to consider Duffy's surviving claims as comprising a derivative action, rather than an individual suit.

2. Fiduciary Duty

¶ 24 Duffy first argues that Camp and Johnson breached their fiduciary duties: Camp breached the fiduciary duty that he owed to the Corporation, and Camp and Johnson, as "majority shareholders," breached the fiduciary duty that they owed to Duffy, as the "minority shareholder." The legal and factual issues at play in each of these two claims differ.

a. Camp's Fiduciary Duty to the Corporation

¶ 25 **[2]** There is no dispute that Camp, as the Corporation's CEO, owed fiduciary duties of loyalty and due care to the Corporation. Duffy contends

that "Camp breached his fiduciary duties of loyalty and due care when he contacted existing clients of the [Corporation] . . . to divert certain business of the [Corporation] to the benefit of himself and the New Entity." Notably, however, Duffy "alleges no breach of fiduciary duty owed to him personally in his capacity as a shareholder" and consequently, "the claim is entirely derivative[.]" *Allen v. Ferrera*, 141 N.C. App. 284, 292, 540 S.E.2d 761, 767 (2000).

¶ 26 Under the North Carolina Business Corporation Act, a corporate officer with discretionary authority must discharge his duties:

> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) In a manner he reasonably believes to be in the best interests of the corporation.

N.C. Gen. Stat. § 55-8-42(a); *see also Seraph Garrison, LLC v. Garrison*, 247 N.C. App. 115, 119, 787 S.E.2d 398, 403 (2016). "[C]orporate directors and officers act in a fiduciary capacity in the sense that they owe the corporation the duties of loyalty and due care." *Seraph Garrison*, 247 N.C. App. at 119, 787 S.E.2d at 403. Section 55-8-42(a)(3) "codifies the requirement that an officer always discharge the responsibilities of the office with undivided loyalty to the corporation. The corporate law duty of loyalty also imposes an affirmative obligation: a fiduciary must strive to advance the best interests of the corporation." *Id.* at 120, 787 S.E.2d at 403–04 (citation and internal quotation marks omitted).

¶ 27 Camp raises several arguments in his defense; principally, he argues that his fiduciary duty to the Corporation ceased prior to the conduct of which Duffy complains. Camp offers two points in time at which he contends that his fiduciary duty to the Corporation ceased: (1) when he resigned as an officer of the Corporation as a result of the 27 February 2020 meeting; and (2) when Duffy retained counsel. However, when viewed in the light most favorable to Duffy under our standard of review, *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576, genuine issues of material fact exist as to whether and when Camp's fiduciary duty to the Corporation ceased.

¶ 28 As to the meeting, Camp asserts that "[i]t is undisputed that on February 27, 2020, Camp met with Duffy and told him he no longer wished to be in business with him, and that three options for moving forward with the business were presented, including closing down"

the Corporation. Duffy maintains that this establishes merely that "Camp sought to terminate his relationship with Duffy" rather than the Corporation. As Duffy explains, "[t]he meeting pertained to Camp's proposed termination of Duffy as an owner of the [Corporation], not Camp's termination of himself as an officer of the [Corporation]." Moreover, Duffy notes that, in their brief on appeal, Defendants assert only that "the undisputed facts show that Camp sought to terminate his relationship *with Duffy*[.]" (Emphasis added). Indeed, in their reply to Duffy's interrogatories, Defendants explained:

> Defendant Camp spoke with [Duffy] on February [27], 2020 about options for moving forward with the [Corporation] – either closing down the [Corporation] and they would go their separate ways or changing the structure of the [Corporation], whereby [Duffy] would be a salaried employee at a rate of $50,000.00. [Duffy] never responded. As a result, [Defendant] Camp established a new company to continue earning a living.

¶ 29 The options that Camp presented to Duffy suggest that Camp would remain in some official capacity with the Corporation, rather than evidence Camp's resignation:

> 1. You stay on as a CampSight employee. I either pay you a $40k/yr salary with incentives or a flat $50k/yr salary. Incentives would be a percentage of business brought in. No healthcare, unfortunately. I agree to take the full tax hit for 2020.
>
> 2. You fire up Duffy Media and I hire you on as a contractor. We keep working together on projects, with pay.. [sic] TBD. Could be hourly. Could be we split projects 50/50 like we, [sic] been doing. Could be you wind up lead in the job and pay me. Here, too, I'll take the 2020 tax hit.
>
> 3. We go our separate ways. You either just leave me CampSight or we dissolve it and wish each other well.

¶ 30 On appeal, Camp asserts that he "believed he had terminated his duties with the [Corporation] by resigning when Duffy failed to respond to him." However, as Duffy correctly observes, "the only mention of any resignation in the record is a single allegation" found in Defendants'

unverified answer, in which Defendants allege that Camp intended his cessation of "all activities on behalf of" the Corporation to be "his own resignation from" the Corporation. This assertion is not otherwise supported by the record on appeal. To the extent that the trial court relied on this allegation, raised only in Defendants' unverified pleading, this was improper. *See 21st Mtge. Corp. v. Douglas Home Ctr., Inc.*, 187 N.C. App. 770, 775, 655 S.E.2d 423, 425–26 (2007) (reversing and remanding the trial court's grant of the defendants' motion for summary judgment "based on the [defendants'] unverified pleading").

¶ 31 Thus, viewed in the light most favorable to Duffy, *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576, the record does not contain sufficient evidence to definitively establish that Camp had resigned his position as an officer of the Corporation, thereby terminating any fiduciary duty to the Corporation.

¶ 32 Camp further alleges that his fiduciary duty to the Corporation ceased when Duffy hired counsel after the 27 February meeting. Defendants cite *Piedmont Institute of Pain Management v. Staton Foundation*, 157 N.C. App. 577, 581 S.E.2d 68, *disc. review denied*, 357 N.C. 507, 587 S.E.2d 672 (2003), for the proposition that it is "well established that fiduciary relationships usually terminate when a party hires counsel because of the adversarial relationship that exists between the parties." In *Piedmont*, this Court affirmed summary judgment where the nonmovant-beneficiaries did "not present[ ] any evidence creating a genuine issue of material of fact with respect to the absence of the adversarial nature of their relationship with [the movant-trustee] during the relevant time[.]" 157 N.C. App. at 583–84, 581 S.E.2d at 73.

¶ 33 The North Carolina Business Court has distinguished *Piedmont* and other non-corporate cases that similarly determined that a fiduciary duty was terminated when one party hired counsel.[4] In *RCJJ, LLC v. RCWIL Enterprises, LLC*, the Business Court noted that the adversarial-relationship reasoning of those non-corporate cases does not readily extend to cases involving fiduciary relationships arising in the "corporate fiduciary setting":

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4. Although "[t]he North Carolina Business Court is a special Superior Court, the decisions of which have no precedential value in North Carolina[,]" *Bottom v. Bailey*, 238 N.C. App. 202, 212, 767 S.E.2d 883, 889 (2014) (citation and internal quotation marks omitted), this Court has recognized that "the Business Court exists solely to hear complex business cases, and as such [we] are respectful of its opinions" to the extent that they may prove to be persuasive authority, *Goldstein v. Am. Steel Span, Inc.*, 181 N.C. App. 534, 536 n.2, 640 S.E.2d 740, 742 n.2 (2007).

> [W]hile a trustee owes a fiduciary duty directly to the beneficiary, and spouses owe a duty to one another, a manager owes a fiduciary duty not to the other member or members with whom he may be in an adverse negotiation, but to the LLC. This makes the reasoning behind those cases relieving a trustee or spouse of fiduciary duties when engaged in adversarial negotiations an uneasy fit in the corporate fiduciary setting.

2016 NCBC 44, ¶ 37, 2016 WL 3850403, at *9 (N.C. Super. June 20, 2016). The *RCJJ* Court's examples of spousal and trustee-beneficiary fiduciary duties are consonant with our Supreme Court's recognition that the "characteristics of a fiduciary relationship are readily apparent, for example, in the relationship of spouses . . . and trustee and beneficiary[.]" *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (citations omitted).

¶ 34 Furthermore, in *Piedmont* (but unlike the case at bar), there was no dispute that the movant-appellee "had repudiated his fiduciary duties." 157 N.C. App. at 583, 581 S.E.2d at 73. In *RCJJ*, the Business Court found it "significant . . . that the cases holding that a fiduciary duty can be extinguished in an adversarial setting . . . did not hold that the fiduciary was relieved of his duties merely because the parties had retained attorneys or were negotiating over a separation of interests." 2016 NCBC 44, ¶ 38, 2016 WL 3850403, at *10. The Business Court thus focused on the nature of the relationship between the parties as a more critical factor than the mere retention of counsel in analyzing the termination of a corporate fiduciary's duties:

> Allowing a manager of a limited liability company to be relieved of his fiduciary duties upon entering into adverse negotiations for the sale of his interests in the company would be inconsistent with the nature of those duties. In addition, the appellate decisions do not support the conclusion that the commencement of adversarial negotiations and retention of attorneys relieves a fiduciary of his duties *as a matter of law*. Rather, *there must be a change in the nature of the relationship between the parties* that establishes that *the parties no longer are in a relationship of confidence and trust*, and that fiduciary duties have been repudiated.

Id. ¶ 40, 2016 WL 3850403, at *10 (emphases added).

¶ 35 We find this analysis persuasive in the corporate setting presented in the instant case. Accordingly, Camp's reliance on *Piedmont* in support of his contention that his fiduciary duty ceased *as a matter of law* upon Duffy's retention of counsel is misplaced.

¶ 36 Our appellate courts do not appear to have yet addressed this question; the Business Court in *RCJJ* described it as an issue of first impression. *Id.* ¶ 35, 2016 WL 3850403, at *8. Nonetheless, we need not resolve this question because here, the issue of whether Camp's fiduciary duty to the Corporation ceased—and, if so, when—presents a mixed question of law and fact, for which summary judgment would only be appropriate "if there are no genuine issues of material fact." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 81, 712 S.E.2d 221, 226 (2011).

¶ 37 In the case at bar, there *are* genuine issues of material fact: if, and when, there was "a change in the nature of the relationship between the parties that establishe[d] that the parties no longer [we]re in a relationship of confidence and trust," and whether "fiduciary duties ha[d] been repudiated." *RCJJ*, 2016 NCBC 44, ¶ 40, 2016 WL 3850403, at *10.

¶ 38 Further, assuming, *arguendo*, that an adversarial relationship existed at the time of the 19 March letter from Duffy's counsel, Duffy observes that the adversarial relationship would have been between Duffy, Camp, and Johnson as shareholders, and not between Camp and the Corporation. Duffy retained counsel to represent him, in his individual capacity, rather than to represent the interests of the Corporation. Therefore, Duffy's retention of counsel to resolve the issue of compensation for his ownership stake in the Corporation cannot, in and of itself, support Defendants' adversarial-relationship argument.

¶ 39 In sum, summary judgment is inappropriate on Duffy's derivative claim that Camp breached his fiduciary duty to the Corporation because Camp has not shown that his fiduciary duty ceased as a matter of law either (1) as a result of the 27 February meeting, or (2) upon Duffy's retention of counsel. Accordingly, the trial court's order must be reversed as to this derivative claim.

b. Camp's and Johnson's Fiduciary Duty to Duffy

¶ 40 **[3]** Duffy also argues that Camp and Johnson, as the "majority shareholders of the closely[ ]held" Corporation, owed a fiduciary duty to Duffy, as the minority shareholder. We disagree.

¶ 41 It is axiomatic that "[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Our appellate

courts have defined a fiduciary relationship "as one in which 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[.]" *Id.* (citation and internal quotation marks omitted). This definition "extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other*." *Id.* at 651, 548 S.E.2d at 707–08 (citation omitted).

¶ 42 "North Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship." *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 355, 826 S.E.2d 567, 571, *disc. review denied*, 373 N.C. 253, 835 S.E.2d 446 (2019). There is no allegation of a *de jure* fiduciary relationship between Duffy, Camp, and Johnson, so we must determine whether "the particular facts and circumstances constituting and surrounding the[ir] relationship" as the three shareholders of the Corporation gave rise to a *de facto* fiduciary relationship. *Id.*

¶ 43 "As a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation. However[,] this rule is not without exception. In North Carolina, it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders." *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993) (citation omitted). "Once a minority shareholder challenges the actions of the majority, the burden shifts to the majority to establish the fairness and good faith of its actions." *Id.*

¶ 44 The circumstances under which multiple minority shareholders combine into majority or controlling shareholders for the purposes of this *de facto* fiduciary duty rule is something of an open question in North Carolina. *See Corwin*, 371 N.C. at 616, 821 S.E.2d at 737 ("This Court has never held that a *minority* stockholder owes fiduciary duties to other stockholders, but it has also never held that a minority stockholder *cannot* owe fiduciary duties to other stockholders."). The determinative issue is what facts are necessary to elevate the simple majority vote of the minority shareholders in a closely held corporation into a situation of "*domination and influence*" over the outvoted minority shareholder. *Dalton*, 353 N.C. at 651, 548 S.E.2d at 708 (citation omitted).

¶ 45 Duffy relies in part on *Norman* for the proposition that "majority shareholders in a close corporation owe a 'special duty' and obligation of good faith to minority shareholders[,]" and hence that Camp and Johnson

owed a fiduciary duty to Duffy. 140 N.C. App. at 407, 537 S.E.2d at 260. *Norman* is inapposite to our analysis of this issue for several reasons.

¶ 46 First, *Norman* arrived at this Court not on a motion for summary judgment—as in the present case—but rather upon the trial court's grant of the defendants' motion to dismiss. *Id.* at 394, 537 S.E.2d at 252. As regards the issue of whether Duffy has shown a genuine issue of material fact concerning whether Camp and Johnson combined into controlling shareholders, this diminishes *Norman*'s value as precedent because "the standard under which orders granting or denying summary judgment motions and the standard under which orders granting or denying dismissal motions are reviewed are not the same[.]" *Prouse v. Bituminous Cas. Corp.*, 222 N.C. App. 111, 116, 730 S.E.2d 239, 242 (2012), *appeal withdrawn*, 366 N.C. 571, 737 S.E.2d 381 (2013). "[T]he essential difference between the manner in which the two types of issues are reviewed on appeal stems from the scope of the factual information that a reviewing court is entitled to consider . . . ." *Id.* Unlike a motion to dismiss, which tests the sufficiency of the facts as pleaded by the nonmovant against the applicable law, "the 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." *Id.* at 116, 730 S.E.2d at 242–43 (citation and internal quotation marks omitted); *see also Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972) ("[T]he real purpose of summary judgment is to go beyond or to pierce the pleadings and determine whether there is a genuine issue of material fact.").

¶ 47 Additionally, the specific facts presented in *Norman* weaken its precedential value as concerns this issue. The closely held corporation in *Norman* was "a family[-]owned poultry business[,]" and the plaintiffs and individual defendants were all "related to founder Nash Johnson by either blood or marriage." *Norman*, 140 N.C. App. at 393, 537 S.E.2d at 252. This is significant because, as the *Norman* Court explained, "[w]hen the close relationships between the shareholders in a 'family' or closely held corporation tragically break down, the majority shareholders are obviously in a position to exclude the minority shareholders from management decisions, leaving the minority shareholders with few remedies." *Id.* at 404, 537 S.E.2d at 258. As the *Norman* Court observed, N.C. Gen. Stat. § 55-14-30 "allows shareholders to seek dissolution of a corporation and liquidation of its assets when corporate assets are being misapplied or wasted," but "such relief is *not available to shareholders who wish to retain their interests in a family business*[.]" *Id.* at 405, 537 S.E.2d at 259 (emphasis added) (citation and internal quotation marks omitted).

¶ 48 The relationship between the shareholders of the Corporation in the present case is emphatically dissimilar to the relationships in the "family business" described in *Norman*. Further unlike the instant case, the minority-shareholder-plaintiffs in *Norman* neither invited the majority-shareholder-defendants to purchase their shares, nor did the plaintiffs seek involuntary dissolution of the family business, facts which informed this Court's decision to recognize their individual claims for breach of fiduciary duty. *Id*. Here, Duffy invited Camp and Johnson to negotiate "an amicable resolution of Duffy's ownership interest in" the Corporation, and he asserted a *Meiselman* claim in his complaint, seeking either involuntary dissolution of the Corporation or a mandatory buyout of his minority ownership interest. We thus conclude that *Norman* is inapplicable to the issue before us.

¶ 49 Duffy also relies on *Loy v. Lorm Corp.*, in which this Court reversed the trial court's entry of summary judgment and allowed a minority shareholder to pursue relief against three fellow shareholders who together held a majority interest, served as corporate "directors and officers[,]" were "firmly in control" of the corporation, and had common interests stemming from their related, jointly owned business. 52 N.C. App. 428, 431, 278 S.E.2d 897, 900 (1981). However, the three minority-shareholder-defendants in *Loy* effectively conceded that they collectively owed the minority-shareholder-plaintiff a fiduciary duty as a group of majority shareholders, and instead challenged on appeal the plaintiff's showing that they breached that duty. *Id*. at 432–33, 278 S.E.2d at 901. This Court therefore did not have the opportunity in *Loy* to address the circumstances under which a group of minority shareholders may effectively combine into a controlling majority, thereby giving rise to a *de facto* fiduciary duty to the remaining minority.

¶ 50 Although our appellate courts have not squarely addressed the standard that a plaintiff must meet in a case such as this, in which two minority shareholders are alleged to have effectively become a controlling majority such that a *de facto* fiduciary duty arises, we note that the Business Court has repeatedly "refused to impose a fiduciary duty on *minority* members that exercise their voting rights by joining together to outvote a third member." *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC 38, ¶ 40, 2019 WL 2526461, at *7 (N.C. Super. June 19, 2019) (collecting cases). "These decisions underscore the obvious difference between backing a majority coalition and exercising majority control as of right. In the latter situation, it is the imbalance of power inherent in the relationship between majority and minority members that gives rise to a fiduciary duty." *Id*. ¶ 41, 2019 WL 2526461, at *7.

¶ 51 We find this reasoning persuasive and applicable to the case at bar. As Defendants argued in their memorandum of law in support of their motion for summary judgment: "The reason for this rule is simple — any shareholder on the losing side of any issue or vote could simply claim the prevailing shareholders were collectively 'majority shareholders' negating any and every corporate action taken by a majority."

¶ 52 Thus, it appears that the few cases in which a group of minority shareholders were treated collectively as controlling or majority shareholders can be distinguished from the present case, as Duffy has not shown that Camp and Johnson assumed a position of "domination and influence" over him as the minority shareholder. *Dalton*, 353 N.C. at 651, 548 S.E.2d at 708 (emphasis omitted) (citation omitted). Duffy supports his allegation of Camp and Johnson's control by reference to Defendants' interrogatory responses, indicating that they "decided that the manner in which the [Corporation] was operated would need to change" and "made a final decision that they could no longer partner with" Duffy. However, a single decision is insufficient to elevate this from a simple case of one minority shareholder being outvoted by two other minority shareholders—albeit in a vote of great importance to the complaining minority—into a situation of such "domination and influence" over the minority shareholder (Duffy) by the controlling shareholders (Camp and Johnson), *id.* (emphasis omitted) (citation omitted), that "the imbalance of power inherent in the relationship between majority and minority" gave rise to a fiduciary duty prior to that vote, *Vanguard Pai Lung*, 2019 NCBC 38, ¶ 41, 2019 WL 2526461, at *7.

¶ 53 Defendants also make persuasive arguments concerning the extent to which Camp and Johnson may be treated as individuals in analyzing their supposed fiduciary duties to Duffy as minority shareholder. With regard to Johnson, Defendants argue that the trial court's order should be affirmed in that "Duffy put forward no evidence that Johnson ever acted as a controlling shareholder." As Defendants observe, at deposition, Duffy "repeatedly acknowledged that Johnson had no responsibilities on behalf of the [Corporation], held no title, 'wasn't active', and did not participate in financial decisions." (Citations omitted). Duffy explained during his deposition that he and Camp generally served as the "ultimate decision-makers" for the Corporation, with Johnson "[o]ccasionally" participating "in these discussions, but not usually." It is evident that Johnson did not exercise control over, much less dominate, the Corporation or its affairs. Summary judgment therefore was proper as to Johnson on this claim.

¶ 54 With regard to Camp's fiduciary duty to Duffy, Defendants assert that Camp and Duffy "made all of the decisions about the [Corporation]

together" and Duffy's "testimony that they made decisions together shows they each had an equal amount of control over" the Corporation. Defendants also observe that "Duffy has not pointed to any evidence of Camp acting on behalf of the [Corporation] without Duffy's involvement, a lack of control over [the Corporation's] affairs, or domination by Camp over the [Corporation]'s decision making." Accordingly, summary judgment was also appropriate as to Camp on this claim.

¶ 55 In short, summary judgment was improper on Duffy's claim that Camp breached his fiduciary duty to the Corporation, but was proper on the controlling shareholder theory advanced by Duffy against Camp and Johnson collectively and individually.

3. Tradename Infringement

¶ 56 **[4]** We next address Duffy's claim of common-law tradename infringement. Our Supreme Court has explained that "[t]he fundamental question in cases of trade-mark or unfair competition . . . is whether the public is being misled and deceived[.]" *Carolina Aniline & Extract Co. v. Ray*, 221 N.C. 269, 273, 20 S.E.2d 59, 61 (1942) (citation omitted). If so, and if the cause is that "a defendant is in effect taking . . . advantage of the [goodwill] and business reputation that a complainant has built up through service or advertising or in any manner regarded as lawful and proper[,]" then the plaintiff may pursue a claim for common-law tradename infringement. *Id.* at 273, 20 S.E.2d at 61–62 (citation omitted).

¶ 57 "A common law claim for trademark infringement under North Carolina law is analyzed under essentially the same standards as a federal Lanham Act claim regarding an unregistered trademark." *Johnson & Morris PLLC v. Abdelbaky & Boes, PLLC*, 2016 NCBC 76, ¶ 13, 2016 WL 5923662, at *4 (N.C. Super. Oct. 11, 2016). "A trademark includes any word, name, symbol, or device used by an individual to identify and distinguish his goods from those manufactured or sold by others and to indicate the source of the goods." *George & Co. LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 392 (4th Cir. 2009) (citation and internal quotation marks omitted). "To establish trademark infringement, a plaintiff must prove that it owns a valid and protectable mark, and that the defendant's use of a reproduction, counterfeit, copy, or colorable imitation of that mark creates a likelihood of confusion." *Id.* at 393 (citation and internal quotation marks omitted). In the present case, the latter requirement concerning the likelihood of confusion is dispositive.

¶ 58 "A likelihood of confusion exists if the defendant's actual practice is likely to produce confusion in the minds of consumers about the origin of the goods or services in question." *Id.* (citation and internal quotation

marks omitted). To assess whether such confusion exists, appellate courts "look to how the two parties actually use their marks in the marketplace to determine whether the defendant's use is likely to cause confusion." *Id.* (citation omitted). The United States Court of Appeals for the Fourth Circuit examines nine factors to determine likelihood-of-confusion in trademark infringement cases:

> (1) the strength or distinctiveness of the plaintiff's mark as actually used in the marketplace; (2) the similarity of the two marks to consumers; (3) the similarity of the goods or services that the marks identify; (4) the similarity of the facilities used by the markholders; (5) the similarity of advertising used by the markholders; (6) the defendant's intent; (7) actual confusion; (8) the quality of the defendant's product; and (9) the sophistication of the consuming public.

Id. (citations omitted). However, "[n]ot all of these factors are of equal importance, nor are they always relevant in any given case." *Id.* (citations and internal quotation marks omitted).

¶ 59 Of these factors, "evidence of actual confusion is often paramount in the likelihood of confusion analysis." *Id.* (citations and internal quotation marks omitted). "Actual confusion can be demonstrated by both anecdotal and survey evidence. Evidence of only a small number of instances of actual confusion may be dismissed as *de minimis*." *Id.* at 398 (citations omitted).

¶ 60 In the instant case, Duffy has offered no evidence that Defendants' actual practice likely produced confusion among customers. Duffy explains that "the mark at issue is 'Campsight' and a variation of the word 'strategy,' specifically 'Campsight Strategic' as used by the [Corporation] and 'CampSight Strategies' as used by the New Entity, Camp, and Johnson." However, as Defendants note, Duffy "presented no survey or other expert testimony" and "presented no anecdotal evidence of third parties expressing confusion." Duffy makes arguments regarding Defendants' "brazen intent . . . to dupe the certain clients of the [Corporation] into thinking the New Entity was an extension and continuation of" the Corporation and offers examples of the "deceptive language and means" by which Defendants allegedly did this, yet offers scant evidence that Defendants' actual practice likely produced confusion among customers.

¶ 61 Duffy references several emails that Defendants sent to the Corporation's clients in order to illustrate "Camp's deceptive

description of the New Entity and its relationship to" the Corporation but, as Defendants note, "these emails only show that Camp was using the name CampSight, and not the third party's response to the use of the tradename." Defendants explain that the emails illustrate that, rather than using deceptive means, "Camp was not attempting to mislead anyone about his relationship with Duffy or the [Corporation] going forward."

¶ 62 Most conclusively for our analysis, however, is Duffy's deposition testimony, which belies his attempt to show actual confusion:

> Q Okay, and have you talked with anyone since the February meeting about the use of the name CampSight or CampSight Strategies?
>
> A Aside from my counsel, no.
>
> Q Okay, have you talked with clients about CampSight Strategies or the CampSight name?
>
> A No.
>
> Q Have you talked with anyone in the industry or potential clients about the use of the name CampSight or CampSight Strategies?
>
> A Not that I recall, no.
>
> Q Have you used, you personally or you through a new corporation, used either of those names since the February meeting?
>
> A No.
>
> Q Okay, has anyone reached out to you and said, oh, I saw this – I saw [Defendant Camp]'s new company CampSight Strategies, and I thought that was CampSight Strategic Communications?
>
> A Not that I recall, no.

¶ 63 Duffy's testimony that he was unaware of any actual confusion undercuts this "most important factor" of the likelihood-of-confusion analysis. *Id.* Further, there is no significant evidence of customer confusion, or the likelihood of confusion, sufficient to overcome this shortcoming as a matter of law. Accordingly, the trial court's grant of summary judgment on Duffy's tradename infringement claim is affirmed.

¶ 64 Duffy also sought injunctive relief in connection with his tradename infringement claim. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation omitted). "The first stage of the inquiry is . . . whether [the] plaintiff is able to show likelihood of success on the merits." *Id.* at 401, 302 S.E.2d at 760. As we have already discussed, Duffy is unable to show that he is likely to succeed on the merits of his tradename infringement claim. Accordingly, the trial court properly denied Duffy's request for a preliminary injunction, and the trial court's order is affirmed as to this issue as well.

4. Conversion

¶ 65 **[5]** Additionally, Duffy advances a claim for conversion of corporate assets and opportunities. "[T]he tort of conversion is well defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citation and internal quotation marks omitted). "There are, in effect, two essential elements of a conversion claim: ownership in the plaintiff and wrongful possession or conversion by the defendant." *Id.* Importantly, "only goods and personal property are properly the subjects of a claim for conversion. . . . [I]ntangible interests such as business opportunities and expectancy interests" are not "subject to a conversion claim." *Norman*, 140 N.C. App. at 414, 537 S.E.2d at 264.

¶ 66 Duffy contends that "existing contracts, orders, payments, and assets of the [Corporation] were diverted to and for the benefit of the New Entity, Camp, and Johnson." Defendants respond that these assets are either "business opportunities and expectancy interests," which are not subject to conversion, *id.*, or "contract rights," which are similarly intangible, *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 583, 541 S.E.2d 157, 166 (2000), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 433 (2001), and therefore not subject to conversion. To the extent that the property that Duffy alleges was misappropriated includes business opportunities, expectancy interests, and contract rights, summary judgment was appropriate.

¶ 67 We also note that Duffy specifically alleges that "Camp contacted existing clients of the [Corporation], providing them with the New Entity's financial information, and instruct[ed] said clients to refrain from certain payments and billing to the [Corporation] until the New

Entity's information [wa]s in place." Duffy further contends that "Camp instruct[ed] that certain completed work be placed under new contracts benefiting the New Entity" and "that existing purchase orders of the [Corporation] be cance[l]ed." To the extent that these allegations could be construed—in the light most favorable to Duffy, *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576—as concerning assets beyond ordinary "business opportunities and expectancy interests[,]" *Norman*, 140 N.C. App. at 414, 537 S.E.2d at 264, and instead concerning actual, tangible funds diverted from the Corporation to the New Entity, summary judgment was still appropriate as Duffy has failed to identify specific sums that were allegedly converted, *see Variety Wholesalers*, 365 N.C. at 528, 723 S.E.2d at 750 ("[T]he general rule is that money may be the subject of an action for conversion only when it is capable of being identified and described." (citation and internal quotation marks omitted)); *see also*, *e.g.*, *Wake Cty. v. Hotels.com*, *LP*, 235 N.C. App. 633, 653, 762 S.E.2d 477, 490 (affirming the trial court's dismissal of Wake County's conversion claim over "a category of monies allegedly owed" where the county failed to establish "the funds' specific source, specific amount, and specific destination"), *disc. review denied*, 367 N.C. 799, ___ S.E.2d ___ (2014).

¶ 68 For these reasons, in sum, Duffy has not demonstrated that Defendants wrongfully possessed any Corporation assets that "are properly the subjects of a claim for conversion." *Norman*, 140 N.C. App. at 414, 537 S.E.2d at 264. Thus, the trial court's grant of summary judgment on Duffy's conversion claim is affirmed.

5. Unjust Enrichment

¶ 69 **[6]** Duffy next asserts a claim of unjust enrichment against Defendants. To make out a claim for unjust enrichment, the claimant "must allege that property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received, but that the defendant has failed to make restitution for the property or benefits." *Id.* at 417, 537 S.E.2d at 266.

¶ 70 In *Norman*, this Court reversed the trial court's grant of a motion to dismiss and revived an unjust enrichment claim where the plaintiff "allege[d] that the defendants breached their fiduciary duties and received benefits for which they have not paid, thereby injuring the [c]ompany and depriving it of such benefits." *Id.* This aptly describes Duffy's claims in the present case: Duffy argues that "existing business belonging legitimately to the [Corporation] was diverted to the benefit and profit

of Camp, Johnson, and the New Entity." Duffy reiterates his allegations that Camp instructed clients to refrain from making certain payments or billing the Corporation for completed work, altered existing contracts with the Corporation to divert business to the New Entity, and instructed clients to cancel existing purchase orders with the Corporation.

¶ 71 In addition to those allegations on behalf of the Corporation, Duffy contends that in his individual capacity he "was entitled to share proportionately in such business and assets but was prevented." However, as stated above, "shareholders generally may not bring individual actions to recover what they consider their share of the damages suffered by a corporation." *Corwin*, 371 N.C. at 612, 821 S.E.2d at 734 (citation omitted). Here, Duffy's asserted direct injury—his proportionate share of the "business and assets" allegedly diverted to the New Entity—is merely his share of the injury suffered by the Corporation. Duffy has thus failed to demonstrate that he "suffer[ed] an injury that is distinct from the injury suffered by the corporation itself" as to this claim, *id.* at 612, 821 S.E.2d at 735 (citation and internal quotation marks omitted), and the claim he advances for unjust enrichment may only proceed derivatively, *see Norman*, 140 N.C. App. at 395, 537 S.E.2d at 253.

¶ 72 In his first set of interrogatories, Duffy asked Defendants to "[i]dentify, with specificity, any and all assets, contracts, clients, customers, property, and/or business opportunities diverted, transferred, and/or assigned to the New Entity from the [Corporation] from April 2, 2020 to present." Defendants answered: "None." Duffy also asked Defendants to "[e]xplain in detail what has occurred with the 2020 work contracts between the [Corporation] and its clients and/or customers since February 28, 2020." Defendants answered:

> In January 2020, the [Corporation] had three pending contracts. Each contract had an agreed upon hourly rate, but work was only to be performed on an as needed basis or project basis when requested by the client. Any requested work in January or February 2020 was performed by Mr. Camp and paid to the [Corporation]. None of the contracts were long term contracts and none of the contracts were exclusive to the [Corporation] as clients could use any service provider other than the [Corporation] without breaching the terms of the contract. If the client never asked for additional services to be performed, then the [Corporation] was not entitled to any compensation. [One client] contract had a defined project

> for about $8,000.00 of work. Mr. Camp performed this work at the request of [the client] and [the client] paid approximately $8,000 to [the New Entity].
>
> When Mr. Duffy made it clear he intended to leave the [Corporation], Defendant Camp informed the [Corporation]'s three ongoing clients that the [Corporation] could no longer do business with them. Defendant Camp informed each of them that he and Mr. Duffy would no longer be partners, and that he could not, in good conscience, continue working for them. Each client indicated an interest in having Defendant Camp continue the video and advisement services. Defendant Camp advised each client that he would have to establish a new entity and contract to continue to work for them.

¶ 73 Defendants' denial of Duffy's allegations in their discovery responses demonstrates that there exists a genuine issue of material fact, thus rendering summary judgment inappropriate as to this claim as well. See *In re Will of Jones*, 362 N.C. at 577, 669 S.E.2d at 578 ("[M]uch of the deposition testimony and affidavits is open to competing interpretations. Given our standard of review, however, we view this evidence in the light most favorable to [the plaintiff] and find that he has forecast sufficient facts" to survive summary judgment.). The trial court's order is reversed with respect to Duffy's derivative unjust enrichment claim.

6. Unfair and Deceptive Trade Practices

¶ 74 **[7]** Duffy also raises a claim against Defendants for unfair and deceptive trade practices. Duffy argues that "Defendants' conduct at issue [wa]s unfair and deceptive" in that Defendants "deceptively diverted existing business of the [Corporation] to the New Entity and carried on said business through the New Entity."

¶ 75 To recover under North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, "a plaintiff must establish that: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff[,]" *Nobel v. Foxmoor Grp., LLC*, 380 N.C. 116, 2022-NCSC-10, ¶ 11 (citation and internal quotation marks omitted).

¶ 76 Subsection 75-1.1(b) provides that, "[f]or purposes of this section, 'commerce' includes all business activities, however denominated,

but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). With respect to this definition of "commerce," our Supreme Court has repeatedly held that the "internal operations of a single business . . . are not business activities within the General Assembly's intended meaning of the term." *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010). "As a result, any unfair or deceptive conduct contained solely within a single business is not covered by the Act." *Id.* at 53, 691 S.E.2d at 680. "The determination of whether an act or practice is in or affects commerce is one of law." *J. M. Westall & Co. v. Windswept View of Asheville, Inc.*, 97 N.C. App. 71, 75, 387 S.E.2d 67, 69, *disc. review denied*, 327 N.C. 139, 394 S.E.2d 175 (1990).

¶ 77 Defendants argue that summary judgment was appropriate as to this claim because "the entire dispute in this case centers around the internal operations of the [Corporation], and more specifically, the desire of certain parties to no longer be in business together." However, Defendants' characterization is incorrect; Duffy's allegations focus heavily on the various clients to whom services had been and were to be rendered, as well as on the New Entity as a beneficiary of the alleged unfair and deceptive acts. Where "there are multiple companies . . . involved," this Court has concluded that an individual defendant's interruption of the commercial relationship between those companies is "in or affecting commerce" and may properly constitute an unfair or deceptive act or practice under § 75-1.1. *Songwooyarn Trading Co. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 57, 714 S.E.2d 162, 168, *disc. review denied*, 365 N.C. 360, 718 S.E.2d 396 (2011).

¶ 78 Therefore, summary judgment was inappropriate with respect to Duffy's unfair and deceptive trade practices claim, and the trial court's order is reversed as to this claim. Moreover, as with Duffy's unjust enrichment claim, discussed above, Duffy does not allege that he "suffer[ed] an injury that is distinct from the injury suffered by the corporation itself" as to this claim. *Corwin*, 371 N.C. at 612, 821 S.E.2d at 735 (citation and internal quotation marks omitted). Accordingly, this claim must proceed derivatively. *See Norman*, 140 N.C. App. at 395, 537 S.E.2d at 253.

7. Civil Conspiracy

¶ 79 **[8]** Finally, Duffy also asserts a claim against Camp and Johnson for civil conspiracy.

¶ 80 The elements of civil conspiracy are well established:

> A claim for damages resulting from a conspiracy exists where there is an agreement between two or

> more persons to do an unlawful act or to do a lawful act in an unlawful way, and, as a result of acts done in furtherance of, and pursuant to, the agreement, damage occurs to the plaintiff. In such a case, all of the conspirators are liable, jointly and severally, for the act of any one of them done in furtherance of the agreement.

Fox v. Wilson, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987) (citations omitted).

¶ 81 In addition, it is equally "well established that there is not a separate civil action for civil conspiracy in North Carolina. Instead, civil conspiracy is premised on the underlying act." *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 350, 712 S.E.2d 328, 333 (citations and internal quotation marks omitted), *disc. review denied*, 365 N.C. 357, 718 S.E.2d 391 (2011). Accordingly, recovery in a civil conspiracy claim "must be on the basis of sufficiently alleged wrongful overt acts. The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all." *Shope v. Boyer*, 268 N.C. 401, 405, 150 S.E.2d 771, 773–74 (1966).

¶ 82 Here, Duffy argues that "the conspiracy is Camp and Johnson's plan to form the New Entity, move the [Corporation]'s assets and business to the New Entity, and thereafter carry on the [Corporation]'s business through the New Entity so as to . . . exclude Duffy and his interests as a shareholder." He additionally alleges that "in February and March of 2020, Camp and Johnson 'decided the manner in which the [Corporation] was operated would need to change' and 'made a final decision that they could no longer partner' with [Duffy]."

¶ 83 Defendants respond that Duffy cannot "use the same alleged acts to form both the basis of a claim for conspiracy to commit certain torts and the basis of claims for those torts." *Jones v. City of Greensboro*, 51 N.C. App. 571, 584, 277 S.E.2d 562, 571 (1981), *overruled on other grounds by Fowler v. Valencourt*, 334 N.C. 345, 435 S.E.2d 530 (1993). However, the import of Duffy's conspiracy claim appears to be that, through an action for damages resulting from a conspiracy, he may recover "jointly and severally . . . for the act of any [conspirator] done in furtherance of the agreement." *Fox*, 85 N.C. App. at 301, 354 S.E.2d at 743. This would entitle Duffy to recover damages, jointly and severally, from Johnson and the Corporation as well as Camp for *the conspiracy* to commit the base tort, for which only Camp may be liable.

¶ 84 We have concluded that summary judgment is inappropriate as to Duffy's derivative claims for: (1) Camp's breach of fiduciary duty to the Corporation; (2) unjust enrichment; and (3) unfair and deceptive trade practices. So too is summary judgment inappropriate on the corresponding conspiracy claim, to the extent that Duffy can show on remand that Defendants allegedly conspired to commit any of the underlying claims.

8. Claim Abandoned on Appeal

¶ 85 Duffy makes no argument on appeal that the trial court erred by granting summary judgment on his *Meiselman* claim. Therefore, this issue is deemed abandoned. N.C.R. App. P. 28(b)(6); *see, e.g.*, *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 679, 748 S.E.2d 154, 161 (2013).

IV. Conclusion

¶ 86 For the foregoing reasons, the trial court properly granted summary judgment with respect to all of Duffy's individual claims, as well as his derivative claims for: (1) breach of fiduciary duty that Camp and Johnson, as controlling shareholders, owed him, as a minority shareholder; (2) tradename infringement and Duffy's concomitant request for injunctive relief relating to that claim; and (3) conversion. We affirm the trial court's order as to those claims, as well as the *Meiselman* claim that was abandoned on appeal.

¶ 87 Summary judgment was inappropriate concerning Duffy's remaining derivative claims: (1) Camp's breach of fiduciary duty to the Corporation; (2) unjust enrichment; (3) unfair and deceptive trade practices; and (4) civil conspiracy. The trial court's order granting summary judgment in favor of Defendants is reversed as to these claims. We remand to the trial court for further proceedings on these surviving derivative claims.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Chief Judge STROUD and Judge DIETZ concur.

N.C. EX REL. EXPERT DISCOVERY, LLC v. AT&T CORP.

[287 N.C. App. 75, 2022-NCCOA-837]

NORTH CAROLINA, EX REL. EXPERT DISCOVERY, LLC, BRINGING THIS ACTION ON BEHALF OF THE STATE OF NORTH CAROLINA, PLAINTIFF

v.

AT&T CORP.; BELLSOUTH COMMUNICATION SYSTEMS, LLC; TELEPORT COMMUNICATIONS AMERICA, LLC; BELLSOUTH TELECOMMUNICATIONS, LLC; CAROLINA TELEPHONE AND TELEGRAPH COMPANY, LLC; CENTRAL TELEPHONE COMPANY; CENTURYLINK COMMUNICATIONS, LLC; MEBTEL, INC.; LEVEL 3 COMMUNICATIONS, LLC; TELCOVE OPERATIONS, LLC; TW TELECOM OF NORTH CAROLINA, L.P.; GLOBAL CROSSING LOCAL SERVICES, INC.; TIME WARNER CABLE INFORMATION SERVICES (NORTH CAROLINA), LLC; FRONTIER COMMUNICATIONS ONLINE AND LONG DISTANCE INC.; GLOBAL CROSSING TELECOMMUNICATIONS, INC. (FORMERLY D/B/A FRONTIER COMMUNICATIONS SERVICES INC.); CITIZENS TELEPHONE COMPANY; MCIMETRO ACCESS TRANSMISSION SERVICES CORP.; VERIZON SOUTH, INC.; NORTH STATE COMMUNICATIONS, LLC.; CHARTER COMMUNICATIONS, INC.; CHARTER COMMUNICATIONS (NC), LLC; CHARTER FIBERLINK NC-CCO, LLC; AND YMAX COMMUNICATIONS CORP., DEFENDANTS

No. COA21-671

Filed 20 December 2022

1. Appeal and Error—petition for writ of certiorari—defective service of notice of appeal—writ allowed

In a case brought under the North Carolina False Claims Act, in which plaintiff asserted on behalf of the State that defendants (multiple telecommunications companies) under-billed for statutorily-required 911 service charges, where plaintiff's failure to properly and timely serve all of defendants with the notice of appeal was a non-jurisdictional violation of Appellate Rule 3 that did not frustrate the appellate court's review or the adversarial process, plaintiff's petition for writ of certiorari was granted.

2. Fraud—N.C. False Claims Act—under-billing of 911 service charges—first-to-file rule—similar claims raised in other states—no bar in this state

In an exceptional case brought under the North Carolina False Claims Act, in which plaintiff asserted—as a relator on behalf of the State in a qui tam action—that defendants (multiple telecommunications companies) under-billed and under-remitted the 911 service charges required by N.C.G.S. § 143B-1403, the trial court improperly relied on the first-to-file rule as a basis for granting defendants' motion to dismiss the action. The rule, which bars another relator's suit if an already-pending suit involves related claims, was inapplicable in this case because, although similar claims had been brought in other states, those out-of-state suits did not involve claims made

pursuant to the North Carolina False Claims Act, nor were any of those actions served on the State of North Carolina.

3. Statutes—911 Fund—claim of under-billing of 911 service charges—section 143B-1403—amendment providing immunity—retroactivity

In an exceptional case brought under the North Carolina False Claims Act, in which plaintiff asserted—as a relator on behalf of the State in a qui tam action—that defendants (multiple telecommunications companies) under-billed for 911 service charges, the trial court properly granted defendants' motion to dismiss for failure to state a claim for relief after determining that a 2018 amendment to the 911 statute (N.C.G.S. § 143B-1403), which was made after plaintiff filed its complaint, was a clarifying amendment that applied retroactively and that served to provide immunity to service providers (such as defendants) from liability for billing or remitting 911 service charges that differed from what was required under the current 911 statutes.

Appeal by Plaintiff from an order entered 19 April 2021 by Judge Stephan R. Futrell in Wake County Superior Court. Heard in the Court of Appeals 25 May 2022.

Fox Rothschild LLP, by Robert H. Edmunds, Jr. and Kip D. Nelson; Higgins Benjamin, PLLC, by Robert N. Hunter, Jr. and Robert G. McIver; and Rabon Law Firm, PLLC, by Charles H. Rabon, Jr., for Plaintiff-Appellant.

Kilpatrick Townsend & Stockton LLP, by Joseph S. Dowdy; Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., by Scott H. Angstreich, pro hac vice; Parker Poe Adams & Bernstein LLP, by Richard S. Glaser, Jr. and Nana Asante-Smith; Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr. and Kimberly M. Marston; Burns, Day & Presnell, P.A., by Daniel C. Higgins; Morgan Lewis & Bockius LLP, by Michael Muller; and Robinson, Bradshaw & Hinson, P.A., by Gregory L. Skidmore and Fitz E. Barringer, for the Defendants-Appellees.

WOOD, Judge.

¶ 1 Expert Discovery, LLC ("Plaintiff") appeals from the order granting "Defendants' Joint Motion to Dismiss for Failure to State a Claim under N.C. Gen. Stat. 1A-1, Rule 12(b)(6)" and denying "the 2016 Defendants'

Motion to Dismiss for Failure to State a Claim and Lack of Subject Matter Jurisdiction under N.C. Gen. Stat. 1A-1, Rule 12(b)(6) and 12(b)(1)." For the reasons stated below, we affirm in part and reverse in part the trial court's order.

I. Factual and Procedural Background

¶ 2 During an emergency, North Carolina's 911 system connects individuals to Police, Fire, and Emergency Medical Services public resources, and a state agency, the 911 Board, oversees it. North Carolina funds its 911 system services by service charges levied on telephone customers. In 1989, our General Assembly enacted a 911 statute to fund North Carolina's 911 system which permitted cities and counties to impose a monthly "911 charge" on each outgoing local telephone access line. 1989 N.C. Sess. Law 587, § 62A-4(a). This statute requires telephone service providers in each local area to collect and remit the service charges monthly to the 911 Board. *Id.*, § 62A-5, -6. The 911 Board then distributes the collected 911 funds to the State's many 911 call centers.

¶ 3 Since 1989, North Carolina's 911 statute has undergone several revisions. In 2007, the General Assembly revised it to impose a single, statewide 911 service charge that applied uniformly to all types of voice communications services, including wireless and Voice over Internet Protocol ("VoIP"). The "911 charge" was imposed "on each active voice communications service connection . . . *capable of accessing the 911 system*." An Act to Modernize and Improve the Administration of the State's 911 System Through a Statewide 911 Board, by Ensuring that all Voice Services Contribute to the 911 System and by Providing Parity in the Quality of Service and the Level of 911 Charges Across Voice Communications Service Providers, 2007 N.C. Sess. Law 383, § 1(a) ("H.B. 1755"). A "[v]oice communications service connection" is defined to include "[e]ach telephone number assigned to a residential or commercial subscriber by a voice communications service provider, without regard to technology deployed." *Id.*, § 62A-40(21). In 2015, the General Assembly revised the 911 statute, so that a 911 service charge was "imposed on each active communications service connection that *provides access to the 911 system* through a voice communications service." 2015 N.C. Sess. Law 261, § 4(c) ("H.B. 730").

¶ 4 In 2018, the General Assembly again amended the 911 statute through two separate bills enacted within weeks of each other. In the first bill titled, "Current Operations Appropriations Act of 2018," our legislators addressed a section of N.C. Gen. Stat. § 143B-1403. The bill stated:

> SECTION 37.4(a) [N.C. Gen. Stat. §] 143B-1403(a) reads as rewritten:
>
> § 143B-1403. Service charge for 911 service.
>
> (a) Charge Imposed. - A monthly 911 service charge is imposed on each active communications service connection that provides access to the 911 system through a voice communications service. The service charge for service other than prepaid wireless telecommunications service is seventy cents (70[cents]) or a lower amount set by the 911 Board under subsection (d) of this section. The service charge is payable by the subscriber to the provider of the voice communications service. The provider may list the service charge separately from other charges on the bill. Partial payments made by a subscriber are applied first to the amount the subscriber owes the provider for the voice communications service. If a subscriber is capable of making more than one simultaneous outbound 911 call though its communications service connections, then the total number of 911 service charges billed to the subscriber shall be (i) for CMRS providers, an amount equal to the number of CMRS connections and (ii) for all other communications service providers, an amount equal to the total number of simultaneous outbound 911 calls the subscriber can make using the North Carolina telephone numbers or trunks billed to their account.

2018 N.C. Sess. Law 5, § 37.4(a) ("S.B. 99") (emphasis supplied to indicate proposed added text). Thus, S.B. 99 added language that explained how 911 charges should be calculated when a customer "is capable of making more than one simultaneous outbound 911 call through its communications service connections." *Id.*

¶ 5 Further, the General Assembly provided relief from liability for providers and customers with earlier billing practices that may have departed from the above-mentioned rule:

> SECTION 37.4(b) For any services for which a bill is rendered prior to 180 days following the effective date of this section, no subscriber or communications service provider shall be liable to any person or entity for billing or remitting a different number

> of 911 service charges than is required by Part 10 of Article 15 of Chapter 143B of the General Statutes.

Id. § 37.4(b). A few weeks later, the General Assembly produced another bill, titled "An Act to Make Technical, Clarifying, and other Modifications to the Current Operations Appropriations Act of 2018 and to Create the Legislative Commission on the Fair Treatment of College Student-Athletes." 2018 N.C. Sess. Law 97 ("S.B. 335"). In this latter bill, the General Assembly again addressed the 911 Act. S.B. 335 stated:

> SECTION 10.3. If Senate Bill 99, 2017 Regular Session, becomes law, then Section 37.4(b), as enacted by that act, reads as rewritten:
>
> SECTION 37.4(b) For any services for which a bill is or has been rendered at any time prior to 180 days following the effective date of this section, whether under [N.C. Gen. Stat. §] 143B-1403 or its predecessors as previously codified, no subscriber or communications service provider shall be liable to any person or entity for billing or remitting a different number of 911 service charges than is required by Part 10 of Article 15 of Chapter 143B of the General ~~Statutes~~ Statutes, as clarified by subsection (a) of this section. Subsection (a) of this section is intended as a clarification of existing law.

Id., § 10.3 (emphasis supplied to indicate proposed added text). On 12 June 2018, the "Current Operations Appropriations Act of 2018" was enacted. The latter bill, which made "Technical, Clarifying, and other Modifications to the Current Operations Appropriations Act of 2018," was enacted on 26 June 2018.

¶ 6 Expert Discovery, LLC is a limited liability company organized and operating under the laws of Alabama, with its principal place of business in Huntsville, Alabama. Its president, Roger Schneider, purports to have thirty-five years of experience with high profile technology and telecommunication initiatives. Mr. Schneider has organized and utilized other entities across the country in order to bring suit against telecommunication providers for alleged underbilling for 911 service charges.

¶ 7 In October 2014, Plaintiff, on behalf of the State of North Carolina, filed a *qui tam* complaint[1] under seal pursuant to N.C. Gen. Stat. § 1-605,

1. "*Qui tam* actions are those 'brought *under a statute* that allows a private person to sue for a penalty, part of which the government or some specified public institution will

North Carolina's False Claims Act. Plaintiff alleged several telecommunication companies "that provide voice communication services within the State of North Carolina" ("Defendants") had "violated the North Carolina False Claims Act by knowingly failing to adequately remit monthly 911 service charges to the State of North Carolina." Plaintiff argued that (1) North Carolina's 911 statute required that the prescribed monthly 911 service charge "[be] imposed on *each telephone* number—as opposed to the number of phone lines"; (2) the legislation places the responsibility for collecting and remitting the 911 surcharges upon the telecommunication companies; and (3) "Defendants routinely do not charge the correct amount of 911 service charges or do not charge 911 service charges at all" because "rather than charging 911 fees by telephone *number*, many of the Defendants instead are routinely charging 911 fees by the number of *lines*, particularly when the number of telephone numbers is greater than the number of lines." Plaintiff contended that this practice results in significant under-payment of 911 service charge fees to the State and thereby harms the State of North Carolina, "its citizens, and other subscribers who are forced to pay more than their fair share to support and sustain the 911 System." In 2014, Plaintiff's first complaint, named five companies as Defendants and 10 "yet-to-be-identified" "fictitiously named corporations." At the time Plaintiff filed its first complaint, Mr. Schneider controlled entities having seven pending "false claims" actions in other states.

¶ 8 On 5 August 2016, Plaintiff amended its complaint to add additional Defendants and to "reflect the most significant evidence gathered to date" to further support its allegations against Defendants. Plaintiff argued that its research and analysis demonstrate that "Defendants' under-collection and under-remittance of 911 service charges is widespread and systemic and is not limited to certain service providers, to certain subscribers, or to certain periods of time." On 20 March 2020, Plaintiff amended its complaint a second time, alleging that "Defendants knowingly and routinely under-billed and under-remitted the 911 service charges required by law between 2008 and 2018 within the State of North Carolina." Again, Plaintiff alleged that Defendants "did not assess or remit one charge per telephone number capable of accessing 911 for their multi-line business customers" and for VoIP service and that Defendants "assessed and remitted one 911 charge for the number of calls a customer could place simultaneously," instead of by charging for each individual telephone number as required by statute. Plaintiff

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receive.' " *Fuller v. Easley*, 145 N.C. App. 391, 397, 553 S.E.2d 43, 47 (2001) (emphasis in original) (quoting *Qui tam action*, Black's Law Dictionary (7th ed. 1998)).

argued that Defendants billed their customers fewer charges than would be due if charges were billed based on those customers' assigned telephone numbers.

¶ 9 On 3 June 2020, the State of North Carolina notified the trial court it was declining to take over Plaintiff's *qui tam* action "at this time," referred the court to N.C. Gen. Stat. § 1-609(f) and noted that "the action may be dismissed only if the court and Attorney General have given written consent to the dismissal and the reasons for consenting." The State requested (1) that the case be unsealed and (2) the court "solicit the written consent of the State . . . before ruling or granting its approval," if either party proposed that "this action or any claims therein be dismissed, settled, or otherwise discontinued." On 24 June 2020, the trial court entered an order to unseal Plaintiff's second amended complaint and the State's notice declining to take over the action. The trial court further ordered that "[s]hould the *qui tam* Plaintiff or the Defendants propose that this action or any claims be dismissed, settled, or otherwise discontinued, the Court will solicit the written consent of the State of North Carolina before ruling or granting its approval."

¶ 10 On 7 August 2020, Plaintiff filed a notice of voluntary dismissal of its claims against Defendants of the Frontier parent company and its subsidiaries.[2] On or about 24 August 2020, the State consented to the dismissal of these Defendants. On 2 October 2020, the remaining Defendants filed a Consent Motion to designate the case as Exceptional under Rule 2.1 of the General Rules of Practice, and on 18 November 2020, Chief Justice Beasley designated the case as Exceptional and appointed Judge Futrell to preside.

¶ 11 In January 2021, Defendants filed two motions to dismiss Plaintiff's second amended complaint. The first motion ("Joint Motion") was brought pursuant to Rule 12(b)(6). The Joint Motion raised five grounds for dismissal of Plaintiff's second amended complaint: (1) the 2018 Amendment to North Carolina's 911 statute expressly released the State's claims Plaintiff sought to bring on its behalf; (2) pending suits alleged similar violations of the relevant state or local False Claims Act and triggered provision of the first-to-file bar under the North Carolina False Claims Act; (3) Plaintiff's complaint failed to state a claim under the Act; (4) the complaint alleged that Defendants complied with the 911 statute as clarified by the General Assembly; and (5) any claims concerning acts

2. We note that Defendants' motion explained Plaintiff filed a notice of voluntary dismissal of its claims against Frontier Communications of America, Inc., Frontier Communications of the Carolinas, LLC, Frontier Communications Online and Long Distance Inc., and Global Crossing Telecommunications, Inc. on or about 7 August 2020.

transpiring before 1 January 2010 should be dismissed because they preceded the North Carolina False Claims Act's effective date.

¶ 12 A smaller group of Defendants, including ten who were newly added in 2016, ("2016 Defendants") filed a separate motion to dismiss under Rules 12(b)(1) and 12(b)(6). This motion stated that the newly added Defendants also "join[ed]" the Joint Motion, which they "incorporated" into their own motion "in full." With respect to their Rule 12(b)(1) motion, the 2016 Defendants argued Plaintiff previously engaged in 911 statute litigation across the country, which was highly publicized. Due to news coverage of Plaintiff's previous litigation efforts in other states, the 2016 Defendants contended that Plaintiff's current claims were based on public disclosures, so that Plaintiff did not qualify as the original source of these disclosures. According to the 2016 Defendants, the public disclosure bar in North Carolina's False Claims Act prevented the trial court from possessing subject matter jurisdiction over Plaintiff's claims, such that the claims should be dismissed in their entirety.

¶ 13 On 29 March 2021, the trial court conducted a hearing on the Defendants' motions, and by order entered 19 April 2021, dismissed Plaintiff's complaint for lack of subject matter jurisdiction. The trial court concluded that Defendants' Joint Motion regarding the first-to-file bar "is substantively jurisdictional despite its label as a 12(b)(6) motion" and "treat[ed] it as a Rule 12(b)(1) motion." The trial court also ruled that the North Carolina False Claims Act's "first-to-file bar removes subject matter jurisdiction from this [trial court] due to the earlier-filed actions in other jurisdictions that allege the same material elements of fraud." The trial court further determined that dismissal of Plaintiff's complaint was also warranted because "in laws enacted in 2018, the General Assembly expressly declared that Defendants would not be liable for the under-billing and under-remitting of 911 charges as alleged in Plaintiff-Relator's complaint." Although the trial court denied the 2016 Defendants' motion to dismiss for failure to state a claim and lack of subject matter jurisdiction, the trial court held that, in the alternative, if the "first-to-file bar did not remove this Court's jurisdiction, Defendants' Joint Motion to Dismiss for Failure to State a Claim is granted, and Plaintiff-Relator's [c]omplaint is hereby dismissed with prejudice." Plaintiff filed notice of appeal on 17 May 2021.

II. Analysis

A. Petition for Writ of Certiorari

¶ 14 **[1]** Plaintiff filed a conditional petition for writ of certiorari due to a defect in the service of its notice of appeal on all Defendants to the

action, and as a precaution should its appeal be considered interlocutory.[3] Plaintiff's counsel filed a notice of appeal of the 19 April 2021 order on 17 May 2021; however, the notice was not mailed to all Defendants' counsels at that time. According to Defendants, counsel for AT&T, North State, and Citizens did not receive service or actual notice of the appeal within the 30-day period, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 3(c)(1). On 16 June 2021, those Defendants who had not been properly served moved to dismiss the appeal. The remaining Defendants also moved to dismiss the appeal based on Plaintiff's failure to comply with Rule 3 on 23 June 2021. During the interim, Plaintiff obtained an extension of time to settle the record of appeal. On 21 July 2021, the trial court denied Defendants' joint motions to dismiss based on the factors test in *Dogwood Development & Management Co. v. White Oak Transportation Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008). It is clear that Defendants did not appeal the trial court's denial of these motions. The record further reflects Defendants filed their response to Plaintiff's petition for writ of certiorari on 23 March 2022, the same day they filed their brief with this Court.

¶ 15 Plaintiff's petition for writ of certiorari contends that its service error is non-jurisdictional and does not constitute a basis for dismissal of its appeal. " '[R]ules of procedure are necessary . . . in order to enable the courts properly to discharge their dut[y]' of resolving disputes." *Id.* at 193, 657 S.E.2d at 362 (quoting *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930)). However, "noncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal . . . . Whether and how a court may excuse noncompliance with the rules depends on the nature of the default." *Id.* at 194, 657 S.E.2d at 363 (internal citation omitted).

¶ 16 Rule 3 of our Rules of Appellate Procedure provides that

> [a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon *all other parties* within the time prescribed by subdivision (c) of this rule.

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3. We take judicial notice that at oral argument before this Court, counsel for the parties clarified that there are no pending claims as to this action before the trial court. Therefore, this appeal is not interlocutory.

N.C. R. App. P. 3(a) (emphasis added). Hence, the plain language of Rule 3(a) provides that "all other parties" must be served with a copy of the notice of appeal. N.C. R. App. P. 3(a). The record reflects Plaintiff failed to comply with Rule 3 and that Defendants objected and requested dismissal of Plaintiff's appeal, so as not to waive the lack of service. Therefore, we consider whether the appeal must be dismissed pursuant to the factors in *Dogwood*. *See Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 102, 693 S.E.2d 684, 689 (2010).

¶ 17 If failure to comply with Rule 3 creates "[a] jurisdictional default[,]" we are required "to dismiss the appeal." *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 197, 657 S.E.2d at 365. However, "[i]t is the *filing* of the notice of appeal that confers jurisdiction upon this Court, not the *service* of the notice of appeal." *State v. Golder*, 257 N.C. App. 803, 804, 809 S.E.2d 502, 504 (2018) (citation omitted), *aff'd as modified* 374 N.C. 238, 839 S.E.2d 782 (2020). In *Lee*, this Court noted that where a notice of appeal is properly and timely filed, but not served upon *all* parties, this violation of Rule 3 is a non-jurisdictional defect. 204 N.C. App. 96, 102, 693 S.E.2d 684, 689 (2010).

¶ 18 *Dogwood* held that a non-jurisdictional failure to comply with appellate rules "normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 198, 657 S.E.2d at 365 (citations omitted). Neither should dismissal be considered unless the noncompliance is a "substantial failure" to comply with the rules or a "gross violation" of the rules. *Id.* at 199, 657 S.E.2d at 366. This Court is required to make a "fact-specific inquiry into the particular circumstances of each case," mindful of the need to enforce the rules as uniformly as possible. *Id.* at 199-200, 657 S.E.2d at 366 (citations omitted). Dismissal is appropriate only for the "most egregious instances of non-jurisdictional default." *Id.* at 200, 657 S.E.2d at 366 (citations omitted). To determine the severity of an appellate rule violation, this Court considers: "[(1)] whether and to what extent the noncompliance impairs the court's task of review[, (2)] . . . whether and to what extent review on the merits would frustrate the adversarial process . . . . [, and (3)] [t]he court may also consider the number of rules violated." *Id.* at 200, 657 S.E.2d at 366-67 (citations omitted).

¶ 19 Looking to this Court's analysis in *State v. Jenkins* and its application of *Dogwood*, our review is not impaired by Defendant's noncompliance with Rule 3(a). *State v. Jenkins*, 273 N.C. App. 145, 150, 848 S.E.2d 245, 249 (2020). As in *Jenkins*, the position of the parties on appeal is known by the timely filing of their briefs with this Court. We hold Plaintiff's violation of Rule 3 did not frustrate the adversarial process. *Id.* at 150,

848 S.E.2d at 249. Further, this case is distinguishable from *Lee*, as the unserved defendants were later "informed of the fact that there was an appeal which affect[ed] their interests." *Lee*, 204 N.C. App. at 103, 693 S.E.2d at 690. While some Defendants initially were not served with the notice of appeal, these Defendants were informed of it and were able to timely respond by filing and serving a joint motion to dismiss the appeal on 16 June 2021. Therefore, Plaintiff's conditional petition for writ of certiorari is granted.

B. Standard of Review

¶ 20 When reviewing a trial court's ruling on a Rule 12 dismissal, this Court reviews the matter *de novo*. *Suarez ex rel. Nordan v. Am. Ramp Co.*, 266 N.C. App. 604, 610, 831 S.E.2d 885, 890 (2019). In determining whether a trial court correctly decided to dismiss a complaint for failure to state a claim pursuant to Rule 12(b)(6), we examine "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." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (citation omitted). In conducting the required 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 Enters., LLC*, 370 N.C. 455, 457, 810 S.E.2d 203, 205 (2018) (citation omitted). Our Supreme Court has long held "it is clear that judicial notice can be used in rulings on . . . motions to dismiss for failure to state a claim." *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 641, 256 S.E.2d 692, 696 (1979). Additionally, a motion to dismiss for lack of subject-matter jurisdiction is not viewed in the same manner as a motion to dismiss for failure to state a claim upon which relief can be granted. In such cases, matters outside the pleadings may be considered and weighed by the court in determining the existence of jurisdiction. *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978).

C. The North Carolina False Claims Act and the First-to-File Rule.

¶ 21 **[2]** Plaintiff first argues that the trial court erred in granting Defendants' motion to dismiss because the False Claims Act's "first-to-file bar removes subject matter jurisdiction" from the trial court. Plaintiff contends the trial court erred in dismissing its action because the first-to-file rule is not jurisdictional and does not apply to actions brought under different state statutes, as none of the other *qui tam* actions were served on the State of North Carolina. We agree.

¶ 22 The North Carolina False Claims Act was created "to ensure that public funds are spent in the manner for which they were intended instead of being misappropriated, misspent, or misused." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 2021-NCSC-163, ¶ 43. North Carolina's False Claims Act creates an incentive for private actors with actual knowledge of fraudulent behavior to bring what are known as "*qui tam*" actions, by which the relator (that is, the private actor) shares in any recovery if it or the government successfully litigates or settles a claim that the relator initially brought. N.C. Gen. Stat. § 1-610 (2014). The purpose of the *qui tam* action is to expose "fraud that the government itself cannot easily uncover by encouraging private parties to report fraudulent conduct." *Mason v. Health Mgmt. Assocs., LLC*, 421 F. Supp. 3d 237, 243 (W.D.N.C. 2019) (citation omitted). Accordingly, any "person" who "[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval" or who "[k]nowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" shall be "liable to the State for three times the amount of damages that the State sustains because of the act of that person." N.C. Gen. Stat. § 1-607(a)(1)-(2) (2014).

¶ 23 Although the North Carolina False Claims Act was not enacted until 2009, *qui tam* practice has long been supported by the public policy of this State. *See, e.g.*, *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶¶ 26-27, 33 (noting that "relator" actions have long been a part of North Carolina practice); *State v. Maultsby*, 139 N.C. 583, 584, 51 S.E. 956, 956 (1905) (explaining that the "legislative power to authorize *qui tam* actions" is "immemorial"). Further, our Supreme Court delineated that our state's False Claims Act is required to be "read consistently with the federal False Claims Act." *State ex rel. Stein*, ¶ 39. Like the federal False Claims Act, North Carolina's False Claims Act contains provisions "to prevent parasitic lawsuits based on previously disclosed fraud," including the "first-to-file" bar. *United States ex rel. Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 39 (4th Cir. 2016). The first-to-file bar precludes another relator's suit "if there is already a separate, pending lawsuit that involves related claims." *United States ex rel. Banigan v. PharMerica, Inc.*, 950 F.3d 134, 142 n.8 (1st Cir. 2020).

¶ 24 As of 2014, our State's first-to-file bar statute outlined:

> When a person brings an action under this subsection, the federal False Claims Act, 31 U.S.C. § 3729 et seq., or any similar provision of law in any other state, no person other than the State may intervene or

> bring a related action based on the facts underlying the pending action; provided, however, that nothing in this subdivision prohibits a person from amending a pending action in another jurisdiction to allege a claim under this subsection.

N.C. Gen. Stat. § 1-608(b)(5) (2014). When a case triggers the first-to-file bar, the later-filed case must be dismissed, rather than stayed. Once all earlier-filed cases conclude, the first-to-file bar will not prevent the re-filing of the dismissed claims as new actions. *See, e.g.*, *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 928-30 (D.C. Cir. 2017). Consequently, the first-to-file bar does not require the exact same facts to be alleged in the later-filed case. Rather, this court must determine "whether the [subsequent complaint] alleges a fraudulent scheme the government already would be equipped to investigate based on the [prior complaint.]" *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1209 (D.C. Cir. 2011).

¶ 25 Neither North Carolina's legislature nor courts have yet answered the question of whether a first-to-file claim is jurisdictional. Generally, federal courts have held first-to-file claims under the federal False Claims Act are *non*-jurisdictional. *In re Plavix Mktg., Sales Pracs. & Prods. Liab. Litig.*, 974 F.3d 228, 232 (3d Cir. 2020); *United States ex rel. Hanks v. United States*, 961 F.3d 131, 137 (2d Cir. 2020). We need not determine today the jurisdictional nature of first-to-file claims in North Carolina because we conclude the first-to-file rule is inapplicable to the case *sub judice*.

¶ 26 While we may take judicial notice of exhibits within the record that are pertinent to Mr. Schneider's pending cases across the country,[4] the first-to-file rule does not serve as a bar to claims, "based on

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4. For example, when Plaintiff filed this case in October 2014, affiliates of Plaintiff previously had filed seven cases alleging that telephone service companies failed to bill their customers all 911 charges owed, and thereby violated the relevant state or local False Claims Act. These cases are as follows:

New Jersey: *New Jersey ex rel. Phone Recovery Servs., LLC v. Verizon New Jersey, Inc.*, No. L-2257-13 (Mercer Cnty. Super. Ct.). Initial complaint filed in October 2013.

Massachusetts: *Massachusetts ex rel. Phone Recovery Servs., LLC v. Verizon of New England, Inc.*, No. 15-00783-BLSI (Suffolk Cnty. Super. Ct.). Initial complaint filed in January 2014.

New York: *New York ex rel. Phone Admin. Servs. Inc. v. Verizon New York Inc.*, No. 100329/2014 (Sup. Ct., N.Y. Cnty.). Initial complaint filed on 20 March 2014.

District of Columbia: *District of Columbia ex rel. Phone Recovery Servs., LLC v. Verizon Washington DC, Inc.*, No. 14-0002277 (D.C. Super. Ct.). Initial complaint filed in April 2014.

different material facts" and "separate regulations." *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1131 (9th Cir. 2015). Although Plaintiff's complaints, both here and in other states, allege claims under various states' False Claims Acts, the underlying allegations of fraud in the complaints do not, in fact, allege violations under the same statutes. Because these claims are based on "separate regulations," the first-to-file rule does not serve as a bar to the action before us. *Id.* Plaintiff argues Defendants violated *North Carolina* law by failing to collect and remit the proper amount of 911 service fees owed to the *North Carolina* 911 Board. There are no identical lawsuits to Plaintiff's claim, as none of the other pending complaints have asserted a claim under *North Carolina's* False Claims Act. A false claims action in North Carolina based on a violation of North Carolina's 911 statute is not barred by a pending false claims action in Iowa brought under Iowa's law. Indeed, claims are not barred when they "exist completely independent of one another." *Id.*

¶ 27 Additionally, one purpose of the first-to-file rule is "to give preclusive effect to the *qui tam* action that presented enough material information for the government to launch an investigation." *United States ex rel. Lee v. N. Adult Daily Health Care Ctr.*, 174 F. Supp. 3d 696, 705 (E.D.N.Y. 2016). The first-to-file bar provides an incentive to relators to "promptly alert the government to the essential facts of a fraudulent scheme." *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 24 (1st Cir. 2009) (cleaned up). Here, none of the other pending *qui tam* actions cited by Defendants were served on the State of North Carolina. North Carolina was never alerted to or placed on notice of any fraudulent schemes committed against it by these previous, out of state, complaints. Plaintiff asserts North Carolina government is not "solely responsible for monitoring every piece of litigation in every state—even if that litigation were under seal. The law makes no such absurd demand." We agree and therefore hold that the first-to-file rule does not apply to the facts of this case, as out-of-state claims do not place the State of North Carolina on notice of the type of fraudulent scheme that Plaintiff has alleged. *See United States ex rel. Harris v. Lockheed Martin Corp.*, 905 F. Supp. 2d 1343, 1350 (N.D. Ga. 2012).

Illinois: *Illinois ex rel. Phone Recovery Servs. of Illinois, LLC v. Ameritech Illinois Metro, Inc.*, No. 14-L-5238 (Cook Cnty. Cir. Ct.), on remand No. 19-L-6803. Initial complaint filed in May 2014.

Minnesota: *Minnesota ex rel. Phone Recovery Servs., LLC v. CenturyLink, Inc.*, No. 62-CV-14-3768 (Ramsey Cnty. Dist. Ct.). Initial complaint filed in May 2014.

Iowa: *Iowa ex rel. Phone Recovery Servs. v. AT&T Inc.*, No. CVCV047928 (Polk Cnty. Dist. Ct.). Initial petition filed in May 2014.

D. Retroactive Application of Legislation.

¶ 28 **[3]** Next, Plaintiff contends that the trial court incorrectly concluded Plaintiff's complaint failed to state a claim because "in laws enacted in 2018," "the General Assembly expressly declared that Defendants would not be liable for the under-billing and under-remitting of 911 charges." Plaintiff argues the trial court's alternative basis for dismissing its second amended complaint was erroneous due to "a misreading of the [General Assembly's] 2018 legislation—a misreading with constitutional implications." We disagree.

¶ 29 The General Assembly enacted S.B. 99 in 2018, amending language in N.C. Gen. Stat. § 143B-1403(a) to provide that if a customer "is capable of making more than one simultaneous outbound 911 call through its communications service connections," then the total number of monthly 911 service charges billed to the customer is assessed by "an amount equal to the total number of simultaneous outbound 911 calls the subscriber can make using the North Carolina telephone numbers or trunks billed to their account." 2018 N.C. Sess. Law 5, § 37.4(a). Therefore, monthly 911 service charges would not be assessed on a per-telephone-number basis. Further, S.B. 335 provides additional clarification regarding the application of N.C. Gen. Stat. § 143B-1403(a). The enacted provision states:

> For any services for which a bill is or has been rendered at any time prior to 180 days following the effective date of this section, whether under [N.C. Gen. Stat. §] 143B-1403 or its predecessors as previously codified, no subscriber or communications service provider shall be liable to any person or entity for billing or remitting a different number of 911 service charges than is required by Part 10 of Article 15 of Chapter 143B of the General ~~Statutes~~ Statutes, as clarified by subsection (a) of this section. Subsection (a) of this section is intended as a clarification of existing law.

2018 N.C. Sess. Law 97, § 10.3 (emphasis supplied to indicate added text).

¶ 30 Defendants argue that the above language in S.B. 335 applies retroactively, and that the immunity granted thereby forecloses Plaintiff's claim, irrespective of it having been filed prior to the statute taking effect. Plaintiff contends "the law does not support such a broad reach."

¶ 31 A retroactive law is one which "is made to affect acts or transactions occurring before it came into effect." *Ashley v. Brown*, 198 N.C.

369, 372, 151 S.E. 725, 727 (1930) (citation omitted). "[A] statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation." *State v. Green*, 350 N.C. 400, 404, 514 S.E.2d 724, 727 (1999) (citation omitted). "The primary endeavor of courts in construing a statute is to give effect to legislative intent." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276-77 (2005) (citations omitted). A court ascertains legislative intent by looking "first to the language of the statute itself." *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). Courts "will not adjudge an act of the General Assembly unconstitutional unless it is clearly so." *Hobbs v. Cty. of Moore*, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966) (citation omitted); *Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982) ("When a statute would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively only." (citation omitted)). However, "[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277 (citing *Fowler*, 334 N.C. at 348, 435 S.E.2d at 532). Where a statute's retroactive application is "clear beyond any reasonable doubt," the reviewing court must apply it retroactively or strike it as unconstitutional. *See Kornegay v. City of Goldsboro*, 180 N.C. 441, 445, 105 S.E. 187, 189 (1920).

¶ 32 Although S.B. 335 does not expressly state that the provision is to apply "retroactively," the bill utilizes the phrases "has been," "at any time," and "its predecessors as previously codified" to indicate the General Assembly's intention for the 911 service charges immunity to be applied to phone bills generated before the Act's enactment. It is clear that phone bills "rendered" under the 911 statute's "predecessors" would necessarily have been sent before the Act took effect in 2018. We also note that the General Assembly specifically added the underscored language to the initial version of S.B. 99, § 37.4(b) to ensure that immunity from 911 service charges applied irrespective of when the service provider billed its customer (inserting "or has been" and "at any time"), and under both the current 911 statute and its past versions (adding "whether under" and "or its predecessors as previously codified"). Thus, the unambiguous language added to section 37.4(b) "clearly purports to apply retroactively to cases arising before and after the passage" of the 2018 legislation. *Wallace v. Greystar Real Estate Partners, LLC*, 2022 U.S. Dist. LEXIS 32760, at *10 (M.D.N.C. Feb. 24, 2022) (unpublished). By its plain language, the 2018 session laws purport to apply retroactively to this case. Therefore, we must give effect to the 2018 legislation's plain meaning unless doing so would be unconstitutional.

¶ 33 Plaintiff contends that even if the legislation is arguably retroactive, its application to pending litigation would unconstitutionally infringe on its vested rights and impair its contractual rights. Specifically, Plaintiff argues that the False Claims Act "grants the relator status as an injured party and then assigns it the right to litigate the claim on behalf of the government," so that the "relator's contractual rights thus vest when it brings the claim." Moreover, Plaintiff alleges that by "bringing this action and making a jury demand," it invoked additional constitutional rights. Plaintiff's arguments are misplaced.

¶ 34 A statute will not be applied retroactively if it "will interfere with rights which had vested or liabilities which had accrued at the time it took effect." *Fogleman v. D&J Equip. Rental, Inc.*, 111 N.C. App. 228, 232, 431 S.E.2d 849, 851 (1993) (citation omitted). A vested right is a right "which is otherwise secured, established, and immune from further legal metamorphosis." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). Thus, "a lawfully entered judgment is a vested right." *Bowen v. Mabry*, 154 N.C. App. 734, 736, 572 S.E.2d 809, 811 (2002) (citing *Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955)).

¶ 35 Our Supreme Court has "recognized a presumption that a state statute 'is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' " *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016) (quoting *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 58 S. Ct. 98, 100, 82 L. Ed. 57, 62 (1937)). "This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441, 1451, 84 L. Ed. 432, 446 (1985) (citation omitted). Accordingly, "to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Id.* Consistent with this presumption, our Supreme Court held that "[a] statute providing a penalty creates no contract between the State and the common informer, even if he acts under the permission given him to sue." *Dyer v. Ellington*, 126 N.C. 941, 945, 36 S.E. 177, 178 (1900).

Such is the case here. Plaintiff is unable to carry its burden of overcoming this presumption as the North Carolina False Claims Act does not create a contractual right for a relator. A relator does not accept the State's offer by filing suit, and thereby enter into a unilateral contract with the government. While Plaintiff is correct that "a *qui tam* relator, is in effect, suing as a partial assignee" on behalf of a government,

Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 773 n.4, 120 S. Ct. 1858, 1863, 146 L. Ed. 2d 836, 846 (2000), treating a *qui tam* provision as "a unilateral contract offer would also be inconsistent with the history of *qui tam* provisions." *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 624, 632 (Fed. Cir. 2012). As a Federal Circuit Court of Appeals has noted, "federal courts have consistently recognized that amendments to *qui tam* statutes that interfere with a relator's pending action do not 'deprive him of rights guaranteed by the Constitution.' " *Id.* (quoting *United State ex rel. Rodriguez v. Weekly Publ'n, Inc.*, 144 F.2d 186, 188 (2d Cir. 1944)). That is to say, "a *qui tam* plaintiff has no vested right and his privilege of conducting the suit on behalf of the United States and sharing in the proceeds of any judgment recovered, is an award of statutory creation, which, prior to final judgment, is wholly within the control of Congress." *Brooks*, 702 F.3d at 632 (cleaned up).

¶ 36 The Supreme Court of the United States also noted that a "*qui tam* relator has suffered no such invasion [of a legally protected right]—indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails." *Vt. Agency of Natural Res.*, 529 U.S. at 773, 120 S. Ct. at 1862, 146 L. Ed. 2d at 845. North Carolina law comports such that as in *Dyer*, our Supreme Court stated:

> An informer has no natural right to the penalty, but only such right as is given to him by the strict letter of the statute . . . . He has in a certain sense an inchoate right when he brings his suit, . . . but he has no *vested* right to the penalty until judgment.

126 N.C. 941, 944-45, 36 S.E. 177, 178 (1900). An inchoate right is "a mere personal power or privilege, solely created by statute, reflecting the existing public policy and [is] subject to change or withdrawal at the pleasure of the Legislature at any time before its exercise." *Pinkham v. Unborn Child. of Jather Pinkham*, 227 N.C. 72, 79, 40 S.E. 2d 690, 696 (1946); *Williams v. Atlantic Coast Line R.R. Co.*, 153 N.C. 360, 364, 69 S.E. 402, 403 (1910). If judgment has not already been entered, generally, "a right created solely by the statute may be taken away by its repeal or by new legislation." *Bass v. Weinstein Mgmt. Co.*, 2021 U.S. Dist. LEXIS 169793, at *7 (M.D.N.C. Sept. 8, 2021) (unpublished) (quoting *Pinkham*, 227 N.C. at 78, 40 S.E.2d at 694). We hold Plaintiff's assertion of having vested rights to its claim, whether contractual or otherwise, fails.

¶ 38 Finally, Plaintiff attempts to categorize the 2018 session laws as a repealing statute. Plaintiff cites case law to argue that its action, "having

been brought before the repealing statute was enacted, is plainly not affected by it" because if the General Assembly "had meant otherwise, it would have inserted, as it always does when such is the intent, the words 'and this shall apply to pending suits.' " *City of Wilmington v. Cronly*, 122 N.C. 388, 391, 30 S.E. 9, 11 (1898). Plaintiff asserts the general rule that "[w]here the statute is simply repealed and no allusion is made to pending actions, the inchoate rights therein acquired are not interfered with, but may be prosecuted to final recovery." *Williams*, 153 N.C. at 365, 69 S.E. at 403 (citation omitted).

¶ 39 However, Plaintiff's argument is inapposite to the case at bar because the 2018 Amendment is not a repeal, but "an absolute and express remission of [a] penalty" that the General Assembly has the right to destroy. *Dyer*, 126 N.C. at 944, 36 S.E. at 178. Just as in *Dyer*, the enacted 2018 legislation is "an act of amnesty or pardon," *id.*, which specifically released all subscribers or communications service providers from liability "to any person or entity for billing or remitting a different number of 911 service charges" than required by the current 911 statutes. 2018 N.C. Sess. Law 97, § 10.3. While it is true that S.B. 335 does not utilize "pending" language, in *Dyer*, our Supreme Court determined that the Act's language stating that the defendants "are hereby released from any and all penalties" was specific enough to indicate "to whom and to what the act was intended to apply." *Dyer*, 126 N.C. at 944, 36 S.E. at 178. Here, the language in S.B. 335 is comparable to the Act in *Dyer*, as the provision unambiguously releases (1) all subscribers or communications service providers (to whom the act was intended to apply) from (2) any person or entity for billing or paying a different 911 service charge amount than required by the "Part 10 of Article 15 of Chapter 143B" of North Carolina's General Statutes (to what the act was intended to apply) (3) during the period for which a bill is or has been rendered at any time prior to 180 days following the enactment of this section (the relevant time period the Act's "amnesty" was intended to apply to). Therefore, we conclude that the language of S.B. 335 is unambiguous regarding "to whom and to what the act was intended to apply."

¶ 40 We further reject Plaintiff's categorization of the 2018 Amendment as "repealing" because S.B. 335 serves as a clarification of existing law. By enacting the 2018 Act to Make Technical, Clarifying, and Other Modifications to the Current Operations Appropriations Act of 2018, the General Assembly made clear its intention. In the first bill, the General Assembly expressly added that a customer "capable of making more than one simultaneous outbound 911 call . . . shall be" billed 911 charges "equal to the total number of simultaneous outbound 911 calls" that a

customer can make. 2018 N.C. Sess. Law 5, § 37.4(a). In the second legislation, the General Assembly's intent is made manifest where § 10.3 states N.C. Gen. Stat. § 143B-1403(a), as amended by S.B. 99, "is intended as a clarification of existing law." 2018 N.C. Sess. Law 97, § 10.3. Thus, our General Assembly provided "further insight into the way in which the legislature intended the law to apply from its original enactment." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 681 (2012). Therefore, as a "clarifying amendment," the language added in § 37.4(a) applies not only to "cases brought after [its] effective date[]," but also "to *all cases pending* before the courts when the amendment is adopted, regardless of whether the underlying claim arose before or after the effective date of the amendment." *Id.* (emphasis added) (citations omitted). As such, Plaintiff's arguments concerning the legislation's lack of explicit "pending" language fails.

III. Conclusion

¶ 41 After careful review of the record and applicable law, we affirm the judgment of the trial court, granting Defendants' motion to dismiss. Although the trial court erred in granting Defendants' first-to-file argument from their Joint Motion to Dismiss, because the first-to-file rule does not apply in this case, we affirm the judgment as the trial court correctly determined the 2018 Amendment to the 911 statute applies retroactively to Plaintiff's claim. Due to the retroactive application of the Amendment, we conclude the trial court correctly granted Defendants' Joint Motion to Dismiss for Failure to State a Claim.

AFFIRMED.

Judges ARROWOOD and CARPENTER concur.

IN RE ADOPTION OF B.M.T.

[287 N.C. App. 95, 2022-NCCOA-838]

IN THE MATTER OF THE ADOPTION OF B.M.T., A MINOR

No. COA22-377

Filed 20 December 2022

Adoption—father's consent—required—reasonable and consistent payments for support—tangible support

The trial court's order concluding that respondent-father's consent would be required before his infant daughter could be adopted by petitioners—with whom the mother had placed the infant for the purpose of adoption without the father's knowledge or consent shortly after her birth—was affirmed. The challenged findings of fact, which for the most part concerned the father's support of the mother and baby during the determinative time period, were supported by competent evidence in the form of receipts, bank statements, telephone records, and the father's testimony. The father provided reasonable and consistent payments in support of the mother and baby in accordance with his financial means pursuant to N.C.G.S. § 48-3-601, both during and after the pregnancy term, including tangible support such as food, clothing, transportation, and baby supplies, and also including the preparation of his home for the baby with a bed, toys, and baby clothing; therefore, with the other statutory requirements being unchallenged, the father's consent was required for the daughter's adoption.

Appeal by Petitioners from Order entered 16 September 2021 by Judge Teresa H. Vincent in Guilford County Superior Court. Heard in the Court of Appeals 1 November 2022.

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

Lindley Law Firm, PLLC, by Kathryn S. Lindley, for respondent-appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Petitioners—the prospective adoptive parents of Layla[1]—appeal from the trial court's Order entered 16 September 2021, requiring

1. A pseudonym is used for the minor child designated in the caption as B.M.T.

Respondent-Father's (Respondent) consent for Layla to be adopted by Petitioners. The Record before us tends to reflect the following:

¶ 2 Respondent is the biological father of Layla. Respondent and Layla's biological mother (Mother) were involved in a romantic relationship at the time of Layla's conception. Respondent and Mother continued their relationship during Mother's pregnancy, and Respondent provided Mother with food, clothing, cash, transportation, personal items, and housing during the pregnancy. Without Respondent's knowledge or consent, Mother placed Layla with Petitioners for the purpose of adoption on 13 June 2019. On 20 June 2019, Respondent and Mother executed a Voluntary Acknowledgement of Paternity with the State of Tennessee. Subsequently, Respondent's name was added to Layla's birth certificate, and Layla's surname was changed to the surname of Respondent.

¶ 3 Petitioners filed a Petition to adopt Layla on 27 June 2019. Petitioners served Respondent with a Notice of Filing Petition for Adoption on or about 10 August 2019. Respondent objected to the adoption on 16 August 2019, requesting custody of Layla and claiming paternity. Further, Respondent stated he was "able and willing to raise and care for [his] child in every way possible." On 27 August 2019, Petitioners filed a Motion to find Respondent's consent not required, stating Mother consistently reported the identity of the biological father as "unknown" and "the unknown birth father's consent is statutorily unnecessary pursuant to [N.C. Gen. Stat.] §§ 48-3-601 and 48-3-603." On 19 April 2021, the matter proceeded to trial in Guilford County District Court. During the trial, Respondent testified Mother often stayed with him at his home during the pregnancy, and he also provided Mother with food, transportation, and maternity clothing. Respondent testified he offered Mother financial support on numerous occasions, which she sometimes accepted and sometimes refused. Additionally, at trial, Respondent presented a document he created entitled "Pregnancy Care Expense Report". Respondent testified the Report does not include all of the support he provided to Mother and the minor child, but the Report was created from the bank statements and receipts in his possession, all of which pre-dated the 27 June 2019 statutory deadline. The Respondent also presented itemized receipts detailing baby items and supplies he purchased for Mother and the minor child.

¶ 4 On 16 September 2021, the trial court entered an Order concluding Respondent's consent to the minor child's adoption is required pursuant to N.C. Gen. Stat. § 48-3-601. The trial court's Findings of Fact are, in relevant part, as follows:

13. The Respondent father provided reasonable and consistent support of the minor child by providing the following:

a. Infant car seat for the minor child.

b. Significant number of meals for the biological mother during her pregnancy.

c. Maternity clothes for the biological mother.

d. Baby clothes and supplies.

e. Diapers.

f. Respondent attended doctor's visits with the biological mother[.]

g. Respondent provided meals for biological mother and formula for [the] child after the birth of the child.

h. Cash of some amount (sometimes the biological mother accepted and sometimes she refused it).

. . . .

15. From August 2018 to July 2019, the Respondent spent $1,698.66 on or in support of the biological mother and the minor child for transportation, food from a variety of restaurants, personal items and baby supplies, and Uber and Lyft transportation.

16. Both Petitioner and Respondent provided child support worksheets which show that child support would have been approximately $350.00 per month after the birth of the child pursuant to N.C. Child Support Guidelines. Between May 17th and June 1st of 2019, Respondent spent $521.34 at Walmart for baby formula, a baby crib, car seat, bouncer, diapers, socks, and other baby supplies.

. . . .

20. Respondent made his home ready for the minor child with bed, toys, and clothes; further he showed his home and the child's items to his sister by video chat.

. . . .

> 23. At the time the minor child was placed with Petitioners, Respondent resided at his own apartment and with his mother in Memphis, Tennessee; further his mother has since died, and he now lives with his fiancé in Mississippi approximately fifteen . . . minutes from his prior home.

¶ 5 Based on these Findings, the trial court made the following Conclusion of Law: "Respondent's consent shall be required in order for the minor child . . . to be legally adopted." Petitioners timely filed written Notice of Appeal on 13 October 2021.

Issues

¶ 6 The dispositive issues on appeal are: (I) whether the trial court's Findings of Fact are supported by competent evidence; and (II) whether the trial court erred in concluding Respondent's consent was required for the adoption of the minor child.

Analysis

¶ 7 Adoption proceedings are "heard by the court without a jury." N.C. Gen. Stat. § 48-2-202 (2021). "Our scope of review, when the Court plays such a dual role, is to determine whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts." *In re Adoption of Cunningham*, 151 N.C. App. 410, 412-13, 567 S.E.2d 153, 155 (2002) (citation and quotation marks omitted). "This Court is bound to uphold the trial court's findings of fact if they are supported by competent evidence, even if there is evidence to the contrary." *In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004) (citing *In re Adoption of Byrd*, 137 N.C. App. 623, 529 S.E.2d 465 (2000), *aff'd on other grounds*, 354 N.C. 188, 552 S.E.2d 142 (2001)). "[I]n reviewing the evidence, we defer to the trial court's determination of witnesses' credibility and the weight to be given their testimony." *Id.* at 331, 590 S.E.2d at 460 (citing *Leak v. Leak*, 129 N.C. App. 142, 150, 497 S.E.2d 702, 706, *disc. review denied*, 348 N.C.498, 510 S.E.2d 385 (1998)).

I. Challenged Findings of Fact

¶ 8 Petitioners contend Findings 13, 15, 16, and 23 are not supported by competent evidence and are, thus, not binding on this Court. We disagree.

¶ 9 At Petitioners' request, Respondent produced numerous documents, including receipts, credit and/or debit card statements, and telephone

records in his possession to demonstrate he provided consistent and reasonable support within his financial means to both Mother and the minor child. These documents, which were presented at trial, as well as Respondent's testimony, support the challenged Findings. As such, the trial court properly exercised its inherent discretion in weighing and considering all competent evidence before making its Findings of Fact. Respondent testified as to the facts found in Findings 13, 15, 16, and 23, and while Petitioners contend Respondent's testimony is not credible evidence to support the challenged Findings, it is not the duty of this Court to reweigh the credibility of Respondent's testimony. *See In re J.T.C.*, 273 N.C. App. 66, 70, 847 S.E.2d 452, 456 (2020) (quoting *Smith v. Smith*, 89 N.C. App. 232, 235, 365 S.E.2d 688, 691 (1988) (citation omitted)) (" 'Credibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness.' "). Thus, because the Findings are supported by competent evidence, these Findings are binding on appeal.

II. Respondent's Reasonable and Consistent Support

¶ 10 Next, Petitioners contend the trial court erred in finding Respondent provided "reasonable and consistent payments", requiring Respondent's consent to Layla's adoption. Chapter 48 of our General Statutes governs adoption proceedings in North Carolina. Section 48-3-601 requires a man "who may or may not be the biological father" to consent to the adoption of a minor child if he:

> 4. Before the earlier of the filing of the petition . . . has acknowledged his paternity of the minor and
>
> . . . .
>
> II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both[.]

N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2021). Because Petitioners concede Respondent has satisfied both the acknowledgment and

communication requirements, we limit our analysis to whether Respondent provided reasonable and consistent payments for the support of the Mother, minor child, or both.

¶ 11 Respondent must present competent evidence to demonstrate: "(1) he provided payments for the support of the biological mother, minor child, or both; (2) such payments were reasonable in light of his financial means; and (3) such payments were made consistently." *In re Adoption of C.H.M.*, 371 N.C. 22, 29-30, 812 S.E.2d 804, 809-10 (2018).

¶ 12 Petitioners contend the trial court erred in concluding Respondent provided reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both. We disagree.

¶ 13 Although "support" required under N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) is not expressly defined, our Supreme Court has stated: " 'support' is best understood within the context of the statute as actual, real and tangible support, and that attempts or offers of support do not suffice." *In re Adoption of Byrd*, 354 N.C. 188, 196, 552 S.E.2d 142, 148 (2001). However, " '[s]o long as the father makes reasonable and consistent payments *for* the support of mother or child, the mother's refusal to accept assistance cannot defeat his paternal interest.' " *C.H.M.*, 371 N.C. at 30, 812 S.E.2d at 810 (quoting *In re Adoption of Anderson*, 360 N.C. 271, 279, 624 S.E.2d 626, 630 (2006)).

¶ 14 In *Byrd*, the respondent-father delivered a $100 money order and baby clothes to a third party for the benefit of the biological mother and child, but the biological mother did not receive the items until after the adoption petition had been filed. *Byrd*, 354 N.C. at 191, 552 S.E.2d at 145. Further, the Court also emphasized *tangible* support is required under N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II). *Id.* at 196-97, 552 S.E.2d at 148. Thus, the Court concluded the respondent's consent to the adoption of the minor child was not required because "respondent never provided tangible support within his financial means to mother or child at any time during the relevant period before the filing of the adoption petition." *Id.* at 197, 552 S.E.2d at 148.

¶ 15 In *Anderson*, the Supreme Court noted the importance of a "payment record" to establish a putative father made reasonable and consistent payments. 360 N.C. at 279, 624 S.E.2d at 630-31. There, the respondent-father presented evidence he made various offers of financial support to the biological mother, but the mother refused to accept his assistance. *Id.* at 278-79, 624 S.E.2d at 630. As such, the respondent never actually provided any payments or support to the mother or the

minor child. *Id.* at 279, 624 S.E.2d at 630. Thus, the Court concluded respondent's consent to the minor child's adoption was not required because "[b]y doing nothing more than sporadically offering support to [mother], respondent left the support prong of N.C. [Gen. Stat. §] 48-3-601 unsatisfied." *Id.* at 279, 624 S.E.2d at 631.

¶ 16 In *C.H.M.*, the Supreme Court emphasized "the importance of a verifiable payment record to establish that a putative father made reasonable and consistent payments." *C.H.M.*, 371 N.C. at 31, 812 S.E.2d at 811 (citing *Anderson*, 360 N.C. at 278, 624 S.E.2d at 630). In that case, the respondent-father neither purchased any baby items for the minor child nor provided any monetary payments for the minor child's support. *Id.* at 24, 812 S.E.2d at 806. Instead, the respondent presented evidence of a lockbox where he had placed money "for the support of the minor child." *Id.* at 25, 812 S.E.2d at 807. However, the Court concluded the respondent's evidence was insufficient to demonstrate the respondent complied with the statutory support payment requirements. *Id.* at 32, 812 S.E.2d at 811. In so concluding, the Court reasoned the respondent failed to demonstrate the money placed in the lockbox constituted "reasonable and consistent payments" prior to the filing of the petition for adoption as the "respondent presented comingled financial evidence" and did not know how much money was placed in the lockbox at any relevant time. *Id.*

¶ 17 In the case *sub judice*, Respondent, as distinguished from the respondents in *Byrd*, *Anderson*, and *C.H.M.*, provided actual, *tangible* support in the form of food, clothing, transportation, and baby supplies for the benefit of both Mother and Layla, as opposed to mere offers of support. Further, unlike the respondent in *Anderson*, who offered evidence of "sporadic" offers of support to the biological mother, here, Respondent provided documentation in the form of receipts, bank statements, and a self-created "Pregnancy Care Expense Report" as evidence of the tangible support he provided Mother and Layla. Here, Respondent provided what the trial court found to be consistent and reasonable within his financial means: tangible items—a car seat, a crib, baby clothing, diapers, formula, and other baby supplies—for the support of the minor child. Further, Respondent not only provided support to the minor child, but he also provided support to Mother throughout her pregnancy and after Layla's birth. Moreover, unlike the respondents in *Byrd*, *Anderson*, and *C.H.M.*, here, Respondent also prepared his own home for the minor child with a bed, toys, and baby clothing. The Court in *Anderson* suggested the "respondent could have supplied the requisite support [by] . . . opening a bank account or establishing a trust fund

. . . in accordance with his financial resources[,]" 360 N.C. at 279, 624 S.E.2d at 630-631; however, while opening a bank account or establishing a trust fund may satisfy the support requirement of N.C. Gen. Stat. § 48-3-601, that is merely one way to satisfy the statutory requirement.

¶ 18 Indeed, as expressly stated in the statute, the support required by Section 48-3-601 may include "tangible means of support[.]" N.C. Gen. Stat. § 48-3-601(b)(4)(II). As such, the instant case is distinguishable from *Byrd*, *Anderson*, and *C.H.M* as Respondent actually provided *tangible* support to both the biological mother and the minor child during and after the pregnancy term. Moreover, Respondent provided this tangible support prior to the statutory deadline—27 June 2019, when the Petitioners filed the Petition for Layla's adoption. *See In re Adoption of K.A.R.*, 205 N.C. App. 611, 617, 696 S.E.2d 757, 762 (2010) ("[T]he bright-line requirement—that the support contemplated by the statute must be provided prior to the filing of petition—found to absent in *Byrd* and *Anderson*, distinguishes this case.").[2]

¶ 19 Thus, the trial court did not err in finding Respondent provided, in accordance with his financial means, reasonable and consistent payments for the support of both Mother and Layla. Therefore, the trial court also did not err in determining Respondent satisfied the statutory requirements of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II). Consequently, the trial court properly concluded Respondent's consent was required in order for Layla to be legally adopted.

Conclusion

¶ 20 Accordingly, for the foregoing reasons, we affirm the trial court's Order concluding Respondent's consent is required for the minor child to be legally adopted.

AFFIRMED.

Chief Judge STROUD and Judge JACKSON concur.

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2. We acknowledge Petitioners' argument that *K.A.R.* was overruled sub silentio by our Supreme Court in *C.H.M.* However, the applicability of *K.A.R.* was clearly at issue in *C.H.M.*, as illustrated by the dissent in that case. While the majority in *C.H.M.*, by omitting discussion of our decision in *K.A.R.* clearly found *K.A.R.* unpersuasive and inapplicable to the facts of *C.H.M.*, it also did not expressly overrule *K.A.R.* despite the opportunity and authority to do so. We further note the Supreme Court denied discretionary review in *K.A.R.* As such, we decline to conclude *K.A.R.* is overruled, and it retains precedential value in this Court. *See also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

IN RE E.B.

[287 N.C. App. 103, 2022-NCCOA-839]

IN THE MATTER OF E.B. AAU/MPU WARDS GRANVILLE COUNTY

No. COA21-694

Filed 20 December 2022

Mental Illness—involuntary commitment—dangerous to self—psychotic and delusional

The trial court's order requiring respondent, who was suffering from psychosis and delusions, to be involuntarily committed for ninety days was affirmed where the trial court's findings—that respondent posed a significant danger to herself due to her noncompliance with medication, lack of stable housing, and lack of insight into her condition—were supported by clear, cogent, and convincing evidence in the record and in turn supported the conclusion that respondent should be involuntarily committed.

Judge INMAN concurring in result only by separate opinion.

Appeal by respondent from order entered 4 March 2021 by Judge John H. Stultz in Granville County District Court. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah Hall Love, for respondent-appellant.

TYSON, Judge.

¶ 1 E.B. ("Respondent") appeals from an order requiring 90 days of inpatient commitment as being mentally ill and being dangerous to self. We affirm.

I. Background

¶ 2 Dr. Gary Pohl ("Petitioner") a state employee who is employed at Central Regional Hospital signed and filed a petition seeking Respondent's involuntary commitment on 21 January 2021, opining she "has a very extensive history of severe mental illness," was "noncompliant with medication and she is currently very psychotic," and was experiencing "paranoid delusions." Respondent underwent a first

examination the following day, with the physician-examiner, Dr. Barbara Mattox, MD, who opined Respondent was "dangerous to herself or others." The examiner specifically noted Respondent believed: (1) someone had implanted tracking devices into her ears, vagina, and uterus; (2) she had undergone genital mutilation; and, (3) that a "snake filled with cocaine" was inside of her gastrointestinal tract.

¶ 3 The trial court ordered Respondent to inpatient involuntary commitment for 30 days, based upon the report and findings "she cannot take care of her physical and medical needs outside of Central Regional Hospital at this time. [Respondent] would cease to take medications if released leading to her decompensation."

¶ 4 Dr. Justin Gettings, Respondent's treating physician, completed another examination on 25 February 2021 and opined Respondent was still dangerous to herself. According to his examination, Dr. Gettings concluded Respondent "remained psychotic and delusional. She believes she has cocaine filled snakes and retained fetal products in her uterus. . . . At present[,] [Respondent] represents a danger to herself if discharged in her current condition."

¶ 5 A re-hearing on Respondent's continued involuntary commitment was held on 4 March 2021. Dr. Gettings testified for the State, and opined Respondent currently suffers from "schizoaffective disorder, bipolar type." He further opined Respondent continued to and would be a danger to herself if discharged. He based his opinion upon observations, despite treatment with medication, Respondent "continue[s] to have persistent delusions that . . . pose a danger to her and make her unsafe to return to the community at this time." Specifically, Dr. Gettings testified:

> [W]hen [Respondent] initially presented, [she] had a delusion that she'd actually had something retained in her uterus. So the content of what has been retained has changed over time, but it's varied from either a cocaine-filled snake—she's mentioned that she has retained fetal product from a prior abortion.
>
> I was worried initially, during the initial part of her admission, that she was actually doing self-examinations of her utero-genital region which could pose potentially a physical danger to herself. . . . [E]ven as recently as this morning, [Respondent] was advocating that she still has retained material in her uterus.

> The second delusion that has been very prominent is that [she] continues to endorse that she's the owner of the Pepsi Cola Company. She stated that she had sole ownership of this product and is owed distributions—financial distributions from the sale of this product. . . . These delusions have remained persistent in spite of treatment.
>
> Third . . . , she has a lot of concern and questioning about the credentials of people involved in her care. . . . [S]he has questioned credentials of some of my colleagues.
>
> She's also questioned the credentials of attorneys that are representing her in a custody case in Durham County. She's told me multiple times that she's had those individuals disbarred. [Respondent] has a history of filing, you know, litigation against folks in Durham County related to that custody battle and getting restraining orders.
>
> I'm bringing all this up because I worry that, if she's in a position in the community where she questions the credentials of professionals, including, you know, potentially police or people that are representing her in civil matters, it could put her at risk and danger to herself.
>
> So those are the three main areas.

¶ 6 When asked by the State whether Respondent might injure herself while engaging in self-examinations of her genitalia and uterus if released, Dr. Gettings responded: "I mean—on a very concrete fashion, yes. I would worry just with, you know, it's an odd delusion . . . . Yes." Dr. Gettings further asserted his opinion it is reasonably probable Respondent would suffer physical debilitation, if immediately released because "she engages in poor self-care, tenuous housing which definitely put[s] her at risk to herself." He also opined, "if we don't have her fully—fully treated and fully at her baseline, she has a high risk of decompensating and requiring repeat or further hospitalization in the future."

¶ 7 Respondent's counsel elicited expert testimony and competent evidence tending to show she had previously lived independently, was compliant with the hospital's rules, has engaged in treatment, and was improving in her condition. Dr. Gettings responded and opined, "I don't

believe she's at her baseline, and that formulation is coming from reviewing past medical records. . . . I do think that there is potentially room for ongoing improvement."

¶ 8 When asked what steps have been taken to try and accommodate Respondent's future discharge, Dr. Gettings asserted "she's essentially homeless," and caregivers had pursued lodging through a transitional housing program. That housing program placed Respondent's application on hold because "the people who organize that program have very significant concerns about [Respondent's] stability and ability to sort of live independently."

¶ 9 Respondent was also sworn, testified, and asserted she would be able to find immediate employment and she had enough money to pay for lodging in short-stay hotels. She testified to continuing to have an obstruction in her gastrointestinal tract and/or uterus despite contrary medical tests, examinations, and treatment revealing no such presence or obstruction.

¶ 10 Respondent also denied needing medication: "Pretty much all of my pills and stuff that was ordered by [Dr. Gettings]. . . . I don't see the problem with me. I see the problem with staff and the billing error. . . . I see, you know, me being consistently held back." While Respondent stated she took laxatives multiple times a day to treat the purported obstructions and blockages, Dr. Gettings did not testify to that effect.

¶ 11 The trial court found and concluded Respondent was mentally ill and dangerous to herself and required further involuntary commitment:

> she suffers from a mental illness, which is schizoaffective disorder. . . . [S]he is currently in possession of a delusion, that there is something retained within her body and . . . that there are other items that are inside of her body that are causing a blockage. The Court finds that these complaints have been medically checked out (sic) and are continuing to be evidence of a delusion. The Court finds that she has persisted in this delusion and that the delusion has changed in nature from a cocaine-filled snake to fetal material to now a blockage in her gastro-intestinal tract that has resulted in her need for high doses of laxatives.
>
> The Court finds that this type of behavior is likely to cause physical self-injury if not stabilized by medication. The Court finds that she does not have adequate

> insight into her mental health issues. She has indicated that she does not need medication.
>
> . . . .
>
> She has been unable to maintain safe, stable housing and that, without this stable housing coupled with her—her own testimony about how she arrived at Central Regional Hospital is incredible, and therefore, that [she] would pose a significant debilitation if she were outside of this hospitalization.

¶ 12 The trial court found Respondent's asserted gastrointestinal or uterine blockage(s) were found to be non-existent and Respondent's "delusional thinking puts [her] at risk for self-inflicted injury due to attemtps [sic] to remove an internal iobstruction [sic]." The Court also found that Respondent's "[n]on-compliance of medication, the lack of stable housing and lack of insight into her condition, taken together, pose a[] serious risk of rapid decompensation if in the community. She therefore poses a significant danger to herself." The trial court concluded and ordered Respondent to be involuntarily committed for 90 days on 4 March 2021, and expressly incorporated Dr. Gettings' report into its oral findings. Respondent appealed.

II. Jurisdiction

¶ 13 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 122C-272 (2021). "When the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent, an appeal of that order is not moot." *In re Webber*, 201 N.C. App. 212, 217, 689 S.E.2d 468, 472-73 (2009). This appeal is properly before this Court "notwithstanding the fact that the period of [Respondent's] involuntary commitment has ended." *In re Whatley*, 224 N.C. App. 267, 270, 736 S.E.2d 527, 529 (2012) (citation omitted).

III. Issues

¶ 14 Respondent asserts the evidence and the trial court's findings are inadequate to support the conclusions of being mentally ill and of being dangerous to herself. She claims the evidence and findings fail to draw the requisite "nexus between past conduct and future danger" required to make and sustain such a conclusion. *In re J.P.S.*, 264 N.C. App. 58, 63, 823 S.E.2d 917, 921 (2019) ("Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger.") (citation omitted)).

IV. Analysis

A. Standard of Review

¶ 15 Respondent, like all individuals before the district court and this Court, is presumed to be sane and is entitled to her liberty and right to be free of restraint. *See* N.C. Const. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."); *Sane*, *Black's Law Dictionary* (11th ed. 2019) ("Having a relatively sound and healthy mind; capable of reason and of distinguishing right from wrong."); *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 956 (1928) (Brandis, J., dissenting) (The founders "conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men."). The State's burden of proof to deprive Respondent of her liberty demands competent and relevant evidence and findings of fact to be based upon clear, cogent, and convincing evidence at the involuntary commitment hearing. This Court reviews an involuntary commitment order "to determine whether the ultimate finding concerning the respondent's danger to self or others is supported by the court's underlying findings, and whether those underlying findings, in turn, are supported by competent evidence." *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016) (citation omitted).

¶ 16 On issues of admission and credibility of the evidence this Court does "not consider whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing," *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980), as that "is for the trier of fact to determine." *In re Underwood*, 38 N.C. App. 344, 347, 247 S.E.2d 778, 781 (1978).

¶ 17 The trial court's conclusions of law to involuntarily commit and deprive Respondent of her liberty must be supported by its findings of fact and supporting evidence on each required statutory element and those conclusions are reviewed *de novo* on appeal. *Id*. The State's *quantum* of evidence must meet and sustain its burden of proof. *See* N.C. Gen. Stat. § 122C-268(j) (2021); *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) ("Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.") (citations omitted)). Our colleague's separate opinion misstates this Court's duty and role to review conclusions of law. If this Court were to adopt the separate opinion's standard of review, the logical conclusion of that standard deprives Respondent

of *any* effective appellate review. *In re Duvall*, 268 N.C. App. 14, 18, 834 S.E.2d 177, 181 (2019); *see* N.C. Gen. Stat. § 7A-32(c) (2021) ("The Court of Appeals has jurisdiction . . . to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.]").

B. Dangerousness to Self

¶ 18 A respondent may be found to be dangerous to herself under the requirements of the statute if, "[w]ithin the relevant past," she has demonstrated the following:

> I. The individual would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.
>
> II. There is a reasonable probability of the individual's suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself or herself.

N.C. Gen. Stat. § 122C-3(11)(a)(1) (2021).

¶ 19 Here, the trial court's order finds and concludes Respondent's involuntary commitment is required, and it concluded Respondent's "[n]on-compliance [with] medication, the lack of stable housing and lack of insight into her condition, taken together, pose a [ ] serious risk of rapid decompensation if in the community. She therefore poses a significant danger to herself."

¶ 20 Because these findings are supported by creditable relevant evidence, the trial court concluded State-Petitioner had met its burden of proof under the statute. Since findings of fact support the trial court's conclusion of involuntary commitment of Respondent, we affirm the trial court's order, and we need not address Respondent's other argument concerning whether involuntary commitment is proper based on any danger to herself posed by injurious self-examination.

1. Inability to Satisfy Healthcare Needs

¶ 21 In challenging the trial court's determination that she is unable to adequately provide for her own medical care, Respondent first argues that "it was undisputed that [she] *voluntarily* arrived at Central Regi[o]nal Hospital seeking medical care." Presuming this fact is true, this assertion misses the mark in two respects:

¶ 22 First, the trial court expressly found Respondent's testimony not credible in its recitation of the oral findings, which were later incorporated into the written commitment order. We do not "second-guess" the trial court's evaluation of Respondent's and the other properly admitted witnesses' credibility. *See In re A.B.C.*, 374 N.C. 752, 761, 844 S.E.2d 902, 909 (2020) (noting in a juvenile case that when the trial court sits and hears testimony as a finder of fact, "it is not the role of this Court to second-guess the trial court's credibility determination") (citation omitted).

¶ 23 Second, Respondent testified she had voluntarily sought medical care for a uterine or gastrointestinal blockage, a condition the expert treating physicians addressed in their testimony and which the trial court found to be non-existent and a subject of Respondent's persistent delusions. These unchallenged findings are binding upon appeal. *In re Moore*, 234 N.C. App. 37, 43, 758 S.E.2d 33, 37 (2014).

¶ 24 These delusions, recounted in the physicians' testimony and the trial court's findings, became evident when Respondent testified, she has no mental health issues, does not need medication for mental illness, and requires copious amounts of laxatives on a daily basis to treat her asserted uterine or gastrointestinal blockages and obstruction(s). To the extent Respondent presented and sought, and continued to seek, medical treatment, the tests showed she did so for an imagined ailment, the physicians testified, and the trial court found does not exist, and Respondent is in denial and neglect of ongoing diagnosed mental illness(es). The trial court's supported findings and its conclusions thereon disclose Respondent, "in the relevant past," has acted in a way that demonstrates a present inability to provide for her medical care, as is required by N.C. Gen. Stat. § 122C-3(11)(a)(1)(I) (2021).

2. Inability to Satisfy Need for Shelter

¶ 25 Respondent challenges the trial court's finding that Respondent "lacks stable housing." Respondent correctly and rightly points out that she had previously lived in an apartment and at several hotels prior to her initial commitment. Dr. Gettings testified from hearsay "what I

understand, that [Respondent's] condo is in a state of disarray to such a severe level that she was not able to continue inhabiting that housing which has then, in turn, led to her living in short-stay hotels. That's—those are not—you know, she's essentially homeless."

¶ 26 Dr. Gettings further testified his attempts to qualify Respondent for a transitional living program was "put on hold," because of "very significant concerns about [Respondent]'s stability and ability to sort of live independently[.]" These portions of Dr. Gettings' testimony were elicited on cross-examination without objection, and any objections thereto are waived. *See In re A.J.D.*, 283 N.C. 1, 7, 2022-NCCOA-258, ¶ 17, 871 S.E.2d 575, 578 (2022) ("[A] review of the Record reveals Respondent did not object to the admission of Dr. Zarzar's testimony on any basis, including impermissible hearsay. As such, Respondent failed to preserve this issue for appellate review." (citing *In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 753-54 (2009)); *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) ("Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." (citation omitted)).

¶ 27 While Respondent's testimony concerning her housing contradicted Dr. Gettings' hearsay assertions, his testimony supports the trial court's finding and conclusion that Respondent "lacks stable housing." The trial court resolves conflicts in the evidence and determines whether Dr. Gettings' testimony was creditable. *In re J.C.D.*, 265 N.C. App. 441, 448, 828 S.E.2d 186, 191-92 (2019). The record contains a finding, assertedly based upon "clear, cogent and convincing" evidence, that Respondent is unable to adequately meet her needs for shelter within the relevant past pursuant to N.C. Gen. Stat. § 122C-3(11)(a)(1)(I). *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74. Even if unsupported, other properly supported facts support the trial court's conclusion.

3. Reasonable Probability of Serious Physical Debilitation in Near Future

¶ 28 Respondent argues the trial court failed to make adequate findings to support a conclusion that a reasonable probability exists of her serious physical debilitation in the near future. She asserts no finding disclosing such probable harm and "[t]here was simply no evidence that, even if [Respondent] refused to take mental health medication upon discharge, . . . her failure to take the medication would create a serious health risk in the near future."

¶ 29 The trial court expressly found Respondent was presently unable to meet her health and housing needs, and when "taken together, pose[s]

serious risk of rapid decompensation if in the community." This Court has upheld conclusions of the need for involuntary commitments for dangerousness-to-self based on substantially similar findings. *See In re Moore*, 234 N.C. App. at 44-45, 758 S.E.2d at 38 ("The trial court found that respondent 'is at a high risk of decompensation if released and without medication,' and that Dr. Fahs thought respondent, if released, would 'relapse by the end of [the] football season.' The trial court's findings indicated respondent was a danger to himself in the future. The trial court properly found that respondent is a danger to himself because there is a reasonable possibility that he will suffer serious physical debilitation in the near future.").

¶ 30 Further, the trial court's finding that Respondent is at "serious risk of *rapid* decompensation" satisfies N.C. Gen. Stat. § 122C-3(11)(a)(1)(II)'s requirement of a temporal finding of "reasonable possibility" of "serious physical debilitation *in the near future*." *Id.* (emphasis supplied).

¶ 31 The trial court's finding and conclusion of a reasonable probability of serious physical debilitation exists "in the near future" is also supported by other evidence. *Id.* When asked by the State if "it's reasonably probable in the near future, if she's discharged with her delusions, that she could suffer physical debilitations," Dr. Gettings testified "I do [sic]. . . . I would worry that, if we don't have her fully—fully treated and fully at her baseline, she has a high risk of decompensating and requiring repeat or further hospitalization in the future."

¶ 32 The trial court also incorporated Dr. Gettings' report into its order, which states Respondent "has remained psychotic and delusional . . . [and] *at present* represents a danger to herself if discharged in her current condition." (emphasis supplied). The trial court's conclusion that Respondent is at risk of rapid decompensation due to her inability to manage her medical and immediate housing needs is supported by findings of fact based upon clear, cogent, and convincing evidence in the record.

V. Conclusion

¶ 33 The trial court could order the involuntarily commitment of Respondent, if Petitioner met its burden of proof by clear, cogent, and convincing evidence to prove she was unable to care for her health or need for shelter in the relevant past and of a reasonable possibility of physical debilitation in the near future. N.C. Gen. Stat. § 122C-3(11)(a)(1)(I)-(II).

¶ 34 The trial court found Respondent's "[n]on-compliance with medication, the lack of stable housing and lack of insight into her condition, taken together, pose a[ ] serious risk of rapid decompensation if in the community. She therefore poses a significant danger to herself."

¶ 35 These findings are supported by clear, cogent, and convincing evidence. The trial court's findings of fact and conclusions of law of Respondent being mentally ill and being dangerous to herself is supported by evidence in the record. The trial court's order is affirmed. *It is so ordered*.

AFFIRMED.

Judge GORE concurs.

Judge INMAN concurs in result only by separate opinion.

INMAN, Judge, concurring in the result.

¶ 36 I agree with the majority that the trial court's involuntary commitment order should be affirmed, but I respectfully disagree with the standard of review it employs in resolving this appeal. Under the proper standard applicable to involuntary commitment orders, competent record evidence supports the trial court's findings of fact, and those findings of fact support the ultimate finding of dangerousness to self. Applying this well-established framework, I concur in the result.

¶ 37 To order an individual's involuntary inpatient commitment, "the [trial] court shall *find* by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others . . . . The court shall record the facts that support its *findings*." N.C. Gen. Stat. § 122C-268(j) (2021) (emphasis added). Consistent with the statute's language, dangerousness to self has long been (and remains) understood as an ultimate finding of fact. *See In re Hogan*, 32 N.C. App. 429, 433, 232 S.E.2d 492, 494 (1977) ("Whether a person is mentally ill . . . and whether he is imminently dangerous to himself or others, present questions of fact."); *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980) ("To enter the commitment order the trial court was required to *ultimately find two distinct facts*, *i.e.*, that the respondent was mentally ill and was dangerous to himself or to others." (emphasis added) (citation omitted)); *In re A.J.D.*, 2022-NCCOA-258, ¶ 15 ("Findings of mental illness and dangerousness to self are ultimate findings of fact." (citation and quotation marks omitted)).

¶ 38 Though occasionally difficult to differentiate, ultimate findings of fact are distinct from both evidentiary facts and conclusions of law:

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.
>
> . . . .
>
> Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.

Woodard v. Mordecai, 234 N.C. 463, 470-72, 67 S.E.2d 639, 644-45 (1951) (citations omitted).

¶ 39 Consistent with the above distinctions between ultimate findings of fact and conclusions of law, this Court held more than four decades ago that ultimate findings of mental illness and dangerousness are *not* to be treated or analyzed as conclusions of law. *Hogan*, 32 N.C. App. at 433, 232 S.E.2d 492 at 494 ("In the order appealed from in the present case the court purported to make these determinations [of mental illness and dangerousness] as 'matters of law.' We will ignore the incorrect designation and treat the court's conclusions as findings of the ultimate facts required by [the then-applicable involuntary commitment statute].").

¶ 40 In *In re Whatley*, this Court equated, without authority and in passing, ultimate findings of mental illness and dangerousness with conclusions of law. 224 N.C. App. 267, 271, 736 S.E.2d 527, 530 (2012) ("The trial court must also record the facts that support its 'ultimate findings,' i.e., conclusions of law, that the respondent is mentally ill and dangerous to himself or others."). To the extent that this statement in *Whatley* amounts to more than mere *dicta*, it is in direct conflict with: (1) *Woodard*'s distinction between ultimate findings and conclusions of

law, 234 N.C. at 470-72, 67 S.E.2d at 644-45; (2) undisturbed precedents establishing mental illness and dangerousness as ultimate findings of fact, *Hogan*, 32 N.C. App. at 433, 232 S.E.2d 492 at 494; and (3) the applicable statute requiring the trial court to "find" a respondent mentally ill and dangerous in order to involuntarily commit her, N.C. Gen. Stat. § 122C-268(j). Because one panel of this Court cannot overrule another and we are required to follow our Supreme Court's precedents, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), *Whatley*'s conflation of ultimate findings of mental illness and dangerousness with conclusions of law is not binding.

¶ 41 When an appellant challenges the trial court's ultimate finding of dangerousness in an involuntary commitment order, our longstanding standard of review is straightforward: "We review the trial court's commitment order to determine whether the ultimate finding concerning the respondent's danger to self or others is supported by the court's underlying findings, and whether those underlying findings, in turn, are supported by competent evidence." *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016). I can find no published decision before or after *Hogan* purporting to apply *de novo* review to ultimate findings of mental illness and dangerousness, and we have explicitly rejected that standard in at least one unpublished decision of this Court. *See In re E.L.*, 268 N.C. App. 323, 834 S.E.2d 189, 2019 WL 5726811, *1 (unpublished) (refusing, based on *Hogan*, to apply the *de novo* standard urged by an appellant to ultimate findings of mental illness and dangerousness).

¶ 42 Our review in applying the competent evidence standard is not unfettered. "It is for the trier of fact to determine whether evidence offered in a particular case is clear, cogent, and convincing. *Our function on appeal is simply to determine whether there was any competent evidence to support the factual findings made.*" *In re Underwood*, 38 N.C. App. 344, 347-48, 247 S.E.2d 778, 781 (1978) (emphasis added) (citations omitted). "*We do not consider* whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing. It is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof." *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74 (emphasis added) (citing *Underwood*, 38 N.C. App. at 347, 247 S.E.2d at 781).

¶ 43 The majority recognizes some of the caselaw concerning the proper standard of review while deviating from precedents in key respects. Its assertions that the ultimate findings of mental illness and dangerousness to self are conclusions of law and that the involuntary commitment thereunder is subject to *de novo* review ignores prior decisions

establishing: (1) mental illness and dangerousness as ultimate findings rather than legal conclusions, *Hogan*, 32 N.C. App. at 433, 232 S.E.2d 492 at 494; and (2) the proper standard of review applicable to those ultimate findings, *see, e.g.*, *W.R.D.*, 248 N.C. App. at 515, 790 S.E.2d at 347.

¶ 44 In supporting its assertion of *de novo* review, the majority misstates the standard applied in *Underwood*. That decision treats dangerousness as an ultimate finding and does not employ *de novo* review:

> Our function on appeal is simply to determine whether there was any competent evidence to support the factual findings made. . . . [T]he petitioner's testimony furnished competent evidence to support the trial court's factual findings . . . . These factual findings in turn furnished ample support for the court's ultimate findings that respondent was mentally ill and imminently dangerous to self or others . . . .

38 N.C. App. at 347-48, 247 S.E.2d at 781. Relatedly, I disagree with the majority's repeated misnomer of the trial court's ultimate findings in this case as legal "conclusions."

¶ 45 The majority's claim that the well-established standard of review set forth in this concurring opinion "deprives Respondent of any effective appellate review, including constitutional claims . . . and issues of statutory interpretation and application," ignores the more than forty years of caselaw reviewing *and reversing* involuntary commitment orders under precisely this standard. *See e.g.*, *Hogan*, 32 N.C. App. at 434, 232 S.E.2d at 495 (reversing an involuntary commitment order because the underlying findings were unsupported by competent evidence and did not support the ultimate findings). Respondent has not challenged the constitutionality of her involuntary commitment, and she has not presented any argument concerning statutory interpretation. Nor has she requested *de novo* review. Instead, her brief simply asks that we employ the exact standard applied in decades of caselaw and in this concurring opinion.

¶ 46 I similarly decline to adopt the majority's several assertions that the trial court's "findings are supported by clear, cogent and convincing evidence," as such judgments on the weight of the evidence are beyond this Court's purview. *See id.* at 347-48, 247 S.E.2d at 781; *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74. Stated simply, because this Court is not authorized to consider whether evidence is clear, cogent, and convincing, we should not purport to decide that issue.

¶ 47 Even though I believe the majority applies the wrong standard of review, I reach the same result applying the correct standard. The evidence recited in the majority opinion is competent to support the trial court's evidentiary findings that Respondent is unable to manage her own medical and housing needs and is at rapid risk of decompensation if released. Those evidentiary findings, in turn, support the trial court's ultimate finding that Respondent is dangerous to herself. I therefore concur in the result affirming the trial court's order.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY HERBERT C. MORETZ DATED APRIL 11, 2001. RECORDED IN BOOK 745, PAGE 62, LEE COUNTY REGISTRY, BY EDDIE S. WINSTEAD, III, SUBSTITUTE TRUSTEE

No. COA22-172

Filed 20 December 2022

Appeal and Error—appellate rule violations—gross and substantial—dismissal warranted

Respondent's numerous appellate rule violations, both jurisdictional and nonjurisdictional—particularly her counsel's failure to include the order appealed from in the record on appeal and to timely serve the proposed record—constituted gross and substantial violations warranting dismissal of her appeal from an order of foreclosure. Other violations that impaired appellate review included the failure to file the transcript and all the evidence presented to the trial court, failure to serve and/or provide proof of service on several filings, and failure to include necessary sections of the appellate brief.

Appeal by Respondent from an order entered 4 May 2021 by Judge J. Stanley Carmical in Lee County Superior Court. Heard in the Court of Appeals 4 October 2022.

Elizabeth Myrick Boone and Sanford Law Group, by Eddie Winstead, for Appellee Eddie S. Winstead, III, Substitute Trustee.

The Key Law Office, by Mark A. Key, for Respondent-Appellant Amanda Tillman.

INMAN, Judge.

¶ 1 Amanda Tillman ("Respondent") appeals from an order foreclosing on her home pursuant to an unpaid promissory note and unsatisfied deed of trust executed by the property's prior owner. Also pending before this Court are several motions, including: (1) a motion by Appellee Eddie S. Winstead, III, as Substitute Trustee (the "Trustee"), to dismiss the appeal for numerous gross and substantial appellate rule violations; (2) two motions by Respondent to amend the record to include the order from which she appeals; and (3) a motion to strike Respondent's motions to amend and her responses to the motion to dismiss. After careful review, we grant the Trustee's motion to dismiss Respondent's appeal in light of the gross and substantial appellate rule violations evident in the record. We dismiss the remaining motions as moot.

I. FACTUAL AND PROCEDURAL HISTORY

A. Underlying Facts and the Foreclosure Proceeding

¶ 2 Respondent was bequeathed a home in Lee County through a codicil to the Last Will and Testament of Herbert Moretz ("Decedent"). That property was subject to a 2001 deed of trust in favor of Sanford Financial, LLC, who also held a promissory note secured by the deed of trust evincing a $123,000 debt owed by Decedent. Decedent never repaid the loan.

¶ 3 Sanford Financial, LLC was originally incorporated in 2000 by organizer and registered agent Robert L. Underwood. The registered office was located in Raleigh. In 2005, Mr. Underwood filed articles of dissolution with the written consent of all members, who are unknown.

¶ 4 On 4 February 2020, Zachary M. Moretz filed articles of organization for another Sanford Financial, LLC with the Secretary of State. Zachary Moretz was listed as the registered agent, and the company's registered office was located in Concord. The limited documents in the record do not disclose whether the new Sanford Financial, LLC is related to the previously dissolved entity of the same name, nor does the limited record show a transfer of Decedent's obligation to the new entity.

¶ 5 The new Sanford Financial served a notice of default on Decedent's estate on 28 August 2020. The estate failed to cure the default, so Sanford Financial pursued foreclosure. The foreclosure was heard before the clerk of superior court, who entered an order for foreclosure on 10 March 2021. Respondent appealed that order to Superior Court, though no notice of that appeal appears in the record.

¶ 6 The Superior Court heard Respondent's appeal on 19 April 2021. No transcript of the hearing has been filed with this Court, and the record

on appeal only includes three of at least seven exhibits introduced at trial. The trial court entered an order of foreclosure on 4 May 2021, but that order is also absent from the record on appeal.

B. Respondent's Notice of Appeal and Subsequent Trial Court Motions

¶ 7 Respondent filed a notice of appeal from the Superior Court's order on 12 May 2021. The certificate of service attached to the notice of appeal is irregular, as it states it was served on 6 May 2021 and signed by counsel four days later on 10 May 2021.

¶ 8 On 14 May 2021, Respondent filed a motion to stay the order of foreclosure, which was heard remotely on 3 June 2021 due to Respondent's counsel's positive COVID test. The trial court set an appeal bond at $20,000 and directed Respondent to prepare and serve a written order. Respondent's counsel was hospitalized following the hearing and continued to experience serious health complications. No order granting the stay was prepared and entered until December 2021, and no bond was posted prior to that date.

¶ 9 Respondent was required to serve the proposed record on appeal by 20 September 2021 under N.C. R. App. P. 11(b) (2021),[1] as the transcript of proceedings was delivered on 5 August 2021. On 7 September 2021, Respondent filed a motion for extension of time to serve the proposed record up to and including 1 October 2021. The motion was never noticed or calendared for hearing. On 15 November 2021, approximately six weeks after the deadline for Respondent to serve a proposed record, the Trustee moved in the trial court to dismiss the appeal pursuant to N.C. R. App. P. 25(a) (2021). That motion was heard on 1 December 2021, at which time the trial court *sua sponte*, under an unspecified plenary power "to prevent manifest injustice," elected to hold the motion to dismiss in abeyance and extend Respondent's deadline to serve the proposed record to 15 December 2021.

¶ 10 Respondent served the proposed record on 15 December 2021, and the trial court subsequently denied the Trustee's motion to dismiss the appeal. On 26 January 2022, the Trustee noticed an appeal of the denial of his motion to dismiss the appeal.[2] The parties agreed to settle the record on 20 February 2022, and the final record was filed on 2 March 2022.

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1. Because this appeal was filed in 2021, all subsequent references to the North Carolina Rules of Appellate Procedure are to the version effective 1 January 2021.

2. The Trustee would later voluntarily dismiss his appeal on 1 April 2022.

The stipulation settling the record on appeal is signed by the parties but is undated, and the certificate of service for the record itself is irregular in that it is both unsigned and undated.

C. Court of Appeals Proceedings

¶ 11 With the appeal docketed and the record filed, Respondent had until 1 April 2022 to file her brief under N.C. R. App. P. 13(a)(1). Respondent failed to do so. On 1 and 4 April 2022, Respondent's counsel emailed Trustee's counsel regarding an extension but never filed such a motion with the Court.

¶ 12 On 25 April 2022, Trustee's appellate counsel moved to dismiss the appeal for Respondent's failure to file an appellant brief. On 3 May 2022, Respondent's counsel responded to the motion, asserting that he had intended to file a motion for an extension but that his assistant, as attested in an affidavit attached to the response, inadvertently failed to do so and misinformed him that it had been filed. Respondent's counsel also filed on that date, 24 days after the expiration of Respondent's deadline to file an appellant brief, a motion for extension of time to file that brief. This Court denied the Trustee's motion to dismiss the appeal and granted Respondent's motion for extension of time, giving Respondent until 23 May 2022 to file a brief with this Court.

¶ 13 Respondent filed her brief with this Court on 23 May 2022. However, the brief omitted a table of authorities, issues presented page, standard of review section, and attorney signature as required by N.C. R. App. P. 28(b)(1), (2), and (6).

¶ 14 The Trustee again moved this Court to dismiss the appeal on 22 June 2022 for failure to comply with the appellate rules. The motion asserts the following appellate rule violations:

(1) Failure to timely serve the proposed record on appeal under N.C. R. App. P. 11.

(2) Failure to secure a proper extension of time to serve the proposed record under N.C. R. App. P. 11 and 27, asserting that Judge Gilchrist lacked authority to grant such an extension after expiration of the time for service.

(3) Failure to timely file the record on appeal under N.C. R. App. P. 12.

(4) Failure to serve the record and demonstrate service through a proper certificate of service under N.C. R. App. P. 26.

(5) Failure to include the order appealed from in the record under N.C. R. App. P. 9.

(6) Failure to include all documents necessary to the disposition of the appeal as required by N.C. R. App. P. 9.

(7) Failure to execute a proper certificate of service for the notice of appeal as contemplated by N.C. R. App. P. 3 and 26.

(8) Failure to comply with the stay and bond provisions of N.C. R. App. P. 8.

(9) Failure to file an appellate information statement as required by N.C. R. App. P. 41.

(10) Failure to file the transcript as required by N.C. R. App. P. 7.

(11) Failure to comply with various provisions of N.C. R. App. P. 28 in the composition of the appellant brief.

¶ 15 Respondent's counsel responded to the second motion to dismiss the appeal on 12 July 2022. He did not dispute the irregularities in the certificates of service appearing in the record, he conceded his failure to include the order appealed from in the record on appeal, and he acknowledged untimely filing the appellate information statement. He likewise admitted his noncompliance with the briefing requirements of the Rules, ascribing this deficiency to his assistant.

¶ 16 At no point did Respondent's counsel address the failure to file the trial transcript with this Court, and the response itself contains several irregularities, namely: (1) the certificate of service states that it was served via email on 3 May 2022; and (2) the response refers to several exhibits, none of which is attached to or included in the filing. Respondent denied the remainder of the alleged rule violations.

¶ 17 Respondent filed with this Court a second response to the Trustee's motion to dismiss on 13 July 2022, a day late under N.C. R. App. P. 10(a). This response is largely identical to the first response, but also includes a corrected Respondent's brief and two emails: one referenced in the body of both responses, and one that appears irrelevant to this appeal. As with the first response, the second response omitted several exhibits or attachments referenced therein. The certificate of service again includes an irregular service date of 3 May 2022, and it also incorrectly certifies that the second response was filed on 12 July 2022.

¶ 18 On 15 July 2022, Respondent's counsel filed with this Court two substantively identical motions to amend the record. Both seek to add

the superior court's foreclosure order to the record on appeal. The motions also include a 16 May 2022 email from Respondent's counsel to the Trustee's appellate counsel acknowledging that there are other "necessary missing documents from the record on appeal," namely (1) Respondent's notice of appeal from the clerk's order to superior court, and (2) any pleadings showing the substitution of the Trustee. However, none of these additional documents is included or referenced in Respondent's motion to amend the record on appeal. The certificates of service for these motions state that they were served on the Trustee and his counsel via email on 15 July 2022.

¶ 19 On 27 July 2022, Trustee's counsel filed with this Court a motion to strike the 13 July 2022 response to the second motion to dismiss as untimely and unserved, asserting that it was never emailed as asserted in the certificates of service. The motion further asserts that Respondent's motions to amend were never served via email as claimed in their certificates of service. Respondent filed no response to this motion.

II. ANALYSIS

¶ 20 Appellate rule violations fall into three categories: (1) waivers arising at trial; (2) jurisdictional defects; and (3) non-jurisdictional defects. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008). Jurisdictional defects mandate dismissal, *id.* at 197, 657 S.E.2d at 365, while non-jurisdictional defects subject an appeal to dismissal if they are "gross" or "substantial," *id.* at 199, 657 S.E.2d at 366-67. This Court identifies gross or substantial violations by examining (1) "whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process," *id.* at 200, 657 S.E.2d at 366-67; and (2) "the number of rules violated," *id.* at 200, 657 S.E.2d at 367.

A. Specific Rule Violations

¶ 21 Reviewing the parties' motions and responses, including Respondent's admitted errors, it is apparent that Respondent's counsel has violated several appellate rules. The following violations, at a minimum, are evident on the face of the record:

(1) Failure to include the order appealed from under N.C. R. App. P. 9(a)(1)h.;

(2) Numerous failures to serve and/or include proper proof of service on several filings, including the notice of appeal, as required by N.C. R. App. P. 3(e), 26(b), 26(d), and/or 37(a);

(3) Failure to timely file an appellate information statement as required by N.C. R. App. P. 41;

(4) Failure to file the transcript as required by N.C. R. App. P. 7(f) and 9(c)(3)b.;

(5) Failure to comply with various provisions of N.C. R. App. P. 28 in the composition of the appellate brief;

(6) Failure to include in the record those materials required by N.C. R. App. 9(a)(1)e., g., i., and j.; and

(7) Filing a response to an appellate motion out-of-time in violation of N.C. R. App. P. 37(a).

Beyond these specific rule violations, Respondent's duplicative responses to the pending motion to dismiss fail to include all of the exhibits and attachments the responses reference.

¶ 22 Respondent's counsel also failed to timely serve the proposed record on appeal notwithstanding the trial court's order attempting to extend the service period. A motion to extend an expired deadline under the appellate rules "must be in writing and with notice to all other parties and may be allowed only after all other parties have had an opportunity to be heard." N.C. R. App. P. 27(d). Respondent's counsel filed no such written motion; while Respondent did move to extend the initial proposed record deadline in writing from 20 September to 1 October 2021, her counsel did not serve a notice or otherwise arrange for a hearing on that motion. When the trial court addressed the matter *sua sponte* in December 2021, in the absence of a written motion, it had no authority to extend the appellate deadline, so its order doing so is void. *See Cadle Co. v. Buyna*, 185 N.C. App. 148, 151, 647 S.E.2d 461, 464 (2007) (holding a trial court lacked authority to extend the time for serving a proposed record on oral motion after said time expired). Respondent points to no rule or caselaw demonstrating the validity of the trial court's order in the face of N.C. R. App. P. 27(d) and *Cadle Co.*, and we therefore hold that the proposed record in this case was not timely filed as required by N.C. R. App. P. 11(b).

B. The Above Violations Are Gross, Substantial, and Warrant Dismissal.

¶ 23 The first violation identified above—Respondent's counsel's failure to include the order appealed from in the record on appeal—is a jurisdictional defect that mandates dismissal. *State v. McMillian*, 101 N.C. App. 425, 427, 399 S.E.2d 410, 411 (1991). While Respondent's counsel

has moved to correct this defect, it nonetheless constitutes a violation to be considered in determining whether the additional rule violations are so gross and substantial as to warrant dismissal. Indeed, those other rule violations meet that standard.

¶ 24 For example, Respondent's counsel's failure to timely serve the proposed record, standing alone, may warrant dismissal. *See Webb v. McKeel*, 132 N.C. App. 817, 818, 513 S.E.2d 596, 597-98 (1999) (dismissing appeal for failure to timely serve proposed record on appeal). *But see Powell v. City of Newton*, 200 N.C. App. 342, 350, 684 S.E.2d 55, 61 (2009) (holding under those facts that failure to timely serve proposed record on appeal was not so egregious as to warrant dismissal).

¶ 25 Respondent's counsel's other rule violations render the record inadequate to resolve the appeal and frustrate appellate review. N.C. R. App. P. 9(a)'s various subparts collectively provide that the record must include all pleadings, documents, and evidence necessary to dispose of the appeal, which may include the trial transcript if designated by the appellant. Here, Respondent designated the use of the trial transcript and relies on the testimony in said transcript for the arguments presented in her brief. But Respondent's counsel ultimately failed to file the transcript with this Court—even after the error was pointed out by the Trustee in his motion to dismiss—as is required by N.C. R. App. P. 7 and 9(c)(3)b. Presuming underlying merit to Respondent's contention that the evidence below does not show that the current Sanford Financial, LLC is the actual holder of the note being foreclosed upon, her counsel's failure to file the transcript and include all evidence presented to the trial court in the printed record on appeal renders this Court unable to conclusively review the issue. That failure also frustrates the ability of the Trustee to respond to those arguments with citations to the record evidence and transcript. These non-jurisdictional violations impair our appellate function and the adversarial process. When coupled with Respondent's other numerous violations of the appellate rules, this violation rises to the level of gross and substantial non-jurisdictional defects to warrant dismissal. *Dogwood*, 362 N.C. at 199-200, 657 S.E.2d at 366-67.

¶ 26 Respondent's counsel's responses to these alleged non-jurisdictional rule violations do not dissuade us from holding dismissal to be appropriate here. He first argues that the Trustee's motion to dismiss should not be granted because it does not include an affidavit or certified docket entries as required by N. C. R. App. P. 25(a). This argument misses the mark because the Trustee's motion arises under N.C. R. App P. 25(b), which imposes no such requirement for a motion to dismiss an appeal for appellate rule violations.

¶ 27 Counsel's remaining arguments are equally unavailing. Several of them rely on exhibits and attachments, which are missing from the filed responses. Counsel asserts that his non-licensed assistant is responsible for several rule violations, but he, as counsel of record and not his paralegal, is responsible for the preparation, signing, service, and filing of materials with this Court under the North Carolina Rules of Appellate Procedure. *See, e.g.*, N.C. R. App. P. 3(d) (requiring a notice of appeal to be "signed by counsel of record . . . or by any such party not represented by counsel of record"). His related claim that the Trustee shares some blame or fault for the inadequate record on appeal is likewise misplaced, as the appellant "b[ears] the burden of proceeding and of ensuring that the record on appeal and verbatim transcript [is] complete, properly settled, in correct form, and filed with the appropriate appellate court by the applicable deadlines." *State v. Berryman*, 360 N.C. 209, 217, 624 S.E.2d 350, 356 (2006).

III. CONCLUSION

¶ 28 "The appellate courts of this state have long and consistently held that the rules of appellate practice . . . are mandatory and that failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (citations omitted). Here, Respondent's counsel failed to abide by many of our rules, both jurisdictional and non-jurisdictional. Even when any jurisdictional failures are set aside, the remaining rule violations are numerous, impair appellate review, and frustrate the adversarial process. Dismissal of the appeal is proper under these circumstances. *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 367. We grant the Trustee's motion to dismiss Respondent's appeal pursuant to N.C. R. App. P. 25(b). We dismiss the remaining motions as moot.

DISMISSED.

Judges TYSON and COLLINS concur.

IN RE McCLATCHY CO., LLC

[287 N.C. App. 126, 2022-NCCOA-841]

IN THE MATTER OF THE McCLATCHY COMPANY, LLC, D/B/A "THE NEWS & OBSERVER;" CAROLINA PUBLIC PRESS, INC., D/B/A "CAROLINA PUBLIC PRESS;" CAPITOL BROADCASTING COMPANY, INCORPORATED, D/B/A "WRAL-TV;" LEE ENTERPRISES, D/B/A "THE NEWS & RECORD;" HEARST PROPERTIES, INC., D/B/A "WXII;" GANNETT CO., INC., D/B/A "THE BURLINGTON TIMES NEWS;" MACKENZIE WILKES, JOHN NORCROSS, AND GRACE TERRY, OF ELON NEWS NETWORK, PETITIONERS

No. COA21-716

Filed 20 December 2022

Public Records—law enforcement agency recordings—media request—statutory findings—redaction—trial court's discretion

The trial court's order requiring the release of all custodial law enforcement agency recordings requested by media petitioners pursuant to N.C.G.S. § 132-1.4A(g), related to a protest march, was vacated and remanded for additional findings of fact where the trial court failed to make required statutory findings to show under which statutory category petitioners were entitled to the release of the recordings. In anticipation of remand, the appellate court also considered additional arguments raised by the law enforcement agency, further concluding that the trial court abused its discretion by not redacting irrelevant recordings and erred by failing to exercise its discretion.

Judge ARROWOOD dissenting.

Appeal by respondent from order entered 15 June 2021 by Judge Andrew H. Hanford in Alamance County Superior Court. Heard in the Court of Appeals 7 June 2022.

Envisage Law, by Adam P. Banks and Anthony J. Biller, for respondent-appellant.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, Hugh Stevens, C. Amanda Martin, and Elizabeth J. Soja, for petitioners-appellees.

TYSON, Judge.

¶ 1 The Graham Police Department ("GPD") appeals from the trial court's order authorizing and ordering the release of all custodial law enforcement agency recordings petitioned by media Petitioners pursuant

to N.C. Gen. Stat. § 132-1.4A(g) (2021). We vacate the order and remand for additional findings of fact.

I. Background

¶ 2 A group of people participated in a "I am Change" march in Graham on 31 October 2020. The organizers of the march secured a permit to march, but were not authorized to close and were instructed not to block the public streets of Graham for the march. When marchers refused to clear an intersection of streets following multiple requests, GPD deployed Oleoresin Capsicum ("pepper spray") canisters to clear the street.

¶ 3 The marchers moved to the grounds of the Historic Alamance County Courthouse. Speeches were given by organizers and designated speakers. Before the speeches were concluded, GPD officers and sheriff's deputies discovered a gas-powered generator providing electricity for a sound system. The generator was operating within two feet of a gas container, in violation of the fire code. Officers attempted to disconnect the generator, but attendees resisted the officers' efforts. The event was declared to be unsafe, dispersal orders were issued, but went unheeded. GPD officers and Alamance County Sheriff's deputies arrested 23 protesters.

¶ 4 The McClatchy Company, LLC, d/b/a The News and Observer Publishing Co., filed an amended petition in Alamance County Superior Court seeking release of custodial law enforcement agency recordings under N.C. Gen. Stat. § 132-1.4A(g) on 2 March 2021. Joining as petitioners were: Carolina Public Press, Inc., d/b/a Carolina Public Press; Capitol Broadcasting Company, Incorporated, d/b/a WRAL-TV; Lee Enterprises, d/b/a News & Record of Greensboro; Hearst Properties, d/b/a WXII; Gannett Co., Inc., d/b/a/ The Burlington Times-News; and Mackenzie Wilkes, John Norcross, and Grace Terry of the Elon News Network (collectively with The McClatchy Company, LLC ("Petitioners").

¶ 5 Petitioners sought from the Alamance County Sheriff ("ACS") and GPD (collectively "Respondents') to:

> release of all law enforcement and other recordings leading up to, during and after the "I am Change" march in Graham, NC, occurring on 31 October 2020 from the time the first contact was made with marchers, spectators or media on that date until the last member of law enforcement left the scene. Petitioners' requests include, but are not limited to,

> recordings from all body worn cameras, dashboard cameras, hand-held recording devices of any kind, drones/unmanned aerial vehicles, stationary cameras, or any other video or audio recording device operated by or on behalf of a law enforcement agency or law enforcement agency personnel as defined by G.S. 1[32]-1.4A(a)(6) when carrying out law enforcement responsibilities at the time of first contact, at the courthouse and around Court Square.

¶ 6 The matter was scheduled for hearing on 8 March 2021. Respondents moved for a continuance, which was allowed. The hearing was rescheduled for 26 April 2021. The trial court also filed an "Order to Provide Custodial Law Enforcement Agency Recording for In-Camera Review", which required Respondents to provide the trial court with a copy of the petitioned recordings "on or before" 12 April 2021 "along with a list of all law enforcement personnel whose image or voice is in the recording[.]"

¶ 7 Respondents were also required to give notice of the petition and hearing "to any law enforcement agency personnel whose image or voice was shown or captured in the recording and to the head of that person's employing law enforcement agency[,]" and to provide the trial court and petitioners' counsel "with a list identifying those portions of the requested recordings to which law enforcement objects to release and all bases for those objections upon provision of the subject recordings for in camera review".

¶ 8 Neither ACS nor GPD appealed this order. ACS submitted its recordings for in-camera review on 18 March 2021. ACS did not file any objections with its submission. GPD submitted its recordings after obtaining an extension of time on 23 April 2021.

¶ 9 GPD listed the following objections to release of the petitioned recordings: (1) "pursuant to N.C.G.S. § 132-1.4A(g)(1)[,]" on the basis of lack of a compelling public interest, since the events at issue had occurred "more than 6 months ago" and were "no longer 'newsworthy' "; (2) "pursuant to N.C.G.S. § 132-1.4A(g)(3)[,]" because petitioners did not seek to " 'obtain evidence to determine legal issues in a current or potential court proceeding' "; (3) "pursuant to N.C.G.S. § 132-1.4A(g)(5)[,]" because the "expansive nature of [p]etitioner[s'] request ensures extraneous footage of march participants will be released[,]" creating "the risk of harm to 'reputation' or 'safety' of protest participants"; and (5) "pursuant to N.C.G.S. § 132-1.4A(g)(6)[,]" on the basis that "such release creates a threat to the 'fair, impartial, and orderly administration of

justice[ ]' " because the "enclosed CLE Recordings contain footage of all individuals arrested by GPD on October 31, 2020." Respondent-GPD also objected to the release of specific footage depicting specific individuals, who were then facing criminal charges following their arrests on 31 October 2020.

¶ 10 The trial court conducted an in-camera review of the submitted recordings between 21-28 May 2021 and scheduled a hearing for 10 June 2021. At the hearing, Respondents argued the following objections against release of the petitioned recordings: (1) law enforcement recordings "are not public records" under N.C. Gen. Stat. § 132-1.4A; (2) "only personal representatives have an absolute right to . . . access . . . these videos"; (3) "[t]he burden [is] slightly less" for "authorized individuals to obtain access to the video[,]" whereas the burden under subsection "g" of the statute "is a bit higher"; (4) the trial court, "in its discretion, can place any sort of additional restriction on top of the release" of such recordings; (6) the matter was no longer newsworthy; (7) the footage sought was available elsewhere; (8) petitioners' request was not specific, but rather "a generic request for all video"; (9) release of the recordings may affect the privacy interests of the individuals depicted therein; (10) there were criminal cases still pending following the 31 October 2020 events; (11) the recordings captured "extraneous footage"; (12) "these videos are available" "for any criminal proceeding" and that petitioners had "not obtained . . . consent" from the individuals depicted therein to release the footage; (13) release of the petitioned recordings could "reveal information regarding a person that is of a highly sensitive . . . nature" and "may harm the reputation or jeopardize the safety of a person"; (14) "these videos could create a serious threat to the fair and impartial and orderly administration of justice"; and, (15) "releasing this video now interrupts the fair and orderly discovery process" of an ongoing federal lawsuit.

¶ 11 At the close of all arguments, the trial court stated the following:

> I will inform everyone that this Court has given this decision great consideration and has not taken this decision lightly in any way. And I'll refer you to Alamance CV 271 (sic).
>
> . . . .
>
> The Court having considered the applicability of all the standards of G.S. 132[ ]-1.4A(g), has determined the following: That the release of the information is necessary to advance a compelling public interest.

The Court finds that there is a compelling public interest in the accountability and transparency of law enforcement officers and that this factor weighs in favor of release.

No. 2, The recording contains information that is otherwise confidential or exempt from disclosure or release under state or federal law. This Court finds this factor is not relevant and does not impact the Court's decision.

No. 3, The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding. The Court finds this factor is not relevant and does not impact this decision.

No. 4, Release would reveal information regarding a person that is of a highly sensitive and personal nature. This Court finds that this factor weighs against release.

No. 5, That release may harm the reputation or jeopardize the safety of a person. This Court finds this factor also to weigh against release.

No. 6, That release would create a serious threat to the fair and orderly administration of justice. This court finds that this factor does weigh in favor of release.

No. 7, Confidentiality is necessary to protect an active internal criminal investigation or potential internal or criminal investigation. This Court finds this factor is not relevant and does not impact the Court's decision.

No. 8, There is good cause shown to release all portions of the recording. This Court finds that the photos and the recordings speak for themselves, and *this Court does not have the authority to [c]ensor this information absent a legitimate or compelling state interest* not to do so. Most importantly this Court gives great weight to transparency and public accountability with regard to police action and considers a failure to release this information to possibly

> undermine the public interest and confidence in the administration of justice.
>
> In light of the foregoing findings of fact, the Court concludes that the media is authorized to the release of all of the photos and recordings. It is therefore ordered that this petition is granted. *That the custodial law enforcement agencies involved shall release all photos and custodial law enforcement recordings* to the media and that's the order of the Court.

(emphasis supplied).

¶ 12 The trial court filed its written "Order on Petition for Release of Custodial Law Enforcement Agency Recording" on 15 June 2021. The order contains determinations consistent with the court's rendering in open court regarding "the applicability of all of the standards in G.S. 132-1.4A(g)[.]" The trial court found:

> The photos/recordings speak for themselves. *This Court does not have the authority to censor the photos/recordings* absent a compelling governmental interest and none was shown. This Court gives great weight to transparency and public accountability of police action and failure to release the photos/recordings would undermine the public trust and confidence in the administration of justice.

(emphasis supplied).

¶ 13 The trial court ordered Respondents to release "ALL recordings and photographs as indicated on the submissions made to the Court by the custodial law enforcement agencies and without redaction or alteration on or before 2:00 p.m. on Friday June 25, 2021."

¶ 14 GPD appealed the 15 June 2021 "Order on Petition for Release of Custodial Law Enforcement Agency Recording" on 23 June 2021. GPD filed a "Motion for Stay of Order Directing Release of Custodial Law Enforcement Recording Pending Appeal" on 25 June 2021, which was amended on 30 June 2021. Petitioners filed a Motion to Show Cause on 6 July 2021. The trial court granted GPD's motion to stay the 15 June 2021 order and denied Petitioners' Motion to Show Cause. GPD appeals.

II. Jurisdiction

¶ 15 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issue

¶ 16 GPD argues Petitioners' petition was overly broad under N.C. Gen. Stat. § 132-1.4A (2021); the trial court improperly imposed a *de-facto* burden and then shifted it onto Respondents; the trial court misapplied the law and imposed the incorrect legal standard in ordering the unredacted release of all portions of all videos and recordings; the trial court abused its discretion in failing to take reasonable steps to protect against the release of information of a highly sensitive personal nature; and, the trial court frustrated the legislative intent behind N.C. Gen. Stat. § 132-1.4A.

IV. Standard of Review

¶ 17 N.C. Gen. Stat. § 132-1.4A(g) provides: "The [trial] court *shall release only those portions of the recording that are relevant to the person's request*, and may place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate." N.C. Gen. Stat. § 132-1.4A(g) (emphasis supplied). The statute mandates express limitations on the release of otherwise non-public and non-personnel records, specifying courts "shall release only those portions . . . relevant," and further provides the trial court "may place any conditions or restrictions on the release." *Id.*

V. Analysis

¶ 18 To analyze the parties' arguments, an examination of N.C. Gen. Stat. § 132-1.4A is required. "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the [plain] language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). "[S]tatutes *in pari materia* must be read in context with each other." *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976) (citation omitted).

¶ 19 "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010) (citation omitted). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal citations, quotation marks, and ellipses omitted).

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

¶ 21 Release of law enforcement photos and recordings is strictly limited by statute and are neither public records subject to uncontrolled release nor personnel records under our General Statutes. N.C. Gen. Stat. § 132-1.4A(b).

¶ 22 N.C. Gen. Stat. § 132-1.4A(c) provides the limited categories of persons who are authorized to seek release of the law enforcement recordings and records:

> (c) Disclosure; General. — Recordings in the custody of a law enforcement agency *shall be disclosed only as provided by this section*. Recordings depicting a death or serious bodily injury shall only be disclosed as provided in subsections (b1) through (b3) of this section.
>
> A person requesting disclosure of a recording must make a written request to the head of the custodial law enforcement agency that states the date and approximate time of the activity captured in the recording or otherwise identifies the activity with reasonable particularity sufficient to identify the recording to which the request refers.
>
> The head of the custodial law enforcement *agency may only disclose a recording to the following*:
>
> > (1) A person whose image or voice is in the recording.
> >
> > (2) A personal representative of an adult person whose image or voice is in the recording, if the adult person has consented to the disclosure.
> >
> > (3) A personal representative of a minor or of an adult person under lawful guardianship whose image or voice is in the recording.
> >
> > (4) A personal representative of a deceased person whose image or voice is in the recording.

> (5) A personal representative of an adult person who is incapacitated and unable to provide consent to disclosure.
>
> *When disclosing the recording, the law enforcement agency shall disclose only those portions of the recording that are relevant to* the person's request. *A person who receives* disclosure pursuant to this subsection *shall not record or copy the recording.*

N.C. Gen. Stat. § 132-1.4A(c) (2021) (emphasis supplied).

¶ 23 The release of recordings in the custody of a law enforcement agency under any section sequentially requires the petitioning party to show it qualifies and the trial court to so find the basis of that qualification under N.C. Gen. Stat. § 132-1.4A(c). *See* N.C. Gen. Stat. § 132-1.4A(f) ("Notwithstanding the provisions of subsection (g) of this section, *a person authorized to receive disclosure pursuant to subsection (c) of this section*, or the custodial law enforcement agency, may petition the superior court in any county where any portion of the recording was made for an order releasing the recording to a person authorized to receive disclosure. . . . *If the court determines that the person to whom release of the recording is requested is a person authorized to receive disclosure pursuant to subsection (c) of this section, the court shall consider the standards set out in subsection (g) of this section and any other standards the court deems relevant in determining whether to order the release of all or a portion of the recording.*") (emphasis supplied).

¶ 24 The restrictions and qualifications required to release under N.C. Gen. Stat. § 132-1.4A(c) are re-stated in the AOC-CV-271 Form, upon which the trial court entered its judgment. The trial court *failed to check any of the boxes on* Petitioners' eligibility or relevance and failed to make any oral findings of eligibility to release on the transcript in open court. In the absence of threshold eligibility and statutorily-required findings, the order of the trial court is vacated, and the cause is remanded for additional findings of fact and conclusions of law consistent with the statute and this opinion.

¶ 25 We address additional arguments raised by GPD, because they are likely to occur on remand. GPD argues the trial court erred by not acting to avoid the release of "information of a highly sensitive personal nature." The trial court, while analyzing each standard of potential harm laid out by the statute, concluded under the fourth and fifth standards of N.C. Gen. Stat. § 132-1.4A(g)—"[r]elease would reveal information

regarding a person that is of a highly sensitive and personal nature" and "release may harm the reputation or jeopardize the safety of a person"—*weighed against* the release of the petitioned recordings. The statute limits the trial court's discretion in analyzing the standards laid out therein and in determining, as a result of that analysis, whether to release any, all, or some or none of the petitioned recordings. Petitioner is entitled to release of law enforcement recordings, only after the trial court's finding the statutory category applicable to the petition.

¶ 26 The trial court stated in open court, at the close of its eight-standard analysis: "[T]his Court does not have the authority to [c]ensor this information absent a legitimate or compelling state interest not to do so." The trial court also stated in the June Order: "This Court does not have the authority to censor the photos/recordings absent a compelling governmental interest and none was shown." This notion flips the express restrictions and application of the statute on its head.

¶ 27 N.C. Gen. Stat. § 132-1.4A(g) provides: "*The court shall release only those portions of the recording that are relevant to the person's request*, and *may place any conditions or restrictions* on the release of the recording that the court, in its discretion, deems appropriate." N.C. Gen. Stat. § 132-1.4A(g) (emphasis supplied).

¶ 28 This duty by the trial court was further-reiterated in *In re Custodial Law Enforcement Recording Sought by City of Greensboro*, in which this Court concluded a trial court "did not abuse its discretion in initially placing and later refusing to modify a restriction on release of body-cam footage" under N.C. Gen. Stat. § 132-1.4A(g). 266 N.C. App. 473, 479, 833 S.E.2d 1, 4 (2019).

¶ 29 The trial court erred by failing to make the required statutory findings. It is also clear from the record the court misapplied the statute and precedents by failing to exercise its discretion. "A court does not exercise its discretion when it believes it has no discretion or acts as a matter of law." *State v. Maness*, 363 N.C. 261, 278, 677 S.E.2d 796, 807 (2009) (citation omitted). Petitioner carries and maintains the burden of eligibility, specificity, and relevance under the statute. Respondents have no burden on remand. *See* N.C. Gen. Stat. § 132-1.4A(c).

VI. Conclusion

¶ 30 The trial court failed to make required statutory findings to show under which statutory category Petitioner is entitled to release any of non-public and non-personnel law enforcement recordings records relevant to its request. The trial court also abused its discretion by not

redacting irrelevant recordings and in authorizing the immediate and unrestricted release of all of law enforcement recordings requested in the 15 June 2021 order. The trial court also erred by stating and concluding "it has no discretion" under the statute. *Maness*, 363 N.C. at 278, 677 S.E.2d at 807.

¶ 31 The order appealed from is vacated and this cause is remanded for additional findings of facts and conclusions of law consistent with the statute and this opinion. The 13 July 2021 stay the trial court entered remains in effect pending final resolution. *It is so ordered.*

VACATED AND REMANDED.

Judge GORE concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

¶ 32 I dissent from the majority opinion vacating and remanding the trial court's order allowing for the release of custodial law enforcement agency ("CLEA") recordings petitioned by a group of media companies ("petitioners"). Specifically, the majority misconstrues the plain language of the statute at issue, N.C. Gen. Stat. § 132-1.4A, in such a way that if allowed to stand it would foreclose members of the media from ever filing a successful petition for the release of any CLEA recording in the future. Because I believe this was never the intent of the statute and is not supported by the plain language of the statue, I dissent. For all the following reasons, I would affirm the trial court's order.

I. Background

¶ 33 The factual preamble of this case is widely known, as the events at issue made local, national, and international headlines.[1] Accordingly, I find it important for our opinion to provide details as to what has led to this appeal.

¶ 34 On Saturday, 31 October 2020, the last day of early voting in the 2020 U.S. general elections, a group of approximately 200 people participated in a march to the polls, dubbed the "I Am Change" march, in Graham,

1. Indeed, as the record on appeal provides, these events were covered not only by *The News & Observer*, *WRAL*, *WXII12*, *The Times News*, and *Elon News Network*, but also by *The Washington Post* and *Newsweek*.

North Carolina. The march was secured with a permit and organized by Reverend Greg Drumwright ("Rev. Drumwright"), a Greensboro pastor and organizer. Also participating were then mayor of Burlington Ian Baltutis, two candidates for local office, and a number of elderly citizens and children. "With marchers walking by two's and three's, the procession snaked through neighborhoods on sidewalks and road shoulders, past one polling place and toward the early-voting site that had been the planned endpoint of Saturday's march."

¶ 35 "At one point, the marchers held a moment of silence in the street in honor of George Floyd, the Black man killed while in police custody in Minneapolis earlier th[at] summer." Then, "law-enforcement officers in riot gear and gas masks insisted demonstrators move off the street and clear county property, despite [the] permit authorizing their presence." "[D]eputies and police officers used pepper spray on the crowd and began arresting people." "Several children in the crowd were affected by the pepper spray."

¶ 36 "The crowd then moved" to a historic courthouse located in Court Square, "where speeches were being given." "But before speeches concluded, Alamance County sheriff's deputies began dismantling the sound system and telling the crowd to disperse." Deputies stated "that the permit had been revoked[,]" but "didn't give the crowd a reason for demanding that they disperse" or for the permit revocation. It would later be reported that the "generator and gas can" at issue "were forbidden under the terms of the event permit."

¶ 37 "Deputies arrested several organizers who refused to disperse, and Graham officers forced everyone out of Court Square, including bystanders, with additional pepper spray." "Both the police department and the sheriff's office have said their use of force was justified." According to the Graham Police Department's community engagement and diversity coordinator, "[w]hen deputies tried to disconnect the sound equipment, an officer was assaulted, and the officer deployed her pepper spray as she fell to the ground." At this point, she contends, marchers were " 'pulling and shoving' officers, who then used more pepper spray to get the crowd to disperse."

¶ 38 By the end of the day on 31 October 2020, "[a]t least 12 people were arrested[,]" including Rev. Drumwright, who would later face felony charges. "Most people were charged with failing to disperse on command." One woman "was charged with misdemeanor riot after she began to sing a freedom song into a megaphone outside the county jail, and a man was charged with attempting to stop officers from arresting her."

The News & Observer reported "[n]one of the arrest records provided to reporters described an assault on an officer."

¶ 39 "The event garnered international media attention and led to two federal lawsuits[,]" one of which was commenced by Rev. Drumwright and "allege[d] voter intimidation and coercion by law enforcement." In the aftermath of this event, "national experts on policing mass demonstrations condemned the way Graham police and Alamance County sheriff's deputies handled the 'I Am Change' march," finding "[t]he use of pepper spray against a group that included children and older people" to be " 'stunning[.]' "

¶ 40 The majority otherwise correctly characterizes the procedural posture of this case. Indeed, on 2 March 2021, petitioners filed an amended petition under N.C. Gen. Stat. § 132-1.4A(g) in Alamance County Superior Court, seeking from the Alamance County Sheriff ("respondent-ACS") and the Graham Police Department ("respondent-GPD") (collectively "respondents") the "release of all law enforcement and other recordings leading up to, during and after the 'I am Change' march in Graham, NC, occurring on 31 October 2020 from the time the first contact was made with marchers, spectators or media on that date until the last member of law enforcement left the scene."

¶ 41 Thereafter, among other events, the trial court filed an "Order to Provide Custodial Law Enforcement Agency Recording for In-Camera Review" (the "March Order"), respondent-GPD provided an assortment of written objections to the petition, the trial court conducted an in-camera review of the CLEA recordings at issue, and a hearing was held on 10 June 2021, where respondents raised another assortment of objections to the petition.

¶ 42 At the close of all arguments, the trial court stated the following:

> I will inform everyone that this Court has given this decision great consideration and has not taken this decision lightly in any way. And I'll refer you to Alamance CV 271.
>
> . . . .
>
> The Court having considered the applicability of all the standards of G.S. 132[ ]-1.4A(g), has determined the following: That the release of the information is necessary to advance a compelling public interest. The Court finds that there is a compelling public interest in the accountability and transparency of law

> enforcement officers and that this factor weighs in favor of release.
>
> No. 2, The recording contains information that is otherwise confidential or exempt from disclosure or release under state or federal law. This Court finds this factor is not relevant and does not impact the Court's decision.
>
> No. 3, The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding. The Court finds this factor is not relevant and does not impact this decision.
>
> No. 4, Release would reveal information regarding a person that is of a highly sensitive and personal nature. This Court finds that this factor weighs against release.
>
> No. 5, That release may harm the reputation or jeopardize the safety of a person. This Court finds this factor also to weigh against release.
>
> No. 6, That release would create a serious threat to the fair and orderly administration of justice. This court finds that this factor does weigh in favor of release.
>
> No. 7, Confidentiality is necessary to protect an active internal criminal investigation or potential internal or criminal investigation. This Court finds this factor is not relevant and does not impact the Court's decision.

¶ 43 Additionally, the trial court made the following statement as to the eighth factors of its analysis:

> No. 8, There is good cause shown to release all portions of the recording. This Court finds that the photos and the recordings speak for themselves, and this Court does not have the authority to [c]ensor this information absent a legitimate or compelling state interest not to do so. Most importantly this Court gives great weight to transparency and public accountability with regard to police action and considers a failure to release this information to possibly

> undermine the public interest and confidence in the administration of justice.

The trial court then ordered the release "of all photos and recordings."

¶ 44 The trial court filed a written "Order on Petition for Release of Custodial Law Enforcement Agency Recording" on 15 June 2021 (the "June Order"), in which it made determinations consistent with its ruling in open court and added:

> The photos/recordings speak for themselves. This Court does not have the authority to censor the photos/recordings absent a compelling governmental interest and none was shown. This Court gives great weight to transparency and public accountability of police action and failure to release the photos/recordings would undermine the public trust and confidence in the administration of justice.

Accordingly, the trial court ordered for respondents to release "ALL recordings and photographs as indicated on the submissions made to the Court by the custodial law enforcement agencies and without redaction or alteration on or before 2:00 p.m. on Friday, June 25, 2021."

¶ 45 On 23 June 2021, respondent-GPD gave notice of appeal from the June Order. Pertinently, this appeal made no mention of the March Order. Respondent-GPD filed a "Motion for Stay of Order Directing Release of Custodial Law Enforcement Recording Pending Appeal" on 25 June 2021, which it amended on 30 June 2021 and filed along with a memorandum in support of the motion. In this memorandum, respondent-GPD argued, among other things, that the trial court had "mistakenly placed the burden of providing a compelling public interest on the custodial law enforcement agency." Both respondents filed a joint motion to amend the June Order on 6 July 2021. Petitioners filed a Motion to Show Cause also on 6 July 2021. On 13 July 2021, the trial court granted respondent-GPD's motion to stay the June Order, denied respondents' motion to amend the June Order, and denied petitioners' Motion to Show Cause. Respondent-ACS did not appeal.

II. Discussion

¶ 46 On appeal, respondent-GPD argues: that petitioners' petition was overly broad under N.C. Gen. Stat. § 132-1.4A; that the trial court "improperly imposed de-facto burden shifting" onto respondents; that the trial court "misapplied the law and imposed the incorrect standard . . . [i]n ordering the unredacted release of all portions of all videos"; that

the trial court "erred and abused its discretion in failing to take reasonable steps to protect against the release of information of a highly sensitive personal nature"; that the trial court abused its discretion by releasing irrelevant and extraneous footage; and that, in abusing its discretion, the trial court "frustrated the legislative intent behind [N.C. Gen. Stat. §] 132-1.4A."

A. Jurisdiction

¶ 47 As a preliminary matter, the majority fails to address a jurisdictional issue presented by this appeal. Respondent-GPD appealed from the June Order and designated its appeal accordingly. In this appeal, respondent-GPD makes no mention of the March Order. However, in its appellate brief, respondent-GPD raises arguments—specifically, that the trial court erred by engaging in "de-facto burden shifting" and that the trial court frustrated the legislative intent of N.C. Gen. Stat. § 132-1.4A—it had not argued in relation to the June Order. Rather, these arguments appeared in respondent-GPD's submission of the petitioned recordings, which related to the March Order, and in its amended motion for staying the June Order, which, by its very nature, followed the June Order.

¶ 48 Under our Rules of Appellate Procedure, any notice of appeal:

> shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C. R. App. P. 3(d).

¶ 49 "The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364-65 (2008) (citations omitted). "A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal." *Id.* at 197, 657 S.E.2d at 365 (citations omitted).

¶ 50 Because part of respondent-GPD's appeal is defective under our Rules of Appellate Procedure, and those defects are jurisdictional in nature, I would have dismissed the arguments regarding burden shifting and frustration of legislative purpose and proceeded with reviewing respondent-GPD's remaining arguments on appeal. *See id.*

B. Standard of Review

¶ 51 As an additional preliminary matter, the majority fails to address the fact that, among its appellate arguments, respondent-GPD also claims that the appropriate standard of review in this case is *de novo*. This is incorrect.

¶ 52 The statute at issue itself expressly states: "The [trial] court shall release only those portions of the recording that are relevant to the person's request, and may place any conditions or restrictions on the release of the recording that the court, *in its discretion*, deems appropriate." N.C. Gen. Stat. § 132-1.4A(g) (2021) (emphasis added). Accordingly, this Court would review for abuse of discretion.

¶ 53 Having eliminated some of respondent-GPD's arguments for failure to comply with our Rules of Appellate Procedure, the only remaining arguments this Court should have reviewed may be summed as follows: whether the trial court abused *its discretion* in releasing all the petitioned footage, "extraneous" footage, or footage containing "information of a highly sensitive personal nature."

C. N.C. Gen. Stat. § 132-1.4A

¶ 54 The majority correctly cites the following: "The best indicia of [legislative] intent are the [plain] language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted). "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). However, what the majority fails to do is to actually apply this precedent; as a result of this failure, the majority misconstrues the plain language of N.C. Gen. Stat. § 132-1.4A, with avoidable and unnecessary results.

¶ 55 The majority contends that "[t]he release of recordings in the custody of a law enforcement agency under any section sequentially requires the petitioning party to show it qualifies and the trial court to so find the basis of that qualification under N.C. Gen. Stat. § 132-1.4A(c)." This is simply not correct.

¶ 56 Subsection (c) of N.C. Gen. Stat. § 132-1.4A, which addresses disclosure of CLEA recordings, reads as follows:

> (c) *Disclosure*; General.--Recordings in the custody of a law enforcement agency shall be *disclosed* only as provided by this section. . . .

> A person requesting *disclosure* of a recording must make a written request to the head of the custodial law enforcement agency that states the date and approximate time of the activity captured in the recording or otherwise identifies the activity with reasonable particularity sufficient to identify the recording to which the request refers.
>
> The head of the custodial law enforcement agency *may only disclose* a recording to the following:
>
> (1) A person whose image or voice is in the recording.
>
> (2) A personal representative of an adult person whose image or voice is in the recording, if the adult person has consented to the disclosure.
>
> (3) A personal representative of a minor or of an adult person under lawful guardianship whose image or voice is in the recording.
>
> (4) A personal representative of a deceased person whose image or voice is in the recording.
>
> (5) A personal representative of an adult person who is incapacitated and unable to provide consent to disclosure.

N.C. Gen. Stat. § 132-1.4A(c) (emphasis added). In summary, subsection (c) of the statute provides a list of those persons entitled to *disclosure* of CLEA recordings, which is separate and distinct from *release* of said recordings. This distinction is further emphasized by the existence and contents of subsections (f) and (g).

¶ 57 Subsection (f) reads as follows:

> (f) *Release* of Recordings *to Certain Persons*; *Expedited Process*.--Notwithstanding the provisions of subsection (g) of this section, *a person authorized to receive disclosure pursuant to subsection (c) of this section*, or the custodial law enforcement agency, *may petition the superior court in any county where any portion of the recording was made for an order releasing the recording to a person authorized to*

> *receive disclosure*. . . . If the petitioner is a person authorized to receive disclosure, notice and an opportunity to be heard shall be given to the head of the custodial law enforcement agency. Petitions filed pursuant to this subsection shall be set down for hearing as soon as practicable and shall be accorded priority by the court.
>
> *The court shall first determine if the person to whom release of the recording is requested is a person authorized to receive disclosure pursuant to subsection (c) of this section. . . . If the court determines that the person is not authorized to receive disclosure pursuant to subsection (c) of this section*, there shall be no right of appeal and *the petitioner may file an action for release pursuant to subsection (g) of this section*.

N.C. Gen. Stat. § 132-1.4A(f) (emphasis added). In summary, subsection (f) addresses how a person who is entitled to *disclosure* of CLEA recordings under subsection (c) would go about petitioning for the *release* thereof, and also states how all other persons excluded by subsection (c) are provided a separate means to file an action for release, articulated by subsection (g).

¶ 58 Subsection (g) of the statute addresses exactly how any other person or entity excluded by subsection (c) would go about petitioning for the release of CLEA recordings; it speaks for itself and reads, in pertinent part, as follows:

> (g) *Release of Recordings; General*; Court Order Required.--Recordings in the custody of a law enforcement agency shall only be released pursuant to court order. Any custodial law enforcement agency or any person requesting release of a recording may file an action in the superior court in any county where any portion of the recording was made for an order releasing the recording.

N.C. Gen. Stat. § 132-1.4A(g) (emphasis added).

¶ 59 Though the statute is long-winded, it is not complex. The statute plainly distinguishes between those persons who are entitled to

disclosure of CLEA recordings, and those who are not; a person who is entitled to disclosure under subsection (c) may petition for release under subsection (f); all other persons excluded by subsection (c) may petition for release under subsection (g).

¶ 60 Indeed, such distinction, which the majority either ignores or fails to perceive, is plainly summarized in each subsection header: "Disclosure; General" for subsection (c); "Release of Recordings to Certain Persons; Expedited Process" for subsection (f); and "Release of Recording; General" for subsection (g).

¶ 61 This plain reading of N.C. Gen. Stat. § 132-1.4A was further reiterated by this Court in *In re Custodial Law Enforcement Recording Sought by City of Greensboro*, a case which the majority cites, in the following statement:

> Our General Assembly has provided that police body-cam footage is neither a public nor a personnel record, [under] N.C. Gen. Stat. § 132-1.4A(b) . . . , and that only those depicted in the video and their personal representatives have an absolute right to view the footage, [under] N.C. Gen. Stat. § 132-1.4A(c) . . . . *The General Assembly also provided that anyone else wanting to view police body-cam footage may not do so unless that individual obtains a court order*[,] [under] N.C. Gen. Stat. § 132-1.4A(g) . . . .

Matter of Custodial L. Enf't Recording Sought by City of Greensboro, 266 N.C. App. 473, 475, 833 S.E.2d 1, 2 (2019) (emphasis added) (citing N.C. Gen. Stat. § 132-1.4A(b), (c), (g) (2016)).

¶ 62 Here, petitioners do not fall within any of the enumerated categories of persons entitled to disclosure as a matter of right provided by subsection (c) of the statute. *See* N.C. Gen. Stat. § 132-1.4A(c). This, however, does not categorically bar petitioners from being able to seek, and possibly obtain, release of CLEA recordings. Rather, petitioners must obtain a court order. N.C. Gen. Stat. § 132-1.4A(g). That is precisely what petitioners have done here: because they were not entitled to disclosure as a matter of right, they petitioned the trial court under subsection (g) in hopes of a favorable order. Accordingly, the majority's contention that the case should be remanded due to an "absence of statutorily-required findings" is incorrect, as it wrongly applies the requirements for identifying whether a petitioner is a person enumerated by subsection (c) to these petitioners.

¶ 63 The majority also suggests that a literal reading of the plain language of N.C. Gen. Stat. § 132-1.4A may lead to "absurd results[.]" *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation and quotation marks omitted). Rather, it is the majority's unique interpretation of the statute that has led to an absurd result. Indeed, the majority's mischaracterization, and subsequent misapplication, of the plain language of N.C. Gen. Stat. § 132-1.4A wholly ignores subsection (g); as a result, the majority would have it so that those limited persons entitled to disclosure under subsection (c) would also be the only persons entitled to release.

¶ 64 The majority's interpretation of N.C. Gen. Stat. § 132-1.4A is not only unfounded, but it is also unrequested. At no point throughout this entire proceeding has respondent-GPD argued that petitioners are excluded, by statute, from petitioning for the release of CLEA recordings or that the trial court should have made a determination as to whether petitioners constituted persons entitled to disclosure under subsection (c). Indeed, it is so obvious from the plain reading of the statute that subsection (c) does not apply to petitioners that it should go without saying. In other words, the issue was never raised, and was thus unpreserved for appeal. N.C. R. App. P. 10(a)(1). Instead, the majority has taken upon itself, *sua sponte*, the task of both arguing and concluding this line of reasoning, something this Court is historically prohibited from doing. *See id.*

¶ 65 Most importantly and poignantly, however, is that the consequence of the majority's reasoning is dangerous: such an interpretation of N.C. Gen. Stat. § 132-1.4A would ensure that members of the media would *never* be allowed to petition the superior court for release of CLEA recordings, let alone obtain them via court order. I see no support in the statute for such a draconian result.

D. Abuse of Discretion

¶ 66 The majority contends that the N.C. Gen. Stat. § 132-1.4A "limits the trial court's discretion in analyzing the standards laid out therein and in determining, as a result of that analysis, whether to release any, all, or some or [sic] none of the petitioned recordings." Setting aside the incorrect depiction of the trial court's discretion as "limited," this statement again, misconstrues the plain language of the statute.

¶ 67 N.C. Gen. Stat. § 132-1.4A(g) provides:

> The request for release must state the date and approximate time of the activity captured in the

recording, or otherwise identify the activity with reasonable particularity sufficient to identify the recording to which the action refers. The court may conduct an in-camera review of the recording. *In determining whether to order the release of all or a portion of the recording, in addition to any other standards the court deems relevant, the court shall consider the applicability of all of the following standards*:

(1) Release is necessary to advance a compelling public interest.

(2) The recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law.

(3) The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding.

(4) Release would reveal information regarding a person that is of a highly sensitive personal nature.

(5) Release may harm the reputation or jeopardize the safety of a person.

(6) Release would create a serious threat to the fair, impartial, and orderly administration of justice.

(7) Confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation.

(8) There is good cause shown to release all portions of a recording.

The court shall release only those portions of the recording that are relevant to the person's request, and may place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate.

N.C. Gen. Stat. § 132-1.4A(g) (emphasis added). The statute speaks clearly: it requires the trial court to consider eight factors and allows it to consider any additional factors of its own making.

¶ 68 The majority takes issue with the fact that the trial court stated in its ruling that the fourth and fifth statutory factors "weighed against"

releasing the CLEA recordings to petitioners, and thus concluded that petitioners are "entitled to release only after finding the statutory category that is applicable to the petition." This statement is not only incorrect, but misconstrues both the statute and the trial court's discretion.

¶ 69 First, the trial court does not have limited discretion. Rather, subsection (g) of the statute provides mandatory factors for the trial court to consider in its analysis, and also allows for the trial court to exercise its discretion in considering additional factors of its own making. Second, nowhere within the plain language of subsection (g) does the statute state that a finding that one or two factors weigh against the release of CLEA recordings is in itself determinative; nor, in fact, does the majority opinion explain away its conclusion.

¶ 70 Indeed, here, during the hearing, the trial court walked through each of the eight standards laid out by the statute with careful consideration. In so doing, the trial court determined whether the specific standard was relevant to the case *sub judice*, and, if so, whether it weighed in favor of or against release of the petitioned CLEA recordings. The trial court also "deem[ed] [it] relevant" to consider "other standards[,]" *see id.*, as permitted by the statute, by giving "great weight to transparency and public accountability with regard to police action" and in "consider[ing] a failure to release this information to possibly undermine the public interest and confidence in the administration of justice." Having considered all these standards, the trial court ultimately concluded, in its discretion, to authorize the release of all the petitioned CLEA recordings. Accordingly, the trial court did not abuse its discretion in authorizing the release of all the requested recordings to petitioners.

E. Authority of the Trial Court

¶ 71 The majority agrees with respondent-GPD's contention that the trial court misapprehended the law and applied an incorrect standard when it stated that it had no authority to censor the recordings absent a compelling government interest. Indeed, the trial court stated in open court, at the close of its eight-standard analysis: "[T]his Court does not have the authority to [c]ensor this information absent a legitimate or compelling state interest not to do so." The trial court also stated in the June Order: "This Court does not have the authority to censor the photos/recordings absent a compelling governmental interest and none was shown."

¶ 72 N.C. Gen. Stat. § 132-1.4A(g) provides: "The court shall release only those portions of the recording that are relevant to the person's request, and may place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate." *Id.*

The majority construes this portion of the statute to mean that it could never be possible for all petitioned CLEA recordings to be relevant to a petitioner's request. However, not only does the majority fail to explain this interpretation in its opinion, but such an interpretation goes against both the plain language of the statute and the plain significance of a trial court's discretion. Indeed, subsection (g) clearly states that the trial court is permitted, and not required, to "place any conditions or restriction on the release" that it, "*in its discretion*, deems appropriate." *Id.* (emphasis added).

¶ 73 Although the trial court may have made an inartful statement as to the controlling law, it is clear from the record that it did not misapply that same law. Our Supreme Court encountered a similar circumstance in *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 336 N.C. 657, 446 S.E.2d 332 (1994) There, the Carolina Utility Customers Association ("CUCA") argued, among other things, that the Utilities Commission (the "Commission") had "misapprehended the scope of its discretion under N.C.G.S. § 62-158 in making the decision to grant or deny Public Service Company's petition" to establish a natural gas expansion fund. *Id.* at 664, 446 S.E.2d at 337. The Commission had stated in its order, " '[o]nce we have found unserved areas that are otherwise infeasible to serve, . . . the General Assembly intends for the Commission to exercise limited discretion as to whether a fund should be created for that particular natural gas utility.' " *Id.* (alterations in original). "CUCA argue[d] that the Commission in fact had wide discretion to determine whether to authorize the establishment of an expansion fund . . . and that the Commission's refusal to exercise its full discretion caused its failure to address CUCA's legal and factual position." *Id.* at 664-65, 446 S.E.2d at 337. "Furthermore, CUCA contend[ed] that the order should be reversed because it constitutes a Commission decision based upon a misinterpretation of applicable law." *Id.* at 665, 446 S.E.2d at 337 (citation omitted).

¶ 74 The Supreme Court disagreed, finding that "the record d[id] not indicate that the Commission viewed itself as without discretion to grant or deny the petition. The Commission in fact stated that it was to exercise 'limited discretion,' as opposed to no discretion whatsoever." *Id.* In fact, the Commission had "held a hearing on the matter and received testimony from numerous witnesses who were either in favor of or opposed to the creation of the expansion fund." *Id.* "After doing so, the Commission issued an order that included extensive findings of fact" and "concluded that 'the creation of an expansion fund for the [Public Service] Company is in the public interest.' " *Id.* "In order to implement

[N.C. Gen. Stat. § 62-158], the Commission adopted Commission Rule R6-82," which set out "limitations . . . in keeping with the language of the enabling statute, N.C.G.S. § 62-158." *Id.* at 666, 446 S.E.2d at 337-38. "The plain language of this rule indicates that the Commission had a proper view of its discretion in making a determination of whether to authorize the creation of an expansion fund[.]" *Id.* at 666, 446 S.E.2d at 338. Thus, the Supreme Court concluded "that the Commission did not act under a misapprehension of applicable law and that it granted the petition and established the expansion fund pursuant to a proper interpretation of its authority and discretion to do so." *Id.*

¶ 75 In the case *sub judice*, N.C. Gen. Stat. § 132-1.4A expressly allows for a trial court to release all or a portion of any sought recording; setting conditions or redacting said recording is permitted, but not mandated. The trial court analyzed each statutory standard with careful consideration and, based on its detailed analysis, concluded that the only acceptable outcome was to order for the release of all of the petitioned CLEA recordings. Furthermore, the very fact that the trial court considered additional standards—namely, transparency and public accountability—in its analysis, as allowed by statute, indicates that it exercised its discretion scrupulously. Thus, the trial court "did not act under a misapprehension of applicable law" and filed its order "pursuant to a proper interpretation of its authority and discretion to do so." *See id.*

¶ 76 In summary, the majority's contention that the trial court's release of all petitioned CLEA recordings could only have been a result of a misapplication of the law is of no moment, as the trial court behaved scrupulously and the controlling statute plainly allows for this outcome.

III. Conclusion

¶ 77 For the foregoing reasons, because the majority has misconstrued and misinterpreted the unambiguous and plain language of N.C. Gen. Stat. § 132-1.4A and has consequently misapplied the statute to this appeal, I dissent from the majority opinion and would affirm.

LACKEY v. CITY OF BURLINGTON

[287 N.C. App. 151, 2022-NCCOA-842]

CINDY LACKEY AND JOHN LACKEY, PLAINTIFFS
v.
CITY OF BURLINGTON, DEFENDANTS

No. COA22-117

Filed 20 December 2022

1. Adverse Possession—prescriptive period—tacking on prior owner's possession—hostile possession—alleyway—failure to state a claim

The trial court properly dismissed plaintiffs' complaint pursuant to Civil Procedure Rule 12(b)(6) for failure to state a claim where plaintiffs claimed that they owned an alleyway abutting their property through adverse possession but failed to allege facts supporting the elements of adverse possession. Plaintiffs could not meet the 20-year prescriptive period by tacking their alleged possession of the alleyway on to the possession by the prior owner where the deed did not actually convey the prior owner's interest in the allegedly adversely possessed alleyway. Furthermore, plaintiffs' alleged possession of the alleyway was not hostile because plaintiffs received permission from the city to use the alleyway for a garden, orchard, and low fence. Finally, to the extent plaintiffs attempted to claim adverse possession against the other subdivision lot owners (all of whom, together with plaintiffs, owned the alleyway until the city accepted the alleyway for public use, as dedicated in the subdivision plat, in 2020), the complaint established that plaintiffs' possession was neither hostile nor exclusive.

2. Estoppel—equitable—dedication of property—acceptance by city—statements prior to acceptance

The trial court properly dismissed plaintiffs' complaint pursuant to Civil Procedure Rule 12(b)(6) for failure to state a claim that the City of Burlington should be equitably estopped from accepting the dedication of an alleyway abutting plaintiffs' property where, according to plaintiffs' allegations, the city annexed the subdivision in which the alleyway was located in 2003 and the city council voted to accept the alleyway for public use (as dedicated in the subdivision plat) in 2020. None of the city's actions were tantamount to a formal rejection of any offer of dedication—including, as plaintiffs argued, the city's statement in 2002 that it did not own the alleyway and the city's statement in 2012 that plaintiffs, along with the other owners of the lots in their subdivision, owned the alleyway.

LACKEY v. CITY OF BURLINGTON

[287 N.C. App. 151, 2022-NCCOA-842]

Appeal by Plaintiffs from Order entered 26 July 2021 by Judge Mark A. Sternlicht in Alamance County Superior Court. Heard in the Court of Appeals 8 September 2022.

Blanco Tackabery & Matamoros, P.A., by Henry O. Hilston, Peter J. Juran, and Chad A. Archer, for plaintiffs-appellants.

Hartzog Law Group, LLP, by Dan M. Hartzog, Jr. and Katherine Barber-Jones, and David R. Huffman, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Cindy Lackey and John Lackey (Plaintiffs) commenced this action on 4 January 2021 by filing a Complaint against the City of Burlington (the City) asserting claims for Declaratory Judgment, Trespass, and Injunctive Relief to Abate a Nuisance arising from Plaintiffs' contention they acquired ownership of an alleyway abutting their property through adverse possession and/or that the City was estopped from accepting a dedication of the alleyway to public use. In response, the City moved to Dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 26 July 2021, the trial court granted the City's Motion to Dismiss. Plaintiffs now appeal from the trial court's Order dismissing their Complaint with prejudice. The Record on Appeal—including the allegations in Plaintiffs' Complaint and the documentary exhibits attached thereto[1]—reflects the following:

¶ 2 On 26 July 1956, Carlton and Etta Day (the Days) subdivided a tract of land in Alamance County into seventeen residential lots known as the Rockford Acres Subdivision. The seventeen lots were designated Lots A through Q, as shown on the Rockford Acres Subdivision Plat (The Rockford Plat). The Rockford Plat proposed two streets within the subdivision, including Hawthorne Lane, running in a generally east to west direction and terminating into a dead-end alleyway located between Lots B and C (the Alleyway). (R p.8, 23) The Alleyway is the contested land in the case before us. The Rockford Plat contained the following dedication language:

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1. *See Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004) ("Since the exhibits to the complaint were expressly incorporated by reference in the complaint, they were properly considered in connection with the motion to dismiss as part of the pleadings." (citation omitted)).

> THE STREETS ON THIS PLAT WILL BE DEDICATED TO THE LOT OWNERS AND NOT TO THE GENERAL PUBLIC, EXCEPT WHEN DEDICATION REQUESTED AND ACCEPTED BY CITY OF BURLINGTON - FOR THE GENERAL PUBLIC.

At the time the Rockford Plat was recorded, the Alleyway was located outside the City limits in Alamance County.

¶ 3 On 2 April 1957, the Days conveyed Lots A and B in the Rockford Acres Subdivision to Otis and Barbara Lackey (the Elder Lackeys) via a Warranty Deed. This Deed contained the following dedication language:

> The streets appearing on the above described plat are dedicated for the benefit of all lot owners who purchase lots in reliance upon said plat. In addition, the grantors herein expressly reserve the right for themselves and their transferees to dedicate at any time said streets, or any part thereof, to the general public.
>
> This property is conveyed subject to, and with the benefits of, all of the provisions and restrictions contained in that indenture executed by Carlton Day and wife on 15 March 1957[.]

¶ 4 On 12 December 1963, the Elder Lackeys purchased property behind Lot B from a private landowner. On 27 April 1978, the Elder Lackeys purchased an additional lot from a neighboring developer, Collins & Young, Inc., behind the now-larger Lot B. Lot B and these additional lots shared a contiguous border with the Alleyway. That year, Collins & Young, Inc. also constructed, and Defendant accepted the maintenance of, a sewer line under the contested land.

¶ 5 On 16 October 1997, the Elder Lackeys recorded a document entitled "Final Plat Property of R. Otis Lackey and wife, Barbara C. Lackey" (the Final Plat). The Final Plat re-divided and renamed Lot A and the now-larger Lot B to Lots 1 and 2, respectively. The Final Plat contained the following language of dedication:

> I, (we) hereby certify that I (we) am (are) the owner(s) of the property, shown and described hereon, which was conveyed to me (us) by deed as recorded in deed book SEE, page MAP, and that I (we) hereby acknowledge this plat and allotment to be my (our) free act and deed and do hereby dedicate to public

> use as streets, rights-of-way, and easements forever, all areas so shown or indicated on said plat.

The Final Plat denotes Hawthorne Lane, including the Alleyway, as a public right-of-way. On 13 August 2002, the Elder Lackeys conveyed Lot 2, as shown on the Final Plat, to Plaintiffs by General Warranty Deed. This conveyance was made "subject to easements, rights of way, and restrictive covenants, if any, appearing of record in the Alamance County Registry."

¶ 6 Plaintiffs allege, upon information and belief, the City annexed the Rockford Subdivision—including Plaintiffs' Lots and the Alleyway—in 2003. Plaintiffs further allege in 2003, the basement of their residence flooded because of inadequate drainage from the Alleyway. Plaintiffs inquired of the State, County, and City and were allegedly informed none of these governmental entities claimed ownership of the Alleyway or were responsible for the flooding.

¶ 7 In 2004, Plaintiffs allege they contacted the City to schedule a public discussion regarding Plaintiffs' claim to the Alleyway. City Representatives informed Plaintiffs that if they withdrew their proposed discussion from the agenda, the City would deal with the drainage issue, and Plaintiffs would be permitted to maintain a garden, orchard, and low fence on the Alleyway. Plaintiffs withdrew their request and constructed a garden, orchard, and low fence on the Alleyway. By 2005, the City had not taken steps to improve drainage on the Alleyway or undertaken other maintenance Plaintiffs alleged was promised by the City in 2004. Plaintiffs again contacted the City with their concerns about the drainage issue, and the City improved the drainage situation on the Alleyway.

¶ 8 On 29 November 2012, Plaintiffs also received title to Lot 1 via General Warranty Deed.[2] That same year, Plaintiffs allege, the City performed a title search on the Alleyway and informed Plaintiffs they, along with the other owners of the seventeen lots shown on the Rockford Plat, owned the rights to the Alleyway. Plaintiffs sought the other lot owners to relinquish their ownership rights in the Alleyway. However, Plaintiffs only received approval from owners of fourteen of the seventeen lots. Subsequently, on 5 March 2020, the City Council voted to accept the Alleyway for public use as dedicated in both the 1956 Rockford Plat and the 1997 Final Plat.

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2. Plaintiffs allege the Elder Lackeys conveyed Lot 1 via this Deed, however, the Deed attached to the Complaint reflects the property was conveyed only by Barbara Lackey. Ultimately, this conveyance is immaterial to the issues in the case at hand.

¶ 9 Plaintiffs' Complaint sought Declaratory Judgments that: Plaintiffs were the owners of the Alleyway; the City was equitably estopped from claiming the Alleyway; and the City was barred from claiming the Alleyway by operation of the Doctrine of Laches. The Complaint also sought injunctive relief against the City to enjoin the City's alleged trespass on the Alleyway and to abate the alleged nuisance resulting from the City's acceptance of the Alleyway for public use. The City filed a Motion to Dismiss on 26 April 2021 asserting Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted. The trial court granted the City's Motion to Dismiss and entered its Order on 26 July 2021 dismissing Plaintiffs' Complaint with prejudice. Plaintiffs timely filed written Notice of Appeal on 18 August 2021.

Issues

¶ 10 The two issues raised by Plaintiffs on appeal to this Court are whether the trial court erred by dismissing their Complaint for failure to state a claim upon which relief may be granted based on Plaintiffs' allegations: (I) Plaintiffs own the Alleyway through adverse possession; and (II) the City should be estopped from accepting dedication of the Alleyway.

Analysis

¶ 11 A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)). "The Motion to Dismiss will be allowed only when the Complaint affirmatively shows that plaintiff has no cause of action." *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974). "The Motion [to Dismiss] is seldom an appropriate pleading in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail." *Id.* "[The Motion to Dismiss] is allowed only when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy." *Id.*

¶ 12 "When considering a 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." *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991) (emphasis in original). Documents attached to and incorporated into a complaint are properly considered as part of a Rule 12(b)(6) motion to dismiss. *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642,

599 S.E.2d 410, 412 (2004). A Rule 12(b)(6) dismissal is proper where "the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

¶ 13 On appeal of a Rule 12(b)(6) motion to dismiss, this Court conducts "a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673, 674 (2003); *see also Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) ("Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." (citation and quotation marks omitted)). As such, this Court also views the allegations in the complaint in the light most favorable to the non-moving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994) (citation omitted). Further, this Court considers "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[.]" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted).

I. Adverse Possession

¶ 14 **[1]** Plaintiffs first argue the trial court erred in dismissing their claim of ownership of the Alleyway on the basis of adverse possession. In their briefing to this Court, however, Plaintiffs fail to identify specific factual allegations in their Complaint that support their claim. Instead, Plaintiffs assert in conclusory fashion that they "clearly pleaded" each of the elements of adverse possession were met. We disagree. Plaintiffs' Complaint fails to allege facts supporting the elements of adverse possession or to demonstrate on its face an insurmountable bar to relief on that basis in several respects.

¶ 15 In North Carolina, "[t]o acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period (seven years or twenty years) under known and visible lines and boundaries." *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176 (2001). The prescriptive period for a party claiming adverse possession under color of title is seven years. N.C. Gen. Stat. § 1-38 (2021). The prescriptive period for a person claiming adverse possession without color of title is twenty years. N.C. Gen. Stat. § 1-40 (2021).

¶ 16 First, Plaintiffs' Complaint demonstrates on its face Plaintiffs fail to meet the prescriptive period to establish their continuous possession of the Alleyway. As an initial matter, it is not expressly alleged in the Complaint on what basis Plaintiffs assert adverse possession—that is, whether they claim adverse possession under color of title or without color of title. Plaintiffs also offer no guidance on what prescriptive period applies in their briefing. Nevertheless, Plaintiffs—both in their Complaint and in briefing—appear to accept the premise they are required to meet the 20-year prescriptive period for adverse possession without color of title. Plaintiffs' Complaint affirmatively shows Plaintiffs' alleged possession of property alone cannot meet the 20-year period. Plaintiffs' Complaint alleges Plaintiffs did not acquire their interest in the adjoining Lot 2 from the Elder Lackeys until 2002 and did not begin using the Alleyway for their garden, orchard, and low fence until 2004.

¶ 17 Rather, Plaintiffs' claim for adverse possession relies on their allegation Plaintiffs "and their predecessors in interests possessed the [Alleyway] for far longer than the twenty-year (20) statutory period for adverse possession, which period began running in 1956 and 1997[.]" In this respect, Plaintiffs effectively argue they should be permitted to "tack" their alleged possession of the Alleyway on to the possession of the Elder Lackeys. While it appears the general rule applied in other states is to permit such tacking of possession to establish adverse possession, North Carolina has adopted a minority position. *See Cole v. Bonaparte's Retreat Prop. Owners' Ass'n*, 259 N.C. App. 27, 35, 815 S.E.2d 403, 409 (2018).[3] Under North Carolina law, a party may only tack their possession on to that of a prior owner where the prior owner actually conveys their interest in the allegedly adversely possessed property. *Id.* at 34, 815 S.E.2d at 409. If ownership is passed through a deed that does not include the allegedly adversely possessed property, the new owner may not tack the prior possession on to their own because, under North Carolina law, "privity through a deed does not extend beyond the property described therein." *Id.* at 36, 815 S.E.2d at 410.

¶ 18 In this case, Plaintiffs' Complaint—including the conveyances from the Elder Lackeys to Plaintiffs—reflect the Elder Lackeys did not convey any interest in the Alleyway to Plaintiffs, and thus, Plaintiffs may not tack their possession of the Alleyway on to that of the Lackeys. Plaintiffs obtained Lot 2 adjoining the Alleyway from the Lackeys in 2002. The

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3. It should be observed Plaintiffs cited *Cole* in support of their adverse possession argument in their briefing to this Court. However, Plaintiffs failed to present any argument on this rather crucial discussion in *Cole*, which is central to Plaintiffs' argument.

General Warranty Deed makes no conveyance of the Alleyway. Indeed, that deed makes express reference to the 1997 Final Plat, which, itself, expressly shows the Alleyway as a public right-of-way. The deed also expressly makes the conveyance subject to any rights-of-way shown on the public record. As such, Plaintiffs, even on the allegations of their Complaint, are not permitted to tack their ownership on to that of the Elder Lackeys to establish Plaintiffs' continuous possession of the Alleyway to meet the 20-year prescriptive period.

¶ 19 Second, Plaintiffs' Complaint also alleges facts revealing that their alleged possession of the Alleyway was not hostile. " 'A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.' " *Daniel v. Wray*, 158 N.C. App. 161, 172, 580 S.E.2d 711, 719 (2003) (quoting *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966)). "However, the hostility requirement is not met if the possessor's use of the disputed land is permissive." *Jones v. Miles*, 189 N.C. App. 289, 292–93, 658 S.E.2d 23, 26 (2008); *see also New Covenant Worship Ctr. v. Wright*, 166 N.C. App. 96, 104, 601 S.E.2d 245, 251-52 (2004) (hostility requirement not satisfied because the possessor's use of the disputed property was permissive); *McManus v. Kluttz*, 165 N.C. App. 564, 573-74, 599 S.E.2d 438, 446 (2004) (hostility requirement satisfied because the possessor's use of the disputed property was not permissive).

¶ 20 Here, Plaintiffs' allegations show their use of the Alleyway was done with permission of the City and, thus, was not hostile to the City's ownership rights in the Alleyway. Plaintiffs alleged they approached the City about the Alleyway in 2004 and were given permission by the City to use the Alleyway property for a garden, orchard, and low fence and that the City would repair the drainage from the Alleyway into Plaintiffs' property. Indeed, in 2005, Plaintiffs again requested the City repair the drainage issue from the Alleyway and there is no allegation Plaintiffs ever reasserted any claim of ownership over the Alleyway inconsistent with their permissive use. *Jones*, 189 N.C. App. at 294, 658 S.E.2d at 27 ("true owner's grant of permission will defeat a possessor's hostile use if the possessor takes no further action to reassert [their] claim over the land").

¶ 21 Third, to the extent Plaintiffs attempt to claim adverse possession of the Alleyway as against the other Rockford Acres lot owners, Plaintiffs' Complaint establishes Plaintiffs' possession was neither hostile nor exclusive.[4] Plaintiffs' Complaint alleges that in 2012, following the City's

4. The other Rockford Acres lot owners are not parties to this action.

own title search, Plaintiffs unsuccessfully sought the other lot owners to relinquish their rights in the Alleyway. As such, their claim of ownership or possession of the Alleyway was not exclusive. Further, Plaintiffs' acknowledgement of the other lot owners' continuing rights in the property defeats any hostility of Plaintiffs' possession. *See New Covenant Worship Ctr.*, 166 N.C. App. at 103-04, 601 S.E.2d at 251-52.

¶ 22 Thus, Plaintiffs' Complaint reveals facts representing an insurmountable bar to their claim for adverse possession of the Alleyway and demonstrates Plaintiffs are not entitled to declaratory relief on this basis. Therefore, Plaintiffs' Complaint fails to state a claim for adverse possession of the Alleyway upon which relief may be granted. Consequently, the trial court did not err by dismissing Plaintiffs' claims arising in adverse possession pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

II. Equitable Estoppel

¶ 23 **[2]** In their second argument, Plaintiffs contend their Complaint alleged a claim the City should be equitably estopped from accepting the dedication of the Alleyway. At the outset, Plaintiffs—in their reply briefing—concede they make no claim there was any statutory withdrawal of the dedication of the Alleyway or of Hawthorne Lane more generally under N.C. Gen. Stat. § 136-96 (2021). Plaintiffs' argument that the City should no longer be permitted to accept dedication of the Alleyway in particular rests solely on their allegations of estoppel.

¶ 24 Specifically, Plaintiffs contend the allegations in their Complaint are akin to the facts in *Lee v. Walker*, 234 N.C. 687, 68 S.E.2d 664 (1952). There, a property owner subdivided a tract of land as shown on a map entitled a Map of Vineland, including lots, blocks, alleys, streets, and avenues. *Id.* at 697, 68 S.E.2d at 671. The name of Vineland was later changed to Southern Pines, and an identical map was recorded. *Id.* Southern Pines was later chartered by the General Assembly as the Town of Southern Pines. *Id.* The Town Charter required the Town Commissioners to "provide for repairing the streets, sidewalks and alleys and cause the same to be kept clean and in good order[.]" *Id.* at 690, 68 S.E.2d at 666. In response, the Town passed and recorded a resolution "to the effect that the town did thereby relinquish 'all right and title that the town may have in the alleyways and parks within each square or block within the town forever[.]' " *Id.* After this resolution, the Town regularly approved building permits that encroached on alleyways in the Town. The plaintiff in *Lee* applied for a building permit from the Town of Southern Pines. The Town denied the permit request on the basis it would require closing an

alley on the property which the Town claimed was public. *Id.* at 689, 68 S.E.2d at 665. The North Carolina Supreme Court ultimately held the Town was estopped from asserting any right to the alleyway at issue in that case. *Id.* at 697, 68 S.E.2d at 671. Importantly, the Supreme Court observed: "the action of the Board [passing the resolution relinquishing the Town's rights in alleyways] was tantamount to a formal rejection of the offer of dedication and was so construed and regarded by the Town of Southern Pines, the original dedicator and his successors in title for more than fifty-eight years prior to the time this controversy arose." *Id.* at 696, 68 S.E.2d at 670. The Court also noted the Town had routinely treated alleyways as private property and assessed taxes on them as such and assessed owners for the pro rata cost of paving the alleys. *Id.*

¶ 25 The allegations in Plaintiffs' Complaint are, however, distinguishable from the facts of *Lee*. Here, there is no allegation the City ever enacted any formal resolution or took action to relinquish any right in the Alleyway. Rather, Plaintiffs point to allegations that in 2002, they inquired of the City as to the ownership of the Alleyway from the City, and the City responded it did not own the Alleyway. Plaintiffs' Complaint also alleges upon information and belief, however, the City did not annex the property, including the Alleyway, into City limits until 2003. Subsequently, in 2004 and again in 2005, the Complaint alleges the City agreed to undertake maintenance on the Alleyway to improve drainage on Plaintiffs' property and permitted Plaintiffs to operate a garden in the Alleyway. These actions are not "tantamount to a formal rejection of any offer of dedication." *Id.* The same is true of the 2012 title search by the City, after which the City informed Plaintiffs they would need to obtain relinquishment from the other lot owners to the Alleyway. This was not "tantamount to a formal rejection of any offer of dedication" by the City, but, in fact, an acknowledgement of the dedication in the Rockford Plat from 1956 which dedicated the Alleyway to the use of the lot owners until the City accepted dedication of the Alleyway for public use. There is likewise no allegation that the City has otherwise treated the Alleyway as private property by taxing the property or requiring Plaintiffs to pay the cost of any improvements or maintenance on the Alleyway. Furthermore, there is no allegation in the Complaint that the City's actions in this regard are inconsistent with any prior action. Moreover, there is no allegation the City acquiesced to the Alleyway being included or conveyed as private property. Again, to the contrary, the 1997 Final Plat referenced in the deeds from the Elder Lackeys to Plaintiffs expressly identifies the Alleyway as a public right-of-way. *See City of Salisbury v. Barnhardt*, 249 N.C. 549, 556, 107 S.E.2d 297, 302

(1959) (" 'to constitute an estoppel against the public the acts relied on must be such as to work a fraud or injustice if the public is not held to be estopped. Obviously, one who knowingly encroaches upon a highway is not within the protection of the rule. If the boundaries are fixed by a recorded map, subsequent purchasers of lots abutting thereon are charged with notice thereof, and the fact that they purchase under the impression that a fence encroaching on the street is on the boundary line thereof will not affect the public rights, provided the municipality has done nothing to mislead them.' " (quoting 25 Am. Jur. 413, Highways, § 115)).

¶ 26 Thus, the allegations in Plaintiffs' Complaint are insufficient to establish a claim that the City should be estopped from accepting dedication of the Alleyway under *Lee*. Therefore, Plaintiffs have failed to state a claim for declaratory relief upon which relief may be granted on their theory of equitable estoppel. Consequently, the trial court did not err by granting the City's Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Conclusion

¶ 27 Accordingly, for the foregoing reasons, we affirm the trial court's 26 July 2021 Order granting the City's Motion to Dismiss pursuant to Rule 12(b)(6) dismissing Plaintiffs' claims with prejudice.

AFFIRMED.

Judges COLLINS and JACKSON concur.

STERGIOS MOSCHOS
v.
SUSAN MOSCHOS

No. COA22-455

Filed 20 December 2022

1. Appeal and Error—preservation of issues—argument abandoned—no legal support

Plaintiff's challenge to the trial court's dismissal of his claims for breach of fiduciary duty, fraud, and misappropriation of marital funds pursuant to Civil Procedure Rule 12(b)(1) was deemed abandoned where plaintiff made a bare assertion of error on appeal but failed to state any reason or argument or to cite any legal authority in support of his assertion.

2. Emotional Distress—intentional infliction—identification of emotional or mental condition—sufficiency of allegations

The trial court properly dismissed plaintiff's claim for intentional infliction of emotional distress pursuant to Civil Procedure Rule 12(b)(6) where plaintiff's allegations failed to identify a severe and disabling emotional or mental condition generally recognized and diagnosed by professionals trained to do so and failed to allege sufficient facts concerning the type, manner, or degree of severe emotional distress he allegedly experienced.

Appeal by Plaintiff from order entered 11 January 2022 by Judge Richard Allen Baddour, Jr., in Orange County Superior Court. Heard in the Court of Appeals 16 November 2022.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for Plaintiff-Appellant.

Coleman, Gledhill, Hargrave, Merritt, & Rainsford, P.C., by James Rainford, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiff Stergios Moschos appeals from the trial court's order dismissing his claims against Defendant Susan Moschos for breach of fiduciary duty, fraud, and misappropriation of marital assets under Rules of Civil Procedure 12(b)(1) and 12(b)(6), and his claim for intentional

infliction of emotional distress under Rule 12(b)(6). Plaintiff has abandoned his argument that the trial court erred by dismissing his claims under Rule 12(b)(1), and the trial court did not err by granting Defendant's motion to dismiss Plaintiff's intentional infliction of emotion distress claim under Rule 12(b)(6). Accordingly, we affirm the trial court's order.

I. Procedural History and Factual Background

¶ 2 Soon after Plaintiff and Defendant were married in 2006, they opened a joint bank account and agreed that Defendant would pay the parties' expenses from the joint account. The parties began depositing their employment income into the joint account, and Defendant paid the couple's expenses from the account. In May 2016, after accepting a new job, Defendant opened and began depositing her paychecks into a separate bank account. At the time of separation, the bank account had a balance of $60,262.

¶ 3 In the fall of 2018, after Defendant continuously expressed dissatisfaction in their marriage, Plaintiff proposed they rehabilitate their marriage by starting new careers in a warmer location. In early 2019, Plaintiff accepted a job interview in Tampa, Florida, and he was invited for a second round of interviews scheduled for 30 April 2019.

¶ 4 On 22 April 2019, Defendant texted Plaintiff, "I am very sorry but our marriage is not working for me any longer. I am moving out. I left you a letter. . . ." Defendant left a one-page typed letter, which stated in part:

> I do NOT want to fight with you. We can smoothly separate if we are both reasonable. I would be fine with splitting our savings and if you are respectful toward me (e.g. not screaming, swearing, name calling), I will not ask for alimony or half your retirement. Condo in Boston is totally yours. I see no need to get attorneys – we can both be respectful and peaceful, even if we are both hurting.
>
> . . . I will file separation paperwork, and, in a year, we can divorce. North Carolina is a no-fault state, so we really don't need to go to court (it would only end in my benefit). I will get the accounts changed so I won't have access to your paycheck. I will continue to get mail but leave yours in the box until my address is changed.
>
> . . . .

> I have considered this at length, for a long time and honestly don't believe we can be a loving couple again. I thank you for the many good years we had together. . . .

¶ 5 The parties agreed that Defendant would relinquish control of their joint account into which Plaintiff had deposited his income during their 13 years of marriage. Before relinquishing control of the account, Defendant withdrew $55,000 one month prior to their separation; paid a deposit for a new apartment the day after she left him; and withdrew approximately $6,690 to lower the balance remaining on her student loan. When Plaintiff discovered that Defendant had withdrawn $55,000 from their joint account,

> he texted to her his frustration and remorse that he had trusted her with managing the financial accounts. She texted him back: "Do you know how lucky you are in [my] not getting alimony and half you(*sic*) retirement. No more comments about finances." When he texted her, "Yes, I am lucky that you are reasonable," she responded, "All good."

On 27 April 2019, Defendant texted Plaintiff that she would complete the separation agreement which would memorialize her promise not to pursue him for alimony and half his retirement. Several days later, Defendant texted Plaintiff and said,

> So, bad news. My attorney said I'm stupid not to take a settlement, especially since I followed your career. I'm willing to be fair and still don't want alimony. Do you want me to draw up a proposal or would you like to have your attorney do so?

When Plaintiff responded that he would like to draw up a proposal consistent with her previous promise not to pursue him for alimony and half his retirement, she responded:

> F**k off, dude. You're getting off easy and you have plenty of earning potential. This can be cheap and easy or long and expensive. I didn't realize how foolish I was being until everybody told me so I have absolutely every right to alimony as well so you're better off just to suck it up and move on. You have 500k in retirement. I'll take 300k if we go to a mediator, write it up, and settle fast.

Defendant filed an action for absolute divorce a year after their separation, which was granted. Defendant also filed an action for equitable distribution, seeking over half of Plaintiff's retirement assets.

¶ 6 On 8 January 2021, Plaintiff sued for breach of fiduciary duty, fraud, defamation, intentional infliction of emotional distress, and misappropriation of marital funds. Defendant moved to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure. Plaintiff later voluntarily dismissed his defamation claim. After a hearing, the trial court granted Defendant's motions to dismiss the remaining claims.

II. Discussion

¶ 7 **[1]** Plaintiff asserts that "[t]he trial court erred in granting Defendant's motions to dismiss the complaint" and recites the applicable standard of review of an order granting a motion to dismiss under Rules 12(b)(1) and 12(b)(6). However, Plaintiff states no reason or argument, and cites no legal authority, in support of his assertion that the trial court erred by dismissing the breach of fiduciary duty, fraud, and misappropriation of marital funds claims under Rule 12(b)(1). Accordingly, any challenge to the trial court's dismissal of those claims under Rule 12(b)(1) is deemed abandoned. *See* N.C. R. App. P. 28(a) (2022); N.C. R. App. P. 28(b)(6) (2022). The trial court's order dismissing the breach of fiduciary duty, fraud, and misappropriation of marital funds claims under Rule 12(b)(1) is thus affirmed, and we need not address Plaintiff's argument that the trial court erred by dismissing those claims under Rule 12(b)(6).

¶ 8 **[2]** As the trial court did not dismiss the intentional infliction of emotional distress claim under Rule 12(b)(1), we address Plaintiff's argument that the trial court erred by dismissing that claim under Rule 12(b)(6).

¶ 9 In ruling on a motion to dismiss for failure to state a claim, the allegations of fact are taken as true. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 351, 416 S.E.2d 166, 168 (1992). Dismissal is proper when (1) the complaint on its face reveals that no law supports plaintiff's claim, (2) the complaint reveals on its face that some fact essential to plaintiff's claim is missing, and (3) when some fact disclosed in the complaint defeats the plaintiff's claim. *Schloss Outdoor Advert. Co. v. City of Charlotte*, 50 N.C. App. 150, 152, 272 S.E.2d 920, 922 (1980). We review an order allowing a motion to dismiss for failure to state a claim upon which relief can be granted de novo. *Halterman v. Halterman*, 276 N.C. App. 66, 2021-NCCOA-38, ¶ 10.

¶ 10 "To state a claim for intentional infliction of emotional distress, a plaintiff must allege: (1) extreme and outrageous conduct (2) which is intended to cause and does cause (3) severe emotional distress to another." *Clark v. Clark*, 280 N.C. App. 403, 2021-NCCOA-653, ¶ 37 (internal quotation marks and citation omitted). "Extreme and outrageous conduct is defined as conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Norton v. Scotland Mem'l Hosp., Inc.*, 250 N.C. App. 392, 397, 793 S.E.2d 703, 708 (2016) (internal quotation marks and citation omitted).

¶ 11 Severe emotional distress has been defined as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Allegations that fail to identify a severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so are not sufficient. *See Pierce v. Atl. Grp., Inc.*, 219 N.C. App. 19, 32, 724 S.E.2d 568, 577 (2012) (concluding plaintiff's allegation of "serious on and off the job stress, severely affecting his relationship with his wife and family members" was insufficient to allege severe emotional distress in the context of a claim for negligent or intentional infliction of emotional distress); *cf. Zenobile v. McKecuen*, 144 N.C. App. 104, 111, 548 S.E.2d 756, 760 (2001) (reversing dismissal of plaintiff's claim for negligent and intentional infliction of emotional distress where she alleged extreme emotional distress consisting of "anxiety disorder, depression, and post-traumatic stress disorder"). Moreover, without factual allegations regarding the type, manner, or degree of severe emotional distress a plaintiff claims to have experienced, a plaintiff's complaint fails to sufficiently allege severe emotional distress. *Cauley v. Bean*, 282 N.C. App. 443, 2022-NCCOA-202, ¶¶ 21-22, *disc. review denied*, 871 S.E.2d 281 (2022) (affirming dismissal of negligent infliction of emotional distress claim where "[t]he only allegations in Plaintiff's complaint regarding her emotional distress are that Defendant's actions 'proximately caused the negligent infliction of emotional distress of [P]laintiff' and that '[P]laintiff suffered severe emotional distress' ").

¶ 12 Here, Plaintiff alleges that he suffered severe emotional distress from Defendant's "sudden abandonment" of him. In support of this contention, Plaintiff alleges that he was "stunned[,] . . . utterly distraught[,] . . . and had to undertake psychological treatment as a result

of [Defendant]'s conduct." These allegations fail to identify a severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so, and fail to allege sufficient facts concerning the type, manner, or degree of severe emotional distress Plaintiff claims to have experienced. Accordingly, Plaintiff failed to allege that he suffered severe emotional distress due to Defendant's conduct. As Plaintiff fails to allege a necessary element of intentional infliction of emotional distress, this claim was properly dismissed under Rule 12(b)(6).

III. Conclusion

¶ 13 Plaintiff abandoned any argument that the trial court erred by dismissing the breach of fiduciary duty, fraud, and misappropriation of marital assets claims under Rule 12(b)(1). Plaintiff failed to state a claim for intentional infliction of emotional distress, and the trial court did not err by dismissing that claim under Rule 12(b)(6). Accordingly, the trial court's order is affirmed.

AFFIRMED.

Judges DIETZ and MURPHY concur.

IN THE MATTER OF THE ESTATE OF CARLTON MARION PAXTON

TERRY CARLTON PAXTON, CAVEATOR
v.
BERLIS ROBERT OWEN, PROPOUNDER

No. COA22-186

Filed 20 December 2022

Wills—caveat proceeding—undue influence—no forecast of evidence

In a caveat proceeding brought by decedent's son in which he alleged that the propounder—a friend of decedent's to whom decedent left his entire estate—obtained the will through undue influence and duress while decedent was physically and mentally weakened, the trial court properly granted summary judgment for the propounder because the caveator failed to set forth specific facts to establish a genuine issue of material fact as to whether the

propounder exerted fraudulent influence on decedent to procure the will.

Appeal by Terry Carlton Paxton from Order entered 6 September 2021 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 1 November 2022.

Donald H. Barton for caveator-appellant.

Whitfield-Cargile Law, PLLC, by Davis A. Whitfield-Cargile, for propounder-appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Terry Carlton Paxton (Caveator) appeals from an Order entered in favor of Berlis Robert Owen (Propounder) on 15 September 2021 granting Propounder's Motion for Summary Judgment. The Record before us tends to reflect the following:

¶ 2 Carlton Marion Paxton (Testator) executed two wills[1] during his lifetime, both of which expressly excluded Caveator from inheriting any of his estate. Testator passed away on 15 September 2019. Propounder offered Testator's Last Will and Testament (Will), dated 3 March 2019, for probate on 9 September 2019. The Will included the following statement: "My son, Terry Carlton Paxton, has been specifically excluded from inheriting any of my estate for reasons known to him." The Will left Testator's entire estate to Propounder, who Testator described in the Will as "my friend[.]"

¶ 3 On 16 September 2019, Caveator, son of Testator, filed a Caveat seeking to invalidate Testator's Will on the grounds of undue influence. Caveator alleged, in relevant part:

> 4. That the typed document dated March 3, 2019, a copy of which is attached as Exhibit "A", is not the Last Will and Testatment [sic] of Carlton Marion Paxton.

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1. The earliest will in the Record, dated 29 May 1990, left Testator's entire estate to Testator's brother, Edward Clinton Paxton. The 1990 Will expressly provided: "My son, Terry Carlton Paxton, has been specifically excluded from inheriting any of my estate for reasons known to him."

> 5. As this Caveator is informed and believes, and upon such information and belief avers, the execution of said typed document and the signature of the said Carlton Marion Paxton thereto was obtained by Berlis Robert Owen, et[] al. through undue and improper influence and duress upon the said Carlton Marion Paxton.
>
> 6. At the time of the purported execution of said typed document by the said Carlton Marion Paxton, he, the said, Carlton Marion Paxton, was by reason of age, disease, and both mental and physical weakness and infirmity not capable of executing a last will and testament, which condition existed and continued until the death of the said Carlton Marion Paxton.

¶ 4 On 10 October 2019, Propounder filed a Motion to Dismiss the caveat proceeding pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. The trial court denied the Motion to Dismiss on 1 November 2019.

¶ 5 On 12 July 2021, Propounder filed a Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. A hearing on Propounder's Motion for Summary Judgment was held on 4 August 2021. On the morning of the hearing, Caveator filed and served an Affidavit in Opposition of Motion for Summary Judgment signed by Keith Eades (Eades), a nephew of Testator. Eades's affidavit expressed concern for Testator's mental and physical health, stating he "was very concerned for [Testator's] wellbeing, feeling like [Testator] did not have long to live."

¶ 6 On 15 September 2021, the trial court entered its Order granting Summary Judgment in favor of Propounder, concluding:

> The affidavit of Mr. Eades and the deposition testimony of the Caveator do not offer a forecast of facts sufficient to put the question of capacity, undue influence[,] or duress before the jury. Because the Caveator has made no forecast of evidence to submit the question of undue influence or duress to the jury, the Court concludes as a matter of law that the propounded will was not the product of undue influence or duress.

Caveator timely filed written Notice of Appeal on 13 October 2021.

Issue

¶ 7 The dispositive issue on appeal is whether the trial court erred in granting summary judgment in favor of Propounder.[2]

Analysis

¶ 8 "Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations omitted). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Id.* (citations omitted). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth *specific facts* showing that there is a genuine issue for trial.' " *Id.* at 369-70, 289 S.E.2d at 366 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e) (2021) (emphasis added)). "The non-moving party 'may not rest upon the mere allegations of his pleadings.' " *Id.* Additionally, conclusory statements of opinion "as opposed to statements of fact, are not properly considered on a motion for summary judgment." *In re Whitaker*, 144 N.C. App. 295, 299, 547 S.E.2d 853, 857 (2001).

¶ 9 On appeal, Caveator advances the argument the trial court erred in granting Summary Judgment in favor of Propounder because there was a genuine issue of material fact as to whether Testator's Will was the product of undue influence.[3]

¶ 10 "In the context of a will caveat, '[u]ndue influence is more than mere persuasion, because a person may be influenced to do an act which is

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2. Caveator makes an additional and very summary argument that the trial court erred by including Findings of Fact in its Order at the Summary Judgment stage, which the trial court described as undisputed facts. Given our disposition in this case, it is not necessary to address Caveator's argument on this issue.

3. Caveator does not challenge the trial court's conclusion Testator had the requisite mental capacity to execute the Will.

nevertheless his voluntary action.' " *In re Will of Sechrest*, 140 N.C. App. 464, 468, 537 S.E.2d 511, 515 (2000) (alteration in original) (quoting *In re Will of Buck*, 130 N.C. App. 408, 413, 503 S.E.2d 126, 130 (1998), *aff'd*, 350 N.C. 621, 516 S.E.2d 858 (1999)). "The influence necessary to nullify a testamentary instrument is the fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." *Whitaker*, 144 N.C. App. at 300, 547 S.E.2d at 857-58 (citations and quotation marks omitted). "The four general elements of undue influence are: (1) decedent is subject to influence, (2) beneficiary has an opportunity to exert influence, (3) beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence." *In re Will of Smith*, 158 N.C. App. 722, 726, 582 S.E.2d 356, 359 (2003) (citation omitted).

¶ 11 The North Carolina Supreme Court has acknowledged:

> It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.

In re Andrews, 299 N.C. 52, 54-55, 261 S.E.2d 198, 200 (1980) (citation omitted). Undue influence "is 'generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence.' " *In re Will of Mueller*, 170 N.C. 28, 29, 86 S.E. 719 (1915) (quoting *In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910)). Our Courts have identified several factors that may be relevant in determining whether a will was procured under undue influence over the testator, including:

> "1. Old age and physical and mental weakness.
>
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
>
> 3. That others have little or no opportunity to see him.
>
> 4. That the will is different from and revokes a prior will.

> 5. That it is made in favor of one with whom there are no ties of blood.
>
> 6. That it disinherits the natural objects of his bounty.
>
> 7. That the beneficiary has procured its execution."

Andrews, 299 N.C. at 55, 261 S.E.2d at 200 (quoting *Mueller*, 170 N.C. at 30, 86 S.E. at 720 (1915)). Although the caveator is not required to demonstrate the existence of every factor to prove undue influence, the caveator must establish a *prima facie* case. *See id.* at 55, 261 S.E.2d at 200 ("[T]he burden of proving undue influence is on the caveator and he must present sufficient evidence to make out a *prima facie* case in order to take the case to the jury."). In summary:

> For influence to be undue, "there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing [her] to make a will which [she] otherwise would not have made."

In re Will of Campbell, 155 N.C. App. 441, 455, 573 S.E.2d 550, 560 (2002) (alterations in original) (quoting *In re Will of Prince*, 109 N.C. App. 58, 61, 425 S.E.2d 711, 713-14 (1993) (citations omitted)).

¶ 12 In the case *sub judice*, Caveator alleges the existence of undue influence based on the following physical and mental conditions: Testator was seventy-nine years of age, suffering from poor health; Testator was on oxygen twenty-four hours a day, seven days a week; Testator suffered from chronic obstructive pulmonary disease; Testator was on a suprapubic catheter; and Testator was severely depressed. Caveator also points to the following testimony to support the existence of undue influence: Testator executed a prior will not naming Propounder as his beneficiary and Testator "expressed a strong desire that his property remain in the Paxton family[.]" In further support of this argument, Caveator notes Propounder "was not a relative, but a neighbor and caretaker, who assisted in the procuring of the Will in which he was named as beneficiary."

¶ 13 In briefing on appeal to this Court, Caveator makes arguments as to the existence of physical and mental weakness relevant to undue

influence; however, Caveator fails to explain or point to any evidence in the Record as to how these factors resulted in undue influence in the case at hand. Specifically, Caveator contends Propounder "had both the opportunity to exert influence over [Testator] and his active role in procuring the execution of the Will in his favor was indicative of his disposition to exert influence over [Testator]." Without presenting specific facts demonstrating the Will was executed as a result of Propounder's fraudulent and overpowering influence over Testator, Caveator's allegation of undue influence is just that: a mere allegation unsupported by any forecast of evidence. *See Whitaker*, 144 N.C. App. at 302, 547 S.E.2d at 858 ("[C]onclusory statements of opinion are not evidence properly considered on a motion for summary judgment.").

¶ 14 Thus, as the trial court recognized, Caveator has failed to set forth specific facts demonstrating Propounder procured the execution of the Will or exerted undue influence over Testator. Therefore, Caveator failed to carry his burden of establishing the existence of a genuine issue of material fact as to whether Testator's Will was the product of undue influence. Consequently, the trial court did not err in granting Summary Judgment in favor of Propounder.

Conclusion

¶ 15 Accordingly, for the foregoing reasons, we affirm the trial court's Order granting Summary Judgment to Propounder.

AFFIRMED.

Chief Judge STROUD and Judge JACKSON concur.

STATE OF NORTH CAROLINA
v.
THOMAS MICHAEL ADAMS, DEFENDANT

No. COA22-588

Filed 20 December 2022

Motor Vehicles—driving while impaired—sentencing—transfer from supervised to unsupervised probation—passage of time—statutory authority

In sentencing defendant for driving while impaired, the trial court exceeded its statutory authority under N.C.G.S. § 20-179(r) by conditioning defendant's transfer from supervised to unsupervised probation upon the passage of a certain amount of time, regardless of whether he had performed his community service; paid his court fines, costs, and fees; and obtained a substance abuse assessment.

Appeal by Defendant from judgment entered 12 January 2022 by Judge Jesse B. Caldwell, IV, in Gaston County Superior Court. Heard in the Court of Appeals 30 November 2022.

Attorney General Joshua H. Stein, by Assistant Attorney Kindelle McCullen and Special Deputy Attorney General Martin T. McCracken, for the State.

Patterson Harkavy LLP, by Christopher A. Brook, for the Defendant.

JACKSON, Judge.

¶ 1 Thomas Michael Adams ("Defendant") appeals from judgment entered after he pleaded guilty to driving while impaired. We vacate and remand for resentencing.

I. Background

¶ 2 Defendant was cited for driving while impaired on 4 December 2019. He pleaded guilty on 12 January 2022.

¶ 3 At sentencing, the court found one factor in aggravation – Defendant's blood alcohol content was more than .15 at the time of the offense – and one factor in mitigation – a safe driving record. The court concluded that the factors balanced each other out, and sentenced Defendant to 120 days' imprisonment. The court then suspended this sentence for

18 months of supervised probation. The court went on to impose a special condition of probation that Defendant perform 48 hours of community service, pay court costs, fines, and fees, and obtain a substance abuse assessment within 60 days. The court further stipulated that if Defendant was in full compliance with the terms of his probation within 12 months, his sentence of supervised probation could be changed to unsupervised probation.

II. Jurisdiction

¶ 4 Defendant did not notice an appeal from the judgment, and there is no right of appeal from a judgment entered upon a guilty plea. N.C. Gen. Stat. § 15A-1444(e) (2021). Defendant has therefore petitioned our Court for certiorari to review the judgment, citing *State v. Killette*, 381 N.C. 686, 690-91, 2022-NCSC-80 ¶ 15, in which our Supreme Court recently reaffirmed our authority to issue the writ of certiorari to review a judgment entered upon a guilty plea. In the exercise of our discretion, we issue the writ of certiorari here, and reach the merits of Defendant's appeal.

III. Analysis

¶ 5 Defendant argues that the sentence imposed by the sentencing court violated N.C. Gen. Stat. § 20-179(r), in that it required him to remain on supervised probation for at least 12 months, even if before that time he had performed his required community service, paid court costs, fines, and fees, and obtained a substance abuse assessment. We agree.

A. Standard of Review

¶ 6 When a defendant asserts that a "sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law[,]" the issue is automatically preserved for appellate review, regardless of whether an objection was raised in the trial court. N.C. Gen. Stat. § 15A-1446(d)(18) (2021). "Alleged statutory errors are questions of law reviewed de novo on appeal." *State v. Porter*, 282 N.C. App. 351, 352, 2022-NCCOA-166 ¶ 5 (2022) (internal marks and citation omitted).

B. The Sentencing Court's Special Condition of Probation Was Unauthorized

¶ 7 North Carolina General Statute § 20-179(r) provides that when a judge determines that a defendant who has been convicted of driving while impaired

> should be placed on supervised probation, the judge shall authorize the probation officer to modify the defendant's probation by placing the defendant on unsupervised probation upon the completion by the defendant of the following conditions of the suspended sentence:
>
> (1) [c]ommunity service;
>
> . . .
>
> [(2)] [p]ayment of any fines, court costs, and fees; or
>
> [(3)] [a]ny combination of these conditions.

N.C. Gen. Stat. § 20-179(r) (2021). Notably, the statute does not authorize a sentencing court to condition an offender's transfer from supervised to unsupervised probation upon the passage of a certain amount of time.

¶ 8 Yet the sentencing court here purported to sentence Defendant to 12 months of supervised probation, regardless of whether he had performed the required community service, paid his court fines, costs, and fees, and obtained a substance abuse assessment before 12 months had elapsed. This was not a sentence authorized by N.C. Gen. Stat. § 20-179(r), and the sentencing court erred by imposing this special condition of probation. We therefore remand the case for resentencing.

IV. Conclusion

¶ 9 Because the lower court sentenced Defendant to a special condition of probation that exceeded the court's statutory authority under N.C. Gen. Stat. § 20-179(r), we vacate the court's judgment and remand the case for resentencing.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
AUSBAN MONROE, III, DEFENDANT

No. COA20-839

Filed 20 December 2022

Homicide—second-degree murder—malice—jury verdict—sentencing

Defendant was properly sentenced as a B1 felon for second-degree murder even though the jury indicated on the verdict sheet that it found all three forms of malice to support defendant's conviction—actual malice (a B1 felony), "condition of mind" malice (a B1 felony), and "depraved-heart" malice (a B2 felony)—because, since the jury found that the evidence supported the first two forms of malice, the depraved-heart malice was not necessary to the conviction and therefore defendant was not entitled to be sentenced as a Class B2 felon. Further, where the language of N.C.G.S. § 14-17(b) was clear and unambiguous, defendant was not entitled to the rule of lenity.

Judge HAMPSON concurring in result only.

Appeal by Defendant from judgment entered 29 January 2020 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 20 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Steven Armstrong, for the State.

Michael E. Casterline for Defendant-Appellant.

JACKSON, Judge.

¶ 1 Defendant Ausban Monroe, III, ("Defendant") appeals from his conviction for second-degree murder. For the reasons detailed below, we hold that the trial court did not err.

I. Background

¶ 2 Early in the morning on 15 October 2017, Lazarus Hohn attended a house party on New Market Way in Raleigh, North Carolina, with several friends. Relatively soon after arriving at the party, Mr. Hohn and

two of his friends, Khalid Al-Najjar and Jamie Reyes, became involved in an altercation with another individual, Victor Benitez, outside the front of the house. Mr. Benitez ended up on the ground. After the fight was over, Mr. Hohn, Mr. Al-Najjar, and Mr. Reyes walked to the complex's parking lot to leave. As they approached their car, Defendant and one of his friends entered the parking lot on foot. Mr. Benitez had informed Defendant, who was attending the same house party, about the altercation in front of the home and that he felt that it had been an unfair fight. Defendant, already heavily intoxicated at that point, decided to seek out Mr. Hohn, Mr. Al-Najjar, and Mr. Reyes to confront them. Once in the parking lot, Defendant pulled out a gun and began pointing it between the three friends, asking who had fought Mr. Benitez. Defendant had purchased the gun on the street, and testimony at trial revealed that it had been stolen from the original owner's home. Defendant testified that he purchased the gun and kept it on him for protection.

¶ 3 Mr. Hohn stepped forward in response to Defendant's question and answered that he had been the one to fight Mr. Benitez. Defendant then pointed the gun at Mr. Hohn, and Mr. Hohn attempted to hit the gun away from him. Defendant and Mr. Hohn started fighting, while Mr. Reyes started fighting with the other individual who had accompanied Defendant to the parking lot. Mr. Al-Najjar testified at trial that he attempted to grab the gun from Defendant during the fight and that it was "going everywhere." As Defendant and Mr. Hohn were fighting, the gun that Defendant was holding fired, and Mr. Hohn fell to the ground, having been shot in the chest. Mr. Al-Najjar threw Defendant to the ground and grabbed the gun. He then discarded the gun and applied pressure to Mr. Hohn's wound with his shirt. Defendant and his friend left the scene.

¶ 4 Paramedics arrived and determined that Mr. Hohn had a single gunshot wound and did not have a pulse or other signs of life. Mr. Hohn was transported to Wake County Medical Center and was pronounced dead shortly after arriving.

¶ 5 Defendant was arrested and, on 6 November 2017, was indicted on one count of first-degree murder. Defendant was tried by jury at the 21 January 2020 Criminal Session of Wake County Superior Court. At the close of the evidence, the trial court instructed the jury on first-degree murder, second-degree murder, and involuntary manslaughter.

¶ 6 With respect to second-degree murder, the trial court instructed the jury that, if they found Defendant guilty of second-degree murder, they should indicate on the verdict form which theory or theories of malice they found. The verdict form itself listed three theories of malice:

(1) malice meaning hatred, ill will, or spite; (2) malice defined as condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in another's death; and (3) malice that arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

¶ 7 During deliberations, the jury asked for clarification on malice and second-degree murder. The trial court repeated its prior second-degree murder instructions.

¶ 8 On 29 January 2020, the jury returned a verdict finding Defendant guilty of second-degree murder. The jury answered "yes" on the form as to whether they found each of the three theories of malice, finding all three present. The trial court sentenced Defendant for second-degree murder as a Class B1 to a minimum of 240 months to a maximum of 300 months active incarceration. Defendant objected to the B1 classification, contending that a B2 classification was appropriate.

¶ 9 Defendant orally noticed appeal.

II. Analysis

¶ 10 Defendant argues on appeal that he is entitled to be resentenced as a Class B2 felon because N.C. Gen. Stat. § 14-17(b) is ambiguous as to how a defendant should be sentenced when the jury finds that the evidence supports multiple theories of malice that do not all carry the same sentence.

A. Standard of Review

¶ 11 "The standard of review relating to the sentence imposed by the trial court is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010). "We review *de novo* whether the sentence imposed was authorized by the jury's verdict." *State v. Lail*, 251 N.C. App. 463, 471, 795 S.E.2d 401, 408 (2016).

B. Rule of Lenity

¶ 12 Defendant contends that he is entitled to the application of the rule of lenity, and therefore that he should be sentenced as Class B2 rather than Class B1 for his second-degree murder conviction. We disagree.

¶ 13 "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." *State v. Conley*, 374 N.C. 209, 212, 839 S.E.2d 805, 807 (2020) (internal quotations omitted). This rule is only applicable to ambiguous criminal statutes. *State v. Cates*, 154 N.C. App. 737, 740, 573 S.E.2d 208, 210 (2002).

¶ 14 For example, in *State v. Smith*, our Supreme Court held that a statute which prohibited the dissemination of "any obscene writing, picture, record or other representation or embodiment of the obscene" was ambiguous. 323 N.C. 439, 444, 373 S.E.2d 435, 438 (1988). Because the use of the word "any" could be reasonably construed as referring to either a single item or multiple items, the Court applied the rule of lenity and held that the defendant could only be convicted of one violation of that statute, even where there were multiple items seized. *Id.*

¶ 15 Similarly, in *Conley*, our Supreme Court held that the prohibition contained in N.C. Gen. Stat. § 14-269.2(b) on the possession or carrying of "any gun, rifle, pistol, or other firearm" on educational property was ambiguous and prohibited conviction for multiple violations where the defendant had several firearms in his possession on school grounds. *Conley*, 374 N.C. at 214, 839 S.E.2d at 808.

¶ 16 "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs. & Div. of Med. Assistance, N.C. Dep't of Health and Human Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). The statute at issue here is our sentencing scheme for second-degree murder, specifically N.C. Gen. Stat. § 14-17(b).

¶ 17 "Second-degree murder is defined as (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Arrington*, 371 N.C. 518, 523, 819 S.E.2d 329, 332 (2018). North Carolina recognizes three forms of malice: (1) "actual malice, meaning hatred, ill-will or spite"; (2) "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification"; and (3) "an inherently dangerous act done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *Id.* (internal citations and quotations omitted). The third theory of malice is often referred to as "depraved heart" malice. *Lail*, 251 N.C. App. at 464, 795 S.E.2d at 404.

¶ 18 North Carolina General Statute § 14-17 was amended in 2012, and, in relevant part, currently reads:

> (b) A murder other than described in subsection (a) or (a1) of this section or in G.S. 14-23.2 shall be deemed second degree murder. Any person who commits second degree murder shall be punished as a Class B1 felon, except that a person who commits second degree murder shall be punished as a Class B2 felon in either of the following circumstances:
>
> (1) The malice *necessary* to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.
>
> . . . .

(emphasis added).

¶ 19 Defendant contends that this statute is ambiguous as to how a trial court should sentence a defendant that is found guilty of second-degree murder under multiple theories of malice, and therefore the rule of lenity prohibits the trial court from sentencing him at the higher Class B1 range. We disagree.

¶ 20 The key term contained in N.C. Gen. Stat. § 14-17(b) is that for a defendant to be entitled to sentencing as a Class B2, the malice *necessary* to prove second-degree murder must be "based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief[]," i.e. depraved heart malice. The word "necessary" has a plain and routinely used meaning in our law. According to Black's Law Dictionary, it means "needed for some purpose or reason; essential." *Necessary*, Black's Law Dictionary (11th ed. 2019). A "necessary element" of an offense is one that is required to support a conviction. *See State v. Ledwell*, 171 N.C. App. 328, 329, 614 S.E.2d 412, 413 (2005). A "necessary witness" is one whose testimony is "relevant, material, and *unobtainable by other means*." *See State v. Smith*, 230 N.C. App. 387, 391, 749 S.E.2d 507, 510 (2013) (emphasis added) (discussing Rule 3.7(a) of the North Carolina Rules of Professional conduct).

¶ 21 We hold that the language of N.C. Gen. Stat. § 14-17(b) is clear and without ambiguity. It is apparent from the statute that a defendant is only entitled to be sentenced as a Class B2 if the malice that is essential

or required for the defendant to be convicted of second-degree murder is depraved heart malice. If the jury finds that the evidence supports either, or both, of the other two forms of malice in addition to depraved heart malice, then a finding of depraved heart malice is not necessary to convict the defendant of second-degree murder, and he is not entitled to sentencing as a Class B2 and will instead be sentenced as a Class B1.

¶ 22 Here, a finding of depraved heart malice was not necessary or essential for the jury to convict Defendant of second-degree murder. Defendant concedes that the jury verdict itself was not ambiguous and does not challenge its finding of all three theories of malice beyond a reasonable doubt. A second-degree murder conviction predicated on a malice theory other than depraved heart malice is sentenced as a Class B1. The jury not only found that the evidence supported depraved heart malice, but that it also supported the other two theories of malice. If the jury had found that the evidence did not support depraved heart malice, Defendant still would have been convicted of second-degree murder under the other two theories. A finding of depraved heart malice was therefore not necessary to his conviction and Defendant was appropriately sentenced as a Class B1 felon.

¶ 23 Defendant relies on our prior decision in *State v. Mosley*, 256 N.C. App. 148, 806 S.E.2d 365 (2017), for his contention that the jury's verdict finding all three forms of malice present in his case requires a sentence in the Class B2 range. *Mosley* is inapplicable under the circumstances of this case.

¶ 24 In *Mosley*, we found that where there was evidence presented at trial that would have supported a second-degree murder conviction on more than one theory of malice, and because those theories of malice carry different sentences, the jury's general finding of unspecified malice was ambiguous. *Id.* at 153, 806 S.E.2d at 369. The trial court had provided the jury with a general verdict form that did not specify which potential forms of malice the jury could find. *Id.* at 149, 806 S.E.2d at 367. When the jury returned a guilty verdict for second-degree murder, the trial court had no way of knowing under which theory of malice that verdict resulted from, and therefore was unable to properly sentence the defendant. *Id.* at 153, 806 S.E.2d at 369. We recommended that:

> In order to avoid such ambiguity in the future, we recommend two actions. First, the second degree murder instructions contained as a lesser included offense in N.C.P.I.—Crim. 206.13 should be expanded to explain all the theories of malice that can support a verdict

> of second degree murder, as set forth in N.C.P.I.—Crim. 206.30A. Secondly, when there is evidence to support more than one theory of malice for second degree murder, the trial court should present a special verdict form that requires the jury to specify the theory of malice found to support a second degree murder conviction.

Id.

¶ 25 The trial court in this case did provide the jury with instructions that explained all three theories of malice, in addition to providing a verdict form that required the jury to specify the theory of malice that they found supported a second-degree murder conviction. Further, Defendant does not challenge the jury verdict here as ambiguous. Therefore, the issues we identified in *Mosley* were not present in this case.

¶ 26 We note that this Court recently decided a similar issue where the jury was presented with, and selected, all three categories of malice on the verdict form for second-degree murder in *State v. Borum*, 274 N.C. App. 249, 849 S.E.2d 367 (2020). However, our Supreme Court granted a petition for discretionary review and petition for writ of supersedeas in *Borum*, in addition to a temporary stay. *State v. Borum*, 867 S.E.2d 667 (N.C. 2022). *Borum* is still pending at our Supreme Court and therefore it is not controlling on our decision here. *See State v. Hutchens*, 272 N.C. App. 156, 161, 846 S.E.2d 306, 311 (2020).

¶ 27 We hold that N.C. Gen. Stat. § 14-17(b) is not ambiguous, and therefore Defendant is not entitled to the application of the rule of lenity. The statute is clear that only where a finding of depraved heart malice is necessary to the conviction of second-degree murder will a defendant be entitled to sentencing as a Class B2 felon. Because the jury here explicitly found that the evidence supported other theories of malice in addition to depraved heart malice, Defendant was properly sentenced as a Class B1 felon.

III. Conclusion

¶ 28 For the aforementioned reasons, we hold that the trial court did not err in sentencing Defendant as a Class B1 felon.

NO ERROR.

Judge CARPENTER concurs.

Judge HAMPSON concurs in result only.

STATE OF NORTH CAROLINA
v.
KEVIN MARCELL SCARBORO

No. COA22-354

Filed 20 December 2022

Sexual Offenses—unanimity of verdict—jury instructions—definition of "sexual act"—disjunctive instructions

In a prosecution for numerous sex offenses against multiple child victims, there was no plain error in the trial court's jury instructions—to which defendant did not object—when it defined "sexual act" to include various alternative acts, not all of which were supported by the evidence. Although defendant argued that the disjunctive instruction improperly allowed for a non-unanimous verdict, he was unable to demonstrate prejudice where the instructions in their entirety were consistent with statutory language and pattern jury instructions and where the victims' testimony provided overwhelming evidence of defendant's guilt.

Appeal by Defendant from judgment entered 10 September 2021 by Judge Wayland J. Sermons, Jr., in Currituck County Superior Court. Heard in the Court of Appeals 30 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State-Appellee.

Mark Montgomery for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Kevin Marcell Scarboro appeals from judgment entered upon jury verdicts of guilty of the following: five counts of second-degree rape, one count of statutory rape of a child by an adult, three counts of statutory sexual offense with a child by an adult, two counts of statutory rape of a child 15 years or younger, three counts of statutory sexual offense with a child 15 years or younger, fourteen counts of sexual activity by a substitute parent, and sixteen counts of indecent liberties with a child. This appeal only involves Defendant's convictions for statutory sexual offense with a child by an adult and statutory sexual offense with a child 15 years or younger with two of three victims. Defendant argues that the trial court erroneously defined sexual act in its jury instructions

which allowed the jury to convict Defendant of sexual offenses not supported by the evidence. Although Defendant has failed to properly preserve this issue for appellate review, we elect in our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review the issue and conclude that the trial court did not plainly err in its jury instruction defining sexual act.

I. Procedural History and Factual Background

¶ 2 Defendant was indicted for multiple counts of second-degree rape, statutory rape of a child by an adult, statutory sexual offense with a child by an adult, statutory rape of a child 15 years or younger, statutory sexual offense with a child 15 years or younger, sexual activity by a substitute parent, and indecent liberties with a child. The case proceeded to trial, and the evidence tended to show the following: R.P., K.P., and M.P.[1] were Defendant's stepchildren. R.P. testified that, beginning when she was approximately ten years old, Defendant began regularly touching her vagina with his hands and mouth, and he would also touch his penis to her buttocks while rocking back and forth. K.P. testified that, beginning when she was approximately eight years old, Defendant began touching her vagina, and it became "almost an everyday occurrence" that Defendant would use his fingers, mouth, or sex toys on her vagina. At one point, Defendant also had sexual intercourse with K.P. M.P. testified that it was "pretty much a daily occurrence" for Defendant to touch her vagina with his hands and his mouth, and, after taking her virginity at fifteen years old, it "ended up progressing to an almost daily occurrence" for Defendant to have sexual intercourse with her. The jury was shown video recordings of two interviews Defendant gave after his arrest, during which he described what he did with R.P. and K.P. as "touching, pointing out, showing them, licking." Defendant said that he would "show" R.P. with his hand because she would get tired of using hers, and that he tried using his mouth on her, but she said she liked the hand better. Defendant admitted that this happened with R.P. around ten times over the course of a few months and said that the last time he had sexual contact with M.P. was the week that he got arrested. Defendant ended his first interview by stating that "[w]hatever my girls told you, man . . . I would never contradict my girls. They don't lie."

¶ 3 During the jury charge conference, Defendant did not object to the trial court's proposed jury instructions, nor did he request any additional instructions. Likewise, after jury instructions were given but before the

1. Pseudonyms are used to protect the identity of the child victims.

jury began deliberating, the trial court asked Defendant whether there were any additions or corrections to the jury charge and Defendant responded, "No, Your Honor." The jury convicted Defendant on all charges, and Defendant was sentenced to multiple extensive consecutive prison terms. Defendant timely appealed.

II. Discussion

¶ 4 Defendant contends that "[t]he trial court erred in instructing the jury that it could convict [Defendant] of sexual offense against R.P. and M.P. based on acts not supported by the evidence" by defining sexual act to include penetration, cunnilingus, or fellatio where there was no evidence of fellatio or vaginal penetration as to R.P. and no evidence of fellatio as to M.P. (capitalization altered).

¶ 5 Our appellate rules make clear that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C. R. App. P. 10(a)(1) (2021). Moreover, "[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. 10(a)(2) (2021). Where a defendant properly objects at trial to jury instructions, a defendant's arguments "challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a)).

¶ 6 Unpreserved issues relating to jury instructions in criminal cases may nevertheless be reviewed for plain error where "the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2021).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error

> will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotation marks and citations omitted). Where a defendant fails to specifically and distinctly contend that the jury instruction amounted to plain error, he is not entitled to appellate review under this rule. *State v. Smith*, 269 N.C. App. 100, 105, 837 S.E.2d 166, 169 (2019) (citation omitted).

¶ 7 In this case, Defendant did not object at trial to the jury instruction he now challenges. Furthermore, Defendant fails to "specifically and distinctly" contend that the jury instruction amounted to plain error. N.C. R. App. P. 10(a)(4). Defendant asserts that the standard of review is, in its entirety, as follows: "Arguments challenging a trial court's decision regarding jury instructions are reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466 (2019)." Defendant's standard of review is incomplete and incorrect, and Defendant fails to assert the plain error standard anywhere in his brief.

¶ 8 In the last paragraph of his argument, Defendant asserts,

> The jury was out for only 34 minutes. It returned to the courtroom with 44 guilty verdicts. It is beyond belief that it "deliberated" and reached unanimity on each of those 44 charges in that time. It is *probable* that, had it been required to be unanimous as to each verdict, it would not have been able to. Even under the traditional plain error standard, the convictions of [Defendant] for sexual offense as to R.P. and M.P. must be vacated.

(emphasis added). Yet, in his conclusion immediately following, Defendant asserts error under the preserved standard: "There is a *reasonable likelihood* that [Defendant] was convicted of at least three counts of first-degree sexual offense based on sex acts not in evidence. Even under the recently adopted plain error standard, those convictions should be set aside." (emphasis added).

¶ 9 While Defendant includes the term "plain error" at the end of his brief, Defendant fails to assert that the standard of review is plain error and ultimately fails to apply the plain error standard. Accordingly, Defendant's argument is not properly before this Court. *State v. Grooms*, 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000) ("[W]hile defendant's assignment of error includes plain error as an alternative, he does not specifically argue in his brief that there is plain error in the instant case.

Accordingly, defendant's argument is not properly before this Court."). Nonetheless, we elect in our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review the issue.

¶ 10 Defendant's sole argument on appeal is that "[t]he trial court erred in instructing the jury that it could convict [Defendant] of sexual offense against R.P. and M.P. based on acts not supported by the evidence." (capitalization altered). Specifically, Defendant argues that the trial court allowed for nonunanimous verdicts by "not requiring the jury to set out the three specific acts it unanimously found that [Defendant] committed as to each complainant," and because of this, "there is no way to determine whether one or more jurors convicted [Defendant]" of acts "not supported by the evidence."

¶ 11 A defendant is guilty of statutory sexual offense with a child by an adult and statutory sexual offense with a person who is 15 years of age or younger if certain statutory age requirements are met and the defendant engages in a "sexual act" with the victim. *See* N.C. Gen. Stat. § 14-27.28 (2018); N.C. Gen. Stat. § 14-27.30 (2018). The term "sexual act" is defined by statute as: "Cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2018).

¶ 12 "The statutory definition of 'sexual act' does not create disparate offenses, rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown." *State v. Petty*, 132 N.C. App. 453, 462, 512 S.E.2d 428, 434 (1999). Where the trial court instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied. *State v. Walters*, 368 N.C. 749, 753, 782 S.E.2d 505, 507-08 (2016). "In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct." *Id.* at 753-54, 782 S.E.2d at 508 (quoting *State v. Bell*, 359 N.C. 1, 30, 603 S.E.2d 93, 113 (2004)).

¶ 13 However, "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted). "When reviewing the jury instruction for plain error the instruction must be reviewed as a whole, in its entirety." *State v. Clagon*, 207 N.C. App. 346, 352, 700 S.E.2d 89, 93 (2010) (citation omitted). Where the trial court instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, but one or more of those acts is not supported by the evidence, it is not per se plain error. *See*

State v. Boyd, 366 N.C. 548, 742 S.E.2d 798 (2013) (reversing per curiam for the reasons stated in 222 N.C. App. 160, 167-68, 730 S.E.2d 193, 198 (2012) (Stroud, J., dissenting)). "Rather, under *Boyd*, a reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate [act]." *State v. Martinez*, 253 N.C. App. 574, 582, 801 S.E.2d 356, 361 (2017)[2] (concluding that the defendant "failed to meet his burden of showing that the trial court's inclusion of 'analingus' in the jury instruction had any *probable* impact on the jury's verdict[,]" because the victim "was clear in her testimony regarding the occasions where fellatio and anal intercourse had occurred").

¶ 14 In this case, the trial court instructed the jury,

> As you know, the defendant is charged with multiple offenses which involve three alleged victims. He is also charged with the same offense against all three alleged victims and as well charged with different offenses against the alleged victims. You will consider each offense separately.
>
> For the purpose of instruction to you on these offenses, the Court will provide the file numbers and count numbers used on the verdict sheets that apply to the alleged victims. In addition, the verdict sheets are grouped according to each defendant (sic), in three separate groups with their initials under the file numbers on the verdict sheets. Again, you will for all offenses consider the evidence separately, consider those offenses separately from the others.
>
> . . . .
>
> You must be unanimous in your decision. All 12 jurors must agree.

Then, consistent with the statute and pattern jury instructions, the trial court instructed the jury, in relevant part, that

> [a] sexual act means any penetration, however slight, by any object into the genital opening of a person's

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2. Defendant asks this Court to reconsider *Martinez*. We may not do so. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

> body. A sexual act means cunnilingus, which is any touching, however slight, by the lips or tongue of one person to any part of the female sex organ of another, or fellatio, which is any touching by the lips or tongue of one person on the male sex organ o[f] another, or any penetration, however slight, by an object into the genital opening of a person's body.

The trial court instructed the jury that it could find Defendant guilty of statutory sexual offense with a child by an adult and statutory sexual offense with a child 15 years or younger if, in addition to the other required elements, it found that Defendant had engaged in either penetration, cunnilingus, or fellatio with the victims. The jury was not required to make specific findings regarding which sexual acts Defendant committed, *State v. Carrigan*, 161 N.C. App. 256, 263, 589 S.E.2d 134, 139 (2003), and the trial court's instruction satisfied the unanimity requirement. *Walters*, 368 N.C. at 753, 782 S.E.2d at 508.

¶ 15 Even assuming arguendo that the jury instructions included an act or acts not supported by the evidence, Defendant has failed to meet his burden of showing that the inclusion of "fellatio" as to R.P. and M.P., and the inclusion of "vaginal penetration" as to R.P., had a probable impact on the jury's finding that Defendant was guilty.

¶ 16 R.P. testified that Defendant "would take off my underwear and shorts . . . [and] touch me with his hands and mouth." R.P. testified that after the first time Defendant used his mouth on her vagina, it happened "[a] few more times[.]" R.P. also testified that Defendant began touching her vagina with his hand "like everyday of the week." M.P. testified that it was "pretty much a daily occurrence" for Defendant to touch the inside and outside of her genitals with his hands and mouth. In his interview, Defendant classified what happened with R.P. and K.P. as "touching, pointing out, showing them, licking[,]" and admitted that this happened with R.P. around ten times over a period of a few months. Defendant also stated that he had sexual encounters with M.P., which continued until the week he was arrested. Defendant was charged with only three counts of statutory sexual offense with a child by an adult and three counts of statutory sexual offense with a child 15 years or younger despite the uncontroverted evidence that these acts occurred far more often. Given the overwhelming evidence that Defendant routinely committed sexual acts upon R.P. and M.P., and considering the jury instruction as a whole, *Clagon*, 207 N.C. App. at 352, 700 S.E.2d at 93, Defendant has failed to show that the trial court's instruction on the definition of sexual act had a probable impact on the jury's finding that Defendant was guilty

of statutory sexual offense with a child by an adult and statutory sexual offense with a person who is 15 years of age or younger. Thus, the trial court did not plainly err. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

III. Conclusion

¶ 17 The trial court did not err by including disjunctive acts in its definition of sexual act, and the jury was not required to make specific findings regarding which sexual acts Defendant committed. Even assuming arguendo that the jury instructions included acts not supported by the evidence, Defendant has failed to show prejudice. Accordingly, we discern no plain error in the trial court's jury instruction defining sexual act.

NO PLAIN ERROR.

Judges ARROWOOD and JACKSON concur.

STATE OF NORTH CAROLINA
v.
JERMELLE LEVAR SMITH

No. COA22-257

Filed 20 December 2022

Evidence—video recording of drug transaction—date and time stamp—computer-generated record—not hearsay

In a prosecution for multiple drug offenses, there was no plain error in the admission of a video recording (without sound) of a drug buy between two confidential informants and defendant that had a date and time stamp visible, which defendant contended constituted inadmissible hearsay of the non-testifying informant. The date and time stamps were computer-generated records that were automatically created without any human input; therefore, the informant who wore the recording device was not a declarant and the stamps were not hearsay. In addition, the deputy who activated the recording device testified at trial about the date and time stamps.

Judge GRIFFIN concurring in result only.

Appeal by Defendant from judgments entered 27 October 2021 by Judge Imelda J. Pate in Sampson County Superior Court. Heard in the Court of Appeals 5 October 2022.

Epstein Sherlin PLLC by Drew Nelson, for Defendant-Appellant.

Attorney General Joshua H. Stein by Assistant Attorney General Stacey A. Phipps, for the State.

WOOD, Judge.

¶ 1 Defendant Jermelle Levar Smith ("Defendant") appeals from judgments entered upon a jury verdict of guilty of three counts of trafficking opium or heroin, one count of possession with the intent to sale or deliver oxycodone, and one count of selling or delivering a Schedule II controlled substance. Defendant contends that the trial court erred by allowing the jury to view video recorded by a non-testifying confidential informant without first redacting the date and time-stamp from the video. For the reasons below, we conclude Defendant received a fair trial free from error.

I. Factual and Procedural Background

¶ 2 On 23 February 2018, the Sampson County Sheriff's Office conducted an undercover drug operation involving Defendant. Deputy Alphus Fann, Jr., ("Deputy Fann"), a 12-year veteran of the Sheriff's department, lead the operation and Deputy Crystal Gore ("Deputy Gore"), a 16-year law enforcement officer, assisted. The deputies utilized two confidential informants, Mr. Figueroa and Mr. Cruz, ("collectively, informants"), to conduct the purchasing of a controlled substance from Defendant. Figueroa had previous drug charges.

¶ 3 On the day of the undercover operation and prior to arriving at the location where the transaction would occur, the deputies provided Figueroa with buy money and outfitted Cruz with a watch featuring an internal video camera. Deputy Fann checked the device to ensure there was not data already on it and verified it was blank. The watch operates like a flash drive and connects to a computer via a USB plug so the recordings can be downloaded. A video recording can be deleted by the wearer of the device, but it cannot be edited or altered. Before leaving for the location where they would be meeting Defendant, the deputies searched both informants and their vehicle for weapons and drugs.

¶ 4 During the transaction, the deputies continued to surveil the informants from nearby. The video recording taken by the watch worn by Cruz showed the following: the informants entered a home, engaged Defendant, and subsequently exchanged money in return for a baggie containing eleven white pills. Once this transaction was completed, the

informants returned the watch and the pills to the awaiting deputies and were searched again.

¶ 5 Thereafter, Deputy Fann downloaded the watch's video recording to his work computer located at the Sheriff's office and erased it from the device to prepare it for use by another officer. On 25 February 2019, the State Crime Lab confirmed that the newly purchased pills contained oxycodone. The following day, Deputy Fann reviewed the video and recognized Defendant, with whom he had prior "dealings." The video recording displayed a time-stamp with the date of 23 February 2018 and utilized military time to indicate when the recording occurred. The time-stamp remained on the bottom of the screen throughout the entire video.

¶ 6 On 9 September 2019, Defendant was indicted for three counts of trafficking opium or heroin, one count of possession with the intent to sell or deliver oxycodone, and one count of selling or delivering oxycodone, a Schedule II controlled substance. The matters were joined for trial, and a jury trial was conducted from 25 through 27 October 2021. During pretrial motions, the State reported to the trial court that its confidential informants were unavailable to testify, as Mr. Figueroa was "believed to be out of the country" and Mr. Cruz had an outstanding warrant for his arrest and could not be located.

¶ 7 During jury selection, the State informed the trial court he had learned Mr. Figueroa contacted Deputy Fann that afternoon and reported that he, the informant, was currently in Duplin County. After discussing this issue with the trial court, the State explained that he planned to move forward without calling Mr. Figueroa as a witness. Defendant's trial counsel stated she had no objection to that approach.

¶ 8 During Deputy Fann's testimony, the State sought to introduce into evidence the video recording taken from the watch, which captured the transaction between Defendant and the informants. Defendant's trial counsel objected to the introduction of the video on the basis that the recording contained statements by the unavailable confidential informants and such statements were inadmissible hearsay. *Voir dire* was conducted outside the presence of the jury and subsequently, the trial court overruled Defendant's objection and allowed the video recording portion of the exhibit to be played for the jury without audio. Defendant's trial counsel renewed her objection to its admission. The State introduced additional exhibits which were still-frame images from the video. Each image also featured the same date and time-stamp text as that on the video recording.

¶ 9 Defendant was convicted of three counts of trafficking opium or heroin, with a consolidated sentence of seventy to ninety-three months, and one count of possession with intent to sale or deliver oxycodone and one count of selling or delivering a Schedule II controlled substance with a consolidated sentence of seventeen to thirty months. The trial court ordered both sentences to run consecutively. Defendant gave oral notice of appeal on 27 October 2021.

II. Appellate Jurisdiction

¶ 10 Defendant failed to comply with Rule 7 of our Rules of Appellate Procedure and filed a petition for writ of certiorari with this Court. According to Rule 7(b), an appellant is required to serve the documentation concerning his transcript order within fourteen days of giving notice of appeal. N.C. R. App. P. 7(b). Here, the trial court appointed an appellant defender. Defendant's appellant counsel filed his notice of appearance on 24 January 2022, more than fourteen days after Defendant's trial counsel entered oral notice of appeal at the conclusion of his jury trial. Appellant counsel ordered the production of the transcript that same day, and the record indicates the trial transcript was produced on 27 January 2022 and delivered prior to the 31 January 2022 deadline set by the Appellate Entries. Defendant's failure to comply with Rule 7(b) did not delay or prejudice the State. Therefore, in our discretion, we grant Defendant's petition for writ of certiorari.

III. Discussion

A. Standard of Review

¶ 11 While Defendant's trial counsel objected to the State introducing the watch's video recording on the basis of a hearsay objection, her objection did not address the date and time-stamp appearing on the recording. Instead, Defendant's counsel objected as follows:

> Although it's a DVD that purports to be an audio and video regarding the two confidential informants, it still contains alleged statements made by these individuals who are not here and cannot be cross-examined, but their statements that are contained on this audio and video CD would be attempted to be introduced into evidence as to what was said and what occurred on that occasion, and that's definitely the definition of hearsay. More importantly, they're not available for the defense to be able to cross-examine them on the issue of whether or not it is, in fact, true or not.

Although Defendant's trial counsel did not make an objection as to the date and time-stamp theory as a violation of hearsay, an appellate court may review "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). In accordance with Rule 10 of our Rules of Appellate Procedure, "an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10. Here, Defendant's brief specifically and distinctly asserts the trial court's admission of the State's exhibits amounted to plain error. Therefore, we review the admissibility of the State's evidence for plain error.

¶ 12 Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d. 513 (1982)). "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). "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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted); *see State v. Santillan*, 259 N.C. App. 394, 401, 815 S.E.2d 690, 695 (2018) (holding a prerequisite to a plain error analysis requires the appellate court to first find prejudice against the defendant, meaning "the error had a probable impact on the jury's finding that the defendant was guilty."). Defendant has the burden to prove that the trial court committed plain error. N.C. Gen. Stat. § 15A-1443 (2021); *see also State v. Parker*, 354 N.C. 268, 290, 553 S.E.2d 885, 901 (2001).

B. Hearsay

¶ 13 Defendant claims for the first time on appeal that the State's exhibits which contain a date and time-stamp constitute inadmissible hearsay. According to Defendant, each date and time-stamp is a "non-verbal statement made by the unavailable informant who filmed the alleged transaction and was offered to prove the truth of the matter asserted."

¶ 14 Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, R. 801(c). "A 'statement' may be a written or oral assertion or non-verbal conduct intended by the declarant as an assertion." *State v. Satterfield*, 316 N.C. 55, 58, 340 S.E.2d 52, 54 (1986) (citation omitted). An act, such as a gesture, can be a statement for purposes of applying rules concerning hearsay. *Id.*; *State v. Fulcher*, 294 N.C. 503, 517, 243 S.E.2d 338, 348 (1978). Further, a declarant is a *person* who makes a statement." N.C. Gen. Stat. § 8C-1, R. 801(b) (emphasis added). "An assertion of one other than the presently testifying witness is hearsay and inadmissible if offered for the truth of the matter asserted." *Livermon v. Bridgett*, 77 N.C. App. 533, 540, 335 S.E.2d 753, 757 (1985). "If a statement is offered for any other purpose, it is not hearsay and is admissible." *State v. Frierson*, 153 N.C. App. 242, 245, 569 S.E.2d 687, 689 (2002) (quoting *State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997)).

¶ 15 Defendant alleges that the date and time-stamps are out-of-court statements demonstrating that the video and images were taken on 23 February 2018 and were "made by the [confidential informant] who produced the video," but did not testify at trial. Defendant's argument is misplaced because the confidential informant was not the declarant of the video's date and time-stamp "statement."

¶ 16 Deputy Fann confirmed that the confidential informant merely "operat[ed]" the watch as an agent of the Sampson County Sheriff's Office but was not the declarant of the video. While the individual wearing the watch was able to point it at certain areas, according to Deputy Fann, the wearer is not "able to tap the watch to pull up certain information," such that the undercover informant could not manipulate or edit the recording. The wearer of the watch is unable to turn off the device, because law enforcement does not "show [the confidential informant] the sequence on how to do that." In fact, the confidential informant maintained no control of the recording device because Deputy Fann prepared and activated the device for the confidential informant to wear and Deputy Gore seized the watch and stopped the device's recording because the confidential informant did not have the ability to turn off the watch on his own. Thus, "whatever [the watch] captures . . . is turned over to [the Sheriff's Office], that's what it captured."

¶ 17 Deputy Fann explained that neither the watch nor the video recording is subject to being edited and described the watch as working "almost like an auxiliary . . . it's an auxiliary plug that you plug directly into the device. The USB plugs into the computer, and you can extract it off the watch to the computer."

¶ 18 In reference to the date and time-stamp appearing on the State's exhibits, Deputy Fann testified that the "date is accurate," but he did not "believe the time-stamp is . . . [the Sheriff's Office] don't [sic] have a way to correct it, so [it] . . . shows up by itself." The testimony at trial makes clear that neither the Sampson County Sheriff's Office nor the confidential informant had control over whether a date and time-stamp appears on the video recordings. "In other words, [this] information was generated instantaneously by the computer without the assistance or input of a person." *United States v. Hamilton*, 413 F.3d 1138, 1142 (10th Cir. 2005).

¶ 19 North Carolina has not specifically addressed whether computer records generally constitute hearsay. Other courts, however, have addressed the issue, and we find the analysis in those cases to be instructive. "When considering the potential hearsay implications of computer records, courts have drawn a distinction between "computer-generated" and "computer-stored" records." *Commonwealth v. Royal*, 46 N.E.3d 583, 587 (Mass. App. Ct. 2016); *see People v. Holowko*, 486 N.E.2d 877, 878-89 (Ill. 1985); *State v. Armstead*, 432 So. 2d 837, 839-840 (La. 1983); *State v. Kandutsch*, 799 N.W.2d 865, 879 (Wis. 2011). "The distinction between computer-stored and computer-generated records depends on the manner in which the content was created — by a person or by a machine." *Royal*, 46 N.E.3d at 587.

¶ 20 Computer-generated records "are those that represent the self-generated record of a computer's operations resulting from the computer's programming." *Kandutsch*, 799 N.W.2d at 878. Therefore, "[b]ecause computer-generated records, by definition, do not contain a statement from a person, they do not necessarily implicate hearsay concerns." *Commonwealth v. Thissell*, 928 N.E.2d 932, 937 n.13 (Mass. 2010); *see Baker v. State*, 117 A.3d 676, 683 (Md. Ct. Spec. App. 2015) ("When records are entirely self-generated by the internal operations of the computer, they do not implicate the hearsay rule because they do not constitute a statement of a 'person.' "). In contrast, computer-stored records "constitute hearsay because they merely store or maintain the statements and assertions of a human being." *Kandutsch*, 799 N.W.2d at 878 (citation omitted).

¶ 21 Applying this analysis to the facts of this case, we hold that the date and time-stamp on the State's exhibits do not constitute hearsay. Here, the date and time-stamps are purely computer-generated records, "created solely by the mechanical operation of a computer and [does] not require human participation." *Commonwealth v. Davis*, 168 N.E.3d 294, 310 (Mass. 2021) (citation omitted). As in this case, the date and

time-stamp is "automatically generated *in response* to a human action[,]" like the turning on of a device or recording of a video, "but requires no actual human input or discretion in their generation." *Commonwealth v. Hopper*, 2022 Mass. App. LEXIS 469 at *13-14 (Mass. App. Ct. 2022) (unpublished) (holding that the time and date stamps recording on Facebook Messenger messages admitted into evidence did not constitute hearsay).

¶ 22 Because the electronic hardware of the device automatically generated the video recording's date and time-stamp, the date and time-stamp on the watch's video does not constitute "a statement made by the person who produced the video." Pursuant to our Rules of Evidence, the hearsay rule applies only to out-of-court statements and is defined as a *person's* "oral [assertion], written assertion, or nonverbal conduct of a person, if it is intended by him as an assertion." N.C. Gen. Stat. § 8C-1, R. 801. Hence, the relevant assertion was not made by a person; it was made by a machine. Accordingly, the machine generated date and time-stamp on the State's exhibits—the video taken by the confidential informant on the Sheriff's Office's camera watch, and subsequent still-frame images from the video — do not constitute hearsay. *See Hamilton*, 413 F.3d at 1142-43 (concluding that the computer-generated header information accompanying pornographic images retrieved from the Internet was not a hearsay statement because there was no "person" acting as a declarant); *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) (concluding that an automatically generated time-stamp on a fax was not a hearsay statement because it was not uttered by a person). Further, the Deputy who activated the device and prepared it for the informant to wear was present in court and, in fact, testified about the date and time-stamp. Therefore, there was no error, much less plain error, in the trial court admitting the date and time-stamped video and still-frame images into evidence.

IV. Conclusion

¶ 23 For the above stated reasons, we hold the trial court did not err in admitting the date and time-stamped video and still-frame images into evidence as State's exhibits. We hold that automatically computer-generated date and time-stamps are not hearsay statements and therefore, admissible. Accordingly, we conclude Defendant received a fair trial free from error.

NO ERROR.

Judge JACKSON concurs.

Judge GRIFFIN concurs in result only.

SULLIVAN v. WOODY

[287 N.C. App. 199, 2022-NCCOA-849]

KARA ANN SULLIVAN, PLAINTIFF
v.
SCOTT NELSON WOODY, DEFENDANT
and
E. LYNN WOODY AND JAMES NELSON WOODY, INTERVENORS

No. COA21-651

Filed 20 December 2022

1. Attorney Fees—custody action—visitation rights—award against intervenor grandparents

In a child custody action in which the paternal grandparents intervened and successfully secured visitation rights, the trial court's attorney fees award—holding intervenor grandparents responsible for all of respondent mother's attorney fees, including those associated with claims to which intervenors were not parties—was vacated for a second time. The trial court, which failed to follow the mandate of the appellate court on remand, was once again directed to make findings of fact delineating the amount of fees reasonably incurred by respondent as a result of intervenors' visitation action (as opposed to those incurred by respondent as a result of claims made by the child's father for custody and support).

2. Attorney Fees—custody action—visitation rights—successful appeal by intervenor grandparents—associated fees

In a child custody action in which intervenor paternal grandparents successfully appealed an attorney fees award after securing visitation rights, where the appellate court vacated the trial court's attorney fees award regarding the visitation litigation for the second time, the trial court's additional award of attorney fees associated with intervenors' appeal was also vacated. Intervenors lawfully asserted their statutory right to visitation with their grandchild as well as their right to appeal the erroneous attorney fees award, and the trial court's entry of an additional award constituted an improper sanction under N.C.G.S. § 50-13.6. Pursuant to Appellate Procedure Rule 34, attorney fees incurred in defending an appeal may be awarded only by an appellate court.

Judge INMAN concurring in part and dissenting in part.

Appeal by Intervenors from orders entered 13 April 2021 by Judge Rebecca Eggers-Gryder in Mitchell County District Court. Heard in the Court of Appeals 9 August 2022.

Jackson Family Law, by Jill Schnabel Jackson, for Plaintiff-Appellee.

Arnold & Smith, PLLC, by Matthew R. Arnold and Ashley A. Crowder, for Intervenors-Appellants.

TYSON, Judge.

¶ 1 E. Lynn Woody and James Nelson Woody ("Grandparents"), Intervenors-Appellants, appeal for the *second* time from orders awarding attorney's fees to Kara Ann Sullivan ("Mother"). Grandparents intervened to secure visitation rights with their granddaughter during a highly-contested domestic and custody dispute between their son, Scott Woody Nelson ("Father") and Mother, which has lasted for nearly seven years.

¶ 2 After careful review of the record and this Court's previous mandate in this case, we *once again* vacate the trial court's amended order and remand for further findings to delineate and separate between reasonable attorney's fees Mother purportedly incurred to defend against Grandparents' visitation claim, as opposed to reasonable attorney's fees she may have incurred to litigate all remaining claims for custody and child support against Father. We also vacate the trial court's entry of an additional award for attorney's fees resulting from Grandparents' first successful appeal and remand.

I. Background

¶ 3 This Court summarized the factual history of this case in Grandparents' first appeal:

> This appeal arises from a heavily litigated child custody dispute that has now stretched on for more than three and a half years. [Mother] and [Father] were married on May 12, 2006. [Mother] filed a complaint seeking temporary and permanent custody of a minor child, child support, and attorney[']s fees on June 17, 2016. [Mother] and [Father] were not separated when the complaint was originally filed. The parties subsequently divorced.
>
> On August 21, 2016, [Grandparents], who are the parents of [Father] and grandparents of the minor child, filed a motion to intervene. The trial court granted [Grandparents]' motion on October 31, 2016. On December 5, 2016, [Grandparents] filed a complaint

> seeking temporary and permanent visitation rights and attorney['s] fees. [Mother] filed an answer to [Grandparents]' complaint on February 8, 2017.
>
> Before the matter was called for trial, [Mother] and [Father] stipulated that [Mother] was a fit and proper parent and that it would be in the best interest of the minor child to reside with [Mother], who would have legal and physical custody of the minor child. A trial was held on the remaining issues in the case—including [Father]'s visitation rights, [Grandparents]' visitation rights, and [Mother]'s claim for attorney's fees—over six days between March 28, 2018[,] and August 31, 2018.
>
> On September 12, 2018, the trial court entered a final order in the case. Pursuant to the final order, the trial court granted [Grandparents] visitation rights with the minor child. The trial court also ordered that [Father] and [Grandparents] were to be jointly liable for [Mother]'s attorney['s] fees in the amounts of $12,720.00 and $74,491.50.
>
> [Grandparents] filed a Notice of Appeal on 4 October 2018.

Sullivan v. Woody, 271 N.C. App. 172, 173-74, 843 S.E.2d 306, 307-08 (2020).

¶ 4 In their first appeal, Grandparents argued "the trial court erred[:] (1) when it made an award of attorney['s] fees against [them]; and[,] (2) when it found [Grandparents] liable for attorney['s] fees unrelated to their involvement in the custody action." *Id.* at 174, 843 S.E.2d at 308. This Court's decision, issued on 21 April 2020, held the trial court properly concluded an award of attorney's fees against Grandparents may be authorized by our General Statutes, but reversed the fee award order and remanded for the trial court to make additional findings of fact and conclusions of law regarding the reasonableness of the fee award against Grandparents, and of the costs Mother incurred to challenge Grandparents' claim specifically. *Id.* at 176-77, 843 S.E.2d at 309-10.

¶ 5 This Court concluded the trial court "failed to make the findings of fact necessary for a determination regarding what amount of [Mother]'s attorney['s] fees were reasonably incurred as the result of litigation by [Grandparents], as opposed to litigation by [Father]." *Id.* at 177, 843 S.E.2d at 309. This Court reversed the order and remanded the case based on the following reasoning:

> [T]he trial court failed to make those findings required by our precedent concerning[:] (1) the scope of legal services rendered by [Mother]'s attorneys in defending against [Grandparents]' visitation claim, or[,] (2) the time required of [Mother]'s attorneys in defending against that claim. Rather, the trial court's findings broadly relate to [Mother]'s attorney['s] fees associated with the entire action—including those claims brought by [Father], to which [Grandparents] were not parties.
>
> [Mother] has cited no authority, and we are aware of none, holding that [Grandparents] may be held liable for attorney['s] fees incurred as the result of claims or defenses they did not assert simply because they paid the opposing party's attorney['s] fees.

Id. at 177, 843 S.E.2d at 309-10.

¶ 6 Upon remand, the trial court conducted hearings on 19 November and 3 December 2020. The trial court did not hear or conduct a further evidentiary hearing, but Mother's attorneys submitted supplemental affidavits related to fees for services provided since entry of the original order. On 13 April 2021, the trial court entered an amended order for the *same amount* of attorney's fees awarded in its original order, totaling $87,211.50 against Grandparents.

¶ 7 On the same day, the trial court entered an additional judgment of $21,138.50 for attorney's fees Mother purportedly incurred *after* the original erroneous order, as those fees consisted of the attorney's fees used to challenge Grandparents' initial appeal. Grandparents *again* appeal from entry of both judgments for attorney's fees to this Court.

II. Jurisdiction

¶ 8 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

¶ 9 Grandparents present extensive challenges to the trial court's award of attorney's fees. We again vacate and remand the amended order, because the trial court failed to follow this Court's prior mandate, and to make sufficient findings as required to find and hold Grandparents responsible *only* for reasonable attorney's fees Mother incurred *solely* as a result of Grandparents' successful claim for visitation.

¶ 10 Grandparents also argue the trial court erred by awarding attorney's fees for Grandparents' appeal "as punishment for providing financial assistance to their son and participating in the litigation."

IV. Insufficient Additional Findings About Allocation of Attorney's Fees

A. Standard of Review

¶ 11 **[1]** Whether the statutory requirements for attorney's fees are met is a question of law, which is reviewed *de novo* on appeal. *Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 66 (1999) (citations omitted). The trial court must make "additional findings of fact upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers" to enter an award of attorney's fees. *Cobb v. Cobb*, 79 N.C. App. 592, 595-96, 339 S.E.2d 825, 828 (1986) (citations omitted). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citation omitted).

¶ 12 If the statutory requirements for attorney's fees "have been satisfied, the amount of the [attorney's fee] award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion." *Smith v. Barbour*, 195 N.C. App. 244, 255, 671 S.E.2d 578, 586 (2009) (citation, internal quotation marks, and alterations omitted). A trial court has no discretion to misapply, ignore, or fail to follow or properly apply this Court's mandates, controlling statutes, or precedents. *Id.* "Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal." *Peters*, 210 N.C. App. at 25, 707 S.E.2d at 741 (citation omitted).

B. Analysis

¶ 13 "A mandate of an appellate court is binding upon the trial court and must be strictly followed *without variation or departure*. No judgment *other than that* directed or permitted by the appellate court may be entered." *McKinney v. McKinney*, 228 N.C. App. 300, 302, 745 S.E.2d 356, 357 (2013) (emphasis supplied) (citation and internal quotation marks omitted).

¶ 14 In this case, the trial court's amended order fails to follow and apply this Court's prior mandate on remand in the first appeal, requiring the trial court to "make the findings of fact necessary for a determination

regarding what amount of [Mother]'s attorney['s] fees were reasonably incurred *as the result of litigation by [Grandparents]*, *as opposed to litigation by [Father]*." *Sullivan*, 271 N.C. App. at 177, 843 S.E.2d at 309 (emphasis supplied). The amended order merely limited the attorney's fees to be paid by Grandparents to include only legal services provided *after* they petitioned for lawful visitation with their granddaughter and intervened in the action:

> 31. Prior to the entry of the Original Order, the Court reviewed Mr. Daniel M. Hockaday's Affidavit of Attorney['s] fees, which [Mother] incurred in this action for custody and support, and in defending the claims of [Father] for custody of the minor child and for child support, and in defending [Grandparents]' claims for visitation and attorney['s] fees. Mr. Hockaday's presence was necessary to represent [Mother] against [Grandparents]' claim for visitation, as well as to assist Ms. Hemphill in [Mother]'s case in chief. His legal assistance was also necessary because of the complicated nature of this matter, and the additional legal work needed in the discovery, due to [Grandparents]' and [Father]'s failure to cooperate fully in providing information. The law firm of Hockaday & Hockaday, P.A. has been paid the sum of $8,000.00 in legal fees, and another $4,720.00 is due. The total attorney['s] fees incurred by [Mother] from that firm are $12,720.00, which the Court finds as reasonable. The $8,000.00 was paid to Hockaday & Hockaday, P.A. by [Mother]'s parents.
>
> 32. The attorney['s] fees and costs incurred by [Mother] for the services of Mr. Hockaday prior to the entry of the Original Order were reasonable. With regard to the statement offered to the Court by Mr. Hockaday, his statement begins with February 2, 2017[,] which is after the date [Grandparents] became parties to this action. The Court finds that all of Mr. Hockaday's legal services for the period from 15 February 2017 through 16 May 2018 are relevant to the action initiated by [Grandparents] and their participation in this case as herein stated. Mr. Hockaday's legal expertise has been necessary on behalf of [Mother]. Therefore, the Court finds that

> [Grandparents] are liable to Hockaday & Hockaday, P.A. for reasonable attorney['s] fees in the amount of $12,720.00.
>
> . . . .
>
> 37. With regard to the Affidavit and statement offered to the Court by Ms. Hemphill, on 31 August 2018, the liability of [Grandparents] should be limited to the period of time beginning December 5, 2016, when [Grandparents] became full parties to this action and when they plead for attorney['s] fees. At the Court's direction, Ms. Hemphill re-submitted to the Court a revised Affidavit with accompanying Exhibits "A" and "B" for the time December 5, 2016[,] through September 5, 2018. From December 5, 2016, when [Grandparents] became parties, through the conclusion of the 31 August 2018 hearing and the entry of the final order, the Court finds that all of Ms. Hemphill's legal services are relevant to the action initiated by [Grandparents] and their participation in this case. Ms. Hemphill's legal expertise has been necessary on behalf of [Mother]. For that period, the total attorney['s] fees which [Grandparents] are liable to Hemphill Law Finn [sic], PLLC are $68,851.00; total paralegal/legal assistant fees are $5,496.00, and the total expenses and costs are $144.50. These amounts total $74,491.50, and the Court finds that these attorney['s] fees and costs incurred by [Mother] for the services of Ms. Hemphill were reasonable. The Court finds that [Grandparents] are liable to the Hemphill Law Firm, PLLC for the attorney['s] fees and expenses in the amount of $74,491.50 for the time period from December 5, 2016[,] through September 5, 2018.

¶ 15 The trial court clarified Grandparents would only be responsible for attorney's fees Mother incurred to two separate law firms after they intervened and held Father liable for Mother's attorney's fees incurred from 16 June through 4 December 2016, before Grandparents intervened, in the amount of $26,539.60. The amended order, however, fails to distinguish between "the scope of legal services rendered by [Mother]'s attorneys in defending against [Grandparents]' *visitation claim*" or describe "the time required of [Mother]'s attorneys in defending against

that claim." *Id.* at 177, 843 S.E.2d at 310 (emphasis supplied); *see generally Robinson v. Robinson*, 210 N.C. App. 319, 337, 705 S.E.2d 785, 797 (2011) ("Because this is a combined action for equitable distribution, alimony, and child support, the trial court's findings should have reflected that the fees awarded are attributable only to fees which Ms. Robinson incurred with respect to the alimony and/or child support actions.") (citation omitted).

¶ 16 The amended order before us again holds Grandparents liable for fees associated with "defending the claims of [Father] for custody of the minor child and for child support" and for Mother's "case in chief" on the fees due to Hockaday & Hockaday, P.A. For example, only two entries in one of the amended affidavits for attorney's fees from one of Mother's attorneys, Mr. Hockaday, explicitly mention services related to Grandparents, totaling $495.00 of the $4,720.00 billed in services rendered.

¶ 17 In addition, the trial court limited Grandparents' liability for Mother's attorney's fees with the separate Hemphill Law Firm from 5 December 2016 to 5 September 2018, but the supplemental affidavit and accompanying billable hours log fail to distinguish between services provided to defend against all of Father's claims as opposed to those services solely related to Grandparents' claim for visitation.

¶ 18 By contrast, the supplemental affidavits introduced to support the trial court's second judgment for attorney's fees entered on 13 April 2021 were "intended solely for the purpose of representing [Mother] in the appeal by [Grandparents] in this action" and "incurred as a result of the appeal of [Grandparents] in this action and the remand." In the original order and in the amended order for attorney's fees, the trial court recited *five remaining issues* to be resolved at trial, but *only one*, "[t]he child's best interest determination as to [Grandparents]' schedule of visitation with the minor child," directly pertained to Grandparents' claim for visitation.

¶ 19 The trial court failed to strictly follow this Court's prior mandate, and we again vacate and remand the amended order of the trial court for further findings and conclusions. *McKinney*, 228 N.C. App. at 302, 745 S.E.2d at 357. We re-emphasize our holding and law of the case in Grandparents' first appeal that "[Mother] has cited no authority, and we are aware of none, holding that [Grandparents] may be held liable for [reasonable] attorney['s] fees incurred as the result of claims or defenses they did not assert simply because they paid the opposing party's attorney['s] fees." *Sullivan*, 271 N.C. App. at 177, 843 S.E.2d at 310.

¶ 20 The amended orders also fail to address whether Mother's or her attorneys' actions demonstrate recalcitrance, stubbornness, needless delays, or good faith to extend or incur unwarranted expenses on the settlement or resolution of Grandparents' statutory visitation claim. The amended orders also do not demonstrate Mother's reasons or need to employ three separate law firms simultaneously in this seven-year litigation that she initiated.

¶ 21 Under the statutory authority stated in North Carolina General Statute Chapter 84-23, the North Carolina State Bar has issued Rule 1.5 regarding attorney's fees and the reasonableness thereof:

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

N.C. Rev. R. Prof. Conduct 1.5(a)-(b).

¶ 22 Rule 1.5, subsection (e) provides:

> "(e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable."

N.C. Rev. R. Prof. Conduct 1.5(e).

¶ 23 Upon remand, the trial court may receive new evidence to clarify which services provided related solely to Mother's challenge of Grandparents' statutory claim for visitation and the reasonableness and division of those fees under Rule 1.5. *See Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003) ("Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court." (citations omitted)).

¶ 24 Because we *again* vacate the trial court's amended order and remand on this ground, it is unnecessary at this time to address Grandparents' remaining challenges to the fees awarded in the amended order, which are preserved. *See Sullivan*, 271 N.C. App. at 173, 843 S.E.2d at 307 ("Because we conclude the trial court failed to make those findings necessary for the fees awarded, we need not address [Grandparents]' additional assignments of error, all of which relate to the award.").

V. Attorney's Fees Associated with Grandparents' First Appeal

A. Standard of Review

¶ 25 **[2]** "Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal. The reasonableness and necessity of costs is reviewed for abuse of discretion." *Peters*, 210 N.C. App. at 25, 707 S.E.2d at 741 (citations omitted). As consistent with State Bar Rule 1.5: "Where the applicable statutes afford the trial court discretion in awarding costs, we review the trial court's determinations for an abuse of discretion." *Khomyak v. Meek*, 214 N.C. App. 54, 57, 715 S.E.2d 218, 220 (2011).

B. Analysis

1. "American Rule" Regarding Attorney's Fees

¶ 26 "Our legal system generally requires each party to bear his [or her] own litigation expenses, including attorney's fees, regardless [of] whether he [or she] wins or loses. Indeed, this principle is so firmly entrenched that it is known as the 'American Rule.' " *Fox v. Vice*, 563 U.S. 826, 832, 180 L. Ed. 2d 45, 53 (2011) (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 44 L. Ed. 2d 141, 147 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.")); *see also Batson v. N.C. Coastal Res. Comm'n*, 282 N.C. App. 1, 12, 2022-NCCOA-122, ¶ 39, 871 S.E.2d 120, 129 (2022) (Tyson, J., dissenting) (first citing *Ehrenhaus v. Baker*, 243 N.C. App. 17, 27-28, 776 S.E.2d 699, 705-06 (2015); and then citing *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972)). The English Rule, on the other hand, provides attorney's fees fall within the court's direction, but are "regularly allowed to the *prevailing party*." *Alyeska Pipeline Service Co.*, 421 U.S. at 247, 44 L.Ed.2d at 147 (emphasis supplied).

¶ 27 Our Supreme Court has held a trial court *may only award* attorney's fees when authorized by statute. *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) ("Today in this State, all costs are given in a court of law by virtue of some statute. The simple but definitive statement of the rule is: Costs, in this state, are entirely creatures of legislation, and without this they do not exist.") (citations, quotation marks, and alterations omitted); *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 448, 167 L. Ed. 2d 178, 185 (2007) (explaining the American Rule is a "default rule [and] can, of course, be overcome by statute") (citation omitted); *Batson*, 282 N.C. App. at 12, ¶ 39, 871 S.E.2d at 129 (Tyson, J., dissenting) (citations omitted).

2. North Carolina Rules of Appellate Procedure 34(a)

¶ 28 Rule 34 of the North Carolina Rules of Appellate Procedure provides "[a] court of the *appellate division* may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both" *if it finds* "an appeal or any proceeding in an appeal was frivolous." N.C. R. App. P. 34(a) (emphasis supplied). An appellate court may impose various sanctions against a party for bringing frivolous appeals, including the award of "reasonable expenses, including reasonable *attorney[']s] fees*, incurred because of the *frivolous appeal or proceeding*." N.C. R. App. P. 34(b)(2) (emphasis supplied).

3. North Carolina General Statute § 50-13.6

¶ 29 Our General Assembly has also enacted legislation governing the assignment of attorney's fees in actions for child support or custody *in the district court*. N.C. Gen. Stat. § 50-13.6 (2021). "In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." *Id.*

> [T]he clear intent of N.C. Gen. Stat. § 50-13.6 is to allow the trial court the discretion to ensure *one parent* in a custody action will not have an inequitable advantage *over the other parent*—based upon *a parent's* inability to afford qualified counsel. North Carolina General Statute § 50-13.6 concerns leveling the field in a custody action by ensuring *each parent* has competent representation. The trial court's authority to award attorney's fees under N.C. Gen. Stat. § 50-13.6 does not depend upon who "wins" any particular ruling in a custody proceeding.

Blanchard v. Blanchard, 279 N.C. App. 269, 277, 2021-NCCOA-487, ¶ 15, 865 S.E.2d 686, 692 (2021) (emphasis supplied) (citation omitted) (confirming N.C. Gen. Stat. § 50-13.6 was intended to place *parents* on equal footing with their available funds and assets in *parental custody* disputes, not to punish *grandparents* or other third parties such as siblings for claiming visitation rights, according to *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002)).

¶ 30 Trial courts, nevertheless, do not possess "unbridled discretion" when assessing attorney's fees. *Burr*, 153 N.C. App. at 506, 570 S.E.2d at 224 (citations omitted) (explaining trial courts "must find facts to support its award"). As explained in *Davignon v. Davignon* and consistent with State Bar Rule 1.5:

> The trial court must make findings of fact to support and show "the basis of the award, including: the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested." The trial court is also required to make findings to allocate and show what portion of the attorney's fees was attributable to the custody and child support aspects of the case.

245 N.C. App. 358, 365-66, 782 S.E.2d 391, 396-97 (2016) (citing *Robinson v. Robinson*, 210 N.C. App. 319, 337, 707 S.E.2d 785, 798 (2011); *Smith v. Price*, 315 N.C. 523, 538, 340 S.E.2d 408, 417 (1986)); *see* N.C. Rev. R. Prof. Conduct 1.5. Also consistent with State Bar Rule 1.5: "Reasonableness, not arbitrary classification of attorney activity, is the key factor under all our attorney['s] fees statutes." *Coastal Production Credit Ass'n v. Goodson Farms*, 70 N.C. App. 221, 228, 319 S.E.2d 650, 656 (1984) (citations omitted).

¶ 31 In derogation to and contrary to the "American Rule," which specifies parties must bear their own attorney's fees and fee-shifting statutes must be narrowly construed, N.C. Gen. Stat. § 50-13.6 should not be used by trial courts as a third-party, fee-shifting, full employment act for the domestic relations bar, nor should trial courts use the statute to punish or deplete parties' marital or other assets through endless litigation. *Id.*; N.C. Gen. Stat. § 50-13.6; *see Fox v. Vice*, 563 U.S. 826, 832, 180 L. Ed. 2d 45, 53 (2011) (citation omitted).

¶ 32 Here, the trial court found, in the order for the attorney's fees associated with Grandparents' appeal, "[Grandparents] have acted in bad faith in this litigation." The trial court's decision to reference Grandparents' purported "bad faith" for intervening and asserting their statutory right to visit their grandchild tends to show the trial court intended to punish Grandparents for exercising their rights. N.C. Gen. Stat. § 50-13.1(a) (2021) (providing "[a]n order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate").

¶ 33 This Court has held "attorney's fees and costs incurred *in defending an appeal* may only be awarded under N.C. R. App. P. 34 by an appellate court" because holding otherwise would discourage litigants from pursuing "valid challenges" to trial court decisions. *Hill v. Hill*, 173 N.C. App. 309, 318, 622 S.E.2d 503, 509 (2005) (citation and internal quotation marks omitted); *cf. McKinney*, 228 N.C. App. at 305, 745 S.E.2d at 360 (distinguishing *Hill* in a case where "attorney's fees [we]re not being awarded as a sanction, but as a discretionary award pursuant to § 50-13.6").

¶ 34 Grandparents lawfully and properly asserted their statutory right to visit with their grandchild and their *right to appeal the trial court's erroneous distribution* of attorney's fees between Father and Grandparents. N.C. Gen. Stat. § 50-13.6 may not be used to sanction Grandparents for their purported "bad faith" in lawfully intervening for visitation or bringing forth the trial court's error in their first appeal.

¶ 35 This Court's prior mandate and remand did not anticipate nor direct the trial court to find facts nor sanction Grandparents under Rule 34 or any other basis by awarding Mother attorney's fees purportedly incurred by yet a *third* attorney she retained to diminish Grandparent's successful assertion of visitation and to defend their meritorious appeal, which was necessitated by the trial court's failure to follow and apply the law. N.C. R. App. P. 34(a); *Hill*, 173 N.C. App. at 318, 622 S.E.2d at 509.

¶ 36 *Again*, the trial court's erroneous and unlawful order is vacated and jurisdiction is remanded for compliance with this Court's rulings and mandate. Grandparents' present and meritorious *second* appeal is necessitated *solely* by the trial court's recalcitrant and inexplicable failure to follow and implement this Court's prior mandate upon remand. N.C. Gen. Stat. § 7A-32(c) (2021); *McKinney*, 228 N.C. App. at 302, 745 S.E.2d at 357; *see also Sullivan*, 271 N.C. App. at 177, 843 S.E.2d at 309.

VI. Conclusion

¶ 37 We vacate the trial court's amended order and *again* remand for further findings and conclusions not inconsistent with the prior mandate and this opinion. N.C. Gen. Stat. § 7A-32(c) confers "[t]he Court of Appeals [with] [ ] jurisdiction . . . to supervise and control the proceedings of . . . trial courts[.]" *Id.*

¶ 38 In the event the trial judge is unwilling or incapable of again precisely following this Court's mandate on remand, the Chief District Court Judge of the 24th Judicial District is authorized and directed to implement this Court's opinion and order upon remand. *Id.*; *McKinney*, 228 N.C. App. at 302, 745 S.E.2d at 357. *It is so ordered.*

VACATED AND REMANDED WITH INSTRUCTIONS.

Judge GORE concurs.

Judge INMAN concurs in part and dissents in part by separate opinion.

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

¶ 39 I agree with the majority's conclusion that the trial court's amended order and judgment awarding attorney's fees to Mother arising from the initial custody dispute—the same fees award addressed in our earlier decision—must be vacated and remanded a second time for the trial court to make findings of fact to delineate between the attorney's fees

Mother incurred to defend against Grandparents' visitation claim as opposed to fees she incurred to litigate claims for custody and child support against Father. I disagree, however, with the majority's reversal of the trial court's second order and judgment requiring Grandparents to pay Mother's additional attorney's fees incurred as a direct result of Grandparents' visitation claims and Grandparents' earlier appeal. The majority has replaced the trial court's unchallenged findings of fact with its own view of the evidence and has disregarded controlling precedent. As to this issue, I respectfully dissent.

¶ 40 I would conclude the trial court's second order and judgment awarding attorney's fees incurred in the first appeal complies with the governing statute, is consistent with binding precedent, is supported by unchallenged findings of fact, and falls within the trial court's discretion.

1. Standard of Review

¶ 41 Although the issue of whether the statutory requirements for attorney's fees are met is a question of law, which we review *de novo* on appeal, *Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 66 (1999), "the trial court's findings of fact supporting the award of attorney's fees are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings," *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011). Further, "[u]nchallenged findings are deemed to be supported by the evidence and are binding on appeal." *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 9 (citation omitted). If the statutory requirements for attorney's fees have been satisfied, "the amount of the attorney fee award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion." *Smith v. Barbour*, 195 N.C. App. 244, 255, 671 S.E.2d 578, 586 (2009) (cleaned up).

2. Section 50-13.6 Authorizes Trial Court's Award of Appellate Fees against Grandparents

¶ 42 N.C. Gen. Stat. § 50-13.6 (2021) provides: "In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit."

¶ 43 Grandparents concede in their brief that the statute does not require a party be the prevailing party or that the party awarded fees be entitled to custody. And our caselaw is clear that an award for attorney's fees in a child custody or support proceeding is not dependent on the

outcome of the case. *See, e.g.*, *Blanchard v. Blanchard*, 279 N.C. App. 269, 2021-NCCOA-487, ¶ 14 ("Nothing in the plain language of [Section 50-13.6] suggests a determination that an interested party has acted in good faith or has insufficient means to cover the costs associated with the action are *determinations contingent on the ultimate outcome of an appeal, by either party, from the underlying judgment.*" (citation omitted) (emphasis added)); *Wiggins v. Bright*, 198 N.C. App. 692, 695, 679 S.E.2d 874, 876 (2009) ("If the proceeding is one covered by [Section] 50-13.6, as is the case here, and the trial court makes the two required findings regarding good faith and insufficient means, then *it is immaterial whether the recipient of the fees was either the movant or the prevailing party.*" (emphasis added)).

¶ 44 Grandparents argue for the first time on appeal, and the majority agrees, that the trial court was not authorized to award attorney's fees incurred in the prior appeal because that appeal was taken solely from an award of attorney's fees. Grandparents cite no authority to support their argument and other than its own policy statement, the majority cites no authority to support this conclusion. "It is not the role of the appellate courts to create an appeal for an appellant. It is likewise not the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein." *Kabasan v. Kabasan*, 257 N.C. App. 436, 443, 810 S.E.2d 691, 697 (2018) (citations and quotation marks omitted) (cleaned up).

¶ 45 Bolder than creating a new rule of law, the majority's holding directly conflicts with binding precedent. A fundamental principle of the rule of law is that courts respect precedent. "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[.]" *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted).

¶ 46 In *McKinney v. McKinney*, 228 N.C. App. 300, 745 S.E.2d 356 (2013), this Court applied Section 50-13.6 to affirm the trial court's award of appellate attorney's fees from a prior appeal, holding that "the award of appellate attorney's fees in matters of child custody and support, as well as alimony, is within the discretion of the trial court." 228 N.C. App. at 304, 307, 745 S.E.2d at 359, 361 (applying, explicitly, this Court's holding in *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981) to the context of child custody and support). *See also Whedon v. Whedon*, 313 N.C. 200, 208-09, 328 S.E.2d 437, 442 (1985) (holding the trial court erred in dismissing the defendant's request for appellate attorney's fees without prejudice).

¶ 47 This case is procedurally identical to *McKinney*. *McKinney* arose, like this case, from the *second* appeal of an attorney's fee award. 228 N.C. App. at 300-01, 307, 745 S.E.2d at 357. And, as in this case, the first appeal in *McKinney* concerned only the award of attorney's fees. *Id.* *McKinney* followed a trial court's amended fee award order, pursuant to this Court's mandate to vacate an earlier award and remand for more precise findings of fact to award only fees within the scope of the statute. *Id.* at 301, 745 S.E.2d at 357-58. As here, on remand, the trial court made an award for appellate attorney's fees associated with the first appeal. *Id.* This Court in *McKinney* affirmed the award of attorney's fees incurred in the first appeal. *Id.* at 307, 745 S.E.2d at 361. As in this case, in *McKinney*, the award of attorney's fees was the only issue raised in both the first and second appeals. The majority does not distinguish or otherwise address the holding in *McKinney*.

¶ 48 The majority further reasons that the trial court lacked statutory authority to order Grandparents, as opposed to Father, to pay Mother's attorney's fees incurred in the first appeal. This reasoning ignores that only Grandparents—not Father—took the first appeal, so that only Grandparents could be responsible for Mother's attorney's fees incurred defending that appeal. It also ignores that Grandparents, as a result of intervening in this matter, are parties adverse to a custody action and subject to liability for attorney's fees pursuant to Section 50-13.6. This Court has interpreted N.C. Gen. Stat. § 50-13.1(a) to provide that "grandparents have standing to seek visitation with their grandchildren when those children are *not* living in a[n] . . . 'intact family.' " *Fisher v. Gaydon*, 124 N.C. App. 442, 444, 477 S.E.2d 251, 253 (1996) (emphasis in original). Neither this Court nor our Supreme Court has previously held that attorney's fees may not be awarded against Grandparents pursuant to Section 50-13.6. Perhaps that is why Grandparents did not even advance this argument in their appeal.

¶ 49 Further advocating for appellants more than their own counsel, the majority categorizes the trial court's award of appellate attorney's fees as a sanction for Grandparents' "bad faith" and asserts that such an award is solely in the province of this Court pursuant to Rule 34 of our Rules of Appellate Procedure. This assertion again ignores this Court's binding precedent and the trial court's order, which expressly awarded appellate fees pursuant to its discretionary, statutory authority under Section 50-13.6. The trial court's finding that Grandparents "acted in bad faith in this litigation" does not constitute a Rule 11 sanction. Second, this Court's authority to award fees and costs associated with defending an appeal under Appellate Rule 34 does not divest the trial court's authority

to award discretionary attorney's fees pursuant to Section 50-13.6—the two are not mutually exclusive.

¶ 50 In *Hill v. Hill*, 173 N.C. App. 309, 622 S.E.2d 503 (2005), the decision quoted by the majority on this point, this Court reversed the trial court's order for *sanctions under Rule 11* "awarding attorney's fees and costs incurred by defendants due to plaintiff's appeal to this Court and petition to our Supreme Court." 173 N.C. App. at 322, 622 S.E.2d at 512. We held that "[t]he authority to *sanction frivolous appeals* by shifting 'expenses incurred on appeal onto appellants' is exclusively granted to the appellate courts under N.C. R. App. P. 34." *Id.* at 317, 622 S.E.2d at 509 (emphasis added) (citations omitted) (cleaned up). *Hill* does not hold that trial courts are not authorized to award appellate attorney's fees pursuant to Section 50-13.6.

3. Grandparents Have Not Demonstrated Abuse of Discretion

¶ 51 Finally, the majority asserts that the trial court abused its discretion in awarding attorney's fees paid to Mother's third attorney in the first appeal. Notably, Grandparents do not challenge the trial court's findings of fact regarding the third attorney, including the reasonableness of her fees. Indeed, Grandparents do not challenge a single finding of fact or conclusion of law in the appellate fees order. Regardless of the majority's opinion about whether it was necessary for Mother to retain an additional attorney to represent her on appeal, the trial court's finding that the representation was necessary and reasonable is binding on appeal where unchallenged. *See In re S.C.L.R.*, ¶ 9.

¶ 52 Grandparents have failed to demonstrate the trial court abused its discretion in the amount it awarded Mother for attorney's fees incurred after the original order and in defending against Grandparents' first appeal. *See Smith*, 195 N.C. App. at 256, 671 S.E.2d at 586. The majority's conclusion to the contrary is based solely on its own characterization of the award, which disregards the trial court's findings of fact and exceeds the arguments raised by Grandparents.

¶ 53 For the above reasons, I would affirm the trial court's order awarding appellate attorney's fees and respectfully dissent from the majority opinion regarding this fee award.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 DECEMBER 2022)

ADVENTURE TRAIL OF CHEROKEE, INC. v. OWENS 2022-NCCOA-850 No. 22-479	Jackson (18CVS775)	Vacated
BYRD v. HODGES 2022-NCCOA-851 No. 22-193	Robeson (19CVS1150)	Affirmed
EQUESTRIAN LAKES, LLC v. N.C. DEP'T OF TRANSP. 2022-NCCOA-852 No. 22-321	Moore (21CVS903)	Affirmed
JUAREZ v. ALVAREZ-GOMEZ 2022-NCCOA-853 No. 22-474	Sampson (21CVD1238)	Affirmed
GRAEFF v. GRAEFF 2022-NCCOA-854 No. 22-406	Cabarrus (20CVD302)	Affirmed
HIGH v. WAKE CHAPEL CHURCH, INC. 2022-NCCOA-855 No. 22-358	Wake (21CVS3776)	Affirmed in Part, Dismissed in Part
HORAN v. HORAN 2022-NCCOA-856 No. 22-203	Wake (19CVD9167)	Affirmed
HUDSON v. HUDSON 2022-NCCOA-857 No. 22-521	Mecklenburg (21CVS14150)	Affirmed
IN RE B.J.N. 2022-NCCOA-858 No. 22-529	Mecklenburg (21SP828)	Vacated and Remanded
IN RE C.L.W. & C.R.W. 2022-NCCOA-859 No. 21-509	Pender (18JA07) (18JA08)	Affirmed in Part, Vacated in Part, and Remanded
IN RE JONES 2022-NCCOA-860 No. 22-392	Forsyth (21CVD2389)	Affirmed

IN RE K.A.S. 2022-NCCOA-861 No. 21-757-2	Cleveland (18JT14)	Affirmed
IN RE T.B. 2022-NCCOA-862 No. 22-337	Cumberland (21SPC50166)	Affirmed
IN RE T.M. 2022-NCCOA-863 No. 21-676-2	Stokes (19JA92) (19JT92)	AFFIRMED IN PART, VACATED IN PART, AND REMANDED
IN RE V.J. 2022-NCCOA-864 No. 22-119	Cumberland (21JA166)	Vacated and Remanded
MARTINEZ v. CITY OF WILSON 2022-NCCOA-865 No. 22-344	Wilson (20CVS794)	Reversed
McLENDON HILLS EQUESTRIAN CTR., LLC v. N.C. DEP'T OF TRANSP. 2022-NCCOA-866 No. 22-322	Moore (21CVS902)	Affirmed
McLEOD v. McLEOD 2022-NCCOA-867 No. 22-292	Iredell (15CVD202)	Affirmed
PEDROTTI v. PEDROTTI 2022-NCCOA-868 No. 22-273	Wake (15CVD12470)	Affirmed in Part and Vacated in Part
ROCK v. CITY OF DURHAM 2022-NCCOA-869 No. 22-235	Durham (19CVS4409)	Affirmed
SCGVIII-LAKEPOINTE, LLC v. VIBHA MEN'S CLOTHING, LLC 2022-NCCOA-870 No. 21-740	Mecklenburg (19CVS16728)	Dismissed
SCGVIII-LAKEPOINTE, LLC v. VIBHA MEN'S CLOTHING, LLC 2022-NCCOA-871 No. 21-690	Mecklenburg (19CVS16728)	Affirmed
SKALAK v. SKALAK 2022-NCCOA-872 No. 22-287	Pitt (16CVD2869)	DISMISSED IN PART AND AFFIRMED IN PART

STATE v. ALSTON 2022-NCCOA-873 No. 22-562	Chatham (18CRS482-87)	Affirmed.
STATE v. AVERY 2022-NCCOA-874 No. 21-700	Catawba (20CRS3951) (20CRS50474) (20CRS50476)	JUDGMENT VACATED AND REMANDED FOR RESENTENCING
STATE v. BOLICK 2022-NCCOA-875 No. 22-349	Alexander (19CRS50647)	Affirmed
STATE v. BUSHYHEAD 2022-NCCOA-876 No. 22-201	Haywood (19CRS52240)	No Error
STATE v. CAMPBELL 2022-NCCOA-877 No. 22-343	McDowell (20CRS346)	NO PLAIN ERROR.
STATE v. COLEMAN 2022-NCCOA-878 No. 22-215	Pender (19CRS50655)	No Plain Error in Part; No Prejudicial Error in Part
STATE v. DAVIS 2022-NCCOA-879 No. 20-811	Nash (12CRS55226)	Affirmed
STATE v. DYER 2022-NCCOA-880 No. 22-362	Jackson (19CRS52292)	Vacated and Remanded
STATE v. FINCHER 2022-NCCOA-881 No. 22-509	Union (20CRS54413)	NO PREJUDICIAL ERROR
STATE v. GOMEZ 2022-NCCOA-882 No. 21-696	Lee (16CRS51662-63)	Affirmed
STATE v. GRIFFIN 2022-NCCOA-883 No. 22-502	Wayne (19CRS2408) (19CRS51961)	No Error in Part; No Plain Error in Part
STATE v. HAYES 2022-NCCOA-884 No. 22-567	Onslow (18CRS54225)	Vacated and Remanded
STATE v. HUDSON 2022-NCCOA-885 No. 22-579	Brunswick (20CRS52200)	Affirmed

STATE v. JOHNSON 2022-NCCOA-886 No. 22-128	Wilkes (19CRS52410)	NO PREJUDICIAL ERROR
STATE v. LEWIS 2022-NCCOA-887 No. 22-417	Watauga (18CRS50115)	NO PLAIN ERROR
STATE v. MERIS 2022-NCCOA-888 No. 22-300	Guilford (14CRS592676-79) (15CRS68137) (16CRS24079-80) (16CRS24208) (16CRS24485-87) (16CRS65968) (16CRS66102-03) (16CRS67176-78) (16CRS69052-57) (16CRS69401-04) (16CRS69965) (16CRS78413)	Affirmed
STATE v. SOLLER 2022-NCCOA-889 No. 22-141	New Hanover (19CRS54532)	Affirmed in Part and Remanded for Resentencing
STATE v. STEEN 2022-NCCOA-890 No. 21-725	Lincoln (10CRS50368-370)	Affirmed.
STATE v. STEEN 2022-NCCOA-891 No. 22-225	Richmond (15CRS52250)	No Error
STATE v. TAYLOR 2022-NCCOA-892 No. 22-393	Jackson (20CR050566)	Reversed and Remanded
STATE v. TRAPP 2022-NCCOA-893 No. 22-487	Rowan (21CR50517)	Remanded for correction of clerical error
STATE v. WALKER 2022-NCCOA-894 No. 22-149	Watauga (17CRS51579)	No Error
STATE v. WOODS 2022-NCCOA-895 No. 22-250	Guilford (20CRS65092-95)	Affirmed

WALL RECYCLING, LLC v. WAKE CNTY. 2022-NCCOA-896 No. 22-181	Wake (20CVS5190)	Reversed and Remanded
WATSON v. N.C. DEP'T OF PUB. SAFETY 2022-NCCOA-897 No. 22-538	N.C. Industrial Commission (TA-28347)	Affirmed
WFP, LLC v. REHAB BUILDERS, INC. 2022-NCCOA-898 No. 22-331	Durham (19CVS3033)	Affirmed
WILSON v. WILSON 2022-NCCOA-899 No. 22-253	Sampson (18CVD837)	Affirmed

ASKEW v. CITY OF KINSTON

[287 N.C. App. 222, 2022-NCCOA-900]

JOSEPH ASKEW; CHARLIE GORDON WADE III;
AND CURTIS WASHINGTON, PLAINTIFFS
v.
CITY OF KINSTON, A MUNICIPAL CORPORATION, DEFENDANT

No. COA22-407

Filed 29 December 2022

Cities and Towns—condemnation—direct constitutional claims—subject matter jurisdiction—failure to exhaust administrative remedies—adequate state remedy

In an action raising direct claims under the state constitution, in which plaintiffs alleged that defendant city violated their rights to equal protection and due process by condemning plaintiffs' properties and marking them for demolition, the trial court lacked subject matter jurisdiction to hear the claims because plaintiffs had not exhausted their administrative remedies first, and they had an adequate state remedy available to them under N.C.G.S. §§ 160A-430 and 160A-393 (allowing, respectively, direct appeal of the city's decision to the city council and certiorari review by the superior court).

Appeal by Plaintiffs from order entered 29 September 2021 by Judge Joshua Willey in Lenoir County Superior Court. Heard in the Court of Appeals 30 November 2022.

Ralph Bryant Law Firm, by Ralph T. Bryant, Jr., for Plaintiffs-Appellants.

Hartzog Law Group LLP, by Dan M. Hartzog, Jr., and Katherine Barber-Jones, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiffs Joseph Askew and Curtis Washington bring this action against Defendant City of Kinston alleging violations of their constitutional rights to equal protection and due process resulting from Defendant's decision to condemn and mark for demolition three properties in Kinston, North Carolina. Plaintiffs appeal an order granting Defendant's motion for summary judgment and dismissing Plaintiffs' claims with prejudice.[1]

1. Plaintiff Charlie Gordon Wade III voluntarily dismissed his complaint without prejudice prior to the order granting summary judgment in favor of Defendant.

Because Plaintiffs did not exhaust their administrative remedies before filing this direct constitutional action in superior court, the trial court lacked subject matter jurisdiction to hear Plaintiffs' claims. Accordingly, we vacate the trial court's order and remand the matter to the trial court to dismiss Plaintiffs' claims without prejudice for lack of subject matter jurisdiction.

I. Factual Background

¶ 2 Plaintiffs contest Defendant's decision to condemn and mark for demolition three properties in Kinston, North Carolina: 110 North Trianon Street and 607 East Gordon Street, owned by Askew,[2] and 610 North Independence Street, owned by Washington.

A. The Condemnation Process[3]

¶ 3 Under N.C. Gen. Stat. § 160A-426, a building inspector has the authority to declare a building unsafe upon determining that the building is "especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes." N.C. Gen. Stat. § 160A-426(a). If the owner of a building that has been condemned as unsafe fails to take prompt corrective action, the inspector must notify the owner:

> (1) That the building or structure is in a condition that appears to meet one or more of the following conditions:
>
> a. Constitutes a fire or safety hazard.
>
> b. Is dangerous to life, health, or other property.
>
> c. Is likely to cause or contribute to blight, disease, vagrancy, or danger to children.

---

2. Askew's son was the record owner of these properties when they were first condemned. Ownership was transferred to Askew by deed recorded 24 January 2019.

3. Citing the need for "a coherent organization of statutes that authorize local government planning and development regulation," the General Assembly repealed Article 19 of Chapter 160A of the General Statutes and added Chapter 160D in 2019. An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, §§ 2.1.(a), 2.3, 2019 N.C. Sess. Laws 424, 439 (effective 1 Jan 2021). Chapter 160D "collect[s] and organize[s] existing statutes," and is not intended to "eliminate, diminish, enlarge, [or] expand the authority of local governments . . . ." *Id.* § 2.1.(e)-(f). Article 19 of Chapter 160A remained in effect at all relevant times in this case. *Id.* at 547, § 3.2.

> d. Has a tendency to attract persons intent on criminal activities or other activities which would constitute a public nuisance.
>
> (2) That a hearing will be held before the inspector at a designated place and time, not later than 10 days after the date of the notice, at which time the owner shall be entitled to be heard in person or by counsel and to present arguments and evidence pertaining to the matter; and
>
> (3) That following the hearing, the inspector may issue such order to repair, close, vacate, or demolish the building or structure as appears appropriate.

Id. § 160A-428.

> If, upon a hearing held pursuant to the notice prescribed in G.S. 160A-428, the inspector shall find that the building or structure is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property, he shall make an order in writing, directed to the owner of such building or structure, requiring the owner to remedy the defective conditions by repairing, closing, vacating, or demolishing the building or structure or taking other necessary steps [within a time period] as the inspector may prescribe . . . .

Id. § 160A-429.

¶ 4 "Any owner who has received an order under G.S. 160A-429 may appeal from the order to the city council by giving notice of appeal in writing to the inspector and to the city clerk within 10 days following issuance of the order." *Id.* § 160A-430. "The city council shall hear and render a decision in an appeal within a reasonable time. The city council may affirm, modify and affirm, or revoke the order." *Id.* "In the absence of an appeal, the order of the inspector shall be final." *Id.*

¶ 5 N.C. Gen. Stat. § 160A-393, provides for review in the nature of certiorari by the superior court of the quasi-judicial decisions of decision-making boards under Chapter 160A, Article 19, which includes the condemnation process and the city council's consideration of orders issued pursuant to N.C. Gen. Stat. § 160A-429. *See id.* § 160A-393(a)-(b).

¶ 6 On certiorari review, "the court shall ensure that the rights of petitioners have not been prejudiced" because the decision being appealed

was, inter alia, "[i]n violation of constitutional provisions," or "[a]rbitrary or capricious." *Id.* § 160A-393(k)(1). If the court concludes that the decision was made in error, "then the court may remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error." *Id.* § 160A-393(l)(3).

B. Condemnation of Askew's Properties

¶ 7 In 2017, Defendant's city inspectors generated a list of over 150 properties that were unoccupied and would be subject to condemnation under North Carolina law. Inspectors then narrowed the list to 50 properties to prioritize for the condemnation and demolition process based on the following criteria:

a. Dilapidated, blighted, and/or burned properties;

b. Residential (noncommercial) properties;

c. Vacant/unoccupied properties;

d. Properties in proximity to a public use, such as a school or a park;

e. Properties fronting on or in close proximity to a heavily travelled road;

f. Properties in proximity to other qualifying properties (ie, forming part of a "cluster" of dilapidated properties); and

g. Properties in an area of police concern.

In September 2017, the city council reviewed and approved the inspectors' criteria and finalized the list of properties to prioritize for condemnation. The list of 50 properties included 110 North Trianon Street and 607 East Gordon Street.

¶ 8 110 North Trianon Street was condemned as dangerous to life on 28 November 2017 because of liability to fire, bad condition of the walls, decay, and unsafe wiring. After a hearing on 9 April 2018, the building inspector issued an order to abate, directing Askew to "remedy the defective conditions within 120 days from the date of this Order, by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Askew of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Askew did not appeal this order.

¶ 9 The building inspector re-inspected 110 North Trianon Street on 6 November 2018 and recommended "[m]oving forward with the condemnation process," noting that "[t]here has not been an observable improvement to the condition of the property." Askew requested to be heard by the city council on 20 November 2018 and was heard at the 7 January 2019 city council meeting. The city council treated Askew's request as an appeal and, after hearing from Askew, decided to proceed with the condemnation process. Askew announced that he intended to appeal and that he would sue in federal court. There is no evidence in the record that Askew petitioned the superior court for certiorari. The condemnation process is now complete with respect to this property.

¶ 10 607 East Gordon Street was condemned as dangerous to life because of liability to fire, bad condition of the walls, decay, unsafe wiring, and house damage from fire on 28 November 2017. After a hearing on 9 April 2018, the building inspector issued an order to abate, directing Askew to "remedy the defective conditions [in three phases] within 60 days from the date of this Order, for the first phase, 120 days for the second phase and 120 days for the third phase by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Askew of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Askew did not appeal this order.

¶ 11 The building inspector re-inspected 607 East Gordon Street on 16 July and 20 November 2018 and noted that "[p]lans have been provided for the repair," that "[p]ermits have been issued for the repair or demolition," and that "[t]here has been an observable improvement to the condition of the property." On both occasions, the building inspector recommended "[g]ranting the owner [additional time] to obtain the necessary permits and begin repair or demolition." On 5 April 2019, the building inspector re-inspected 607 East Gordon Street and concluded that "Askew has failed to stabilize the structure or protect the building from water damage that continues to cause rot and decay. It is my opinion that the dangerous conditions listed on the original condemnation order still exist." The condemnation process is now complete with respect to this property.

C. Condemnation of Washington's Property

¶ 12 610 North Independence Street was condemned as dangerous to life because of liability to fire, bad condition of the walls, decay, and roof collapsing on 15 November 2018. After a hearing on 21 June 2019, the building inspector issued an order to abate, directing Washington to

"remedy the defective conditions within 120 days from the date of this Order, by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Washington of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Washington did not appeal this order. The condemnation process is now complete with respect to this property.

II. Procedural History

¶ 13 Plaintiffs initially filed a complaint against Defendant in federal court in January 2019, alleging "violations of their [Fourteenth] amendment, substantial due process, equal protection rights, discrimination, disparity and condemnation of a historical home." *Askew v. City of Kinston*, No. 4:19-CV-13-D, 2019 WL 2126690, at *1 (E.D.N.C. May 15, 2019). Plaintiffs' federal complaint was dismissed in May 2019 for lack of subject matter jurisdiction. *Id.* at *4.

¶ 14 Plaintiffs then commenced this action by filing a complaint in Lenoir County Superior Court in June 2019, alleging violations of their rights to equal protection and due process under the North Carolina Constitution and seeking a declaratory judgment, injunctive relief, and damages in excess of $25,000. Defendant filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the rules of civil procedure, which the trial court denied. Defendant then filed an answer to the complaint, generally denying the material allegations and asserting twelve affirmative defenses, including that "Plaintiffs' claims are barred, in whole or in part, by their failure to exhaust administrative remedies, and/or satisfy the administrative prerequisites to the filing of this action." Defendant moved for summary judgment in July 2021, reiterating that "Plaintiffs have failed to establish any evidence that . . . Plaintiffs have no adequate alternative remedies, [or] that Plaintiffs exhausted their administrative remedies." After a hearing, the trial court entered a written order on 29 September 2021 granting Defendant's motion for summary judgment on all claims. Plaintiffs timely appealed to this Court.

III. Discussion

¶ 15 Plaintiffs argue that the trial court erred by granting summary judgment in favor of Defendant on Plaintiffs' substantive due process and equal protection claims. Defendant argues, inter alia, that Plaintiffs' direct constitutional claims are barred because Plaintiffs failed to exhaust their administrative remedies and Plaintiffs had an adequate remedy provided by statute.

A. Subject Matter Jurisdiction

¶ 16 Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). "A party may not waive jurisdiction, and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (2000) (citations omitted). An action is properly dismissed for lack of subject matter jurisdiction when the plaintiff has failed to exhaust its administrative remedies. *Flowers v. Blackbeard Sailing Club*, 115 N.C. App. 349, 352-53, 444 S.E.2d 636, 638-39 (1994). "[W]here the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) (citations omitted).

B. Exhaustion of Administrative Remedies

¶ 17 Plaintiffs have brought equal protection and substantive due process claims under North Carolina Constitution Article I, Section 19, which states:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. I, § 19.

¶ 18 It is an essential element of a direct claim under the North Carolina Constitution that the plaintiff have no other legal remedy available. *Swain v. Elfland*, 145 N.C. App. 383, 390, 550 S.E.2d 530, 536 (2001). However, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). "[T]o 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." *Craig ex. rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339-40, 678 S.E.2d 351, 355 (2009). Additionally, "an adequate remedy must provide the

possibility of relief under the circumstances." *Id.* at 340, 678 S.E.2d at 355. "The party claiming excuse from exhaustion bears the burden of alleging both the inadequacy and the futility of the available administrative remedies." *Abrons Fam. Prac. and Urgent Care, PA v. N.C. Dep't of Health and Hum. Servs.*, 370 N.C. 443, 451, 810 S.E.2d 224, 231 (2018) (citation omitted).

1. Adequacy and Futility

¶ 19 Plaintiffs allege that "there is no adequate remedy at state law to redress the deprivation of plaintiffs' rights . . . ." However, N.C. Gen. Stat. §§ 160A-430 and 160A-393 provide Plaintiffs both "the opportunity to enter the courthouse and present [their] claim" and "the possibility of relief" contemplated in *Craig*, through direct appeal to the city council and certiorari review by the superior court.

¶ 20 Plaintiffs allege that they have "been injured by the City of Kinston's action of condemning their property, and/or placing their property on the list for demolition, and/or ordering the demolition of their property, and/or placing their property on a schedule for imminent demolition"; that the decision to demolish Plaintiffs' property was "based upon plaintiff's race"; and that Defendant's "refusal to remove plaintiff's property from the list of properties to be demolished is arbitrary and capricious." These injuries are within the scope of the city council's review on direct appeal and the superior court's review on certiorari. *See* N.C. Gen. Stat. § 160A-430 (authorizing the city council to hear an appeal without limitation); N.C. Gen. Stat. § 160A-393(k)(1) (authorizing the superior court to review a decision-making board's quasi-judicial decisions for constitutional violations). Plaintiffs primarily seek to enjoin Defendant from demolishing Plaintiffs' properties. This relief is within the city council's authority on direct appeal – the council may revoke a condemnation order. *Id.* § 160A-430. This relief is also within the superior court's authority on certiorari review – the court may remand to the governing board with instructions to remove Plaintiffs' property from the demolition list. *See id.* § 160A-393(l)(3).

¶ 21 Because the statutes authorize the city council and the superior court to review Plaintiffs' injuries and grant the relief Plaintiffs seek, the statutory scheme provides Plaintiffs with "the opportunity to enter the courthouse doors and present [their] claim" and "the possibility of relief," and therefore provides an adequate remedy. *See Craig*, 363 N.C. at 339-40, 678 S.E.2d at 355. Furthermore, Plaintiffs do not allege that exhaustion would be futile. Accordingly, Plaintiffs are not excused from exhausting their administrative remedies. *See Abrons*, 370 N.C. at 451, 810 S.E.2d at 231.

2. Exhaustion

¶ 22 The record evidence does not support the conclusion that Plaintiffs exhausted their administrative remedies before filing the present complaint under the North Carolina Constitution; Plaintiffs do not argue otherwise.

¶ 23 With respect to 110 North Trianon Street, Askew attended a hearing and was issued an order to abate, pursuant to N.C. Gen. Stat. § 160A-429. Askew did not give notice of appeal in writing to the inspector and to the city clerk as required by N.C. Gen. Stat. § 160A-430. Nevertheless, the city council treated Askew's November 2018 request to be heard as an appeal, which it heard and denied in January 2019. There is no evidence in the record that Askew petitioned for certiorari to the superior court.

¶ 24 With respect to 607 East Gordon Street and 610 North Independence Street, Askew and Washington attended respective hearings and were issued orders to abate, pursuant to N.C. Gen. Stat. § 160A-429. Plaintiffs did not give written notice of appeal to the inspector and to the city clerk as required by N.C. Gen. Stat. § 160A-430. In the absence of appeal, the orders to abate are final. N.C. Gen. Stat. § 160A-430.

¶ 25 Because Plaintiffs did not exhaust their administrative remedies with respect to any of the properties at issue, the trial court lacked jurisdiction to hear Plaintiffs' direct constitutional claims. *Flowers*, 115 N.C. App. at 352-53, 444 S.E.2d at 638-39.

IV. Conclusion

¶ 26 Because Plaintiffs did not exhaust their administrative remedies before filing this direct constitutional action in superior court, the trial court lacked subject matter jurisdiction to hear Plaintiffs' direct constitutional claims. Accordingly, we vacate the trial court's order and remand the matter to the trial court to dismiss Plaintiffs' claims without prejudice for lack of subject matter jurisdiction.

VACATED AND REMANDED WITH INSTRUCTIONS.

Judges ARROWOOD and JACKSON concur.

CAROLYN LOUISE GUNN TESTAMENTARY TRUST, BY AND THROUGH CYNTHIA M. ROWLEY, TRUSTEE, PLAINTIFF

v.

CAROLYN ELISE BUMGARDNER, AND EUGENE TISELSKY, DEFENDANTS

No. COA22-230

Filed 29 December 2022

1. Easements—abandonment—fence—lack of use—unequivocal act showing clear intention to abandon

In an easement dispute, there were no genuine issues of material fact as to whether plaintiff had abandoned the disputed easement where there was no evidence of any unequivocal act by plaintiff showing a clear intention to abandon the easement. Although the former owner of the servient estate had constructed a fence across the easement (to address a potential issue between the dogs living on both properties) and plaintiff had not used the easement for a long time, these facts, standing alone, were insufficient to meet the criteria for abandonment.

2. Easements—scope—unambiguous language—ingress and egress —pedestrians and vehicles

An easement's language providing "a non-exclusive and perpetual easement for the purposes of ingress and egress to and from" plaintiff's property unambiguously permitted plaintiff's use of the easement by any common means of transportation that could travel along the easement, including by pedestrians and vehicles. The 18-foot width of the easement also supported this conclusion. Extrinsic factors pointed to by defendants, such a telephone pole, roadside curb, and other obstructions making it difficult or impractical for vehicles to use the easement, did not render the easement's language ambiguous.

3. Easements—obstruction of easement—permanent injunction —balancing of equities—trial court's discretion

In an easement dispute, the Court of Appeals noted the inconsistency in the case law in cases involving the obstruction of an easement and announced two principles: first, that a trial court may, in its discretion, enter a permanent injunction prohibiting a party from obstructing another party's easement (and is not required to balance the equities or consider the hardships to the parties); second, that the trial court may, in its discretion, consider the balance of the equities or the relative hardship to the parties in fashioning a

permanent injunction if the court finds it appropriate to do so. Here, where the trial court issued a permanent injunction ordering defendants to remove any trees, shrubs, or fencing interfering with the easement, the Court of Appeals vacated the permanent injunction and remanded the matter to ensure that the trial court would have the opportunity to apply the principles announced in the opinion.

Appeal by defendants from order entered 27 October 2021 by Judge Carla Archie in Gaston County Superior Court. Heard in the Court of Appeals 7 September 2022.

Whitaker & Hamer, PLLC, by Aaron C. Low, for plaintiff-appellee.

Villmer Caudill, PLLC, by Bo Caudill, for defendants-appellants.

DIETZ, Judge.

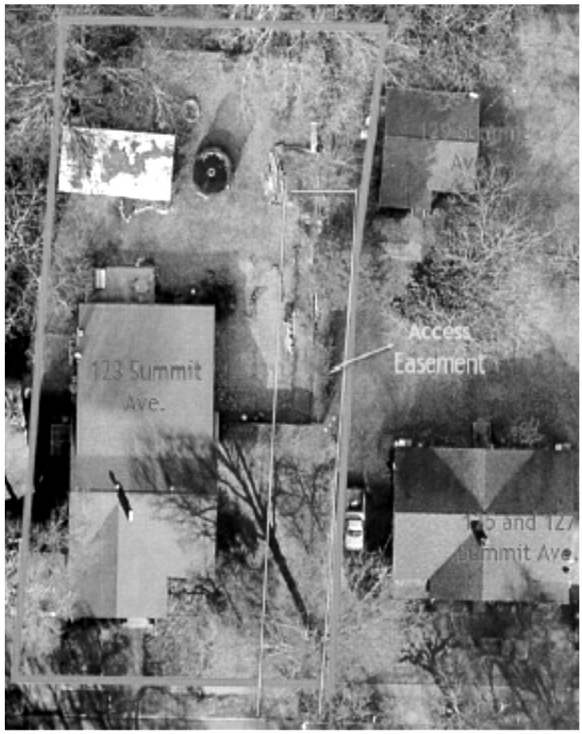
¶ 1 Defendants Carolyn Elise Bumgardner and Eugene Tiselsky appeal the entry of partial summary judgment, and a corresponding permanent injunction, requiring them to remove a fence and other obstructions blocking an easement for ingress and egress across their property.

¶ 2 As explained below, we hold that the trial court properly entered partial summary judgment concerning the existence and scope of the easement, and we affirm that portion of the court's order. We vacate the permanent injunction and remand for the trial court to conduct further proceedings as set forth below.

Facts and Procedural History

¶ 3 The following recitation of facts represents Defendants' version of events, viewed in the light most favorable to them. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

¶ 4 Along Summit Avenue in Mount Holly there are three homes as shown in the aerial photograph below:



¶ 5 Defendants Carolyn Elise Bumgardner and Eugene Tiselsky own the home at 123 Summit Avenue. Plaintiff Carolyn Louise Gunn Testamentary Trust owns the cottage located at 129 Summit Avenue, behind a duplex home at 125 and 127 Summit Avenue. Carolyn Rucker (formerly Carolyn Louise Gunn), the beneficiary of the trust, lives in the cottage. Rucker has special needs.

¶ 6 In 1998, Leann Wheeler purchased the 123 Summit Avenue property now owned by Defendants from the Hilderbran family. At the time, Kenneth Hilderbran also owned the cottage at 129 Summit Avenue. As part of the sale, Wheeler granted Hilderbran an easement across her property for ingress and egress to the cottage at 129 Summit Avenue:

> NOW THEREFORE, Wheeler, while retaining absolute ownership of said property, for and in consideration of the premises, does hereby give and grant

> unto Hilderbran, his heirs and assigns a non-exclusive and perpetual easement for the purposes of ingress and egress to and from the aforesaid property of Hilderbran across the property of Wheeler, said easement being more particularly described as Exhibit B attached hereto.

¶ 7 Hilderbran later sold the cottage at 129 Summit Avenue to Plaintiff and Carolyn Rucker moved into the cottage.

¶ 8 Shortly after the sale of the cottage to Plaintiff, Barbara Gilbert approached Wheeler to discuss an issue involving Wheeler's dog. Gilbert was Carolyn Rucker's sister and the owner of the duplex in front of the cottage at 125 and 127 Summit Avenue. Gilbert was not a trustee of Plaintiff, the testamentary trust that owned the cottage for Rucker's benefit.

¶ 9 Gilbert explained to Wheeler that she was worried Wheeler's dog would have problems with Rucker's dog. Gilbert proposed installing a fence that would separate Wheeler's property from the cottage property.

¶ 10 Wheeler agreed and retained a surveyor to identify the property line on which to build the fence. The survey revealed that "when the properties had been split, they had not set the property line well and it ran through the corner of the cottage." As a result, Wheeler agreed to sell a small portion of property to Plaintiff so that the cottage was entirely on Plaintiff's property and the fence could be built along the new property line separating Wheeler's property from the cottage.

¶ 11 In an affidavit, Wheeler testified that, at the time she put up the fence between the properties, Barbara Gilbert promised Wheeler that she would "redo the duplex property"—meaning the 125 and 127 Summit Avenue property in front of the cottage that Gilbert currently owned—"and put the easement access on it instead of 123 Summit" because the easement was "for her sister."

¶ 12 During the time that Wheeler owned the property at 123 Summit Avenue, Plaintiff did not use the easement across the property, which was obstructed by the fence. At one point, Wheeler saw that someone "posted a house sign at the end of the duplex driveway to direct the pizza delivery and EMT's" to use the duplex driveway to access the cottage or deliver items to Carolyn Rucker.

¶ 13 Wheeler further testified that when she later sold her property to a new owner, she remembered Barbara Gilbert's promise to "redo" the easement and place it on the duplex property and realized that she

"never followed up on that promise because the easement was still on" her property. Wheeler told the new owner "to reach out to resolve the issue."

¶ 14 The new owner, Donna Skipper, testified in an affidavit that when she bought the property, she knew it was subject to an easement and that "Leann Wheeler informed me that the fence obstructing a portion of the Easement which runs between 123 Summit Avenue and 129 Summit Avenue may need to be moved and offered to have it removed before closing." Skipper also testified that she talked to Plaintiff (through the then-trustee of the trust) and "understood" that if Carolyn Rucker "ever needed us to move the fence to let vehicles access 129 Summit Avenue, then I would be willing to do so." Skipper later sold the property to Defendants and testified that, while conducting a "walkthrough" of the property with Defendants, she showed them "where the Easement was located and explained to them that the Easement was for vehicle access to 129 Summit Avenue."

¶ 15 After Defendants bought the property, Carolyn Rucker used the easement from time to time, either by walking along the easement to access the cottage, or by inviting relatives to drive onto the easement to pick her up when she needed transportation. This led to a dispute over the existence and scope of the easement.

¶ 16 In 2017, Plaintiff filed this action, alleging that Defendants "erected a fence, trees, and shrubbery" that prevented the use and enjoyment of the easement on the property. Plaintiff sought a permanent injunction compelling removal of "the barriers of a fence, trees, and shrubbery" as well as monetary damages.

¶ 17 Initially, on cross-motions for partial summary judgment, the trial court entered partial summary judgment in favor of Plaintiff, stating that Plaintiff's motion "is allowed with respect to the plaintiff's first cause of action for injunctive relief and the plaintiff is entitled to judgment as a matter of law with respect to this claim." Defendants appealed and this Court dismissed the appeal, holding that the trial court's partial summary judgment order did not contain sufficient findings to constitute a permanent injunction. *Carolyn Louise Gunn Testamentary Tr. v. Bumgardner*, 276 N.C. App. 277, 2021-NCCOA-90.

¶ 18 On remand, Plaintiff filed a new motion for summary judgment and a motion for clarification of the trial court's earlier order. After a hearing, the trial court denied Plaintiff's motion for clarification but again granted partial summary judgment in favor of Plaintiff in a new order

with more details of the scope of the resulting permanent injunction. The order stated:

> 3. That the Plaintiff's Motion for Summary Judgment as to the First Cause of Action for Injunctive Relief is GRANTED as follows:
>
> a. The Court hereby issues a permanent injunction that prohibits the Defendants from blocking ingress and egress to the easement by the Plaintiff's beneficiary or any of her invitees;
>
> b. The Court hereby issues a permanent injunction requiring Defendants to remove any trees, shrubs, or fencing that are prohibiting or interfering with ingress or egress of the easement by vehicles within 60 days from the date of hearing, which is by December 10, 2021. Defendants do not have to remove any property out of the easement over which they have no control, including the telephone pole that may be on the easement.

Defendants timely appealed.

Analysis

I. Abandonment of the easement

¶ 19 **[1]** Defendants first argue that the trial court erred by granting partial summary judgment, and entering the resulting permanent injunction, because there are genuine issues of material fact with respect to whether Plaintiff abandoned the easement.

¶ 20 An easement may be abandoned "by unequivocal acts showing a clear intention to abandon and terminate the easement." *Skvarla v. Park*, 62 N.C. App. 482, 486–87, 303 S.E.2d 354, 357 (1983). "The essential acts of abandonment are the intent to abandon and the unequivocal external act by the owner of the dominant tenement by which the intention is carried to effect." *Id.* Importantly, the "lapse of time in asserting one's claim to an easement, unaccompanied by acts and conduct inconsistent with one's rights, does not constitute waiver or abandonment of the easement." *Id.* Particularly relevant to this case, we held in *Skvarla* that a "fence, because it was erected by the owner of the servient tenement, was not evidence of abandonment" even though the fence had existed for "a long time," during which the dominant estate could not use the easement. *Id.*

¶ 21 Here, viewing all the evidence in the light most favorable to Defendants, there is no forecast of trial evidence that creates any genuine issues of material fact concerning abandonment. The undisputed evidence in the affidavits establishes that Leann Wheeler, the owner of the servient estate, constructed the fence across the easement. Wheeler, in her affidavit submitted by Defendants, acknowledges that she constructed the fence to address a potential issue between Wheeler's dog and Rucker's dog.

¶ 22 Wheeler communicated with Barbara Gilbert, Rucker's sister, about the fence and Gilbert "promised" that, at some point in the future, she would "redo" the easement by moving it onto the duplex property that Gilbert owned. But there is no evidence in the record that Gilbert—who was not a trustee of Plaintiff—had any authority to bind the trust. Thus, Gilbert's statements are not evidence of any "unequivocal acts showing a clear intention to abandon and terminate the easement" by the easement holder. *Id.* Moreover, Wheeler's affidavit indicates that Gilbert chose not to move the easement. When Wheeler sold the 123 Summit property, she later "realized that I had never followed up on that promise because the easement was still on 123 Summit."

¶ 23 Finally, although Defendants have presented affidavit testimony establishing that Plaintiff and its predecessors in title rarely—and for many years never—used the easement to access the property, this "lapse of time in asserting one's claim to an easement" cannot create an issue of fact concerning abandonment unless accompanied by unequivocal acts and conduct demonstrating the intent to terminate the easement. *Id.* At most, Defendants have shown that Plaintiff was content not to use the easement for many years and instead access the property through permissive use of the duplex property. That fact, standing alone, is insufficient to meet the criteria for abandonment. *Id.* Accordingly, the trial court did not err by granting partial summary judgment on the issue of abandonment.

II. Scope of the easement

¶ 24 **[2]** Defendants next challenge the trial court's grant of partial summary judgment on the scope of the easement. Defendants contend that, although the easement provides a right of ingress and egress it "does not clarify the manner of access permitted (e.g., whether such access includes vehicles or commercial vehicles or is limited to pedestrian access to and from the nearest public street)."

¶ 25 The scope of an express easement "is controlled by the terms of the conveyance if the conveyance is precise as to this issue." *Swaim*

v. Simpson, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786–87 (1995). Here, the easement provides "a non-exclusive and perpetual easement for purposes of ingress and egress to and from" the cottage property at 129 Summit Avenue. This Court has observed that the "term ingress/egress" is not ambiguous. *Sauls v. Barbour*, 273 N.C. App. 325, 335, 848 S.E.2d 292, 300 (2020). "Ingress and egress" means the "right to use land to enter and leave another's property." *Ingress-and-Egress Easement*, *Black's Law Dictionary* (11th ed. 2019).

¶ 26 As a result, this language unambiguously permits use of the easement by any common means of transportation that can travel along the easement, including both pedestrian and vehicle use. This is further supported by the width of the easement, which Defendants acknowledge is approximately 18 feet. This Court has recognized that an easement of this size reflects an intent to be used for vehicles and not solely by pedestrians. *Benson v. Prevost*, 277 N.C. App. 405, 2021-NCCOA-208, ¶ 19.

¶ 27 Defendants point to a number of extrinsic factors—for example, that the easement terminates at a location on the cottage property that would "make it difficult, if not impossible, for vehicles to park on or maneuver over the easement without coming onto Defendants' unencumbered property." But that does not render the easement's scope ambiguous. If Plaintiff or its invitees cross onto Defendants' unencumbered property while using the easement, that gives rise to a separate property issue. Similarly, Defendants argue that there is now a telephone pole, a roadside curb, and other obstructions that make it impractical to use vehicles on the easement. Again, this does not render the easement language ambiguous, which is a question that we address solely by reference to the language of the conveyance. *Swaim*, 120 N.C. App. at 864, 463 S.E.2d at 786–87.

¶ 28 We therefore hold that the trial court properly entered partial summary judgment on the issue of scope of the easement.

III. Entry of permanent injunction

¶ 29 **[3]** Finally, Defendants argue that the trial court erred by entering the permanent injunction. Specifically, Defendants contend that entry of a permanent injunction requires a balancing of relevant equities and, here, the trial court did not make findings concerning the key equitable questions such as the "value of the easement" and the "cost of compliance" with the injunction.

¶ 30 This Court's case law on this issue is wildly inconsistent. There is a line of cases dealing with traditional property encroachment that

rejects any need to balance the equities and instead holds that, if an encroachment and continuing trespass are established, the law entitles the property owner to a permanent injunction to have the encroachment removed. *See*, *e.g.*, *Bishop v. Reinhold*, 66 N.C. App. 379, 384, 311 S.E.2d 298, 301 (1984); *Williams v. S. & S. Rentals, Inc.*, 82 N.C. App. 378, 384, 346 S.E.2d 665, 669 (1986); *Graham v. Deutsche Bank Nat. Tr. Co.*, 239 N.C. App. 301, 307, 768 S.E.2d 614, 618 (2015); *see also* Olivia Weeks, *The Law Is What It Is, But Is It Equitable: The Law of Encroachments Where the Innocent, Negligent, and Willful Are Treated the Same*, 39 Camp. L. Rev. 287 (2017).

¶ 31 At the same time, there are cases dealing with removal of trees, fences, and even whole buildings that are in violation of a restrictive covenant. These cases, some from our Supreme Court, hold that the use of a permanent injunction is within the trial court's discretion and "depends upon the equities between the parties." *Ingle v. Stubbins*, 240 N.C. 382, 390, 82 S.E.2d 388, 395 (1954); *Crabtree v. Jones*, 112 N.C. App. 530, 534, 435 S.E.2d 823, 825 (1993); *Fed. Point Yacht Club Ass'n, Inc. v. Moore*, 233 N.C. App. 298, 318, 758 S.E.2d 1, 13 (2014). There is also an encroachment case from this Court, dealing with a fence constructed across a property line, in which the Court held that "it was within the trial court's discretion to consider whether the injunctive relief sought was an appropriate remedy." *Mathis v. Hoffman*, 212 N.C. App. 684, 687, 711 S.E.2d 825, 826 (2011).

¶ 32 Ultimately, harmonizing all of this inconsistent case law may be a task only our Supreme Court can accomplish. The best this Court can do is to announce a rule for cases like this one, involving obstruction of an easement, that stays consistent with as much of this case law as possible. Doing so, we arrive at two key principles: First, our case law permits a trial court, in its discretion, to enter a permanent injunction prohibiting a party from obstructing another party's easement. When doing so, the trial court is not *required* to balance the equities or consider the relative hardships to the parties. Second, and again in the trial court's discretion, the court *may* consider the balance of the equities or the relative hardship of the parties in fashioning a permanent injunction if the court finds it appropriate to do so.

¶ 33 Having announced these two principles, we turn to the trial court's ruling in this case. After determining that Plaintiff was entitled to summary judgment, the trial court's order states that "Plaintiff is entitled to a permanent injunction that prohibits Defendants from blocking ingress and egress to the easement by the Plaintiff's beneficiary or any of her invitees" and that "Plaintiff is entitled to a permanent injunction requiring

Defendants to remove any trees, shrubs, or fencing that are prohibiting or interfering with ingress or egress of the easement."

¶ 34 We cannot be sure from the trial court's language that the court applied the principles we announced here—that is, that the court understood it had discretion to balance the equities or consider the relative hardships of the parties but chose instead to simply order the immediate removal of the obstructions to the easement.

¶ 35 Because "balancing of equities is clearly within the province of the trial court," *Crabtree*, 112 N.C. App. at 534, 435 S.E.2d at 825, and because this Court has not previously considered how to harmonize our case law for this type of easement case, we vacate the permanent injunction and remand to ensure that the trial court has an opportunity to apply the rule set out today. On remand, before again entering a permanent injunction, the trial court may consider whether to balance the equities or assess the relative hardships of the parties in determining whether a permanent injunction is appropriate and what the scope of that injunction should be.

Conclusion

¶ 36 We affirm the trial court's entry of partial summary judgment but vacate the entry of the permanent injunction and remand for further proceedings.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges COLLINS and CARPENTER concur.

KOZEC v. MURPHY

[287 N.C. App. 241, 2022-NCCOA-902]

ROBERT RICHARD KOZEC, JR., PLAINTIFF
v.
KRISTEN ANNE MURPHY, DEFENDANT

No. COA22-433

Filed 29 December 2022

Evidence—authentication—child protective services records—public records—need for live witness testimony—misapprehension of the law

At a hearing on a mother's motion to modify child custody based on allegations that the father sexually abused the children, the trial court—acting under an apparent misapprehension of the law—abused its discretion by excluding a set of Child Protective Services (CPS) records on grounds that no witness was present to authenticate them, without first determining whether they constituted public records under Evidence Rule 902(4), which does not require authentication by live witness testimony. Because it was unclear from the hearing transcript whether the court excluded the records solely on its flawed authentication basis or whether it had also considered the documents' admissibility as public records under Rules 902(4) or 803(8), the matter was remanded for a new hearing so that the court could review the CPS records and so that the parties could present full arguments on their admissibility.

Appeal by Plaintiff from order entered 12 October 2021 by Judge J. Brian Ratledge in Wake County District Court. Heard in the Court of Appeals 16 November 2022.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellant.

Schiller & Schiller, PLLC, by David G. Schiller, for defendant-appellee.

MURPHY, Judge.

¶ 1 In its hearing on Mother's motion to modify a permanent child custody order, the trial court abused its discretion by not first reviewing various child protective services documents, already submitted along with an affidavit as a part of the sealed court file pursuant to a prior N.C.G.S. § 7B-302(a1) order, before denying Father's request to enter the

documents as part of his evidence. Further, based upon the statements of the trial court and arguments by counsel, it is unclear as to whether the trial court's exclusion of these documents was limited to an authentication basis or extended to exclusion under either North Carolina Rule of Evidence 803(8) or 902(4). We vacate and remand for the trial court to hold a new hearing on Mother's motion to modify permanent child custody that affords both parties the opportunity to present argument on the documents' admissibility in conjunction with the trial court's simultaneous review of the documents.

BACKGROUND

¶ 2 This case arises out of the trial court's 12 October 2021 *Order Modifying Permanent Child Custody* ("the Order") of the minor children of Plaintiff-Appellant Robert Kozec ("Father") and Defendant-Appellee Kristen Murphy ("Mother").

¶ 3 The parties were never married but are the parents of two children, of whom Mother was provided legal and physical custody and of whom Father was granted visitation by a permanent custody order entered 6 February 2013. On 3 November 2016, Mother filed a motion to modify custody and sought emergency suspension of all contact between Father and the children. The trial court entered a *Temporary Emergency Custody Order* on 7 December 2016, suspending Father's visitation and ordering he have no contact with the children. On 13 June 2017, Father filed a *Petition for Writ of Certiorari* requesting that we review this order, which a panel of this Court allowed on 5 July 2017; the panel in an unpublished opinion subsequently vacated the order because it constituted a custody modification that "d[id] not make the substantial change of circumstances and its effect upon the children clear." *See Kozec v. Murphy* ("*Kozec I*"), 261 N.C. App. 115, 2018 WL 3978150, *1-*3 (Aug. 21, 2018) (unpublished) (citation and marks omitted).

¶ 4 On 22 August 2018, one day after we filed the decision in *Kozec* I but more than a week before the mandate of our decision issued, Mother filed an *Ex Parte Motion for Emergency Custody*, seeking to suspend Father's visitation with the minor children and prevent him from having any communication with them, based on various allegations of changed circumstances that created an imminent risk of physical harm to the minor children if Father was allowed to continue visiting and communicating with them. Mother's 22 August 2018 motion relied heavily on allegations made by a therapist, Ms. Mary Jernigan, who had started seeing the children approximately two months prior and who initiated child protective services investigations in both Wake and Johnston counties

after those two months. That same day, the trial court entered an *ex parte* emergency custody order, but it did not have jurisdiction over the matter until *Kozec I*'s mandate issued, resulting in us vacating the 22 August 2018 emergency order on 29 August 2018. On 10 September 2018, the trial court entered an *ex parte* emergency order, and Mother's 22 August 2018 motion to modify child custody was set for a "return hearing" on 18 September 2018. Mother filed an *Amended Motion to Modify Custody* on 17 September 2018, which contained some of the same allegations included in her 2016 motion seeking emergency custody, in addition to allegations regarding matters occurring since entry of the 2016 order that we vacated in *Kozec I*. After the return hearing, the trial court entered a *Temporary Custody Order and Notice of Hearing* on 30 October 2018, awarding sole legal and physical custody to Mother.

¶ 5 On 3 April 2019, the trial court entered an *Order and Preliminary Injunction* that allowed the parties' counsel, but not the parties, to access the children's medical and mental health records that were ordered to be made available on the "[eleventh] [f]loor of the Wake County Courthouse in the Family Court Office." The parties' counsel were permitted to "review those records but [could] not make copies, take photographs or otherwise reproduce the records and remove them from the Wake County Courthouse." However, when the attorney serving as Father's counsel was permitted to withdraw from representing Father, he informed the trial court that Father would need access to certain records "to adequately prepare for a pending [o]rder to [s]how [c]ause to be heard at a later date." The trial court entered a *Protective Order* on 21 August 2019, which concluded that "allowing [Father] access to the children's private treatment records is ill-advised and not in their best interest" and ordered that Father could choose to call the children's therapists as fact witnesses who would be constrained by a limiting instruction so as to prevent the specific divulging of the confidential treatment information of the minor children.

¶ 6 On 27 December 2019, the trial court entered a *Temporary Order for Child Custody (Review Hearing)*, concluding "[t]he terms of the Temporary Custody Order entered [30 October 2018] shall remain in full force and effect and shall not be modified. [Mother] shall retain sole legal and physical custody."

¶ 7 Mother's motion to modify permanent child custody was heard on 14 and 15 June 2021. During the modification hearing, the trial court denied Father's motion to admit several Wake County Child Protective Services records ("the CPS Records"), including investigations and assessments conducted by the agency relating to the parties' minor

children. CPS Records were subpoenaed by Mother and the documents were placed under seal by the trial court's *Amended Protective Order* entered 5 February 2018. Under the *Amended Protective Order*, the trial court ordered the CPS Records to be provided to the parties' counsel for their review. Subject to the provisions of N.C.G.S. § 7B-302(a1), the trial court classified the CPS Records as "relevant and necessary to the trial in this matter and [as being] unavailable from any other source" such that their disclosure to counsel was permitted. By its 5 February 2018 order, the trial court placed significant limits on counsel's review and copying of the documents.

¶ 8 After denying, without consideration of the "relevant" sealed documents, Father's motion to admit the CPS Records into evidence during the 14 and 15 June 2021 hearing, the trial court announced its ruling on Mother's motion to modify, which it later memorialized in the Order entered 12 October 2021. The Order, *inter alia*, finds as fact that Father sexually abused his own children, decrees that Mother shall have sole legal and physical custody, and bars Father from having contact with the minor children. Father timely appeals the Order.

ANALYSIS

¶ 9 Father urges us to "vacate and reverse [the Order] and remand for a new trial where *all* the relevant evidence (including the evidence previously and erroneously excluded) is considered by the trial court before determining if a modification of the permanent custody order is warranted." Father argues the trial court erred in excluding the CPS Records he attempted to offer into evidence and the findings of fact in the Order were, as a result of the documents' exclusion, made under a misapprehension of law that requires us to vacate the Order.

¶ 10 " 'A trial court may order the modification of an existing child custody order if the [trial] court determines that there has been a substantial change of circumstances affecting the child's welfare and that modification is in the child's best interests.' " *Peeler v. Joseph*, 263 N.C. App. 198, 201 (2018) (quoting *Spoon v. Spoon*, 233 N.C. App. 38, 41 (2014) (citation omitted)). "Our court reviews a trial court's decision to modify an existing custody order for[] '(1) whether the trial court's findings of fact are supported by substantial evidence[] and (2) whether those findings of fact support its conclusions of law.' " *Id.* "[W]hether changed circumstances exist is a conclusion of law" that we review *de novo*. *Thomas v. Thomas*, 233 N.C. App. 736, 739 (2014) (citation omitted); *see also Peeler*, 263 N.C. App. at 201. "[C]ourts must consider and weigh all evidence of changed circumstances which [a]ffect or will affect the best

interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child." *Hibshman v. Hibshman*, 212 N.C. App. 113, 121 (2011) (citation and marks omitted).

¶ 11 However, "[t]he dispositive issue here—the trial court preventing [Father] from presenting certain evidence—is an evidentiary issue." *Cash v. Cash*, 284 N.C. App. 1, 2022-NCCOA-403, ¶ 14. Although Father identifies a potential conflict in our caselaw as to whether a *de novo* or an abuse of discretion standard applies to evidentiary issues, we apply the more onerous standard and consider whether the trial court abused its discretion by excluding the CPS Records.[1] "A trial court abuses its discretion when it acts under a misapprehension of law." *Id.* (citations omitted).

¶ 12 As to the documents at the heart of the dispositive issue raised by this appeal, at the modification hearing, the trial court denied Father's motion to admit the CPS Records on the basis that Father did not have "any[one] to come and . . . authenticate or, as [Mother's counsel] aptly put it, cross-examine maybe what is or isn't in the report." This basis was erroneous as it appears it was rooted in a misapprehension of law that child protective services records must be authenticated by live witness testimony even where they may qualify as public records under Rule 902(4). Under Rule 902(4), "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required" for the following records:

> (4) Certified Copies of Public Records.—A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

N.C.G.S. § 8C-1, Rule 902(4) (2021); *see id.* § 8C-1, Rule 1005 (2021) ("The contents of an official record, or of a document authorized to be

1. In *State v. Clemons*, 274 N.C. App. 401, 409-12 (2020) (citations omitted), we discussed the conflict in the context of our review of a "decision regarding authentication" and stated, "[b]ased on . . . our extensive caselaw explicitly applying de novo review on issues of authentication, we conduct de novo review of whether the evidence at issue here was properly authenticated." However, in this case, we do not make a determination about which standard of review *should* apply because the result would be the same under either standard.

recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 . . . ."). We therefore hold that a trial court acts under a misapprehension of law and abuses its discretion where it excludes documents on the basis that there is no live witness present to authenticate them without first determining whether they fall under Rule 902(4).

¶ 13 Here, even when Father's counsel reiterated during the hearing that the documents were CPS Records embraced under Rule 902(4) and do not require authentication by live witness testimony, the trial court noted its past understanding was that child protective services records and other public records require that "somebody . . . authenticate[] the[] records or [say,] '[y]eah, this is what it says to be.' " The trial court, in finishing with Father's counsel's argument, characterized the origin of its reasoning: "So it's not your argument, okay, that's the *policy*." By excluding the CPS Records based on this apparent policy without first determining they were not records that may be authenticated by certification under Rule 902(4), the trial court acted under a misapprehension of law.

¶ 14 Mother's initial response—that Father allegedly did not have the affidavit to present to the trial court during the hearing because he did not subpoena the CPS Records—does not alter our conclusion. Mother contends "the [trial] court [] did not actually have the authenticating affidavit before it" and "[Father] should not now be heard to complain that the trial judge would not admit evidence that the trial judge did not have before him based upon an authenticating affidavit that was also not before him." We are not convinced. Pursuant to the non-traditional offer of proof employed by the trial court here, the authenticating affidavit certifying the CPS Records as public records is properly before us on appeal. Based on when the affidavit was signed and when Wake County Child Protective Services was ordered to produce the CPS Records pursuant to the *Amended Protective Order* entered 5 February 2018, the Record demonstrates the affidavit was supplied with the CPS Records and existed long before the June 2021 hearing on Mother's motion. There was no indication at the hearing that Father did not have the affidavit to present to the trial court nor that the decision excluding the CPS Records was due to Father lacking the affidavit. Indeed, as our holding emphasizes, *supra* ¶¶ 12-13, the trial court did not consider the affidavit *at all* because it believed live witness testimony was necessary to authenticate the CPS Records and did not review the sealed documents.

¶ 15 As to the prejudice to Father from the exclusion of the CPS Records, such prejudice may be relevant in our analysis if we were determining

whether the trial court correctly applied the law that it did not misapprehend. But our inquiry in the case *sub judice* is focused on a misapprehension of law that is the basis of the trial court's exclusion of evidence. Where a trial court acts under a misapprehension of law in excluding evidence, it commits an abuse of discretion, and this abuse of discretion must be remedied by vacating and remanding for the parties to have a full opportunity to be heard upon trial court's corrected apprehension of the applicable law. *See*, *e.g.*, *Cash*, 2022-NCCOA-403 at ¶¶ 15-27. We hold that such an abuse of discretion occurred here with the trial court's erroneous requirement that the CPS Records must be authenticated by live witness testimony even if the documents qualified as public records under Rule 902(4). However, this is not the end our inquiry on appeal.

¶ 16 Mirroring his contentions below regarding the admissibility of the documents, Father argues the CPS Records should have been considered by the trial court as they are embraced by the public records exception to the hearsay rule provided by Rule 803(8). The trial court had indicated it was skeptical of Father's assertions that the CPS Records fell under the hearsay exception in Rule 803(8) and qualified as public records that may be authenticated by certification under Rule 902(4). *See* N.C.G.S. § 8C-1, Rule 803(8) (2021); N.C.G.S. § 8C-1, Rule 902(4) (2021). The trial court ultimately did not contain a stated rationale in its written order excluding the CPS Records, which stated, "[Father], in his case in chief, moved for admission of the [CPS Records], which had been previously subpoenaed by [Mother] for a prior hearing in this matter. . . . [Mother] objected to the introduction of these records, and the Court sustained [Mother's] objection." As such, given that the Record is unclear as to whether the trial court excluded the CPS Records as hearsay not falling under Rule 803(8) or as not constituting certified public records that can be authenticated by affidavit under Rule 902(4), we remand for Mother and Father to have the opportunity to present argument on these issues.

¶ 17 The trial court misapprehended the law and abused its discretion by excluding the CPS Records. Additionally, as it is unclear from the hearing transcript whether the trial court ultimately excluded the CPS Records solely on this basis or also on the bases that the records do not constitute public records under either Rule 803(8) or Rule 902(4), we remand for both parties to have full opportunity to present argument as to the documents' admissibility, along with the trial court's simultaneous review, under these or any of our other Rules of Evidence. Because we vacate and remand on this issue, we need not reach Father's other argument on appeal.

CONCLUSION

¶ 18 As its exclusion of the CPS Records was based on the misapprehension of law that public records—such as relevant child protective services records in a child custody modification proceeding—must be authenticated by live witness testimony, the trial court abused its discretion in excluding these records. We therefore vacate the Order and remand for the trial court to consider the admissibility of the CPS Records under North Carolina Rules of Evidence 803(8) and 902(4) as well as any other relevant evidence rules. On remand, the trial court should hold a new hearing on Mother's motion to modify the child custody order and both parties shall have the opportunity to present argument on the documents' admissibility.

VACATED AND REMANDED.

Judges DIETZ and COLLINS concur.

STATE OF NORTH CAROLINA
v.
LUIS ERNESTO AGUILAR, DEFENDANT

No. COA21-786

Filed 29 December 2022

1. Search and Seizure—motion to suppress—denial—rationale for ruling

In denying defendant's motion to suppress, the trial court adequately provided a rationale for its ruling where the trial court's statements from the bench during the hearing and during a later session of open court, coupled with the relevant conclusion of law, made clear what the court had concluded: that the officers had probable cause to conduct the warrantless search of defendant's vehicle based on the totality of the circumstances despite the police canine's failure to alert during a sniff search around the vehicle.

2. Search and Seizure—motion to suppress—warrantless search of vehicle—failure of canine to alert—totality of circumstances

The trial court's denial of defendant's motion to suppress evidence of contraband found during a warrantless search of his vehicle

was affirmed where the totality of the circumstances—including the reliable information from confidential informants, which was confirmed by the observations of experienced narcotics investigators—supported the conclusion that it was objectively reasonable to believe that defendant's vehicle contained narcotics, even though a police canine failed to alert on the vehicle.

Appeal by Defendant from judgment entered 1 June 2021 by Judge Nathan H. Gwyn III in Union County Superior Court. Heard in the Court of Appeals 8 June 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Gilda C. Rodriguez for defendant.

MURPHY, Judge.

¶ 1 Our review of a denial of a motion to suppress is strictly limited to determining whether the trial court's underlying findings of fact are supported by competent evidence, in which case they are conclusively binding on appeal, and whether those factual findings in turn support the court's ultimate conclusions of law. We affirm the trial court's denial of Defendant's motion to suppress.

BACKGROUND

¶ 2 Defendant Ernesto Luis Aguilar appeals from his convictions, pursuant to a plea agreement, for trafficking by possession and transportation heroin that was 14 grams or more but less than 28 grams. On appeal, Defendant contends the trial court erred by denying his motion to suppress because officers lacked probable cause as required to justify the warrantless search of his vehicle.

¶ 3 On the morning of 29 January 2020, Lieutenant Ben Baker with the Union County Sheriff's Office received information from an informant, confidential source of information #1 ("CSI #1"),[1] known to have provided reliable tips in past illegal narcotics investigations. This information was a particularized tip that Robert Storc, who was under investigation

1. There are two confidential sources of information that provided tips to officers here: (1) CSI #1, who provided information regarding Robert Storc; and (2) confidential source of information #2 ("CSI #2"), who provided information regarding Mike Moreno, allegedly a local drug dealer with which the investigators were previously familiar.

for the sale of narcotics, would later that day be driving his dark colored Honda Accord and purchasing heroin from a supplier at a specified location, which was later changed to the Burger King parking lot in Monroe.

¶ 4 Later on 29 January 2020, members of the Union County Sheriff's Office and Monroe Police Department were conducting surveillance on Storc regarding the tip. Detective Ian Gross of the Union County Sheriff's Office watched Storc from the parking lot of a Buffalo Wild Wings in Monroe, which was across the street from the Burger King. Set up just across Highway 74 and equipped with binoculars, Detective Gross had a clear line of sight of Storc and other vehicles at Burger King. Around noon, Detective Gross observed Storc drive around the Burger King parking lot several times, park in different spots, and settle on a spot in the west side of the lot. Approximately five to ten minutes later, a grey Honda Accord, which Detective Gross believed to be either a 2010 or 2012 model based on previously owning a similar vehicle, parked near Storc. Detective Gross testified that the grey Honda Accord was driven by a "white or Hispanic male" with "short or bald hair" and that the vehicle had a paper license tag with plastic factory rims. Detective Gross claims Storc walked over to the grey Honda Accord, talked with the driver for a couple minutes, and returned to his vehicle. Detective Gross did not see Storc return to his own Honda Accord with anything in his hands.

¶ 5 Neither Storc nor the driver of the grey Honda were seen entering the Burger King and, shortly after the encounter, they left the parking lot separately and traveled westbound on Highway 74. Officers lost track of the grey Honda Accord but followed Storc to the parking lot of the Target approximately two miles down Highway 74 in Monroe and took Storc into custody where they found "a golf ball size" of what appeared to be heroin in his pocket. Storc allegedly then admitted who supplied him the heroin. Detective Brantley Birchmore of the Monroe Police Department, who was assisting in the investigation, claimed Storc said he just got the heroin from a man at a Burger King driving a grey Honda, but the supplements Detective Birchmore wrote following Storc's arrest did not include such an admission.

¶ 6 Seemingly coincidentally, as Storc was being taken into custody, CSI #2 told Detective Daniel Stroud of the Union County Sheriff's Office that Mike Moreno, a drug dealer known to law enforcement in Monroe, was about to purchase heroin at his house from someone driving a grey Honda Accord with a South Carolina paper tag. After receiving the information, some of the officers left the Target parking lot and drove to Moreno's house, which was about four to five miles or seven to ten

minutes away. From the parking lot of a nearby funeral home, Detective Gross observed Moreno's house for approximately three to five minutes before he noticed a grey Honda Accord with a paper tag parking in front of the house, and he communicated over police radio that he believed it to be the same vehicle that he had seen in the Burger King parking lot. Detective Gross then saw a white or Hispanic male leave the house and walk towards the grey Honda.

¶ 7 When the grey Honda drove away, officers followed it to the Fiesta Mart where they stopped the vehicle and found Defendant, a light-skinned bald Hispanic male, as the driver. The canine unit on scene conducted a sniff search around the grey Honda but did not alert on the car. However, based on the totality of the circumstances, such as the tips provided by two unrelated confidential informants and officers' observations that confirmed these specific tips, officers believed they had probable cause and proceeded to search the vehicle. Defendant was then arrested after officers found heroin while searching the car.

¶ 8 On 1 June 2020, the Union County Grand Jury indicted Defendant for trafficking by possession and transportation 28 grams or more of heroin. Defendant moved to suppress the evidence found during the search of his vehicle on the basis that officers lacked probable cause. Defendant's *Motion to Suppress* was heard at the 8 March 2021 Criminal Session of Union County Superior Court. On 18 March 2021, the trial court announced its decision to deny the motion, and Defendant gave notice of his intention to appeal. The trial court's written order denying Defendant's *Motion to Suppress* was signed 18 March 2021 and entered 1 April 2021.

¶ 9 On 1 June 2021, a superseding charging document was filed in which Defendant was charged by information of trafficking by possession and transportation heroin that was 14 grams or more but less than 28 grams. Although expressly reserving the right to appeal the suppression order, Defendant pleaded guilty to both charges at the 1 June 2021 Criminal Session of Union County Superior Court. The trial court entered a *Judgement and Commitment Order* and sentenced Defendant to a consolidated active sentence of 90 to 120 months. Defendant timely appeals. *See* N.C.G.S. § 7A-27(b) (2021); N.C.G.S. § 15A-979(b) (2021); N.C.G.S. § 15A-1444(a2) (2021).

ANALYSIS

¶ 10 Defendant urges us to reverse the trial court's denial of his *Motion to Suppress* on the basis that officers lacked probable cause to search his vehicle.

¶ 11 Our review of the "denial of a motion to suppress 'is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Tripp*, 381 N.C. 617, 2022-NCSC-78, ¶ 12 (quoting *State v. Cooke*, 306 N.C. 132, 134 (1982)). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651 (citation and marks omitted), *disc. rev. denied*, 369 N.C. 190 (2016). "Findings of fact not challenged on appeal 'are deemed to be supported by competent evidence and are binding on appeal.' " *Tripp*, 2022-NCSC-78 at ¶ 12 (quoting *State v. Biber*, 365 N.C. 162, 168 (2011)). "Even when challenged, a trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *Id.* (quoting *State v. Buchanan*, 353 N.C. 332, 336 (2001) (citation omitted)). Meanwhile, " '[c]onclusions of law are reviewed de novo and are subject to full review.' " *Id.* at ¶ 13 (quoting *Biber*, 365 N.C. at 168).

A. Findings of Fact

¶ 12 Defendant challenges only two of the trial court's 28 findings of fact. Specifically, Defendant contends Finding 6 and Finding 15 are not supported by competent evidence. The trial court's remaining findings of fact are not challenged and therefore are deemed to be supported by competent evidence and binding on appeal. *See id.* at ¶ 12 (quoting *Biber*, 365 N.C. at 168). We review Defendant's challenges to Findings 6 and 15 below.

1. Finding of Fact 6

¶ 13 Finding 6 reads,

> That approximately five to [ten] minutes after Storc's Honda parked, a grey Honda Accord, 2011 or 2012 model, with factory plastic rims, and no window tint driven by a white or Hispanic male, short hair or bald, pulled into the Burger King parking lot and parked on the same west side parking lot at Burger King.

Defendant claims the finding is not supported by competent evidence because "Gross did not have a clear view of the driver of the grey Honda as the trial court's finding implied" and thus the finding "erroneously portrayed what Gross was able to see while he was parked across the street from the Burger King." Defendant points to the fact that Detective

Gross "testified that he 'could not make that person out at the time.' " According to Defendant, "Gross reiterated that he could not see the driver while surveilling the Burger King when he testified that he 'could[] [not] see into [the grey Honda] but [he] could see that the driver was still seated in the driver's seat.' " Defendant contends that "[e]xactly when Gross was able to see the driver of the grey Honda that was at the Burger King parking lot was not revealed in his testimony or the supplemental report he completed for this case."

¶ 14 In response, the State argues, "[t]here was competent evidence that Detective Gross could make out the physical features of the driver of the grey Honda." According to the State, Detective Gross "could clearly make out the physical features of the driver as a white or Hispanic male with short or bald hair, but did not know the actual identity of the driver." The State thus contends, "[t]he fact that the Detective did not know the identity of the driver does not negate competent evidence that he could see the driver's physical features that ultimately matched Defendant's appearance." We agree with the State.

¶ 15 The Record reveals that Finding 6 is supported by competent evidence. As Defendant notes, Finding 6 was based on the testimony of Detective Gross, a detective with the Union County Sheriff's Office who claimed to have participated in and made arrests in "probably 100 or more" narcotics investigations. The testimony relevant to Finding 6 is reproduced below:

> [DETECTIVE GROSS:] So that day I observed the black Honda that was driven by Mr. Stor[c] circle the building several times, park in different spots and finally came to rest on the west side of that parking lot, of the Burger King parking lot.
>
> [THE STATE:] Was -- so you said he was moving around, driving around. Was that significant to you?
>
> [DETECTIVE GROSS:] It was.
>
> [THE STATE:] Why?
>
> [DETECTIVE GROSS:] So typically with any kind of drug transaction that we've witnessed and that I've been a part of the person that's purchasing the narcotics will move around in order to see who's following them. Sometimes it's just out of pure nervousness, but they will move around. But typically somebody that goes to a restaurant or anywhere, they go there,

they park, they go in, they come out. It's not something that they normally do.

[THE STATE:] Now, just a little bit more about that day in particular. About what time of day was this?

[DETECTIVE GROSS:] It was approximately noon.

[THE STATE:] Can you describe the weather conditions for that day?

[DETECTIVE GROSS:] It was clear, no rain.

[THE STATE:] Okay. And you stated you were across the street. Were you able to see with your own eyes?

[DETECTIVE GROSS:] No. I had to -- I could see the parking lot but in order to see everything clearly I used a set of binoculars.

[THE STATE:] Okay. And so tell me exactly what you saw in regards to Robert Stor[c] in that Burger King.

[DETECTIVE GROSS:] So after the vehicle parked on the west side of the lot, I don't recall exactly how many, maybe 5 to 10 minutes another vehicle, a gr[e]y in color Honda Accord, maybe a 2010, 2012 model pulled up on the same side of the parking lot, parked, and was driven by a white or Hispanic male. I could not make that person out at the time. At that time I watched Mr. Stor[c] get out of his vehicle and go to the driver's side of the gr[e]y Honda.

[THE STATE:] Okay. And then what happened when he went to the driver's side of the gr[e]y Honda?

[DETECTIVE GROSS:] Mr. Stor[c] stopped and talked with the driver approximately a minute, maybe two, and then went back to his vehicle.

[THE STATE:] Okay. Can you describe the -- well, first of all, was there anything about that interaction that stood out to you?

[DETECTIVE GROSS:] Just the fact that there was a meeting in a parking lot of obviously the target of that investigation, Mr. Stor[c], for a brief amount of time, which is consistent with a drug transaction.

[THE STATE:] Now, could you see what was going on within the gr[e]y Honda Accord that had pulled up beside Robert Stor[c]'s black Honda Accord?

[DETECTIVE GROSS:] I couldn't see into it but I could see that the driver was still seated in the driver's seat.

[THE STATE:] And you said that you -- you said that the driver was either a white or Hispanic male, but could you make out any other discerning characteristics about him?

[DETECTIVE GROSS:] Just short or bald hair.

[THE STATE:] Now, can you also further describe that gr[e]y Honda Accord that Stor[c] got into or went up to at the Burger King?

[DETECTIVE GROSS:] Yes. So like I said, again, I think it was a 2010 or 2012 model, somewhere about there.

[THE STATE:] How do you know that?

[DETECTIVE GROSS:] The reason I say that is I actually owned one of those –

[THE STATE:] Okay.

[DETECTIVE GROSS:] -- previously, so --

[THE STATE:] I'm sorry. Go ahead and describe the car.

[DETECTIVE GROSS:] So the vehicle had the plastic rims and stood out. You know, the -- I couldn't tell from that point what the tag was, just because I couldn't see the tag on the vehicle as it was parked there.

[THE STATE:] Could you tell if it was like a paper tag or like a metal tag?

[DETECTIVE GROSS:] So I was able to tell that it was a paper tag once both parties separated and the vehicles left the parking lot.

[THE STATE:] Were you able to see the numbers on the paper tag?

> [DETECTIVE GROSS]: No, ma'am.
>
> [THE STATE:] Okay. Also about that car, did it have like dark tinted windows?
>
> [DETECTIVE GROSS:] No. The windows were clear.

Detective Gross's testimony of what he observed at the Burger King is consistent with Finding 6 because Gross could make out the characteristics of the grey Honda Accord—that it was an early-2010's model with factory plastic rims and no window tint—and features of the driver—that he was white or Hispanic with bald or short hair—as he entered the parking lot about five to ten minutes after Storc's Honda Accord parked there. That Detective Gross could not make out the *identity* of the driver of the grey Honda Accord as someone with which he was familiar in his narcotics investigations does not mean his testimony describing the vehicle and driver's features was not competent evidence, as Detective Gross was clear and direct about the limited features of the driver he observed. Furthermore, to the extent that Defendant challenges Finding 6 based on the argument that it "implied" Detective Gross had a "clear view" of the driver in the grey Honda Accord, we are unpersuaded because neither the "clear view" language or anything like it appears in Finding 6. Even if Defendant is correct that Detective Gross did not have a clear view and could not see into the grey Honda Accord once it parked in the Burger King parking lot, challenged findings of fact " 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *Tripp*, 2022-NCSC-78 at ¶ 12 (quoting *Buchanan*, 353 N.C. at 336). We therefore conclude Finding 6 is supported by competent evidence and binding on appeal because a reasonable mind might accept Detective Gross's testimony as adequate to support the finding. *See Ashworth*, 248 N.C. App. at 651.

2. Finding of Fact 15

¶ 16 Finding 15 reads, "[t]hat while standing in the parking lot of [Target] Storc told Birchmore that he got the dope from a guy at the Burger King." Defendant claims the finding is not supported by competent evidence because "[i]t was not until a year later, in preparation for the motion to suppress hearing, that Birchmore communicated [] Storc's admission to the prosecutor handling [Defendant's] case" and "Birchmore's belated recollection of Storc's admission was not supported by the documentation Birchmore produced while the events were fresh in his mind a year earlier . . . ." We are not convinced.

¶ 17 The Record reveals that Finding 15 is supported by competent evidence. Detective Birchmore testified that he is a detective with the

Monroe Police Department who has participated in and made arrests in 50 to 100 narcotics investigations. Finding 15 is entirely consistent with Detective Birchmore's testimony during the hearing. Although the supplements that Detective Birchmore prepared did not mention that Storc "got the dope from a guy at the Burger King," Detective Birchmore testified at the hearing that he knew Storc "had made a comment about meeting a male at Burger King to receive dope, which ended up being heroin[,]" but that he "could[] [not] remember exactly how [Storc] worded it." We therefore conclude Finding 15 is supported by competent evidence and binding on appeal because a reasonable mind might accept Detective Birchmore's testimony as adequate to support the finding, despite Detective Birchmore not including Storc's incriminating statement in the supplements he prepared after Storc and Defendant's arrests. *See Ashworth*, 248 N.C. App. at 651. That Detective Birchmore did not include Storc's statement in his supplements goes, at most, to the credibility of Detective Birchmore and the weight of his testimony—determinations reserved for the trial court. *See State v. Fields*, 268 N.C. App. 561, 568 (2019) (citations and marks omitted) ("[T]he trial court determines the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, the trial court determines which inferences shall be drawn and which shall be rejected.").

B. Conclusions of Law

¶ 18 **[1]** Defendant also argues that these findings do not support the trial court's ultimate conclusion of law that officers had probable cause to search his vehicle. Additionally, Defendant argues that "the trial court erred by failing to provide its rationale in the conclusions of law for denying the motion to suppress." Defendant relies heavily on *State v. Faulk*, 256 N.C. App. 255 (2017), as he claims, "[i]n this case, like in *Faulk*, the trial court only had one relevant conclusion of law and did not provide its rationale for denying [Defendant's] motion to suppress—neither from the bench nor in the suppression order." Citing *State v. Baskins*, 247 N.C. App. 603 (2016), Defendant requests that "this case [] be remanded for conclusions of law that provide a rationale for the trial court's ruling on [Defendant's] motion to suppress."

¶ 19 At the outset, we first address whether the trial court erred by allegedly failing to provide a rationale for its ruling with the single conclusion of law in the order denying Defendant's *Motion to Suppress*, as such an error would require that we remand to allow the trial court to make additional findings of fact and conclusions of law. *See*, *e.g.*, *State v. McFarland*, 234 N.C. App. 274, 284-85 (2014) ("[T]he trial court failed

to make adequate conclusions of law to justify its decision to deny [the] defendant's motion to suppress . . . . Therefore, we must remand to allow the trial court to make appropriate conclusions of law based upon the findings of fact."); *see also State v. Neal*, 210 N.C. App. 645, 656 (2011) (citation and marks omitted) ("Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for the appropriate proceedings to determine the issue or matter without ordering a new trial."). We are not persuaded that the trial court failed to provide a rationale for denying Defendant's *Motion to Suppress*.

¶ 20 In *Faulk*, we concisely explained the trial court's duty to set forth findings of fact and conclusions of law when ruling on a motion to suppress:

> When ruling on a motion to suppress following a hearing, "[t]he judge must set forth in the record his findings of facts and conclusions of law." [N.C.G.S.] § 15A-977(f) (2015). While this 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[,]" *State v. Bartlett*, 368 N.C. 309, 312 . . . (2015), our Court has explained that "it is still the trial court's responsibility to make the conclusions of law." [*McFarland*, 234 N.C. App. at 284].
>
> "Generally, a conclusion of law requires 'the exercise of judgment' in making a determination, 'or the application of legal principles' to the facts found." [] *McFarland*, 234 N.C. App. at 284 . . . (quoting *Sheffer v. Rardin*, 208 N.C. App. 620, 624 . . . (2010)). When a trial court fails to make all the necessary determinations, *i.e.*, findings of fact resolving disputed issues of fact and conclusions of law applying the legal principles to the facts found, "[r]emand is necessary because it is the trial court that 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*, *in the first instance*, as to whether or not a constitutional violation of some kind has occurred." [*Baskins*, 247 N.C. App. at 610] (emphasis added) (internal [] marks and citation omitted); *see also State v. Salinas*, 366 N.C. 119, 124 . . . (2012) (holding that remand was

> necessary for additional findings of fact that resolved the conflicts in evidence).

Faulk, 256 N.C. App. at 262-63; *see* N.C.G.S. § 15A-977(f) (2021). Relying on our review of "a similar order denying a defendant's motion to suppress" in *Baskins*, we remanded *Faulk* to the trial court to "make necessary conclusions of law concerning [the] [d]efendant's motions to suppress." *See Faulk*, 256 N.C. App. at 263, 265 (citing *Baskins*, 247 N.C. App. at 609-11). The *Baskins* written order contained the following sole conclusion of law regarding the validity of the traffic stop:

> The temporary detention of a motorist upon probable cause to believe he has violated a traffic law (such as operating a vehicle with expired registration and inspection) is not inconsistent with the Fourth Amendment's prohibition against unreasonable searches and seizures, even if a reasonable officer would not have stopped the motorist for the violation. [citation omitted] [Detective] O'Hal was justified in stopping [the] [d]efendant['s] vehicle.

Baskins, 247 N.C. App. at 610. We explained in *Baskins* that "[t]his conclusion consists of a statement of law, followed by the conclusion that Detective O'Hal was 'justified' in initiating the stop" and that "does not specifically state that the stop was justified based upon any specific violation of a traffic law." *Id.* Citing *McFarland*, 234 N.C. App. at 283-84, we held that this sole conclusion of law did not make any conclusion about whether "Detective O'Hal was justified in initiating the stop based upon either the alleged registration violation or the alleged inspection violation . . . ." *Baskins*, 247 N.C. App. at 610-11.

¶ 21 Similarly, in *Faulk*, the order's sole conclusion of law stated, in its entirety,

> [t]hat [N.C.G.S. §] 15A-401(E) was not applicable to the arrest of [the defendant] in the State of Maryland and the arrest and subsequent search was not a violation of the Fourth and Fourteenth Amendments of the United States Constitution, therefore, the motion to suppress filed by the [d]efendant in this matter on [5 July 2016] is hereby denied.

Faulk, 256 N.C. App. at 264. Employing slightly different reasoning than we did in *Baskins*, we explained in *Faulk*, "[w]hile the undisputed evidence and facts found by the trial court support the denial of the motion,

the order lacks any conclusion applying legal principles to those facts, *i.e.*, it omits an appropriate determination in the first instance" as to "why [the] [d]efendant's warrantless arrest while in a private home . . . did not violate [the] [d]efendant's Fourth and Fourteenth Amendment rights." *Id.* We also found, as to the defendant's later filed motion to suppress, that "[b]ecause the evidence relevant to the search warrant was undisputed, the trial court was not required to make findings of fact to support its denial of the 14 July 2016 motion." *Id.* at 265. However, even though findings were not required, we held "the trial court's failure to provide its rationale from the bench, coupled with the omission of *any* mention of the motion challenging the search warrant, preclude[d] meaningful appellate review of that ruling." *Id.* (emphasis added). We emphasized that it "is the trial court's duty to apply legal principles to the facts, even when they are disputed." *Id.*

¶ 22 Defendant claims the case *sub judice* is like *Faulk* because "the trial court only had one relevant conclusion of law and did not provide its rationale for denying [his] motion to suppress[.]" We disagree. Here, the trial court's statements from the bench during the hearing on Defendant's *Motion to Suppress* and during a later session of open court on 18 March 2021, coupled with the relevant conclusion of law in the written order entered 1 April 2021, provided the court's rationale for denying the motion.

¶ 23 Notably, on appeal, Defendant completely ignores the trial court's statements from the bench during the 11 March 2021 hearing. These statements inform the trial court's later statements on 18 March 2021 that Defendant selectively quotes in his brief to suggest the trial court did not provide the rationale for its ruling.

¶ 24 Specifically, after allowing the parties to present arguments and evidence at the suppression hearing, as memorialized in a transcript over 100 pages in length, the trial court noted that it would "take it all under advisement" and "probably do [its] own research" before ruling on Defendant's *Motion to Suppress*. The State argued at the hearing that "[t]he canine didn't alert. But it did[] [not] even matter because we had so much other information that gave them probable cause to believe that [] Defendant had drugs within that car." The trial court made clear that its focus was on whether the caselaw has held that a negative canine hit on a vehicle means officers lacked probable cause to search despite other facts and circumstances to the contrary. This is shown in the exchange between Defendant's counsel and the State at the end of the hearing.

¶ 25 Answering Defendant's counsel's contention that "the facts of the dog not alerting is not in either one of th[e] cases" the State relied on during the hearing, the State explained, "I looked for a case like that. There's not a case because I believe if you've got probable cause, you've got probable cause." Defendant's counsel quickly replied, "I would argue that the fact that we can't find a case where the drug dog did not alert and they still searched illustrates there was no probable cause and most every other officer would know that there's no probable cause to search the car." The trial court then indicated it would review the cases cited by the parties and would "probably do [its] own research . . . ." The State then stated that it "wasn't able to find a case [saying] that the absence of a dog alert negates any other probable cause" and that "just because the dog did[] [not] alert does[] [not] negate all the other probable cause that they had." Defendant's counsel had the last word at the hearing, seeming to suggest that the lack of a positive canine hit necessarily compels the conclusion that officers did not have probable cause. Given this lengthy exchange on the issue raised by Defendant's *Motion to Suppress*, our search for the rationale for the trial court's ruling as announced in open court on 18 March 2021 and explained by written order entered 1 April 2021 cannot be complete without considering the context of what was said during the suppression hearing. These statements show the ruling was that officers had probable cause based on the totality of the circumstances—as laid out in four pages of findings—despite the canine failing to alert during a sniff search of the vehicle.

¶ 26 Furthermore, the statement announcing the denial of Defendant's *Motion to Suppress*—when considered in its entirety—shows the court exercised its judgment and applied the totality of the circumstances test for probable cause:

> The Court's going to deny your motion, but I do want to put this on the record, that the Court struggled with the fact that the dog didn't hit on the car. And I don't mean this sarcastic or any ill will toward the Government, but when a dog has a positive alert it's the gospel we're supposed to take and it's the gospel. And when the dog has a negative alert, we're supposed to -- it seems like we're supposed to ignore that. But based on everything, the totality of everything I would have had to -- the not hitting would have had to outweigh all the other stuff based on -- based on the cases I've read there was nothing on point, obviously y'all know. But the appellate court, where

> you like it or not, they are very lenient toward these dogs and their behaviors, whether it's issues or positives and nothing's found. So that's the Court's ruling. But I want you -- I wanted it to be on the record the things that I had problems with.

The trial court clearly explained the rationale for why it denied Defendant's *Motion to Suppress* concerning evidence officers found after searching the vehicle because the court exercised its judgment in applying the law to the facts and concluding that "based on . . . the totality of everything . . . the [canine] not hitting [did not] outweigh all the other stuff . . . ." These statements from the bench were confirmed by order entered 1 April 2021.

¶ 27 In that order, the trial court made 28 findings of fact that described the totality of circumstances on which the court based its decision and that we held *supra* are binding on appeal:

> 1. That on [29 January 2020] Detective Ben Baker ("Baker"), Detective Ian Gross ("Gross"), Detective Jonathan Presson ("Presson"), and Detective Jason Stroud ("Stroud"), all with the Union County Sheriff's [Office] Narcotics Division and Detective Brantley Birchmore ("Birchmore") with the Monroe Police Department Narcotics Unit, conducted a drug interdiction surveillance operation at Burger King located on Highway 74 and Secrest Shortcut Road in Monroe, Union County, North Carolina ("Burger King"). All members involved in the drug interdiction surveillance operation each had years of experience and many hours training in narcotics investigations.
>
> 2. That Baker received information from a confidential source of information (CSI #1) that Robert Storc would be driving his dark colored Honda Accord and meeting a heroin source of supply at the Burger King, and this information was conveyed to all members involved in the drug interdiction surveillance operation.
>
> 3. That the CSI #1 was a reliable source of information in that they had given Baker reliable information regarding drug investigations many times over the years. That the CSI was a career informant, whose

information led police to make many arrests over fifteen years at the local and federal level.

4. That on [29 January 2020] at approximately 12:00pm, Gross parked his gold Chrysler minivan at the Buffalo Wild Wings located on Hwy 74 across from the Burger King, where he was able to see the parking lot area of the Burger King and used binoculars to see more clearly [the] vehicles in the parking lot[.]

5. That Gross observed a black Honda Accord driven by Robert Storc circle the Burger King parking lot several times, park in different spots, and finally park in a spot to the west side of the parking lot at Burger King.

6. That approximately five to [ten] minutes after Storc's Honda parked, a grey Honda Accord, 2011 or 2012 model, with factory plastic rims, and no window tint driven by a white or Hispanic male, short hair or bald, pulled into the Burger King parking lot and parked on the same west side parking lot at Burger King.

7. That Storc got out of his vehicle and went to the driver's side of the grey Honda Accord, spoke to the male driver for approximately one to two minutes and then returned to his vehicle. Gross did not notice anything in Storc's hands.

8. That neither Storc nor the male driver of the grey Honda Accord went inside Burger King or went through the drive-thru at Burger King. That the male driver of the grey Honda Accord never exited his vehicle at the Burger King.

9. That based on Gross's training and experience, the CSI #1 information, he opined that a drug transaction had occurred between Storc and the driver of the grey Honda Accord in the parking lot of Burger King.

10. That both Storc's vehicle and the grey Honda Accord left the parking lot of Burger King and traveled westbound on Highway 47 and Gross relayed that information to all Detectives involved in the drug interdiction surveillance via police radio.

11. That Gross noticed when the grey Honda Accord left the Burger King parking lot, a paper license tag was on the grey Honda Accord.

12. That the other officers involved in the surveillance followed both Storc's vehicle and the grey Honda Accord, but lost the grey Honda Accord in traffic.

13. That officers followed Storc's vehicle into the parking lot of Target located on Highway 74, approximately two and [a] half miles from the Burger King, where Storc backed into a parking space in front of Rack Room Shoes adjacent to Target.

14. That Storc was removed from the vehicle, patted down and arrested by Birchmore. Approximately nine to [ten] grams of a substance believed to be heroin was located in the front right pocket of Storc's jeans.

15. That while standing in the parking lot of Target/Rack Room Shoes Storc told Birchmore that he got the dope from a guy at the Burger King.

16. That while in the parking lot of Target/Rack Room Shoes, Stroud received information from an independent confidential source of information (CSI #2) that was not involved in the investigation to this point, that a source of supply of heroin which was driving a grey Honda Accord with a South Carolina paper tag was delivering heroin to Michael Marino, known to law enforcement as Mike Mike, at Marino's residence located on West Park Drive in Monroe, which was approximately four to five miles and approximately seven to ten minute drive from the Target parking lot. Marino was known to law enforcement as a heroin drug trafficker due to many dealings with him in the past, and law enforcement where he lived due to previous surveillance of his residence.

17. That CSI #2 was reliable in that Stroud had used this confidential source of information approximately twenty to thirty times and those times Stroud had found him/her to be reliable.

18. That Gross went to Marino's residence located on West Park Drive, and parked in the back parking lot

of a funeral home located next to West Park Drive, where he was able to view Marino's residence.

19. That Gross noticed the same grey Honda Accord with a paper license tag that he had seen in the parking lot of Burger King approximately fifteen to twenty minutes earlier, parked in front of Marino's residence, along with Marino's black Chrysler 300 parked in front of the residence.

20. That Gross saw a white or Hispanic male leave Marino's residence and walk toward the grey Honda Accord parked in front of Marino's residence, "either get into the driver's seat or go near the vehicle".

21. That approximately three to five minutes after Goss arrived at Marino's residence, the grey Honda Accord left Marino's residence and traveled toward Franklin Street.

22. That Stroud also went to Marino's residence located on West Park Drive, an approximate 10-minute drive from the Target/Rack Room Shoes parking lot on Elizabeth Avenue, which is across the street from Marino's residence.

23. That Stroud noticed a grey Honda Accord parked in front of Marino's residence and shortly after Stroud's arrival on Elizabeth Avenue, the grey Honda Accord left, turning on Elizabeth Avenue heading toward Franklin Street. That Stroud used binoculars and saw the driver ([the] only occupant of the vehicle) of the grey Honda Accord, stocky build Hispanic male, clean shaven, broad jaw, wearing a dark shirt and a black toboggan.

24. That Gross, Stroud and several other officers involved in the drug interdiction surveillance followed the grey Honda Accord, where it traveled on Franklin Street, turned right on Morgan Mill Road and continued to travel on Walk Up to the area of Riverside Drive or Castle Drive, Monroe, and then turned left onto Castle Drive and immediate right into the parking lot of Fiesta Mart, and parked on the south side of the parking lot beside the building.

> 25. That the area where Fiesta Mart is located is a known drug trafficking area, that Monroe Police Department has worked several drug cases and surveillance in that area.
>
> 26. That the vehicle was stopped and the driver removed from the vehicle. That the driver did not say anything and appeared "very stoic and calm".
>
> 27. That Presson conducted an air sniff around the grey Honda Accord with his [canine], [which] . . . did not alert on the grey Honda Accord.
>
> 28. That Gross, Birchmore and Stroud identified the person that was removed from the grey Honda Accord as [Defendant]. That [] [D]efendant is a light skinned, bald Hispanic male.

Based on its findings of fact, the trial court made the following conclusions of law:

> 1. This matter is properly before the Court; and the Court has jurisdiction over the respective parties and over the subject matter of this action.
>
> 2. Based upon a totality of the circumstances the Court concludes that [] Defendant's motion to suppress for lack of probable cause be denied.

These conclusions of law and findings of fact, along with the trial court's statements during the hearing on 11 March 2021 and during the announcement of the denial of Defendant's *Motion to Suppress* on 18 March 2021, sufficiently explain the court's rationale in resolving the sole issue implicated by the motion and addressed at the suppression hearing: whether officers had probable cause to search Defendant's vehicle based on the totality of the circumstances. This separates the case *sub judice* from *Baskins* and *Faulk*.

¶ 28 Unlike in *Baskins*, where the trial court intimated that its denial of the defendant's motion to suppress challenging the basis for his traffic stop was due to officers observing the defendant commit a traffic violation but did not indicate the particular alleged violation that justified the stop, here the trial court indicated that, despite the negative canine hit, observations from surveilling officers and information from reliable confidential sources were sufficient to establish probable cause to search Defendant's vehicle. Our decision in *Faulk* that remanded due

to the sole conclusion of law in the order stated that neither a particular statutory provision nor the defendant's constitutional rights were violated is likewise distinguishable because the trial court here explained that probable cause supported the search based upon the totality of the circumstances in the findings. As such, we hold that appellate review of the order is indeed possible and no remand is necessary. We therefore consider whether the trial court's findings of fact support its ultimate conclusion of law that officers had probable cause to search Defendant's vehicle based upon the totality of the circumstances. *See Tripp*, 2022-NCSC-78 at ¶ 12.

¶ 29 **[2]** "The Fourth Amendment [to] the United States Constitution and Article [I], Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures." *State v. Parker*, 277 N.C. App. 531, 2021-NCCOA-217, ¶ 25 (citation and marks omitted), *disc. rev. denied*, 860 S.E.2d 917 (Mem) (2021). "Typically, a warrant is required to conduct a search unless a specific exception applies." *Id.* (citation and marks omitted). "For example, the motor vehicle exception provides that the search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search." *Id.* (citation and marks omitted). "Probable cause is generally defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty of an unlawful act." *Id.* (citation and marks omitted)). 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. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

State v. Degraphenreed, 261 N.C. App. 235, 241 (2018) (citation and marks omitted).

¶ 30 Defendant challenges the trial court's ultimate conclusion of law by arguing that, "[i]n the absence of a positive alert from the [canine], there was no probable cause to search the vehicle." As such, we must determine whether the conclusion that there was probable cause—based on the then-existing facts and circumstances being sufficient to support a reasonable belief that Defendant's vehicle carried contraband

materials—is supported by trial court's findings of fact. *See id.*; *Tripp*, 2022-NCSC-78 at ¶ 12. "The existence of probable cause is a commonsense, practical question that should be answered using a totality-of-the-circumstances approach." *State v. McKinney*, 361 N.C. 53, 62 (2006) (citation and marks omitted).

¶ 31 Here, the binding findings of fact reveal several circumstances that, even in the absence of a positive alert from the canine, support a reasonable belief that Defendant's vehicle carried contraband materials. The evidence showed (i) a credible confidential source provided reliable information that Storc was going to the Burger King to get heroin; (ii) Storc met a grey Honda with paper tags driven by a man matching Defendant's description at the Burger King parking lot; (iii) neither Storc nor the other driver went into Burger King and instead had a one to two minute interaction in the car that Detective Gross testified as being consistent with a drug transaction; (iv) when law enforcement stopped Storc shortly after leaving Burger King, they found heroin in his pocket; (v) at the same time, another credible confidential source provided reliable information that Moreno, a known drug trafficker, was being supplied with heroin by a male in a grey Honda with paper tags; (vi) law enforcement immediately went to Moreno's house and saw what they believed to be the same grey Honda with paper tags parked that was driven by the same white or Hispanic man they saw at Burger King; (vii) law enforcement followed and stopped the grey Honda driven by Defendant, which was the same vehicle at the Burger King and Moreno's house; and (viii) Defendant is a bald Hispanic male. Based on these facts regarding reliable information from confidential sources confirmed by observations of experienced narcotics investigators, it was objectively reasonable to believe that Defendant's vehicle contained contraband materials such as the heroin found on Storc.

¶ 32 Furthermore, Defendant has cited no case, either before the trial court or on appeal, holding that officers *cannot* have probable cause to search a vehicle if a canine search is conducted and the canine fails to alert. Nor did we find such a case. Defendant cites cases that found probable cause existed where there was a positive alert for narcotics by a specially trained canine, *see*, *e.g.*, *State v. Washburn*, 201 N.C. App. 93, 100 (2009), *disc. rev. denied*, 363 N.C. 811 (2010), but the only case Defendant cites mentioning a failure to alert is a United States Supreme Court case that simply mentioned the reality in policing that "[i]f a dog on patrol fails to alert to a car containing drugs, the mistake *usually* will go undetected because the officer will not initiate a search." *Florida v. Harris*, 568 U.S. 237, 245 (2013) (emphasis added). Indeed, this

statement seems to imply that officers occasionally *do* search a vehicle after a canine fails to alert, seemingly based on other circumstances. *Id.*

¶ 33 Nevertheless, whether probable cause existed is a practical question that should be answered based on the totality of the circumstances present in the particular case. *See McKinney*, 361 N.C. at 62; *Harris*, 568 U.S. at 244 ("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."). We therefore hold that the circumstances in this case supported a reasonable belief that Defendant's vehicle carried narcotics. Accordingly, the trial court's ultimate conclusion of law that officers had probable cause to search Defendant's vehicle was not erroneous, as it is supported by the circumstances laid out in the trial court's findings of fact that are binding on appeal.

CONCLUSION

¶ 34 As the findings of fact support the trial court's ultimate conclusion of law, that officers had probable cause to search Defendant's vehicle based upon the totality of the circumstances, the trial court did not err in denying Defendant's *Motion to Suppress*.

AFFIRMED.

Judges DIETZ and WOOD concur.

STATE OF NORTH CAROLINA
v.
GLENN SPENCER BOYETTE, JR., DEFENDANT

No. COA21-612

Filed 29 December 2022

1. Appeal and Error—notice of appeal—timeliness—fourteen-day period

Defendant timely appealed the revocation of his probation where he filed his written notice of appeal within the fourteen-day period allowed by Appellate Rule 4. Although the trial court rendered its decision at the hearing on 30 April 2021, the entry of the order was delayed until 24 May 2021 when it was filed with the clerk of court; therefore, defendant's filing of his written notice of appeal on 25 May 2021 (one day after entry of the order) was timely.

2. Probation and Parole—revocation proceeding—admission of evidence—exclusionary rule

The appellate court rejected defendant's arguments that the trial court erred by not suppressing evidence that was allegedly obtained in violation of the Fourth and Fourteenth Amendments, because the exclusionary rule does not apply in probation revocation proceedings.

Judge JACKSON concurring as to part A and concurring in result only as to part B.

Appeal by Defendant from judgments entered 30 April 2021 by Judge Daniel A. Kuehnert in Caldwell County Superior Court. Heard in the Court of Appeals 10 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

MURPHY, Judge.

¶ 1 Rule 4 of the North Carolina Rules of Appellate Procedure authorizes appeal in criminal cases via written notice of appeal filed with the

Clerk of Court. Such written notice may be filed at any time between (1) the date of the rendition of the judgment or order and (2) the fourteenth day after entry of the judgment or order. Where a written order exists, the date of entry of the judgment or order is when the judge's written order is filed with the Clerk of Court. Here, the trial court's order was filed by the Clerk of Court on 24 May 2021. The next day, on 25 May 2021, Defendant filed his written notice of appeal. Since Defendant filed his written notice of appeal within the fourteen-day period allowed by Rule 4, Defendant's appeal was timely, and we deny the State's *Motion to Dismiss Appeal*.

¶ 2 Evidence procured in contravention of the Fourth and Fourteenth Amendments is not subject to the exclusionary rule at probation revocation hearings, and we reject Defendant's arguments that the trial court erred by not suppressing evidence allegedly obtained in violation of his constitutional rights.

BACKGROUND

¶ 3 On 16 July 2015, Defendant, pursuant to a plea arrangement, pled guilty to possession of stolen goods and manufacturing methamphetamine. On 3 September 2015, Defendant received a sentence of 73 to 100 months, suspended for 60 months of supervised probation, for the manufacturing methamphetamine charge. The same day, the trial court sentenced Defendant to a consecutive term of 6 to 8 months for the possession of stolen goods charge, which was also suspended for 60 months of supervised probation.

¶ 4 Around 1:40 a.m. on 25 May 2020, two Sheriff's deputies, Corporal Robbins and Sergeant Knupp, were at the Yadkin Valley Fire Department on Highway 268 when they saw a yellow Ford pickup truck drive past them toward the Wilkes County Line. Approximately 10 to 15 minutes later, they saw the truck come back with a lawnmower in the bed. The officers thought it was unusual for someone to pick up a lawnmower so early in the morning, and they began following the truck in separate patrol cars. They followed Defendant in his truck for about 5 to 8 minutes, and Cpl. Robbins initiated a traffic stop after the truck crossed the middle line and went 55 mph in a 35 mph zone.

¶ 5 After stopping the Defendant at the Hillbilly Trading Post, Cpl. Robbins approached Defendant and retrieved his driver's license. Sgt. Knupp checked Defendant's information because Cpl. Robbins was having difficulty with his radio. While Sgt. Knupp was checking Defendant's information, Cpl. Robbins conducted a "free-air sniff" of the truck with his K-9. The dog completed two circles around the truck; and, although

he sniffed "intense[ly]" in a few places, he never alerted. During the free-air sniff, Sgt. Knupp was told by dispatch that Defendant was on probation and had a suspended license, and Sgt. Knupp relayed this information to Cpl. Robbins. Sgt. Knupp also confirmed Defendant's probation status, found Defendant was subject to warrantless searches, and informed Cpl. Robbins of that information. Cpl. Robbins then went back to Defendant and told him he was subject to warrantless searches, which Defendant confirmed.

¶ 6 Cpl. Robbins asked Defendant to exit the vehicle and frisked him for weapons. No weapons were found on Defendant's person. Cpl. Robbins then searched the vehicle while Defendant stood with Sgt. Knupp. In the vehicle, Cpl. Robbins found a single-shot shotgun, two glass smoking pipes, a straw, and two plastic baggies containing a "crystal substance." The North Carolina State Crime Lab results later revealed the crystal substance was methamphetamine. Neither Sgt. Knupp nor Cpl. Robbins recalled whether Defendant was the registered owner of the truck.[1]

¶ 7 Subsequently, on 17 and 27 May 2020, Defendant's probation officer filed probation violation reports with the trial court, alleging Defendant had violated the revocation-eligible condition of probation not to commit a criminal offense and indicating Defendant was found in possession of a firearm and methamphetamine. The alleged probation violations came before the trial court for hearing on 30 April 2021. At the hearing, the trial court revoked Defendant's probation in both cases and activated his suspended sentences but modified them to run concurrently. Defendant gave written notice of appeal on 25 May 2021; and, on 25 April 2022, the State filed a *Motion to Dismiss Appeal*, arguing Defendant's appeal was untimely.

ANALYSIS

¶ 8 On appeal, Defendant contends the trial court erred by not suppressing the evidence found during the search of the truck. The State's *Motion to Dismiss Appeal*, however, claims Defendant failed to timely appeal. Accordingly, we first address the State's *Motion to Dismiss Appeal* and then whether the trial court erred by not suppressing the evidence found in the search of the truck.

1. At some point during the stop, both officers asked Defendant about the lawnmower and other tools in the back of the pickup. Defendant said they were his, and the officers did not proceed with an investigation.

A. State's *Motion to Dismiss Appeal*

¶ 9 **[1]** The North Carolina Rules of Appellate Procedure provide:

> Any party entitled by law to appeal from a judgment or order of a [S]uperior or [D]istrict [C]ourt rendered in a criminal action may take appeal by: (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the [C]lerk of [S]uperior [C]ourt and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order . . . .

N.C. R. App. P. 4(a) (2021). According to the relevant portion of N.C.G.S. § 15A-1347, a defendant has the right to appeal "[w]hen a [S]uperior [C]ourt judge, as a result of finding . . . a violation of probation, activates a sentence or imposes special probation." N.C.G.S. § 15A-1347(a) (2021). Also, in a criminal case, a "[j]udgment is entered when [a] sentence is pronounced." N.C.G.S. § 15A-101(4a) (2021). The State argues that, in a probation-revocation case, judgment is entered when the trial court orally announces it is activating a suspended sentence.

¶ 10 "Compliance with the requirements for entry of notice of appeal is jurisdictional." *State v. Oates*, 366 N.C. 264, 266 (2012) (citing *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197-98 (2008)). "We review issues relating to subject matter jurisdiction de novo." *Id.* (citing *Harris v. Matthews*, 361 N.C. 265, 271 (2007)).

¶ 11 In support of its argument, the State relies on our opinion in *State v. Yonce*. In that case, a defendant was sentenced to 15 to 18 months imprisonment, which the trial court suspended in favor of supervised probation for five years. *State v. Yonce*, 207 N.C. App. 658, 659 (2010), *disc. rev. denied*, 365 N.C. 80 (2011). A little over five months into his probation, the defendant's probation officer filed violation notices. *Id.* On 27 October 2008, a violation hearing was held. *Id.* at 660. The trial court found the defendant had willfully violated the terms and conditions of his probation but gave the defendant until 1 December 2008 to come into compliance and scheduled a review hearing on 8 December 2008. *Id.* The trial court also found that,

> if [the] [d]efendant fully complied with the monetary payment provisions of the original judgments by 1 December 2008, his active [prison] sentences should not be put into effect. On the other hand, if [the] [d]efendant failed to "be in full and complete compliance" on 8 December 2008, his prison sentences should be activated immediately.

Id. At the review hearing, the trial court "ordered that [the] [d]efendant begin serving his active sentences." *Id.* at 661. On 12 December 2008, the defendant gave notice of his appeal, which "allude[d] to the 8 December 2008 order," but his arguments on appeal "primarily focused on the 27 October 2008 order." *Id.* at 661-63. After noting that N.C.G.S. § 15A-101 prescribed that judgment is entered when the sentence is pronounced, we reasoned the "[trial court] entered a final judgment when [the judge] ordered that [the] [d]efendant's 'sentences [be put] into effect' on 27 October 2008." *Id.* at 663. We then held,

> [s]ince [the] [d]efendant did not note his appeal to this Court until 12 December 2008, a date substantially more than fourteen days following the entry of [the trial court]'s order [on 27 October 2008], this Court lacks jurisdiction over [the] [d]efendant's challenge to the revocation of his probation as embodied in [the trial court]'s order and has no authority to consider [the] [d]efendant's challenge to that decision.

Id.

¶ 12 Here, the trial court found Defendant had willfully violated his conditions of probation by being in possession of a firearm and methamphetamine, and it pronounced the activation of Defendant's suspended sentences at the end of the probation violation hearing on 30 April 2021. While it is true N.C.G.S. § 15A-101 purports to dictate that judgment is entered when the sentence is pronounced, in *State v. Oates*, our Supreme Court explained that Rule 4 of the North Carolina Rules of Appellate Procedure governs appeals in criminal cases. *See Oates*, 366 N.C. at 268. The Court continued,

> we believe Rule 4 authorizes two modes of appeal for criminal cases. The Rule permits oral notice of appeal, but only if given at the time of trial . . . . Otherwise, notice of appeal must be in writing and filed with the clerk of court. Such written notice may be filed at any time between the date of the rendition of the judgment or order and the fourteenth day after entry of the judgment or order. Here, the suppression order was rendered on 15 December 2009 when the trial judge stated, "I'm going to enter the order suppressing," thereby deciding the issue before him. The order was entered on 22 March 2010 when the clerk of the superior court in Sampson County filed the judge's

> written order in the records of the court. As a result, the span within which the State could have filed its written notice of appeal extended from 15 December 2009 until 5 April 2010. The State's 22 December 2009 appeal was timely.

Id. (citations omitted). The State's motion is controlled by *Oates* and not our earlier holding in *Yonce*. The trial court rendered its decision at the hearing on 30 April 2021. The order was entered, however, on 24 May 2021 when the order was filed with the Clerk of Court. Like in *Oates*, where the delayed entry of the order extended the time to appeal, the delayed entry in this case also extended the time Defendant had to appeal. As a result, the filing of Defendant's notice of appeal on 25 May 2021—one day after the entry of the order—was timely. We therefore deny the State's *Motion to Dismiss Appeal*.

B. Evidence Found in the Search of the Truck

¶ 13 **[2]** Defendant provides three arguments in support of his contention the evidence found during the search of the truck should have been suppressed by the trial court: (1) the search of the truck by Cpl. Robbins was not supported by reasonable suspicion and therefore violated the Fourth Amendment; (2) the search of the truck was not authorized by N.C.G.S. § 15A-1343(b)(14); and (3) Defendant did not consent to the search of his truck.

¶ 14 However, as each of these arguments incorrectly assumes that the exclusionary rule applies during probation revocation proceedings, they are all without merit.[2] In 1982, our Supreme Court held "that evidence which does not meet the standards of the [F]ourth and [F]ourteenth [A]mendments to the United States Constitution may be admitted in a probation revocation hearing." *State v. Lombardo*, 306 N.C. 594, 602 (1982). In addition, N.C.G.S. § 15A-1345 states, in relevant part, "[f]ormal rules of evidence do not apply at the [probation revocation] hearing . . . ." N.C.G.S. § 15A-1345(e) (2021); *see also State v. Murchison*, 367 N.C. 461, 464 (2014) (marks and citations omitted) ("[O]ur Rules of Evidence, other than those concerning privileges, do not apply in proceedings for sentencing, or granting or revoking probation."). Thus, regardless of

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2. While Defendant's brief only cursorily refers to the Fourth Amendment in the course of these arguments, the caselaw he cites and the underlying rationale of his arguments are necessarily based on the Fourth Amendment exclusionary rule. Furthermore, Defendant acknowledges in a container paragraph for the section containing all three arguments that he is arguing the search "violated his rights under the United States and North Carolina Constitutions."

whether the search would have passed constitutional muster if offered as the basis for the admission of evidence at a trial on the new offenses, the trial court did not err by admitting the evidence at Defendant's probation revocation hearing.

CONCLUSION

¶ 15 Our Supreme Court has made it clear that defendants in a criminal proceeding may file written notice of appeal within fourteen days of a trial court's order being filed in the records of the court by the Clerk of Court. Defendant did so, and we deny the State's *Motion to Dismiss Appeal*. Furthermore, at a probation revocation hearing, the Fourth Amendment's exclusionary rule for evidence does not apply. Accordingly, the trial court did not abuse its discretion by admitting the evidence obtained in the search of the truck.

NO ERROR.

Judge CARPENTER concurs.

Judge JACKSON concurs as to part A and concurs in result only as to part B.

STATE OF NORTH CAROLINA
v.
BOBBY LESHAWN BYRD

No. COA22-527

Filed 29 December 2022

Search and Seizure—search warrant application—affidavit—probable cause—nexus between cellphone and home invasion

The trial court properly denied defendant's motion to suppress evidence found on his cellphone where the warrant application's supporting affidavit established probable cause for the search by demonstrating a nexus between the cellphone and an armed home invasion, based on the following details: the victim described a red and black suitcase that had been stolen from his home; the victim's neighbor described a dark late-model Lexus with chrome rims that was parked near the home at the time of the invasion; the neighbor later positively identified the vehicle; that same vehicle had been

used to transport defendant to the hospital later in the night of the home invasion; the registered owner of the Lexus consented to having her car searched, which led to the discovery of the stolen suitcase and defendant's white cellphone; the car's owner explained to law enforcement that she had loaned out her car earlier in the day, that she did not know what the car had been used for, that defendant was her cousin, and that defendant owned a white cellphone that was missing.

Appeal by Defendant from order entered 29 July 2021 by Judge James Ammons in Johnston County Superior Court. Heard in the Court of Appeals 16 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John F. Oates, Jr., for the State-Appellee.

Drew Nelson for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Bobby Leshawn Byrd appeals the trial court's order denying his motion to suppress evidence obtained during the search of his cellphone. Defendant argues that probable cause did not support issuing a warrant to search the cellphone. We affirm the trial court's order.

I. Background

¶ 2 Defendant was arrested on 7 October 2018 and subsequently indicted for first degree burglary, first degree kidnapping, robbery with a dangerous weapon, conspiracy to commit those offenses, and having attained violent habitual felon status. Prior to trial, Defendant moved to suppress all evidence obtained from the search of his cellphone. The motion to suppress came on for hearing on 26 July 2021. The trial court heard arguments and considered the search warrant application, which included the affidavit of Detective R. L. Ackley.

¶ 3 The facts as alleged in Ackley's affidavit tended to show that, on the night of 13 September 2018, deputies from the Johnston County Sheriff's Department responded to a call regarding a suspicious vehicle and shooting investigation. Upon arriving in the area, a deputy was flagged down by Zachary McNeill, who stated that he was the victim of a home invasion. McNeill said that two unknown black men kicked in the door to his mobile home, fired multiple shots into his home, bound McNeill's hands, covered his face, and hit him in the head with a pistol. After

approximately one hour had passed, and once McNeill no longer heard the men's voices, McNeill fled out the front door of his home. McNeill reported that the men stole an Xbox, cash, clothing, and a distinct red and black Tourister suitcase that had been gifted to McNeill by his employer.

¶ 4 One of McNeill's neighbors heard gunshots coming from McNeill's home and drove to investigate the disturbance. The neighbor noticed an older-model, dark colored Lexus with chrome rims parked near McNeill's home, and he provided deputies with a description of the car and the driver. That same night, in a separate incident, Defendant was shot in the leg while at a Comfort Inn and then transported to the hospital in an older-model dark Lexus with chrome rims. Ackley was made aware of the similarity between the car observed near McNeill's home and the car that transported Defendant to the hospital, and he obtained a photo of the car that transported Defendant to the hospital. McNeill's neighbor reviewed the photo, and immediately identified the car as the same one he saw parked near McNeill's home. Ackley seized the car and contacted its registered owner, Latasha Surles. Surles consented to a search of her car, a 1998 black Lexus 400 with chrome rims. Law enforcement searched the Lexus, and they found a white LG cellphone and a red and black Tourister suitcase. Surles was later interviewed by law enforcement, wherein she stated that Defendant, who is her cousin, owns a white LG cellphone that was missing. She explained that she loaned her Lexus to a man named Elias Sanders on the night of the home invasion, but that she did not know what Sanders "used her vehicle for or who was with him."

¶ 5 Following the parties' arguments, the trial court entered a written order denying Defendant's motion to suppress. The case came on for trial on 6 October 2021, and Defendant again moved to reconsider the denial of the motion to suppress. The trial court denied Defendant's motion. The jury found Defendant guilty of first degree burglary, first degree kidnapping, robbery with a firearm, and of being a violent habitual felon. The trial court sentenced Defendant to the mandatory term of life in prison without parole. Defendant gave proper oral notice of appeal in open court.

II. Discussion

¶ 6 Defendant argues that the trial court improperly denied his motion to suppress the evidence collected from the cellphone because the search warrant was not supported by probable cause. Specifically, Defendant argues that the affidavit in support of the warrant failed to allege sufficient facts to show a nexus between Defendant's cellphone and the home invasion. We disagree.

¶ 7 This Court reviews a trial court's denial of a motion to suppress to determine "whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Wiles*, 270 N.C. App. 592, 595, 841 S.E.2d 321, 325 (2020) (citation omitted). Unchallenged findings of fact are binding on appeal. *State v. Fizovic*, 240 N.C. App. 448, 451, 770 S.E.2d 717, 720 (2015). A trial court is only required to make a finding of fact "when there is a material conflict in the evidence," *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015), and this Court may consider such undisputed evidence when determining whether the trial court's conclusions of law are supported. *State v. Wiggins*, 210 N.C. App. 128, 138, 707 S.E.2d 664, 672 (2011). We review the trial court's conclusions of law de novo. *Wiles*, 270 N.C. App. at 595, 841 S.E.2d at 325.

¶ 8 The Fourth Amendment provides: "The right of the people to be secure in their . . . effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. However, "what the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures." *State v. Ladd*, 246 N.C. App. 295, 301, 782 S.E.2d 397, 401 (2016) (quotation marks and citations omitted). "[A] search occurs when the government invades reasonable expectations of privacy to obtain information." *State v. Perry*, 243 N.C. App. 156, 167, 776 S.E.2d 528, 536 (2015) (citation omitted). In order to determine whether an individual possesses a reasonable expectation of privacy, this Court must consider whether (1) "the individual manifested a subjective expectation of privacy" and (2) "society is willing to recognize that expectation as reasonable." *Id.* (quotation marks and citation omitted).

¶ 9 The Supreme Court of the United States has acknowledged that substantial privacy concerns are implicated in the search of a cellphone, holding that law enforcement must first obtain a warrant in order to search the contents of a cellphone—even when a cellphone is seized in a search incident to a lawful arrest. *Riley v. California*, 573 U.S. 373 (2014); *see Ladd*, 246 N.C. App. at 302, 782 S.E.2d at 402 (holding that officers "must generally secure a warrant before searching a cell phone seized incident to arrest" as "serious privacy concerns arise in the context of searching digital data"). A valid search warrant must be based on probable cause, and our courts examine the totality of the circumstances to determine whether such probable cause exists. *State v. Worley*, 254 N.C. App. 572, 576, 803 S.E.2d 412, 416 (2017). Probable cause means

that our courts "must make a practical, common-sense decision based on the totality of the circumstances, whether there is a fair probability that evidence will be found in the place to be searched." *Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416 (quotation marks, brackets, and citations omitted). This Court has held that affidavits "must establish a nexus between the objects sought and the place to be searched." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citations omitted).

¶ 10 Here, the trial court made the following relevant, unchallenged findings of fact to support the denial of Defendant's motion to suppress:

> 8. On 13 September 2019, officers responded to a suspicious vehicle complaint on Pine Level Road in Smithfield, North Carolina.
>
> 9. During the investigation into the suspicious vehicle, Zachary McNeil[l] advised officers of a home invasion.
>
> 10. Mr. McNeil[l] advised that two unknown black males entered his house, tied him up, ransacked his house, and stole items from his home.
>
> 11. The stolen items included one thousand dollars, men's clothing, and a red and black Tourister suitcase.
>
> 12. An independent witness advised officers that he saw an older modeled, dark in color Lexus with chrome rims leaving the scene of the home invasion.
>
> 13. Later that morning, a black male was brought to the emergency room of Johnston Memorial Hospital with a gunshot wound. The black male was brought to the hospital in a dark in color Lexus with chrome rims.
>
> 14. The officers' investigation led them to a 1998 black Lexus 400 with the license plate number EJT-1456.
>
> 15. A picture of the Lexus was taken and shown to the witness who saw the car, who identified the car as the car he saw leaving the scene of the home invasion.
>
> 16. Detective Ackley then seized the car and interviewed the owner.
>
> 17. The owner of the Lexus provided Detective Ackley consent to search the car.

> 18. While searching the car, Detective Ackley found a white in color LG phone and a red and black Tourister suitcase.
>
> . . . .
>
> 20. The search warrant affidavit provides considerable information regarding the Affiant's knowledge of how evidence can be stored and hidden on cell phones.
>
> 21. The Affiant listed the item to be searched as the LG white in color cell phone found in the 1998 black Lexus.

¶ 11 These unchallenged findings of fact support the trial court's conclusion of law that the search warrant was based on probable cause because these findings show that: McNeill reported that he was the victim of a home invasion and that, among other things, a distinct red and black Tourister suitcase was stolen from his home; a neighbor provided eyewitness testimony that he saw an older-model, dark Lexus with chrome rims near McNeill's home at the time of the invasion; that same neighbor later positively identified the 1998 black Lexus 400 with chrome rims as the same vehicle that left the scene of the home invasion; Defendant was taken to the hospital in a dark in color Lexus with chrome rims; and the white LG cellphone was discovered in the Lexus, along with the specific red and black Tourister suitcase that was taken from McNeill's home. These findings show the requisite nexus between Defendant's white LG cellphone and the home invasion. *See McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357.

¶ 12 Moreover, the trial court's conclusion of law is further supported by the undisputed facts established by Surles' interview with law enforcement. *Wiggins*, 210 N.C. App. at 138, 707 S.E.2d at 672. Surles explained that: she was the owner of the Lexus; she loaned the car to Elias Sanders during the morning hours of 13 September 2018; and Defendant was her cousin and the owner of a white LG cellphone that was missing as of the time of the interview. After Surles provided consent to search the car, law enforcement found both the white LG cellphone and the distinct red and black Tourister suitcase in the car. Under the totality of the circumstances, these facts show a nexus between Defendant's white LG cellphone and the home invasion. *Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416; *McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357.

III. Conclusion

¶ 13 As the evidence here supports the findings of fact, and the findings of fact support the trial court's conclusion of law that "[t]he search warrant of the seized cell phone was based on sufficient probable cause," we affirm the trial court's denial of Defendant's motion to suppress. *Wiles*, 270 N.C. App. at 595, 841 S.E.2d at 325.

AFFIRMED.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
DAVID JEROME HESTER, DEFENDANT

No. COA22-227

Filed 29 December 2022

1. Appeal and Error—petition for writ of certiorari—record on appeal—failure to include judgment

Defendant's petition for a writ of certiorari challenging the trial court's order of attorney fees, which defendant alleged was issued months after his criminal trial and without notice or the opportunity to be heard, was denied because defendant failed to include the attorney fees judgment in the record on appeal.

2. Constitutional Law—effective assistance of counsel—implied concession of guilt—lesser-included offenses

In defendant's prosecution for crimes arising from a series of break-ins at a nonoperational power plant—felony breaking or entering, felony larceny after breaking or entering, felony possession of stolen goods, and respective lesser-included offenses—defense counsel's concession during closing argument that defendant was at the plant ("caught") without permission and possessed the plant's stolen keys (which "don't just grow from the ground") constituted an implied admission of guilt as to two lesser-included offenses and required defendant's consent. Because there was no evidence in the record that defendant consented to counsel's admission of guilt, the case was remanded to the trial court for an evidentiary hearing on the matter.

STATE v. HESTER

[287 N.C. App. 282, 2022-NCCOA-906]

Appeal by Defendant from judgments entered 11 June 2021 by Judge Michael A. Stone in Duplin County Superior Court. Heard in the Court of Appeals 18 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

Christopher J. Heaney for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant David Jerome Hester appeals from judgments entered upon jury verdicts finding him guilty of felony breaking or entering, felony larceny, and felony possession of stolen goods following a series of break-ins at a nonoperational power plant (the "plant") in Duplin County, North Carolina. Defendant contends his trial counsel violated his constitutional rights in three distinct ways: (1) conceding Defendant's guilt without his consent; (2) prejudicially indicating to the jury he did not believe Defendant's testimony maintaining his innocence; and (3) after reaching an "absolute impasse" as to tactical decisions, disregarding Defendant's directives. After careful review, we remand to the trial court for an evidentiary hearing to determine whether Defendant knowingly consented to his counsel's admissions of guilt and dismiss Defendant's remaining claims without prejudice to filing a motion for appropriate relief below.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 The evidence of record discloses the following:

¶ 3 In the early morning of 13 December 2017, police found Defendant with his girlfriend, April Crisp, and his acquaintance, Jamie Wiggs, inside a warehouse within the plant. Although the plant was not in operation, the warehouse contained various industrial tools and equipment.

¶ 4 Michael Houston, a former employee familiar with the plant and its contents, visited the plant two or three times a week to ensure its security. During a visit on 6 November 2017, he found evidence indicating someone had broken into the plant and the warehouse: the perimeter fence had been cut, the office door had been pried open, several rooms were in disarray, and numerous items were missing including computers, radios, cell phones, and keys to areas of the plant. Mr. Houston reported this break-in and theft to his supervisors and police.

¶ 5 A few weeks later, Mr. Houston reported another plant break-in. A forklift fuel tank, pipe threaders, and other equipment were missing, and he found carts loaded with other items ready to be hauled away. After this alleged break-in, Mr. Houston and one of the plant owners installed deer, security cameras inside the warehouse to capture any movement. The cameras were programmed to send a text message along with photos to the plant owner's cell phone when movement triggered the cameras.

¶ 6 The plant owner received a text early in the morning of 13 December 2017, notifying him that the cameras had captured movement, and the photos revealed people inside the warehouse. He called the Duplin County Sheriff's Office, and around 1:25 a.m., Patrol Sergeant Kennedy and Deputy Raynor were dispatched to the plant along with State Trooper Edwards. The officers found Defendant, Ms. Crisp, and Mr. Wiggs inside the warehouse. They also discovered bolt cutters outside the warehouse and, on a chain securing the front gate, a blue lock, which did not belong to the power plant.

¶ 7 An investigator and detective from the Duplin County Sheriff's Office obtained warrants to search the two trucks parked at the plant that night, one of which was Defendant's white 2004 Dodge Ram pickup. In Defendant's truck bed, the detectives found a tap and die set, grinding blades, welding leads, machinery parts, pressure gauges, first aid supplies, and red bolt cutters. They also found multiple pairs of work gloves and an assortment of keys—labeled, for example, "small gate," fuel yard," "storage building," and "front gate," while other keys had "danger signs" attached to them—in the cab of the truck.

¶ 8 A grand jury indicted Defendant on three counts each of felony breaking and entering, felony larceny after breaking and entering, and felony possession of stolen goods as well as ancillary counts of habitual felon status and habitual breaking or entering for the alleged break-ins at the plant on 5-6 November, 10-11 November, and 12-13 December 2017. Defendant pleaded not guilty to all charges.

¶ 9 Defendant's case came on for trial on 7 June 2021. Mr. Houston testified that: (1) the tagged keys found in Defendant's truck belonged to the plant; (2) the gloves found in Defendant's truck were the exact type the plant used for welding; and (3) other items found in Defendant's truck were the type of items used at the plant. However, neither the property manager nor Mr. Houston could produce an updated, itemized list of the property in the plant, and some items Mr. Houston described as missing—a large toolbox, a pipe threader, calibration tools, handheld

radios, a battery charger, and computer hard drives—were not found in Defendant's Dodge pickup truck.

¶ 10 Throughout the trial, defense counsel had ongoing trouble with his hearing. After the State rested, Defendant's counsel requested a *Harbinger* inquiry because Defendant had decided to testify in his defense, and the trial court engaged with Defendant about his decision. Before testifying, Defendant told the trial court that his counsel "can't hear well evidently" and that his counsel did not ask several of the questions of the witnesses which Defendant had requested. The trial court responded, "That's fine. Thank you, sir," but did not investigate further.

¶ 11 Defendant testified and maintained his innocence, explaining that on the night he and Ms. Crisp were found at the plant, he coasted into the property because his truck was having mechanical problems. He could not restart his truck because the battery was dead, so he called Mr. Wiggs to help jump-start his car. Once Mr. Wiggs arrived, the three entered the plant looking for jumper cables. At some point, Ms. Crisp apparently dropped her ring under a forklift, so Mr. Wiggs and Defendant moved the forklift to look for it. As a commercial truck driver and part-time welder, Defendant kept tools in his truck, including sets of keys, a first aid kit, and graphite metal grinding wheels. He testified he never placed any of the plant's property into his truck and had no knowledge of how the plant keys wound up there.

¶ 12 Defense counsel opened his closing argument addressing the jury, "Let me level with you. I agree it's not good to be caught in the act while being in somebody else's building without consent." Throughout his argument, defense counsel repeatedly characterized Defendant as being "caught" and "in the act."

¶ 13 Before the case was submitted to the jury, the State dismissed the two counts of felony possession associated with the 5-6 and 10-11 November break-ins. The jury found Defendant guilty of one count each of felony breaking or entering, felony larceny after breaking and entering, and felony possession of stolen goods associated with the 12-13 December plant break-in but not guilty of the same charges associated with the other two break-ins on 5-6 and 10-11 November. Defendant entered an *Alford* plea to habitual felon status. The State dismissed the habitual breaking and entering ancillary indictments. The trial court arrested judgment on the felony possession of stolen goods charge and sentenced Defendant to 97 to 129 months in prison. Defendant gave oral notice of appeal from the criminal judgments.

II. ANALYSIS

A. Attorney's Fees Entered against Defendant

¶ 14 **[1]** Defendant filed a petition for writ of *certiorari* with this Court on 20 May 2022, challenging the attorney's fees entered after Defendant gave oral notice of appeal from the criminal judgments and months after trial because the trial court did not provide Defendant notice or the opportunity to be heard on the issue of attorney's fees as required by *State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018).

¶ 15 Although the trial court entered criminal judgments against Defendant on 11 June 2021, the trial court did not personally address attorney's fees with Defendant at trial and did not enter an order for attorney's fees at that time. Instead, the trial court apparently entered judgment for attorney's fees over three months later, on 20 September 2021. But because Defendant did not include the attorney's fees judgment in the record on appeal and did not supplement the record with the judgment pursuant to our Rules of Appellate Procedure, N.C. R. App. P. 9(d), 11(c) (2022), we cannot review the judgment, and we deny Defendant's petition for review of this issue.

B. Defense Counsel Conceded Defendant's Guilt

¶ 16 **[2]** Defendant offers three separate arguments contending his counsel's actions at trial violated his constitutional rights. We review each of Defendant's alleged violations of a constitutional right *de novo*. *State v. Garner*, 252 N.C. App. 393, 400, 798 S.E.2d 755, 760 (2017). Upon *de novo* review, we consider the matter anew and freely substitute our own judgment for that of the trial court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

1. Implied Admissions of Lesser-Included Offenses

¶ 17 Defendant first argues that his counsel conceded his guilt without his consent by referring to Defendant as being "caught" or "in the act" five times throughout the closing argument in violation of *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). In particular, Defendant contends his counsel's admission that Defendant possessed the stolen keys from the plant and was inside the warehouse without consent directly contradicted Defendant's testimony and amounted to a concession of Defendant's guilt on all charges associated with the 12-13 December plant break-ins, or, at the very least, the lesser-included offenses of misdemeanor breaking or entering and misdemeanor possession of stolen goods. We conclude that, by conceding Defendant was at the plant without permission and possessed the plant's stolen keys, defense counsel

admitted Defendant's guilt as to one count of misdemeanor breaking or entering and one count of misdemeanor possession of stolen goods. Such admissions by counsel required Defendant's consent.

¶ 18 "A criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant's guilt to the jury without his prior consent." *State v. McAllister*, 375 N.C. 455, 456, 847 S.E.2d 711, 712 (2020) (citing *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08). A constitutional violation exists whether the admission is express or implied. *Id.* at 475, 847 S.E.2d at 723. "Admitting a fact is not equivalent to an admission of guilt." *Id.* at 469, 847 S.E.2d at 720 (citation omitted). And "defense counsel can admit an element of a charge without triggering a *Harbison* violation." *State v. Arnette*, 276 N.C. App. 106, 2021-NCCOA-42, ¶¶ 42, 45. Requesting that the jury find a defendant not guilty cannot serve to negate trial counsel's previous admissions. *See State v. Cholon*, 284 N.C. App. 152, 2022-NCCOA-415, ¶ 26.

¶ 19 Unlike other types of ineffective assistance of counsel claims reviewed pursuant to *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), a defendant whose counsel commits *Harbison* error is not required to demonstrate prejudice to obtain relief. *Harbison*, 315 N.C. at 179-80, 337 S.E.2d at 507 ("[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed."). No showing of prejudice is required, in large part, because a concession without consent violates a defendant's "absolute right to plead not guilty—a decision that must be made knowingly and voluntarily by the defendant himself and only after he is made aware of the attendant consequences of doing so." *McAllister*, 375 N.C. at 463, 847 S.E.2d at 716 (citing *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507).

¶ 20 Recently, in *State v. McAllister*, our Supreme Court applied *Harbison* to a context in which defense counsel *impliedly* admitted the defendant's guilt during his closing argument. 375 N.C. at 473, 847 S.E.2d at 722. The defendant in *McAllister* was charged with four crimes—assault on a female, rape, sexual offense, and assault by strangulation. *Id.* at 472-73, 847 S.E.2d at 722. During closing argument, counsel stated, "You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did." *Id.* at 473, 847 S.E.2d at 722. Counsel further asserted that the defendant was "being honest" in his videotaped interview with law enforcement when he admitted to smacking, grabbing, backhanding, and pushing the victim. *Id.* at 473-74, 847 S.E.2d at 722-23. Counsel did not address the assault on a female charge during closing, but he repeatedly mentioned the other three, more severe charges. *Id.* at

474, 847 S.E.2d at 722-23. Finally, defense counsel asked the jury to find the defendant not guilty on the three more severe charges yet made no such request for the charge of assault on a female. *Id.* The Court held defense counsel impliedly admitted defendant's guilt on this count, resulting in *Harbison* error, by: (1) vouching for the truth of the defendant's interview statements; (2) interjecting his personal opinion to imply the defendant lacked justification in his use of force towards the victim; and (3) omitting the charge of assault on a female from the list of charges for which he asked the jury to find the defendant not guilty. *Id.*

¶ 21 Here, Defendant was charged with three separate instances of three crimes—felony breaking or entering, felony larceny after breaking or entering, and felony possession of stolen goods—and respective lesser-included offenses. Felonious breaking or entering has three elements: that a defendant (1) breaks or enters; (2) a building; (3) with the intent to commit a felony or larceny therein. *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992); N.C. Gen. Stat. § 14-54(a) (2021). Non-felonious breaking or entering differs in that it need not be done with the intent to commit a felony so long as the breaking or entering was wrongful, without any claim of right. § 14-54(b). Felony larceny after breaking and entering has four elements: that a defendant (1) takes and carries away another person's property; (2) without that person's consent; (3) from a building after breaking and entering; and (4) knowing that he was not entitled to deprive the victim of the item's use. *State v. Redman*, 224 N.C. App. 363, 365-66, 736 S.E.2d 545, 548 (2012); N.C. Gen. Stat. § 14-72(b)(2) (2021). Felony possession of stolen goods also has four elements: that a defendant (1) possessed personal property; (2) which was stolen pursuant to a breaking or entering; (3) knowing or having reasonable grounds to believe the property was stolen pursuant to a breaking or entering; and (4) acted with a dishonest purpose. *State v. McQueen*, 165 N.C. App. 454, 459, 598 S.E.2d 672, 676 (2004); N.C. Gen. Stat. § 14-71.1 (2021). Misdemeanor possession of stolen goods differs from felonious possession only in that the State need not prove that the property was stolen pursuant to a breaking or entering. *See* § 14-72(a).

¶ 22 Defense counsel described Defendant as "caught" or "in the act" several times during closing argument:

> Let me level with you. I agree *it's not good to be caught in the act* while being in somebody else's building *without consent*.
>
> It ain't good to identify yourself to then *er caught on camera* while *you* are in somebody else's building *without consent*.

. . . .

> And that happened because they were *caught in the act* and they searched the trucks. One of them being Mr. Hester's truck, a 2004 Dodge Ram.
>
> . . . .
>
> And when it comes to the December, the last incident where *he was in the act*, it was in the warehouse, they're bringing three charges; felony breaking and entering, felony larceny after breaking and entering, and felony possession of stolen goods.
>
> . . . .
>
> I agree with you, *it looks pretty bad* for the December 12th, 13th offense, when you are in a warehouse *caught*, bundled up in the wintertime, and identify yourself on camera. That *looks pretty bad*. But does that prove—does that—anything else?

(Emphasis added). Then defense counsel addressed the "elephant in the room, the keys," which "appear[ed] to belong to the power plant," quipping "keys don't grow from the ground and they don't materialize as in Star Trek." In closing, defense counsel urged the jurors not to "shut [their] eyes to what [they] saw" but ultimately requested a not guilty verdict on all counts.

¶ 23 Coloring defense counsel's statements as an acknowledgement of the undisputed fact that Defendant was in the warehouse at the plant on the night of 13 December, the State argues defense counsel did not admit Defendant's guilt of the charged offenses, expressly or impliedly, during closing argument. That Defendant was inside the warehouse on 12-13 December was not disputed at trial; Defendant admitted he entered the plant warehouse, and police found him there. But Defendant never conceded in his testimony that he was there without consent. Beyond Defendant's presence in the plant, defense counsel's repeated characterization of Defendant as "caught" and "in the act" at the plant implied he was there unlawfully, without consent of its owners. Defendant also denied putting any plant property in his truck and testified he "didn't know" how the keys got there. He never admitted he had actual or constructive possession of the keys. Yet, defense counsel referred to the keys as the "elephant in the room," which "don't grow from the ground" and "don't materialize as in Star Trek" and conceded the keys found in Defendant's truck "appear[ed] to belong to the power plant."

¶ 24 As in *McAllister*, defense counsel in this case undermined Defendant's credibility by casting doubt on his testimony at trial, interjected his personal opinion that Defendant had been caught "in the act," and made implied admissions of Defendant's guilt as to the lesser-included crimes of misdemeanor breaking or entering and misdemeanor possession of stolen goods. *See McAllister*, 375 N.C. at 474, 847 S.E.2d at 722-23; *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004) ("For us to conclude that a defendant permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that defendant *knew* his counsel were going to make such a concession. Because the record does not indicate defendant *knew* his attorney was going to concede his guilt to second-degree murder, we must conclude defendant's attorney made this concession without defendant's consent, in violation of *Harbison*." (emphasis in original)). *Cf. State v. Gainey*, 355 N.C. 73, 92-93, 558 S.E.2d 463, 476 (2002) (holding no concession of guilt because of "the consistent theory of the defense that defendant was not guilty"); *State v. Greene*, 332 N.C. 565, 572, 422 S.E.2d 730, 734 (1992) (holding no admission of guilt where "[t]he clear and unequivocal argument was that the defendant was innocent of all charges"). And like counsel in *McAllister*, defense counsel only challenged the State's evidence for the charges associated with the first two alleged break-ins, not the third, for which he was convicted. *See McAllister*, 375 N.C. at 474, 847 S.E.2d at 722-23.

¶ 25 As in *Harbison* and *Matthews*, defense counsel's admissions to the lesser-included crimes of misdemeanor breaking or entering and misdemeanor possession of stolen goods amount to *Harbison* error. *See Harbison*, 315 N.C. at 178-81, 337 S.E.2d at 506-08 (remanding for a new trial where defense counsel explicitly admitted the defendant's guilt during closing argument and requested the jury convict him of the lesser crime without the defendant's consent); *Matthews*, 358 N.C. at 109, 591 S.E.2d at 540 ("*Harbison* requires that the decision to concede guilt to a lesser included crime 'be made exclusively by the defendant.' " (quoting *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507)). Defense counsel's ultimate request to the jury for a not guilty verdict on all counts cannot negate his admissions of Defendant's guilt for those misdemeanor crimes. *See Cholon*, ¶ 26.

¶ 26 Recognizing the *McAllister* Court's admonition that a "finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence," *McAllister*, 375 N.C. at 476, 847 S.E.2d at 724, we conclude this case presents such an occurrence. Defense counsel's comments about the keys and Defendant's presence at the warehouse without

consent constitute the "functional equivalent of an outright admission of the defendant's guilt as to" the crimes of misdemeanor breaking or entering and misdemeanor possession of stolen goods. *Id.* at 475, 847 S.E.2d at 723 (citation omitted). While perhaps a valid trial strategy, such admissions required Defendant's consent. *Id.*, 847 S.E.2d at 723-24; *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507 ("This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands.").

2. No Record Evidence Defendant Consented to Admissions

¶ 27 Having determined defense counsel implicitly admitted Defendant's guilt to two misdemeanor crimes, we must next consider whether Defendant consented to the admissions. After the State rested, defense counsel indicated to the trial court that the defense would "most likely not" present any evidence. However, following a break for lunch, defense counsel informed the trial court that his client wished to testify and asked the trial court "to engage in the *Harbinger* (sic) inquiry to make sure that the defendant understands the risks he faces in choosing to testify." The trial court distinguished between *Harbinger* and *Harbison* and then apprised Defendant of his right to remain silent and not *testify*. Before he testified, Defendant expressed concern that his counsel had difficulty with his hearing and failed to ask witnesses questions he requested. The trial court responded, "That's fine. Thank you, sir" but did not investigate further. Notwithstanding this exchange about Defendant's choice to testify, neither defense counsel nor the trial court engaged with Defendant about his right to consent to any admission by his counsel pursuant to *Harbison*, though Defendant maintained his innocence throughout trial. *See Harbison*, 315 N.C. at 177, 180, 337 S.E.2d at 506-07 (holding prejudicial error where counsel requested that the jury find the defendant guilty of manslaughter instead of first-degree murder but "the defendant steadfastly maintained that he acted in self-defense").

¶ 28 "[A]n on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument," but such a colloquy is not the "sole measurement of consent." *State v. Thompson*, 359 N.C. 77, 120, 604 S.E.2d 850, 879 (2004) (citation omitted). Our Supreme Court has "made clear that the absence of any indication in the record of defendant's consent to his counsel's admissions will not—by itself—lead us to 'presume defendant's lack of consent.' " *McAllister*, 375 N.C. at 477, 847 S.E.2d at 725 (citations omitted).

¶ 29 Therefore, we remand to the trial court for an evidentiary hearing as soon as practicable for the sole purpose of determining whether Defendant knowingly consented in advance of his counsel's admissions of guilt to misdemeanor breaking or entering and misdemeanor possession of stolen goods. *See id.*; *Cholon*, ¶¶ 28-29 (remanding for an evidentiary hearing to determine whether the defendant knowingly consented to his counsel's admissions). On remand, the trial court shall make findings of fact and conclusions of law and enter an order. *See McAllister*, 375 N.C. at 477, 847 S.E.2d at 725.

C. Defendant's Remaining Claims

¶ 30 In the event the trial court determines Defendant consented to his counsel's admissions on remand, and thus no *Harbison* error exists, Defendant also argues: (1) for the same reasons outlined above, defense counsel violated his Sixth Amendment right to counsel by prejudicially indicating to the jurors he did not believe Defendant was innocent, contradicting Defendant's testimony, and undermining Defendant's credibility; and (2) after Defendant and his counsel reached an "absolute impasse" about tactical decisions, defense counsel disregarded, intentionally or because of a hearing impairment, his directives about examining witnesses. These claims may be rendered moot by the trial court's determination of the *Harbison* issue on remand, and in any event cannot be decided on the record before us. We therefore dismiss Defendant's remaining claims without prejudice to him filing a motion for appropriate relief below. *See State v. Floyd*, 369 N.C. 329, 341, 794 S.E.2d 460, 468 (2016); *State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985).

III. CONCLUSION

¶ 31 For the reasons set forth above, we remand to the trial court for an evidentiary hearing regarding Defendant's *Harbison* claim, and we dismiss Defendant's remaining claims without prejudice to Defendant filing a motion for appropriate relief.

REMANDED IN PART; DISMISSED IN PART.

Judges COLLINS and JACKSON concur.

STATE v. McVAY

[287 N.C. App. 293, 2022-NCCOA-907]

STATE OF NORTH CAROLINA
v.
QUENCY ANDRE McVAY, DEFENDANT

No. COA22-241

Filed 29 December 2022

1. Motor Vehicles—speeding to elude arrest—lawful performance of officer's duties—motion to dismiss

In a prosecution for felonious speeding to elude arrest, the State presented sufficient evidence that a police officer was lawfully performing his duties—when attempting to stop defendant's vehicle—to survive defendant's motion to dismiss. The officer was lawfully authorized to pursue and stop defendant when he witnessed defendant fail to stop at a stop sign and when defendant subsequently began driving recklessly, and the indictment's allegation that the officer was attempting to arrest defendant for discharging a weapon into an occupied vehicle was mere surplusage that must be disregarded.

2. Appeal and Error—preservation of issues—special jury instruction—failure to submit request in writing

In a prosecution for felonious speeding to elude arrest, where defense counsel orally requested that the jury be instructed that the specific duty the officer was performing was to arrest defendant for discharging a firearm into an occupied vehicle, the request was for a deviation from the pattern jury instruction and therefore qualified as a request for a special instruction. Because the request for a special instruction was made orally rather than submitted in writing, the issue was not preserved for appellate review. Further, defendant waived plain error review by failing to allege plain error.

Appeal by Defendant from judgment entered 15 July 2021 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

MURPHY, Judge.

¶ 1 Defendant Quency Andre McVay argues the trial court erred by denying his motion to dismiss for insufficiency of evidence and by denying Defendant's jury instruction request. As we explain in further detail below, the trial court did not err in denying Defendant's motion to dismiss, and Defendant's jury instruction request was not preserved for our review.

BACKGROUND

¶ 2 On 21 November 2016, Officer Calvin Davis of the Charlotte-Mecklenburg Police Department was parked at an intersection in his patrol car and received a call from a dispatcher to be on the lookout for a "[w]hite sedan . . . possibly a Honda" driven by a black male with a black female passenger because the driver had shot into another vehicle. This information was based upon a prior call to the 911 operator. The caller indicated "a young African American" driving a "white or a white silver Nissan" had shot at his car. Shortly after receiving the dispatch call, at about 10:00 p.m., Davis observed a "white sedan moving at a high rate of speed" drive through a stop sign and pass his parked vehicle.

¶ 3 Davis began to follow the white sedan, which continued at a high rate of speed, and saw it drive through several more stop signs. At this point, Davis initiated his blue lights and siren, but the white sedan continued to drive at a high rate of speed and Davis gave chase. Two more officers joined the pursuit, and they chased the white sedan for approximately ten minutes through residential areas at speeds ranging from 55 to 90 miles per hour. The white sedan eventually was blocked by, and stopped in front of, a stopped train at a railroad crossing. Defendant showed his hands out the window of the sedan and yelled that "the only reason [he was] running is because [he is] wanted by the U.S. Marshals." Defendant and the female passenger, Jami Landis, exited the vehicle and were arrested.

¶ 4 On 5 December 2016, a Mecklenburg County Grand Jury indicted Defendant for felonious speeding to elude arrest, discharging a firearm into a vehicle in operation, and possession of a firearm by a felon. The indictment stated that Defendant was "fleeing and attempting to elude a law enforcement officer" and Davis was "in the lawful performance of [his] duties, arresting the suspect for [an] outstanding warrant and discharging [a] weapon into an occupied vehicle." On 10 April 2017, Defendant was also indicted for attaining habitual felon status. The separate indictments were joined for trial at the 5 March 2018 Criminal

Session of Mecklenburg County Superior Court, the Honorable Lisa C. Bell presiding. At trial, Defendant moved to dismiss the charges for insufficient evidence, arguing that there was no evidence to suggest that the officers were attempting to arrest Defendant for his outstanding warrants or properly discharging their duties, nor evidence that Defendant was found in possession of a firearm. The trial court granted Defendant's motion as to the outstanding warrants and denied the rest of the motion.

¶ 5 At the charge conference, Defense Counsel orally requested that the jury be instructed that the specific duty that Davis was performing was to arrest Defendant for discharging a firearm into an occupied vehicle. The State objected and requested that the trial court use only the pattern jury instruction verbiage. The trial court sustained the State's objection and instructed the jury that, to satisfy the duty element of the offense, it must find "[D]efendant was fleeing and/or attempting to elude law enforcement officers who were in their lawful performance of their duty." The jury found Defendant guilty of felonious speeding to elude arrest and attaining habitual felon status.

¶ 6 Defendant was not present for part of the trial beginning on 8 March 2018 and was not present for the verdict. As a result, the trial court entered a prayer for judgment continued. On 29 July 2019, in accordance with N.C.G.S. § 15A-932(a)(1), the State dismissed the charges against Defendant, with leave to reinstate them at a later time, because the prosecutor believed he could not be readily found. Defendant was later located, and, on or about 28 June 2021, the charges were reinstated in accordance with N.C.G.S. § 15A-932(d). N.C.G.S. § 15A-932(d) (2021). On 15 July 2021, judgment was entered on the jury verdict and the trial court sentenced Defendant to an active term of imprisonment of 90 to 120 months. Defendant timely appeals.

ANALYSIS

¶ 7 On appeal, Defendant argues (A) "the trial court erred by denying the motion to dismiss when there was insufficient evidence that Officer Davis was lawfully performing his duties when attempting to stop [Defendant]"; and (B) "the trial court erred by denying [Defendant's] request to instruct the jury on the duty the officer was performing at the time he attempted to stop [Defendant]."

A. Defendant's Motion to Dismiss

¶ 8 **[1]** On appeal, Defendant argues that, because the arrest was warrantless and not supported by probable cause to arrest based on the surviving theory in the indictment, Davis was not lawfully performing his

duties. Specifically, Defendant contends that, per the language of the indictment, Davis arrested Defendant for discharging a weapon into an occupied vehicle. Defendant cites *State v. Thompson*, 281 N.C. App. 291, 2022-NCCOA-6, ¶ 19, to assert that whether the officer was lawfully performing his duties depends on what the State alleges in the indictment. As Davis received only a generic description of the white sedan and its drivers and identified neither Defendant nor Landis before pursuing them, Defendant argues the facts and circumstances were not such that would "warrant a prudent man" to believe Defendant had shot into an occupied vehicle. Without this requisite belief, Davis did not have probable cause to conduct the warrantless arrest and, in turn, was not lawfully performing his duties when Defendant failed to stop his vehicle.

¶ 9 The State argues that the indictment's allegation of Defendant discharging a weapon goes beyond the essential elements of the crime charged (speeding to elude arrest), and therefore may be treated as surplusage immaterial to the question of guilt. Citing *State v. Noel*, 202 N.C. App. 715, *disc. rev. denied*, 364 N.C. 246 (2010), the State contends that it was not required to prove Davis was "arresting [Defendant] for . . . discharging [a] weapon into an occupied vehicle"; rather, the State was required only to present evidence that "tended to show Officer Davis had been performing *some* lawful duty when [Defendant] fled him." *See Noel*, 202 N.C. App. at 720-21. The State asserts that Davis was lawfully authorized to pursue Defendant and issue a citation when he witnessed Defendant commit a traffic infraction and that the authority "escalated to an imperative" when Defendant began to drive through the city at dangerous speeds. The State contends that the trial court's denial of the motion to dismiss was proper.

¶ 10 "The denial of a motion to dismiss for insufficient evidence is a question of law, . . . which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 522 (2007) (citing *State v. Vause*, 328 N.C. 231, 236 (1991); *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 478 (2005)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Shepard*, 172 N.C. App. at 478 (citation omitted). "Taking the evidence in the light most favorable to the State, if the [R]ecord here discloses substantial evidence of all material elements constituting the offense for which the accused was tried, then this court must affirm the trial court's ruling on the motion." *State v. Stephens*, 244 N.C. 380, 383 (1956).

¶ 11 "To survive a motion to dismiss, the State must offer substantial evidence of each essential element of the offense and substantial evidence that [the] defendant is the perpetrator." *State v. Lee*, 348 N.C. 474, 488

(1998) (citation omitted). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108 (1986) (citations omitted). Under N.C.G.S. § 20-141.5(a), "[t]he essential elements of . . . speeding to elude arrest . . . are: (1) operating a motor vehicle (2) on a street, highway, or public vehicular area (3) while fleeing or attempting to elude a law enforcement officer (4) who is in the lawful performance of his duties." *State v. Mulder*, 233 N.C. App. 82, 89 (2014) (citing N.C.G.S. § 20-141.5(a)).

¶ 12 As Defendant's arrest was warrantless, Defendant is correct in asserting that the arrest must have been supported by probable cause. Under N.C.G.S. § 15A-401(b)(1), "[a]n officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense . . . in the officer's presence." N.C.G.S. § 15A-401(b)(1) (2021). "An arrest is *constitutionally* valid whenever there exists probable cause to make it." *State v. Chadwick*, 149 N.C. App. 200, 202, *disc. rev. denied*, 355 N.C. 752 (2002) (citation and marks omitted). " 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a [prudent] man in believing the accused to be guilty[.]' " *State v. Zuniga*, 312 N.C. 251, 259 (1984) (quoting *State v. Shore*, 285 N.C. 328, 335 (1974)). In *Zuniga*, our Supreme Court provided, "[t]o establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." *Zuniga*, 312 N.C. at 259 (citation and marks omitted); *see also Thompson*, 2022-NCCOA-6 at ¶ 17 (citation and marks omitted) ("[P]robable cause does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required. A probability of illegal activity, rather than a prima facie showing of [it], is sufficient."). However, Defendant's next assertion—that Davis needed and lacked the indicted theory of probable cause—is not persuasive.

¶ 13 When an indictment includes the essential elements of a crime being charged, those "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Birdsong*, 325 N.C. 418, 422 (1989) (citation and marks omitted). In *State v. Teel*, the defendant was arrested for and convicted of fleeing to elude arrest and reckless driving. *State v. Teel*, 180 N.C. App. 446, 447 (2006). In that case, the indictment did not specifically describe the lawful duties the officers were performing at the time of the defendant's flight. *Id.* at 448. We considered whether the trial court erred when it

"denied [the] defendant's motion to dismiss the charge of [] fleeing to elude arrest because the indictment did not describe the lawful duties the officers were performing at the time of [the] defendant's flight." *Id.* at 447-48. In holding that the trial court did not err, we provided:

> [T]he offense of fleeing to elude arrest is not dependent upon the *specific* duty the officer was performing at the time of the arrest. Therefore, [it] is not an essential element of the offense of fleeing to elude arrest, as defined in [N.C.G.S.] § 20-141.5, and [is] not required to be set out in the indictment.

Id. at 449.

¶ 14 The facts of *Teel* parallel the present case. Defendant was arrested after fleeing to elude arrest and was indicted for that offense. The indictment set out that Davis arrested Defendant for "discharging [a] weapon into an occupied vehicle"; but, per *Teel*, the specific duty that Davis was performing at the time of arrest was not an essential element of fleeing to elude arrest and was not required to be stated in the indictment. *Id.* The State is correct that "specification of the officer's duty is surplusage that is immaterial to the question of guilt" and therefore "provides no basis for reversing [Defendant's] conviction." *State v. Rankin*, 371 N.C. 885, 889 (2018).

¶ 15 Per N.C.G.S. § 20-518(b)(1), it is unlawful for a driver to fail to fully stop at an intersection with a stop sign. *See* N.C.G.S. § 20-518(b)(1) (2021). Davis witnessed Defendant drive through such a juncture without stopping. Under the facts and circumstances known to Davis, he had objective probable cause to believe Defendant had committed a traffic infraction. It was within his purview to follow and stop Defendant and issue a citation. *See State v. Philips*, 149 N.C. App. 310, 316, *appeal dismissed*, 355 N.C. 499 (2002) (quoting N.C.G.S. § 15A-302(b)) ("[An] officer 'may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction.' "). Moreover, per N.C.G.S. §§ 20-140(b) and (d), one is guilty of reckless driving if he drives a vehicle in such a way that likely endangers other people or property. *See* N.C.G.S. §§ 20-140(b), (d) (2021). Davis pursued Defendant, who drove through stop signs at speeds of up to 90 miles per hour in residential zones, likely endangering other persons. Considering the facts and circumstances known to Davis, we conclude that he had probable cause to believe Defendant was committing a crime—specifically, reckless driving—and it was within Davis's authority to make a warrantless arrest. *See Philips*, 149 N.C. App. at 316 (quoting N.C.G.S. § 15A-401(b)(1) (1999)).

¶ 16 The State presented substantial evidence that Davis had probable cause to arrest Defendant for fleeing to evade arrest and was engaged in the "lawful performance of his duties" under N.C.G.S. § 20-141.5(a). The indictment provided that Defendant was "fleeing and attempting to elude a law enforcement officer[,]" and Davis was in the "lawful performance of his duties[.]" The indictment contained the essential elements of the crime charged under N.C.G.S. § 20-141.5(b).[1] *See Birdsong*, 325 N.C. at 422. Per *Teel*, Davis's arrest of Defendant for shooting at an unoccupied vehicle was surplusage and therefore immaterial to the question of Defendant's guilt. *Teel*, 180 N.C. App. at 449.

¶ 17 In his reply brief, Defendant contends that, while *Teel* may excuse the State from alleging the specific duty Davis was performing in the indictment, per *State v. Silas*, 360 N.C. 377 (2006), Defendant's reliance on allegations set out in the indictment (specifically, that Davis arrested Defendant for shooting into an unoccupied vehicle) prejudiced Defendant. In *Silas*, the trial court allowed the State to orally amend the indictment by changing the alleged intended felony to conform to the evidence at trial. *Silas*, 360 N.C. 377. Our Supreme Court held, "[t]here is no requirement that an indictment . . . contain specific allegations of the intended felony[.] . . . However, if an indictment does specifically allege the intended felony, . . . allegations may not be amended." *Id.* at 383. Citing this holding, Defendant asserts that, although the indictment included language that may not be necessary for a valid indictment, the State is bound by that language because Defendant relied on it as the State's theory of the case and formulated his defense around it. But here, unlike in *Silas*, nothing in the Record demonstrates that the State requested, or the trial court allowed, the indictment to be amended to conform to the evidence at trial.

¶ 18 In *State v. Noel*, which was decided four years after *Silas*, we held that immaterial variance between the allegations in an indictment and the evidence offered will not constitute fatal variance. *Noel*, 202 N.C. App. at 721. In that case, the evidence supported the material allegation that the officer was performing his legal duties as a government employee at the time of arresting the defendant, and the additional allegation as to the exact duty being performed was surplusage which must be disregarded. *Id.* (citation and marks omitted) ("The indictment charged the essential elements of the crime . . . . Proof was offered to support the

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1. We note that Defendant was indicted pursuant to N.C.G.S. § 20-141.5(b), which provides that a violation under N.C.G.S. § 20-141.5(a) shall be a Class H Felony if two or more enumerated factors were present at the time of the violation. N.C.G.S. § 20-141.5(b) (2021).

material allegation . . . . The additional allegation . . . [was] surplusage and must be disregarded."). As such, the variance between the additional allegation in the indictment and the proof offered was immaterial. *Id.*

¶ 19 As in *Noel*, in this case the indictment's allegation of shooting at an unoccupied vehicle was mere surplusage, and the evidence offered supported the allegation that Davis was performing his legal duties when he arrested Defendant. As surplusage, the additional allegation must be disregarded, and the State is not required to prove it. Defendant was not prejudiced by relying on the indictment, and the trial court did not err in denying his motion to dismiss.

B. Defendant's Requested Instruction

¶ 20 **[2]** Defendant argues that Davis did not have probable cause to arrest Defendant for shooting into an occupied vehicle, and as such he was not lawfully performing his duties in attempting to stop Defendant. Defendant contends that the trial court's erroneous denial of the requested instruction was prejudicial and requires a new trial.

¶ 21 "Where a defendant has properly preserved [his] challenge to jury instructions, an appellate court reviews the trial court's decisions regarding jury instructions de novo." *State v. Richardson*, 270 N.C. App. 149, 152 (2020) (citation omitted). "An instruction about a material matter must be based on sufficient evidence." *State v. Osorio*, 196 N.C. App. 458, 466 (2009 (citation omitted). "Failure to give the requested instruction where required is a reversible error." *State v. Reynolds*, 160 N.C. App. 579, 581 (2003) (citation omitted), *disc. rev. denied*, 358 N.C. 548 (2004). "Failure to charge on a subordinate—not a substantive—feature of a trial is not reversible error in the absence of request for such instruction." *State v. Hunt*, 283 N.C. 617, 623 (1973) (citation and marks omitted).

¶ 22 Upon a party's request of a charge instruction on a subordinate matter of the trial, the trial court's failure to charge on that matter may constitute reversible error. *See Hunt*, 283 N.C. at 623. "A request for a . . . deviation from the pattern jury instruction [would] qualify as a special instruction and would [need] to be submitted to the trial court in writing." *State v. Brichikov*, 281 N.C. App. 408, 2022-NCCOA-33, ¶ 17 (citing *State v. McNeill*, 346 N.C. 233, 240 (1997) ("We note initially that [the] defendant's proposed [deviation from the pattern] instructions were tantamount to a request for special instructions.")), *aff'd on other grounds*, 2022-NCSC-140. "[A] trial court's ruling denying requested special instructions is not error where the defendant fails to submit his request for instructions in writing." *Id.* (citation and marks omitted); *see State*

v. Starr, 209 N.C. App. 106, 113 (citation and marks omitted) ("[W]here . . . [the] [d]efendant fail[ed] to submit his request for instructions in writing, the trial court's ruling denying [the] requested instructions is not error . . . ."), *aff'd as modified*, 365 N.C. 314 (2011).

¶ 23 Defendant did not submit in writing a request for instructions regarding the specific duty Davis was performing; Defendant requested orally that this specific instruction be included. Per *Brichikov* and *McNeill*, this request was for a special instruction; and, because it was not submitted in writing, this issue was not preserved for our review.

¶ 24 If an instructional issue is unpreserved in a criminal case, we may review the trial court's decision for plain error, but only if "the defendant [] *specifically and distinctly contend*[*s*] that the alleged error constitutes plain error." *See State v. Lawrence*, 365 N.C. 506, 516 (2012) (emphasis added) (citations and marks omitted). Defendant did not "specifically and distinctly" allege plain error. Accordingly, this issue is not preserved for plain error review, and we cannot address it on appeal. *State v. Truesdale*, 340 N.C. 229, 233 (1995) ("[The] [d]efendant has failed specifically and distinctly to contend that the trial court's instruction . . . constituted plain error. Accordingly, he has waived his right to appellate review of this issue.").

CONCLUSION

¶ 25 The Record discloses substantial evidence of each element of felonious speeding to elude arrest, and the trial court did not err in denying Defendant's motion to dismiss. Defendant's instruction request was not preserved for appellate review.

NO ERROR.

Judges DILLON and INMAN concur.

STATE v. NORRIS

[287 N.C. App. 302, 2022-NCCOA-908]

STATE OF NORTH CAROLINA
v.
JACOB THOMAS NORRIS, DEFENDANT

No. COA20-908

Filed 29 December 2022

1. Homicide—solicitation to commit first-degree murder—sufficiency of evidence

The State presented substantial evidence of each element of solicitation to commit first-degree murder to overcome defendant's motion to dismiss, including that defendant counseled, enticed, or induced his girlfriend to commit a crime in a lengthy message exchange over social media by mentioning multiple times that he intended to kill and that, as his sidekick, she would also have to hurt and kill. Further, even though defendant's girlfriend did not know he had a "Kill List," the crime of solicitation does not require that the solicitor communicate all the details of the plan to the listener, and the evidence was sufficient to show that he intended to solicit her to commit first-degree murder through premeditation and deliberation.

2. Appeal and Error—preservation of issues—variance between indictment and jury instructions—plain error not alleged

In a prosecution for solicitation to commit first-degree murder, defendant failed to preserve for appellate review his argument that the trial court erred by denying his motion to dismiss, which defendant premised on his assertion that there was a fatal variance between the indictment language and the jury instructions. Where defendant's argument amounted to a jury instruction challenge, but he failed to allege plain error on appeal after having not objected to the alleged error at trial, the issue was subject to dismissal.

3. Evidence—solicitation to commit murder—drawings and notes of weapons—testimony from people on defendant's "kill list"—relevance

In a trial for solicitation to commit first-degree murder, the trial court did not err by admitting a collection of defendant's drawings and notes depicting the comic book villain the Joker as well as a variety of weapons, or by admitting testimony from eleven of the thirteen people on defendant's "Kill List" and from a relative of a twelfth person on the list. Both types of evidence were admissible as being relevant under Evidence Rules 401 and 402 because they

shed light on defendant's state of mind at the time of his message exchange with his girlfriend, with whom he discussed wanting to kill people, and on whether he possessed the specific intent to have solicited her to commit first-degree murder.

4. Evidence—solicitation to commit murder—drawings and notes of weapons—testimony from people on defendant's "kill list"—more probative than prejudicial

In a trial for solicitation to commit first-degree murder, the trial court did not err by admitting a collection of defendant's drawings and notes depicting the comic book villain the Joker as well as a variety of weapons, or by admitting testimony from eleven of the thirteen people on defendant's "Kill List" and from a relative of a twelfth person on the list. Both types of evidence were admissible under Evidence Rule 403 where, even though they undeniably posed a risk of prejudice to defendant, they were nonetheless more probative than unfairly prejudicial regarding defendant's state of mind and the specificity of defendant's plan to hurt real people.

5. Criminal Law—prosecutor's closing argument—defendant's character—insinuation that defendant planned a mass shooting

In closing arguments at a trial for solicitation to commit first-degree murder, the trial court did not err in failing to intervene during the prosecutor's closing argument where none of the statements were so grossly improper as to constitute reversible error. The prosecutor's characterization of the evidence and comment on defendant's apparent lack of remorse, while unfavorable to defendant regarding his intent to commit the offense, were supported by a reasonable interpretation of the evidence, and the prosecutor's summary of the relevant law on solicitation was accurate. The prosecutor's statements invoking mass shootings and suggesting that defendant intended to kill his victims with a similar type of action, while improper, when considered in context were not prejudicial or so grossly improper as to merit reversal.

Appeal by Defendant from judgment entered 12 March 2020 by Judge William A. Wood II in Randolph County Superior Court. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Senior Policy & Strategy Counsel Steven A. Mange, for the State.

Kimberly P. Hoppin for defendant-appellant.

MURPHY, Judge.

¶ 1 While in high school, Defendant Jacob Thomas Norris admired the Joker, a comic book villain and fictional mass murderer. One day, after confessing via social media to his then-girlfriend, Patty,[1] that he was entertaining homicidal thoughts with respect to a number of his peers, Defendant asked her whether she wanted to kill people as well. Patty, concerned by the conversation, reported what Defendant had said to her mom—who, in turn, reported the conversation to law enforcement and school authorities. Defendant was subsequently discovered with a collection of notes and drawings indicating he wanted to harm or kill at least thirteen specific peers.

¶ 2 Defendant was tried for soliciting Patty to commit first-degree murder. At trial, the State's closing arguments included multiple comments about mass shootings. The jury convicted Defendant, who now timely appeals. On appeal, Defendant argues the trial court erred in (A) denying his motion to dismiss for insufficient evidence; (B) denying his motion to dismiss for fatal variance with the indictment; (C) admitting irrelevant evidence under Rules 401 and 402 of our Rules of Evidence; (D) admitting evidence substantially more prejudicial than probative under Rule 403 of our Rules of Evidence; and (E) failing to, ex mero motu, strike the State's grossly improper remarks during closing arguments. For the reasons stated below, we dismiss the case in part; hold in part that the trial court did not err; and, finally, hold in part that, although the trial court erred, it did not commit prejudicial error.

BACKGROUND

¶ 3 Early in 2018, Defendant Jacob Thomas Norris began dating Patty while both were students at the same high school. During their relationship—most of which consisted of exchanging messages via Snapchat[2]—Patty learned of Defendant's fascination with the Joker, a murderous comic book villain. Defendant and Patty, who shared a milder interest in

1. We use a pseudonym for Defendant's romantic interest throughout this opinion to protect her identity and for ease of reading.

2. At trial, the State asked Patty, "What is Snapchat for us old folks?" For the benefit of the "old folks," Patty explained that "you can either like send pictures and like little messages or you can talk like regular texting on a cell phone and you can video chat or regular voice call on there."

the Joker, referred to one another with pet names referencing the Joker and his romantic partner in crime, Harley Quinn, during the brief course of their relationship.

¶ 4 On 29 January 2018, Defendant and Patty exchanged a series of messages in which Defendant expressed having homicidal thoughts and a desire for Patty to join him in acting on them:

> [Defendant:] I have something to say.
>
> [Patty:] Yeah?
>
> [Defendant:] When you say you want to be my Harley, my true Harley, that you don't know what's going to happen when we call ourselves Joker and Harley.
>
> [Patty:] What?
>
> [Defendant:] You said you want to be my true Harley meaning you would have to hurt people.
>
> [Patty:] What are you getting at? Like I'm getting an idea now but not the full picture.
>
> [Defendant:] You know how Joker and Harley kill people? That's what I'm getting at.
>
> [Patty:] Yeah. Do you want to do something like that?
>
> [Defendant:] Get it no[w]. Yes.
>
> [Patty:] Do you want to do that specifically?
>
> [Defendant:] You don't want that, do you? If you do, don't -- if you don't, I understand.
>
> [Patty:] I'm just asking.
>
> [Defendant:] But do you want that?
>
> . . . .
>
> [Patty:] I can't quite say I do. I have a side of me that does.
>
> . . . .
>
> [Defendant:] So, no. I told you I'm a sociopath.
>
> . . . .
>
> [Defendant:] You see me differently now, don't you?

[Patty:] Since we're asking questions that come deep from our minds, I have one for you and everything is up to you because I respect everything you say and feel.

[Defendant:] Shoot.

[Patty:] Do you know what polyamorous is?

[Defendant:] I'll Google it. Hold on.

[Patty:] No, let me tell you.

[Defendant:] Shoot.

[Patty:] But do you have any idea what it is?

[Defendant:] No, never heard of it.

[Patty:] Do you know what monogamous is?

[Defendant:] Never heard of it.

[Patty:] Okay.

[Defendant:] So going to tell me?

[Patty:] Monogamous is when two people date/marry, and it's only two people. Polyamorous is when there are more than two people date one another.

[Defendant:] What are you trying to say?

[Patty:] Just hear me out. Okay? Don't just assume anything because it most likely will not be true.

[Defendant:] Okay.

[Patty:] So I feel as I am polyamorous myself because I've always liked more than one person. Not right now though. It's just strictly you, I promise. But I truly do feel as though I am this way. I have a video of information on polyamorous if you're interested in hearing more about it so you understand it better, but I wanted to run this by you because I want your opinion and thoughts and I thought now is the perfect time to ask you since we are both asking things that only both of us would understand each other in more ways and, no, I do not see you differently. It just caught me off guard.

> [Defendant:] So do you or do you not want to be my Harley?
>
> [Patty:] I am your Harley. Just you understand your Harley.
>
> [Defendant:] I understand.
>
> [Patty:] Or accept this part of her.
>
> [Defendant:] Is this the gentle part?
>
> [Patty:] Of what I'm saying?
>
> [Defendant:] Yes.
>
> [Patty:] How much do you accept?
>
> [Defendant:] The whole package.
>
> . . . .
>
> [Patty:] Thank you. Thank you for dealing with me, seeing me as how I am accepting me for who I am as a person. I know I already ask so much of you and you have no idea how thankful I am that you are here in my life and love me for who I am. I don't think any words could ever tell me enough of what you are and mean to me. I don't know what I did to get you in my life but whatever it was I would do it again over and over and over. No matter how many times I would constantly do it so you came into my life. I have a feeling you're going to be my one. I can just feel it. Now I'll gladly be your Harley Quinn till the day I die.[3]

After the exchange, Patty, concerned about what Defendant had expressed, showed the messages to her mother, who reported the conversation to law enforcement. The day after the conversation, Patty and her mother also reported the exchange to the school resource officer ("SRO"), the principal, and the guidance counselor.

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3. For formatting purposes, the dialogue reproduced in the text of the opinion above is the conversation between Defendant and Patty as read aloud by Patty for the jury at trial. As minor alterations exist between the transcribed version of the conversation above and the conversation as presented in the exhibits, we turn the attention of any reader wishing to examine the original Snapchat conversation to Record Supplement pages 1 through 11.

¶ 5 On 31 January 2018, the principal and SRO met with Defendant, who admitted to sending the messages, told them he was a sociopath, and expressed that he found death funny. At the time of the meeting, the SRO did not believe Defendant had committed any crime. However, the same day, the SRO visited Defendant's home, where there were multiple guns and knives; and, on a second visit one month later, Defendant's father provided the SRO a collection of notes documenting Defendant's violent ideations concerning his peers. Among these notes were two papers entitled "Test Subjects" and "Kill List"—which, as their titles imply, named individuals Defendant appeared to have marked for human experimentation and homicide, respectively. The list entitled "Test Subjects" included the cities where the individuals lived, and the "Kill List" included a method of, and reason for, killing each of the thirteen individuals it named. There was also a document called "Joker Toxin" that identified the prices of various poisons.

¶ 6 Upon the school official's discovery of Defendant's notes, Defendant was suspended and, later, indicted for solicitation to commit murder. The indictment read as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above [] [D]efendant unlawfully, willfully and feloniously did solicit [Patty] to commit the felony of Murder, [N.C.G.S. §] 14-17, of persons known to the defendant, to wit: [first and last initials used for each individual]. [] [D]efendant intending [sic] to murder persons named in a list he created and in his possession and entitled "Kill List."

¶ 7 At trial, the State presented evidence of the above. In addition to testimony from Patty, the principal, and the SRO, among others, the State offered—and the trial court admitted, over Defendant's objections—testimony from eleven of the thirteen people whose names appeared on the "Kill List," as well as the mother of a twelfth person appearing on the list and a collection of notes and drawings by Defendant concerning the Joker. During closing arguments, the State remarked that Patty was "terrified[] [b]ecause [her] significant other was asking [her] to go kill people . . . ." It also remarked that Defendant "had the means to carry out [his] threats" and that there was "a diagram of [the] school."[4] Finally, the State also suggested there was a link between the allegations

4. The "diagram of [the] school" refers to one of Defendant's drawings, which the principal testified resembled a map of Defendant's high school.

against Defendant and "current events," presumably in reference to the frequent, high-profile mass shootings taking place in the years immediately preceding Defendant's trial:

> Now, I'm not going to talk about current events and what's going on everywhere, but you are not required to empty your brains of everything you know about these situations. . . .
>
> . . . . When you all go back there you can educate yourselves and talk about the Joker. An emblem of evil. The most twisted character there is. Mass murderer. Crime sprees. Hurting other people. That's the evil that this man . . . embraced. And once you do that, as completely as he did, there's no stepping back. There's no stepping back.

¶ 8 After closing arguments, the jury found Defendant guilty of solicitation to commit first-degree murder on 12 March 2020, and the trial court gave him an active sentence of 58 to 82 months. Defendant timely appealed.

ANALYSIS

¶ 9 On appeal, Defendant argues the trial court erred in (A) denying his motion to dismiss for insufficient evidence; (B) denying his motion to dismiss for fatal variance with the indictment; (C) admitting irrelevant evidence under Rules 401 and 402 of our Rules of Evidence; (D) admitting evidence substantially more prejudicial than probative under Rule 403 of our Rules of Evidence; and (E) failing to, ex mero motu, strike the State's grossly improper remarks during closing arguments.

A. Motion to Dismiss: Insufficient Evidence

¶ 10 **[1]** Defendant first argues the trial court erred in denying his motion to dismiss for insufficient evidence.

> We review denial of a motion to dismiss criminal charges *de novo*, to 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 [the] defendant's being the perpetrator of such offense. The trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court does not

> weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Spruill, 237 N.C. App. 383, 385 (2014) (citations omitted), *disc. rev. denied*, 368 N.C. 258 (2015). Here, there is no contention that there was insufficient evidence of Defendant's identity; accordingly, we review de novo whether the State presented sufficient evidence of each element of the alleged crime.

¶ 11 Concerning the offense of solicitation, we have remarked that

> [t]he gravamen of the offense of soliciting lies in counseling, enticing or inducing another to commit a crime. Solicitation is complete when the request to commit a crime is made, regardless of whether the crime solicited is ever committed or attempted.
>
> To hold a defendant liable for the substantive crime of solicitation, *the State must prove a request to perform every essential element of the underlying crime.*

State v. Crowe, 188 N.C. App. 765, 768-69 (citations omitted), *cert. denied*, *disc. rev. denied*, 362 N.C. 364 (2008). Thus, where the underlying offense is first-degree murder, "the State must prove that [the] defendant counseled, enticed, or induced another to commit . . . '(1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation.' " *Id.* at 769 (quoting *State v. Peterson*, 361 N.C. 587, 595 (2007), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d 377 (2008)).

¶ 12 Defendant offers two primary contentions with respect to sufficiency of the evidence: first, that the evidence does not support Defendant having *solicited*—that is, "counseled, enticed, or induced," *id.*—Patty to commit a crime; and, second, that Defendant could not have solicited Patty to commit *first-degree murder* because Patty was not aware of the specific people on Defendant's "Kill List."

¶ 13 As to Defendant's first contention, our Supreme Court has stated that solicitation is "an attempt to conspire" so that "the solicitor plans, schemes, suggests, encourages, and incites the solicitation." *State v. Mann*, 317 N.C. 164, 171-72 (1986); *see State v. Smith*, 269 N.C. App. 100, 101 (2019) (quoting 2 Wayne R. Lafave, *Substantive Criminal Law* § 11.1, at 264 (3d ed. 2018) ("For the crime of solicitation to be completed, it is only necessary that the actor, with intent that another person commit a crime, have enticed, advised, incited, ordered or otherwise

encouraged that person to commit a crime."). Such is the case here. Defendant reiterated that he intended to kill at least three times as Patty sought clarification during their Snapchat conversation: first, he hinted at what was "going to happen when [they] call[ed] [them]selves Joker and Harley"; second, when Patty expressed confusion, he elaborated that "[his] true Harley . . . would have to hurt people"; and, finally, he outright stated that "Joker and Harley kill people[.]" Moreover, Defendant's communication fits comfortably within applicable definitions of "entice": "[t]o lure or induce[.]" *Entice*, Black's Law Dictionary (9th ed. 2009); *see also Crowe*, 188 N.C. App. at 769 (emphasis added) ("[T]he State must prove that [the] defendant counseled, *enticed*, or induced another to commit [the underlying crime].").

¶ 14 The second contention fails as well. "Solicitation is a specific-intent crime, and the offense is complete upon the request." *State v. Smith*, 269 N.C. App. 100, 101 (2019) (citations omitted). For the State to demonstrate the underlying mens rea in a solicitation case, it is not necessary for it to show the solicitor fully communicated the details of his or her plan to the listener; rather, "[t]he *solicitor conceives the criminal idea* and furthers its commission via another person by suggesting to, inducing, or manipulating that person." *Mann*, 317 N.C. at 171 (emphasis added). As we noted in *Mann*, " 'the solicitor, working his will through one or more agents, manifests an approach to crime more intelligent and masterful than the efforts of his hireling' " such that "the solicitor is morally more culpable than a conspirator; he keeps himself from being at risk, hiding behind the actor" he solicited. *Id.* at 172 (quoting Wechsler, Jones, and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Colum. L. Rev. 571, 621-22 (1961)); *see also* Joshua Dressler, *Cases and Materials on Criminal Law* 798 (3rd ed. 2003) (emphasis added) ("Solicitation is a controversial crime because *the offense is complete as soon as the solicitor asks, entices, or encourages* another to commit the target offense. As observed in *Mann*, a solicitation may consist of nothing more than an attempt to conspire with another to commit an offense, which essentially makes solicitation a double inchoate offense.").

¶ 15 Here, as long as Defendant's "Kill List" tended to demonstrate to the jury that the killings he proposed to Patty were, as they existed in his *own* mind, unlawful, malicious, and specifically intended after a measure of premeditation and deliberation, the evidence was sufficient to survive a motion to dismiss. And, in this case, the "Kill List" evidenced each of these elements. Indeed, Defendant's conveyance of his desire

to kill others fits the general malice requirement, and his having asked Patty to kill necessarily contemplates the killings he asked her to perform being premeditated and deliberated.[5] *See State v. McBride*, 109 N.C. App. 64, 68 (1993) (marks omitted) (citing *State v. Reynolds*, 307 N.C. 184, 191 (1982)) ("There is[] . . . a [] kind of malice which is defined as nothing more than that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."). Defendant's motion to dismiss for insufficient evidence was properly denied.

B. Motion to Dismiss: Fatal Variance

¶ 16 **[2]** Next, Defendant argues that the trial court erred in denying his motion to dismiss because the indictment fatally varied from the jury instruction at trial. The indictment alleged that Defendant "solicit[ed] [Patty] to commit the felony of Murder, [N.C.G.S. §] 14-17, of persons known to [] [D]efendant, to wit: C.P., C.D., M.C., C.C., C.E., C.E., A.H., N.B., D.B., H.D., L.G., D.B., C.S." The jury, meanwhile, was instructed the State had to prove "Defendant solicited, that is urged or tried to persuade another . . . to murder another person" and that "Defendant intended that the person he solicited murder the alleged victim." Defendant contends the variance between the indictment and the instruction warrant reversal on appeal.

¶ 17 However, Defendant's argument appears to be little more than an allegation of instructional error clothed as fatal variance. Fatal variance

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5. This is, of course, to say nothing of what was, in the light most favorable to the State, the meticulous planning of killings and other acts of violence reflected in Defendant's notes and drawings presented at trial—which included, but were not limited to, a recipe for a toxin with which to "poison [the] water supply" and concept art of a Joker-themed combat suit.

However, we separately note our wariness of the use of what may otherwise be considered Defendant's artistic expression or self-care journaling for this purpose. While creating new laws governing the permissibility of certain categories of evidence is a task for the political branches of our government, we note for the General Assembly's consideration that other states have limited or considered limiting the use of defendants' creative expression as evidence in cases where the literal truth of the expression is dubious. *See, e.g.*, An Act to Add Section 352.2 to the Evidence Code, Relating to Evidence (effective Jan. 1, 2023) (to be codified at 2022 Cal. Stat. 973) ("In any criminal proceeding where a party seeks to admit as evidence a form of creative expression, the court, while balancing the probative value of that evidence against the substantial danger of undue prejudice[,] . . . shall consider[] that[] . . . the probative value of such expression for its literal truth or as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available."); *see also* S.B. S7527, 244th Leg. Session (N.Y. 2022) (awaiting vote by N.Y. State Assembly).

occurs when a discrepancy existed between the language in the indictment and the evidence at trial. *See State v. Glenn*, 221 N.C. App. 143, 147 (2012) ("A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged."); *State v. Watson*, 272 N.C. 526, 527 (1968) (quoting *State v. Jackson*, 218 N.C. 373, 376 (1940)) (" 'It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegation and proof must correspond.' "). While occasional analyses in our caselaw have discussed jury instructions in relation to fatal variance, none have fully untethered a fatal variance analysis from discussion of the evidence itself in the way Defendant attempts to do here. *See*, *e.g.*, *State v. Turner*, 98 N.C. App. 442, 448 (1990) ("[W]e believe that the State's evidence does support the trial court's instruction; however, the indictment does not."); *State v. Charleston*, 248 N.C. App. 671, 678 (2016) (marks omitted) ("Generally, an impermissible variance has occurred when, although the State's evidence might support the trial court's instruction, the indictment does not.").

¶ 18 Our caselaw contains a mechanism for contesting the accuracy of jury instructions; that mechanism is alleging instructional error. *Carrington v. Emory*, 179 N.C. App. 827, 829 (2006) ("A trial court must instruct the jury on the law with regard to every substantial feature of a particular case."). And, where a defendant alleges on appeal that instructional error occurred after having not objected at trial, he must specifically allege plain error to invoke our review. N.C. R. App. P. 10(a)(4) (2022) (emphasis added) ("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."); *State v. Collington*, 375 N.C. 401, 411 (2020) (marks omitted) ("The purpose of Rule 10(a)(4) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the plain error rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."). Defendant did not seek our review for plain error, and we will not entertain an improperly appealed instructional error argument simply because it arrived within the Trojan horse of a fatal variance heading in Defendant's brief. We dismiss this challenge.

C. Rules 401 and 402

¶ 19 **[3]** Defendant next argues the trial court erred in admitting evidence that was irrelevant under Rules 401 and 402 of our Rules of Evidence. He bases this argument on the admission of two groups of evidence: (1) a collection of drawings and notes depicting the Joker and a variety of weapons, and (2) testimony from eleven of the thirteen people on the "Kill List" and a relative of the twelfth. "Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456 (2010).

¶ 20 " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2021). "The value of the evidence need only be slight." *State v. Roper*, 328 N.C. 337, 355, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d. 232 (1991). Moreover, "[i]n order to be relevant, evidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Miller*, 197 N.C. App. 78, 86, *disc. rev. denied*, 363 N.C. 586 (2009).

¶ 21 Here, both groups of evidence—the drawings and the testimony—are relevant. The drawings would help the jury determine Defendant's state of mind and evaluate whether the proposed crime, as he imagined it, met the requirements for solicitation. *See supra* at ¶ 14. This is especially pertinent in a case where, as here, a jury may have understood Defendant's proposition as a joke or otherwise been skeptical about his sincerity without a fuller glimpse into his state of mind at the time of his discussion with Patty. Furthermore, the testimony was relevant to show that the people described on Defendant's "Kill List" were real and to further demonstrate that he had the requisite specific intent to have solicited Patty to commit first-degree murder. As a result, the admission of the two groups of evidence was proper.

D. Rule 403

¶ 22 **[4]** Defendant further argues the drawings and testimony discussed with respect to Rules 401 and 402, if relevant, had "probative value [that was] substantially outweighed by the danger of unfair prejudice" under Rule 403. *See* N.C.G.S. § 8C-1, Rule 403 (2021) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). "A trial judge's decision under

Rule 403 regarding the relative balance of probative weight and potential for prejudice will only be overturned for an abuse of discretion." *State v. Hyman*, 153 N.C. App. 396, 401-02 (2002), *cert. denied*, 357 N.C. 253 (2003). "[W]here the trial court is given discretion to make a decision and exercises that discretion, we may only reverse that decision if the appellant shows that the decision was not the result of a reasoned choice." *State v. Jordan*, 128 N.C. App. 469, 475, *disc. rev. denied*, 348 N.C. 287 (1998).

¶ 23 At the threshold, we note that both groups of evidence—Defendant's Joker-related notes and drawings and the testimony of the individuals on the "Kill List"—created an undeniable risk of prejudice to Defendant. We have little doubt that exposure to detailed records of Defendant's violent thoughts, especially when paired with live testimony from the young men and women those thoughts concerned, would have stirred the emotions of the jurors in this case. Nonetheless, the existence of *some* prejudice will not warrant exclusion under Rule 403; rather, "[r]elevant evidence is admissible, despite its prejudicial effect, unless the evidence is *unfairly* prejudicial." *State v. Moseley*, 338 N.C. 1, 33 (1994) (emphasis added), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Our Supreme Court, for example, has held that a trial court erred under Rule 403, not when evidence would inflame the jury in the general sense, but instead when its probative value is so comparatively negligible that it would "tend *solely* to inflame the jurors." *State v. Hennis*, 323 N.C. 279, 284 (1988) (emphasis added).

¶ 24 Moreover, whether evidence was unfairly prejudicial is a circumstantial judgment that depends on the context of its presentation. Of photographic evidence, for example, our Supreme Court has said the following:

> The test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies—these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in

> weighing its use by the [S]tate against its tendency to prejudice the jury.

Id. at 285.

¶ 25 Here, although the State only actually used the two groups of evidence cursorily—each segment of testimony involving a person on the "Kill List" lasted less than four transcript pages, many far less—the *danger* of unfair prejudice resulting from the State's indication it was going to introduce the notes and drawings and have almost all of the individuals named on the "Kill List" testify was, at the times Defendant objected, substantial. However, because the trial court chose to admit both groups of evidence on reasonable bases offered by the State—including the drawings' tendency to illustrate Defendant's mental state, the witness's tendency to demonstrate that the "Kill List's" stated victims were real people, and the State's assurance that the interviews would be "really quick"—we cannot say the trial court's admission of the evidence rose to the level of an abuse of discretion. While we find it likely that the jury's passions were stirred by the drawings and testimony, the evidence served a probative function arguably above and beyond inflaming them.

E. Failure to Intervene

¶ 26 **[5]** Finally, Defendant argues the trial court erred in failing to intervene ex mero motu during three sections of the State's closing argument: (1) when the State characterized the evidence presented in a manner that conformed to its narrative at trial; (2) when the State remarked that Patty did not need to know of the "Kill List" for Defendant to be found guilty of solicitation to commit murder; (3) when the State allegedly demeaned Defendant's character by insinuating that his flat affect indicated a lack of remorse; and (4) when the State allegedly appealed to the jury's sympathies discussing the evil nature of the Joker and alluding to the national prevalence of mass shootings.

¶ 27 "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*." *State v. Jones*, 355 N.C. 117 (2002).

> [W]hen defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (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 (2017). While "we have long recognized that prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom[,]" *id.* at 180 (marks omitted), it remains the case that "an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record" during closing arguments. N.C.G.S. § 15A-1230(a) (2021).

¶ 28 Furthermore, a defendant appealing based on the trial court's failure to intervene ex mero motu "has the burden to show a reasonable possibility that, had the errors in question not been committed, a different result would have been reached at the trial." *State v. Goins*, 377 N.C. 475, 2021-NCSC-65, ¶ 11 (marks omitted). "When evaluating the prejudicial effect of an improper closing argument, we examine the statements in context and in light of the overall factual circumstances to which they refer." *Id.* at ¶ 13 (marks omitted). In so doing, "we look to the evidence presented at trial and compare it with what the jury actually found[,]" as "[i]ncongruity between the two can indicate prejudice in the conviction." *Huey*, 370 N.C. at 185; *see also Goins*, 2021-NC-65 at ¶ 16 (basing a finding that improper statements did not prejudice the defendant, in part, on the jury's re-examination of a piece of evidence during deliberations).

1. Characterization of the Evidence

¶ 29 Defendant argues the State improperly characterized the evidence by indicating that Patty was terrified that Defendant was urging her to kill people, that Defendant had the means to carry out an attack on the targets identified on his "Kill List," that Defendant's father knew about the list and did not take appropriate action, and that one of the people named on the list had specifically called Defendant a "chicken." None of these were "so grossly improper as to impede [] [D]efendant's right to a fair trial." *Huey*, 370 N.C. at 179.

¶ 30 As mentioned previously, the elements of solicitation to commit first-degree murder are that Defendant counseled, enticed, or induced another to commit an unlawful killing with malice and the specific intent to kill formed after some measure of premeditation and deliberation. *See supra* at ¶ 11. Assuming, as we must, that the jury correctly applied the instructions provided to it with respect to the charge at issue, neither the father's purported inaction nor whether the Defendant had specifically

been called "chicken" would have had any logical relationship to the elements of the offense. *See State v. Prevatte*, 356 N.C. 178, 254 (2002) ("Jurors are presumed to follow a trial court's instructions."), *cert. denied*, 538 U.S. 936, 155 L. Ed. 2d 631 (2003). These comments, therefore, did not impede Defendant's right to a fair trial—let alone prejudice him.

¶ 31 Defendant's ability to act on his "Kill List" and Patty's response bear a clearer relationship to the elements of the offense, as they tend to lend credibility to the State's contention that Defendant had the requisite intent. However, in both of these cases, the characterizations were, at worst, unfavorable interpretations of the evidence presented at trial. With respect to the actionability of the "Kill List," Defendant argues that he could not have taken action because "[Defendant's] father secured or removed all weapons [from his home] when asked to do so." However, the State's argument most plausibly refers to the actionability of the "Kill List" at the time of the solicitation, *after* which the weapons in the home were removed. Furthermore, with respect to the object of Patty's fear, Patty described herself as "terrified" and expressed that she "wanted out of it, too, and [] wanted to go and talk to someone as soon as possible." While perhaps uncharitable to Defendant, this statement could fairly be interpreted as Patty being frightened by Defendant seeking her participation in his plans.

2. Summation of the Law

¶ 32 Defendant also argues the trial court erred by failing to intervene when the State remarked that Patty did not need to know of the "Kill List" for Defendant to be found guilty of solicitation to commit murder. However, for the reasons discussed in Part A of our analysis, *see supra* at ¶ 14, this is a correct statement of the law of solicitation, and the trial court did not err.

3. Demeaning Defendant's Character

¶ 33 Defendant next argues the trial court erred by failing to intervene when the State demeaned his character by suggesting he lacked remorse. However, the only point in the transcript to which Defendant directs our attention for this proposition is a single instance in which the State described Defendant as "[v]ery matter-of-fact." Even assuming such a mundane turn of phrase qualifies as demeaning Defendant, this characterization was supported—almost verbatim—by testimony presented at trial. In this regard, then, the trial court also did not err.

4. Statements on the Joker and Mass Shootings

¶ 34 The last occasion on which Defendant argues the trial court erred by failing to intervene ex mero motu is when the State appealed to the jury's sympathies by describing the nature of the Joker and insinuating that Defendant was planning a mass shooting:

> Now, I'm not going to talk about current events and what's going on everywhere, but you are not required to empty your brains of everything you know about these situations. . . .
>
> . . . . When you all go back there you can educate yourselves and talk about the Joker. An emblem of evil. The most twisted character there is. Mass murderer. Crime sprees. Hurting other people. That's the evil that this man . . . embraced. And once you do that, as completely as he did, there's no stepping back. There's no stepping back.

In addition to the specific occasion above, Defendant also points out three other occasions during closing arguments when the State referenced mass shootings:

> [Patty and her mother went] to the police department because they [knew] something bad may occur. They want[ed] to prevent a mass shooting.
>
> . . . .
>
> If I call you and say hey, let's go kill some people -- because that's exactly what he's saying here, let's go kill some of these people. I call you and I mean it, and I have that malice in my heart because I felt like people had bullied me. Isn't that how mass shootings start?
>
> . . . .
>
> Well, shootings at school, that never happens. [The principal] doesn't need to be worried about that. That never happens in the United States. No reason for him to be concerned about that.
>
> . . . .
>
> [Patty] didn't know who they were going to be. That's how mass shootings operate. You may not know who

> all the victims are. The important thing is he solicited to murder.

¶ 35 Our Supreme Court has found the State's improper remarks to be reversible error under similar circumstances. In *State v. Jones*, for example, the North Carolina Supreme Court held that the trial court abused its discretion "when it overruled [the] defendant's timely objection to the prosecutor's references to the Columbine school shooting and the Oklahoma City bombing[,]" two high-profile mass killings. *Jones*, 355 N.C. at 131, 133. The Court reasoned that

> [t]he impact of the statements in question, which conjure up images of disaster and tragedy of epic proportion, is too grave to be easily removed from the jury's consciousness, even if the trial court had attempted to do so with instructions. Moreover, the offensive nature of the remarks exceeds that of other language that has been tied to prejudicial error in the past.

Id. at 132. Based on this reasoning, we are persuaded that, at least to some degree, the remarks were improper, as they were clearly designed to instill in the jury the idea that Defendant's conviction would prevent another in a string of nationally salient acts of mass violence.

¶ 36 However, unlike in *Jones*, where the issue was whether the trial court abused its discretion in overruling the defendant's objection to the State's improper comments at trial, *id.* at 137, Defendant's contention is that the trial court failed to intervene ex mero motu. The basic impropriety of the State's comment, then, is only the first prong of the analysis, to be followed by a determination of "whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *Huey*, 370 N.C. at 179. As to this second prong, we remain unconvinced. If the jury accepted that Defendant sincerely intended to kill the thirteen people named on his "Kill List"—which the verdict indicates was the case—whether that intent would have been acted upon in the form of a typical mass shooting or some other act of violence would have been immaterial to the elements of the crime; the question posed was whether Defendant solicited Patty to commit first-degree murder in some form, not whether he solicited her to commit first-degree murder via mass shooting in particular. In other words, the State's invocation of high-profile mass shootings would have painted in the juror's minds only one of many scenarios which could just as legitimately have supported the verdict.

¶ 37 Furthermore, we disagree with Defendant's contention that he was prejudiced by the remarks. In attempting to establish prejudice, Defendant correctly points out that "the State raised the . . . specter of mass shootings and school shootings where these were not even discussed . . . and were not relevant to the narrow questions to be decided by the jury." However, this alone does not establish prejudice, especially when "we examine the statements in context and in light of the overall factual circumstances to which they refer." *Goins*, 2021-NCSC-65 at ¶ 13 (marks omitted). The comments, while improper, took place during a closing argument consistently grounded in the concrete, factual details discussed at trial, not an emotional appeal to the jury. Furthermore, there were multiple items of physical evidence and segments of testimony evidencing Defendant's intent, and the act of solicitation itself was established by a written record of messages. Against such great evidentiary weight, we remain unconvinced that the State's improper comment prejudiced Defendant.

¶ 38 As such, even though these comments were improper, the trial court's failure to intervene does not constitute reversible error.

CONCLUSION

¶ 39 The evidence at trial was sufficient to convict Defendant of solicitation to commit first-degree murder, notwithstanding Defendant's contentions that his actions did not qualify as solicitation and the fact that Patty was unaware of specific targets. Defendant's nominal fatal variance argument was, in substance, an unpreserved allegation of instructional error at trial, and he failed to specifically seek our review for plain error, thus abandoning the argument. Furthermore, all evidence contested on appeal was both relevant and not substantially more prejudicial than probative. Finally, the State's remarks during closing arguments, despite being improper, were neither prejudicial nor so grossly improper that they denied Defendant his right to a fair trial.

NO ERROR IN PART; DISMISSED IN PART; NO PREJUDICIAL ERROR IN PART.

Judges DIETZ and WOOD concur.

STATE v. REAVIS

[287 N.C. App. 322, 2022-NCCOA-909]

STATE OF NORTH CAROLINA
v.
JESSICA REAVIS, DEFENDANT

No. COA21-561

Filed 29 December 2022

Firearms and Other Weapons—possession at a demonstration—specific location an essential element—statement of charges insufficient—amendment improper

Defendant's conviction under N.C.G.S. § 14-277.2(a) for possession of a firearm at a protest over the removal of a Confederate monument at a county courthouse was vacated where the misdemeanor statement of charges lacked an essential element of the offense because it described defendant's conduct as occurring "at a demonstration" but failed to state the specific type of location. Supplementary materials—including incident reports that gave the address and described the location as being on the side of a road—did not sufficiently specify that the firearm possession occurred at a private health care facility or public place as required by statute. Since the original pleading was defective for failure to include an essential element, the trial court erred by allowing the State to amend the statement of charges at trial; only amendments that do not change the nature of the offense are permissible.

Judge INMAN concurring in the result only.

Appeal by Defendant from judgment entered 13 July 2020 by Judge R. Allen Baddour, Jr., in Chatham County Superior Court. Heard in the Court of Appeals 22 March 2022.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park and Solicitor General Fellow Zachary W. Ezor, for the State.

Dobson Law Firm, PLLC, by Jeffrey L. Dobson, and The Vernon Law Firm, A Professional Association, by John W. Moss, for defendant-appellant.

MURPHY, Judge.

¶ 1 To be valid, a criminal pleading must contain allegations supporting every essential element of the offense with which a defendant is

charged. Moreover, where a statute indicates that a defendant's actions must take place at a specific type of location to support criminal liability, a defendant's actions having taken place at that type of location is an essential element of the offense. Here, Defendant has been charged under N.C.G.S. § 14-277.2(a), which criminalizes possession of a firearm at a "parade, funeral procession, picket line, or demonstration upon any private health care facility or upon any public place owned or under the control of the State . . . ." N.C.G.S. § 14-277.2(a) (2021). As Defendant's conduct occurring either at a hospital or on public land is an essential element of N.C.G.S. § 14-277.2(a) and the statement of charges—even taken together with relevant supplementary materials pursuant to N.C.G.S. § 15A-924(a)(5)—did not specify on what type of land Defendant's conduct took place, we vacate her conviction.

BACKGROUND

¶ 2 This case arises out of an altercation at a protest over the removal of a Confederate monument at the historic Hillsborough courthouse on 5 October 2019. That day, protestors objecting to the statue's removal and counter-protestors favoring the removal both congregated on-site, leading law enforcement to closely monitor the area in the event conflict arose. Consequently, officers in marked patrol cars would ride through the area every ten to fifteen minutes to ensure the high tensions between the two groups did not give way to violence. During one of these periodic patrols, an officer discovered Defendant Jessica Reavis, whom he recognized as a frequent attendee of the courthouse demonstrations, standing with a group of protesters holding Confederate flags while gesticulating at a group of counter-protestors. As she did so, the officer noticed what appeared to be a concealed firearm at her waist. Fearing the potential consequences of Defendant's being armed if the confrontation between the two groups were to turn violent, the officer returned to his command center and alerted his colleagues of the situation. Subsequently, a team of officers approached and arrested Defendant.

¶ 3 Prior to her trial before the Chatham County District Court, Defendant and the District Court were provided with a *Misdemeanor Statement of Charges* alleging that she "did unlawfully and willfully possess a dangerous weapon while participating in, affiliated with, or present as a spectator at a demonstration" under N.C.G.S. § 14-277.2. Alongside the *Misdemeanor Statement of Charges*, Defendant and the District Court were also provided with an *Incident/Investigation Report* documenting several officers' accounts of the incident. In relevant part, the report provided that the "[l]ocation of [the] [i]ncident" was "40 East St, Pittsboro, NC 27312"; that the type of location was a "[h]ighway/

[r]oad/[a]lley/[s]treet/[s]idewalk"; and that the "[c]rime/[i]ncident(s)" prompting the report's creation were "[d]isorderly [c]onduct[,]" "[c]arrying [a] [c]oncealed weapon," and "[w]eapon at parades ETC[.]" The "[n]arrative" portion of the report included brief descriptions of the reporting officers' interactions with Defendant on the date of the incident; and, in that portion, the reporting officers described, at various points, Defendant's weapon possession as occurring "on the protest side of the road" and "20 yards from East Street[.]"[1] On 10 January 2020, Defendant was found guilty of possessing a weapon at a demonstration before the District Court and sentenced to fifteen days in the custody of the Sheriff, which was suspended for six months of unsupervised probation on the condition that Defendant "[s]urrender [her] firearms [and] not further violate the law[.]"

¶ 4 After receiving her sentence at District Court, Defendant sought a trial de novo before the Chatham County Superior Court pursuant to N.C.G.S. § 15A-1431(b). *See* N.C.G.S. § 15A-1431(b) ("A defendant convicted in the [D]istrict [C]ourt before the judge may appeal to the [S]uperior [C]ourt for trial de novo with a jury as provided by law."). Prior to trial, Defendant filed several motions, including a *Motion for Change of Venue*, a *Motion to Dismiss Charges*, a *Motion to Dismiss for Unconstitutional Prosecution*, and a *Motion to Dismiss for Unconstitutional Vagueness*, all of which were denied. At the close of all evidence, Defendant again moved to dismiss the charge on the basis that the *Misdemeanor Statement of Charges* was fatally defective for failing to specify that the possession took place "either at a public health facility or a publicly owned place controlled by the State or local government as required[.]" In response, the State moved to amend the *Misdemeanor Statement of Charges* under N.C.G.S. § 15A-922(f) to specify the unlawful firearm possession occurred at a public place. The Superior Court allowed the State's motion and, once again, denied Defendant's.

¶ 5 On 22 April 2021, Defendant was found guilty and sentenced to forty-five days in the custody of the Sheriff, which was suspended for twelve months of supervised probation on the condition that she not possess or control any firearm in North Carolina. Defendant timely appeals.

¶ 6 During the pendency of the appeal, we entered an order asking the trial court whether the aforementioned police report had, in fact, been

1. Defendant was also described as having been "escorted [] into the Dunlap Building[,]" but only in the course of her arrest.

furnished to Defendant prior to her District Court trial. The order stated, in relevant part, as follows:

> The Superior Court entered judgment following a jury verdict finding Defendant guilty of possessing a pistol at a demonstration in violation of N.C.G.S. [§] 14-277.2. The Record indicates that the State provided Jeff Dobson, Defendant's counsel in the Chatham County Superior Court, a copy of the police report in this case. However, the record is silent as to whether Defendant or Defendant's counsel received the police report before her trial in the Chatham County District Court, where this case originated. It further appears that Mr. Dobson may not have been trial counsel for Defendant in the District Court.
>
> The original jurisdiction to try this petty misdemeanor was in the District Court. N.C.G.S. [§] 7a-272(a) (2021). Defendant was convicted in District Court on 10 January 2020 and entered notice of appeal to Superior Court. The Superior Court only obtained jurisdiction of this matter through the operation of N.C.G.S. 7A-271(a)(5). N.C.G.S. [§] 7A-271(a)(5) (2021). As a result, we must not only determine the jurisdiction of the Superior Court, but also that of the District Court at the time the District Court trial occurred. While the State has [appended] a copy of a document labeled 'Weapon Charges + Jessica + Thalia' to its brief, no such document exists in the record, nor is there any indication whether this document was the police report the State asserted was provided to Mr. Dobson. Both of the below questions are factual in nature and are necessary to determine the jurisdiction of the lower courts and this Court. Accordingly, the matter is remanded to the Superior Court, Chatham County, for findings of fact on the following two questions:
>
> 1) Is the above-referenced document, attached to the State's Brief as Appendix 9-17, the police report which was provided to Mr. Dobson as referenced at T 18:11-14?

> 2) Was the police report provided to Defendant and/or Defendant's counsel prior to the State putting on any evidence in her District Court trial?

(Record citations omitted.) On 11 May 2022, the trial court replied with an order finding the following:

> Having it been heard on the 7th day of April 2022, . . . this court finds, by the agreement of all parties, that:
>
> (1) The police report attached to the State's Brief as Appendix 9-17 is, in fact, the same police report which was provided to Mr. Dobson as referenced at T 18:11-14; and
>
> (2) The police report was provided to both Defendant and her counsel prior to trial in District Court and again prior to trial in Superior Court.

ANALYSIS

¶ 7 On appeal, Defendant argues the trial court erred by denying her *Motion for Change of Venue*, *Motion to Dismiss for Unconstitutional Prosecution*, and *Motion to Dismiss for Unconstitutional Vagueness*, as well as by denying her motion to dismiss for defects in the *Misdemeanor Statement of Charges* and permitting the State to amend it at the close of all evidence. The State, meanwhile, argues that the *Misdemeanor Statement of Charges* was valid as originally filed; and, in the alternative, that any defects in the statement of charges were cured via amendment at trial. As we agree the charging document was defective and its amendment improper, Defendant's remaining arguments are moot, and we vacate her conviction.

¶ 8 At the threshold, we note that the two arguments at issue in this case—whether the statement of charges was valid *ab initio* and whether the trial court erred in permitting the State to amend the statement of charges—collapse into a single issue just beneath the surface of their respective analyses. Under N.C.G.S. § 15A-924(a)(5),

> [a] criminal pleading must contain[] . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2021). Although special rules—which we will discuss later in this opinion, *see infra* ¶ 10—apply to our construction of statements of charges under this statutory scheme, the above substantive requirement applies to a criminal pleading "[w]hether by statement of charges or by indictment[.]" *State v. Dale*, 245 N.C. App. 497, 502 (2016). Where a charging document does not identify every essential element of the offense in compliance with N.C.G.S. § 15A-924(a)(5), we must vacate a defendant's conviction. *See State v. Barnett*, 223 N.C. App. 65, 72 (2012); *State v. Harris*, 219 N.C. App. 590, 598 (2012).

¶ 9 Like the initial validity of a criminal pleading, the permissibility of amending a criminal pleading at trial depends on whether the amendment would affect an essential element of the offense. The North Carolina Supreme Court has noted that, especially with respect to misdemeanor statements of charges, the State retains liberal power to amend criminal pleadings at trial; however, the amendment may not alter the "nature of the offense . . . ." *State v. Capps*, 374 N.C. 621, 628 (2020) (emphasis added) ("The General Assembly gave prosecutors the freedom to amend criminal pleadings at any stage of proceedings *if doing so does not change the nature of the charges* or is otherwise authorized by law."). Moreover, where the essential elements of an offense are affected by an amendment, the nature of the offense is changed. *State v. Bryant*, 267 N.C. App. 575, 578 (2019) (emphasis added) ("When the prosecutor amended the citation in question from larceny to shoplifting, she changed the nature of the offense charged. Larceny and shoplifting are separate statutory offenses *requiring proof of different elements*."); *see also State v. Carlton*, 232 N.C. App. 62, 66-67 (2014) ("[G]iven the significantly distinct elements of these two crimes, we are compelled to conclude that amending the citation to charge Defendant under [N.C.G.S.] § 14-290—rather than under [N.C.G.S.] § 14-291—would change the nature of the offense charged."). Thus, if a criminal pleading is originally defective with respect to an essential element, the State's amendment of the pleading to include the missing element is impermissible, as doing so would change the nature of the offense. Here, then, if the *Misdemeanor Statement of Charges* was incomplete with respect to an essential element, Defendant would be correct in arguing both that the statement of charges was deficient *ab initio* and that the trial court erred in permitting the State to amend it.

¶ 10 Bearing the foregoing in mind, we now must determine whether, upon conducting a de novo review, the State's failure to specify that the alleged offense occurred at a public place affects an essential element of the offense. *See Dale*, 245 N.C. App. at 502 ("Challenges to the validity

of [a criminal pleading under N.C.G.S. § 15A-924(a)(5)] may be raised at any stage in the proceedings and we review the challenge *de novo*."). In so doing, we are cognizant of the fact that, "[w]hen the [criminal] pleading [at issue] is a . . . statement of charges[,] . . . both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient" to have identified the essential elements of the crime.[2] N.C.G.S. § 15A-924(a)(5) (2021). Here, the Superior Court has confirmed that the police report included in the Record alongside Defendant's *Misdemeanor Statement of Charges* was both before it for consideration and furnished

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2. The State argues that, beyond the consideration of supplementary materials authorized by N.C.G.S. § 15A-924(a)(5), "the rules governing amendments to indictments are far less flexible" than those governing amendments to statements of charges. As a result, it contends, "the amendment was permissible." And, indeed, the statutes governing the respective pleadings state very different amendment rules. *See* N.C.G.S. § 15A-923(e) (2021) ("A bill of indictment may not be amended."); N.C.G.S. § 15A-922(f) (2021) ("A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged."). However, we have been clear that, "[t]o be sufficient, any charging instrument, whether an indictment, arrest warrant, or otherwise, must allege all essential elements of the crime sought to be charged." *State v. Madry*, 140 N.C. App. 600, 601 (2000) (citing N.C.G.S. § 15A–924(a)(5) (1999)). This requirement is grounded in N.C.G.S. § 15A-924(a)(5), which establishes the acceptable floor for the contents of *all* criminal pleadings, not just indictments. *See generally* N.C.G.S. § 15A-924(a)(5) (2021). To the extent our current caselaw permits the amendment of indictments in circumstances similar to those in which it permits the amendment of statements of charges, the explanation is that our caselaw has evolved in a manner that contrasts with an intuitive reading of the sentence "[a] bill of indictment may not be amended." N.C.G.S. § 15A-923(e) (2021). However, it remains the case that, statutorily, neither an indictment nor a statement of charges may be amended in a manner that changes the nature of the offense. *See State v. Barber*, 281 N.C. App. 99, 2021-NCCOA-695, ¶ 29 ("An amendment to an indictment is permissible so long as the amendment does not substantially change the nature of the charge as alleged in the indictment."), *disc. rev. denied*, 871 S.E.2d 518 (N.C. 2022); N.C.G.S. § 15A-922(f) (2021) ("A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged.").

We note the possibility that the State, in arguing for this distinction, may be drawing on our jurisprudence discussing the *jurisdictional* component of criminal pleadings. In *State v. Jones*, for example, the defendant, who failed to object at trial, argued on appeal that the trial court lacked jurisdiction because the criminal pleading—in that case, a citation—did not allege every element of the offense. *State v. Jones*, 255 N.C. App. 364, 369-70 (2017). We held the trial court did not err, reasoning that, because constitutional concerns with criminal pleadings are exclusive to indictments, "the failure to comply with [N.C.G.S.] § 15A-924(a)(5) . . . is not a *jurisdictional* defect." *Id.* at 371 (emphasis in original). Here, however, where Defendant objected at trial and bases her argument on the *statutory* insufficiency of the *Misdemeanor Statement of Charges*, the failure to fulfill the elemental requirement of N.C.G.S. § 15A-924(a)(5) would constitute reversible error.

to Defendant at all relevant times prior her appeal; however, even assuming, *arguendo*, the police report was a supplementary document of the type contemplated by N.C.G.S. § 15A-924(a)(5), the statement of charges did not contain each essential element.[3]

¶ 11 The offense with which Defendant was charged was N.C.G.S. § 14-277.2: carrying a weapon at a parade, funeral procession, picket line, or demonstration. Under N.C.G.S. § 14-277.2(a),

> [i]t shall be unlawful for any person participating in, affiliated with, or present as a spectator at any parade, funeral procession, picket line, or demonstration upon any private health care facility or upon any public place owned or under the control of the State or any of its political subdivisions to willfully or intentionally possess or have immediate access to any dangerous weapon.

N.C.G.S. § 14-277.2(a) (2021).[4] While our existing caselaw does not address the essential elements of N.C.G.S. § 14-277.2(a), we have held with respect to analogous statutes that the location of a defendant's conduct is essential to the offense. Specifically, in *State v. Huckelba*, we observed that, where firearm possession was prohibited on educational

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3. As we were not briefed on the scope of N.C.G.S. § 15A-924(a)(5), we find it improvident—and, for the reasons discussed below, unnecessary, *see infra* ¶¶ 12-16—to decide at this point whether "any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant" encompasses documents before the trial court. N.C.G.S. § 15A-924(a)(5) (2021). Indeed, the full sentence in which the above phrasing appears suggests that "information showing probable cause which was considered by the judicial official" simply refers to information that informed, *ex ante*, the decision of the magistrate judge or other judicial official to authorize the issuance of the document. N.C.G.S. § 15A-924(a)(5) (2021) ("When the pleading is a criminal summons, warrant for arrest, or magistrate's order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement."). While we expressly adopt neither this position nor the State's position that supplementary documents under N.C.G.S. § 15A-924(a)(5) refer to documents considered by the trial court, we observe for the benefit of future consideration that the issue is both unclear based on the language of the statute and, as yet, undiscussed in our jurisprudence.

Suffice it to say, given the reliance of our forthcoming analysis on the police report, the *Misdemeanor Statement of Charges* in this case would not, standing alone, contain every element of the offense charged as required under our established caselaw. *See infra* ¶¶ 12-16; *see also Barnett*, 223 N.C. App. at 72; *Harris*, 219 N.C. App. at 598.

4. While the other subsections of N.C.G.S. § 14-277.2 include exceptions to the general rule set out in N.C.G.S. § 14-277.2(a), none of them are relevant to our discussion of this issue. *See generally* N.C.G.S. § 14-277.2 (2021).

property pursuant to N.C.G.S. § 14-269.2, whether the location of the conduct was, in fact, educational property was an essential element of the offense. *See State v. Huckelba*, 240 N.C. App. 544, 567 ("The indictment charged all of the essential elements of the crime: that Defendant knowingly possessed a Ruger pistol on educational property—High Point University."), *rev'd on other grounds*, 368 N.C. 569, 780 S.E.2d 750 (2015). We also went on to clarify that, while the charging document need not have specified an address, it must have charged that the property on which the offense occurred *was* educational property. *See id.* ("We agree with the State that the physical address for High Point University listed in the indictment is surplusage because the indictment already described the 'educational property' element as 'High Point University.' Because the indictment properly contained all of the essential elements of the crime, Defendant has failed to establish any fatal variance in her indictment.").

¶ 12 Applying *Huckleba* here, we do not find that the statement of charges, even together with the police report, contained sufficient information to indicate that Defendant's conduct took place in the statutorily specified location—that is, "upon any private health care facility or upon any public place owned or under the control of the State or any of its political subdivisions . . . ." N.C.G.S. § 14-277.2(a) (2021) Defendant argues that the statement of charges itself lacks any reference to the location of the alleged offense. The State, meanwhile, does not contest the absence of the offense's location from the statement of charges; rather, it argues the supplementary information in the police report supplies the missing element. Specifically, the State contends that the indictment supplied the missing element by describing the "[l]ocation of [the] [i]ncident" as "40 East St, Pittsboro, NC 27312," further detailing the type of location as a "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk[,]" and specifying that the police responded to that location. We also separately observe that the police report describes Defendant's weapon possession as occurring "on the protest side of the road" and "20 yards from East Street[.]"

¶ 13 Under these facts, we agree with Defendant that the criminal pleading was insufficient with respect to an essential element. In *Huckleba*, the sufficiency of the charging document was derived from the fact that, while the incorrect address it supplied was unnecessary to indicate the type of location where the events occurred, the fact it specifically alleged that Defendant's actions took place "on educational property"—and further specified the "educational property" to be "High Point University"—satisfied the locational element. *Id.* We see a similar pattern emerge in our charging document jurisprudence with respect to

first- and second-degree burglary: even in cases where reviewing courts have held an indictment sufficient despite including an incorrect address, the essential element that the offense took place in a dwelling house is always otherwise present. *See*, *e.g.*, *State v. McCormick*, 204 N.C. App. 105, 111 (2010) (emphasis added) ("[T]he indictment alleges that [the] defendant *'did break and enter the dwelling house* of Lisa McCormick located at 407 Ward's Branch Road, Sugar Grove Watauga County'; however, the evidence adduced at trial indicated that the house number was 317 instead of 407."); *State v. Davis*, 282 N.C. 107, 113 (1972) (emphasis added) ("The indictment alleges that the defendant 'did unlawfully . . . break and enter the dwelling house of Nina Ruth Baker located at 840 Washington Drive, Fayetteville, North Carolina.' . . . . Miss Baker testified that she lived at 830 Washington Drive. There was no controversy as to the location of her residence, and the allegation that [the] defendant 'did unlawfully . . . break and enter the dwelling house of Nina Ruth Baker in Fayetteville, North Carolina,' would have been sufficient."); *see also State v. Cook*, 242 N.C. 700, 702 (1955) (noting that a then-existing burglary statute "contain[ed] the following essential elements: (1) an unlawful breaking or entering (2) of the dwelling house of another (3) with the intent to commit a felony or other infamous crime therein").

¶ 14 This pattern in our caselaw highlights the different functions of the address and the locational element in a charging document. The precise address of a defendant's conduct, while advisable to include, *see State v. Melton*, 7 N.C. App. 721, 724 (1970), primarily operates to apprise the defendant of the conduct of which she is accused. *See State v. Sellers*, 273 N.C. 641, 650 (1968) ("[A] building must be described as to show that it is within the language of the statute and so as to identify it with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense."). On the other hand, indicating the *type* of location involved—a dwelling house in first- and second-degree burglary, educational property in *Huckleba*, and public land here—operates to supply an essential element of the offense. Both adequate notice to a defendant *and* a description of the essential elements of an offense are necessary for an indictment to be valid. *See Davis*, 282 N.C. at 113 ("The description of the house in this case was adequate to bring the indictment within the language of the statute. This house was *also* identified with sufficient particularity as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense.") And, while the same language can often accomplish both purposes, the presence of one does not always guarantee the presence of the other.

¶ 15 Here, although the details in the police report contain an address and briefly describe the location as a "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk[,]" neither of these details indicate, directly or implicitly, that Defendant's conduct took place "upon any private health care facility or upon any public place owned or under the control of the State or any of its political subdivisions" without resort to sources outside the statement of charges and police report. N.C.G.S. § 14-277.2(a) (2021). The address provided is not accompanied by a name or description any more detailed than "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk"; if the address belonged to a public place, it would only be discovered through reference to an external database rather than through reference to the documents actually provided to Defendant. Similarly, nothing in the disjunctive use of "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk" indicates any more than the statement of charges itself that the events described occurred at a public place.[5] Finally, the description of Defendant's firearm possession as occurring "on the protest side of the road" and "20 yards from East Street," while illustrative, again indicates nothing about the public or private nature of the area without reference to external information.

¶ 16 Without any allegations in the charging document supporting an essential element of the offense—that Defendant's conduct took place "upon any private health care facility or upon any public place owned or under the control of the State or any of its political subdivisions"—the *Misdemeanor Statement of Charges* in this case lacked an essential element of N.C.G.S. § 14-277.2(a). N.C.G.S. § 14-277.2(a) (2021). As the missing element was essential, the trial court also erred in allowing the State to amend the charging document at trial, which changed the "nature of the offense . . . ." *Capps*, 374 N.C. at 628. For this reason, we must vacate Defendant's conviction. *See Barnett*, 223 N.C. App. at 72; *Harris*, 219 N.C. App. at 598. However, as in previous cases, we do so "without

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5. To elaborate, we note the significance of the fact the police report lists highways, roads, alleys, streets, and sidewalks as alternatives through the use of a slash. *See Slash*, Webster's New World College Dictionary 1364 (5th ed. 2014) ("[A] short diagonal line (/) used between two words to show that either is applicable . . . ."). Logically, the alternative listing of the types of locations in the list indicates that the conduct could have taken place at *any one* of them, not any particular type of location on the list. In other words, the designation "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk" applies just as accurately to a privately-owned alley as a State-controlled highway, making the designation unhelpful in distinguishing between "public place[s] owned or under the control of the State" and other places. N.C.G.S. § 14-277.2(a) (2021). This is the case even though certain *individual* items in the list on the police report, like highways, either are necessarily or are extremely likely to be "public place[s] owned or under the control of the State" such that, standing alone, they might have supplied the missing element in this case. N.C.G.S. § 14-277.2(a) (2021).

prejudice to the State's right to attempt to prosecute Defendant based upon a valid [criminal pleading]." *Id.*

CONCLUSION

¶ 17 The Misdemeanor Statement of Charges, even when taken together with the police report considered by the trial court and furnished to Defendant, lacked an essential element of N.C.G.S. § 14-277.2.

VACATED.

Judge GRIFFIN concurs.

Judge INMAN concurs in the result only.

STATE OF NORTH CAROLINA
v.
DAMIAN R. TAYLOR, DEFENDANT

No. COA22-243

Filed 29 December 2022

1. Evidence—lay opinion testimony—identification of defendant in surveillance footage

In a prosecution for discharging a weapon into an occupied property and inflicting serious injury, the trial court did not abuse its discretion in admitting lay opinion testimony by three officers identifying defendant as the shooter in the surveillance footage of the crime. Given that the officers had had previous encounters with defendant before viewing the footage, that defendant's appearance had changed between the night of the crime and defendant's trial, and that the quality of the surveillance video itself was poor, there was a rational basis for concluding that the officers were more likely than the jury to correctly identify defendant as the individual shown in the footage.

2. Firearms and Other Weapons—discharging a weapon into an occupied property inflicting serious injury—defendant as perpetrator—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss two counts of discharging a weapon into an occupied property

inflicting serious injury, where the evidence included surveillance footage showing a man approaching the victim's home until he disappeared off-screen; debris flying on-screen moments later; and the man returning to his vehicle and driving off while pointing an object at the home twice, making a flash appear on-screen each time. The surveillance footage—along with several .40 caliber rounds recovered near the home and police testimony identifying defendant as the man shown in the footage—all supported a reasonable inference that defendant fired the shots that struck the victim. Although another man could be seen on video pointing a gun at the house, the footage suggested that the gun failed to fire at all.

3. Constitutional Law—right against self-incrimination—testimony regarding defendant's silence—referenced in closing argument

In a prosecution for discharging a weapon into an occupied property inflicting serious injury, there was no plain error where the trial court allowed a police officer to testify that defendant did not cooperate with law enforcement's investigation of the crime and remained silent when police questioned him, nor was there plain error where the prosecutor referenced the testimony during closing arguments. Defendant's constitutional right against self-incrimination was not violated because the prosecutor did not ask the officer to comment on defendant's silence, did not rely on the officer's testimony to establish defendant's guilt or any element of the charged crime, and only mentioned defendant's noncooperation in order to contextualize law enforcement's decision not to immediately arrest him.

Appeal by Defendant from judgments entered 22 April 2021 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 18 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Taylor H. Crabtree, for the State.

Joseph P. Lattimore for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant Damian R. Taylor appeals from judgments entered after a jury found him guilty on two counts of discharging a weapon into an

occupied property inflicting serious injury and one count of possession of a firearm by a felon. On appeal, Defendant contends that the trial court erred in: (1) allowing several police officers to offer their lay opinion that Defendant can be identified as the shooter in surveillance video of the crime; (2) denying Defendant's motion to dismiss the charges of discharging a firearm into an occupied property inflicting serious injury; and (3) admitting testimony from police that Defendant was not cooperative in the investigation. After careful review, we hold Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The evidence of record tends to show the following:

¶ 3 In the late-night hours of 3 November 2017, Crystal Tyree was in her living room in Rocky Mount when several gunshots were fired into her home from her front yard. Ms. Tyree suffered numerous injuries from the gunfire, including a broken leg and a headwound. Several officers with the Rocky Mount Police Department promptly arrived at Ms. Tyree's home to investigate and render aid to Ms. Tyree.

¶ 4 The investigating officers located the following evidence at the crime scene: (1) six stamped .40 caliber shell casings in the front yard; (2) bullet holes in the living room wall above a couch; (3) a projectile behind Ms. Tyree's television; (4) a shattered glass coffee table on Ms. Tyree's porch; (5) bullet holes in the front door; (6) a .40 caliber stamped shell casing in the road in front of the home; and (7) a blood trail left by Ms. Tyree as she dragged herself from the living room to the kitchen.

¶ 5 Ms. Tyree gave police surveillance footage from three security cameras placed around her home. The video, in black and white, shows a Dodge Avenger stop outside Ms. Tyree's home. A driver exits the vehicle, approaches the home, and then moves closer toward the home and out of the camera frame. Debris then flies from the home. Another individual then gets out of the passenger side of the Avenger and points a gun at the home, though it does not appear to fire. No muzzle flash is shown on the video, and the person seemingly manipulates the gun's firing mechanism after attempting to fire two shots. The driver then reenters the frame and a flash can be seen after he returns to the car. The video next shows a flash from the driver's side of the vehicle as it pulls away from Ms. Tyree's home.

¶ 6 One of the responding officers who viewed the video, Sergeant Keith Miller, believed he recognized Defendant as the driver and another man, Jerry Green, as the passenger. Sgt. Miller had seen Defendant before

and was able to specifically identify him as the driver based on his thick glasses, dreadlocks, and slight size.

¶ 7 Independent of Sgt. Miller's video identification, another officer, Officer Daryl Jones, linked Defendant and Jerry Green to the crime as potential suspects. Told only to be on the lookout for a "dark-in-color sedan," Officer Jones drove to a home on Proctor Street where he had observed a dark Dodge Avenger a few days earlier. When he arrived, Officer Jones found the car parked in a driveway with two men inside. Officer Jones then drove around the block while waiting for other officers to arrive; when he next approached the home, Defendant, Jerry Green, and Terry Green—Jerry's brother—were standing beside the Dodge Avenger and a green Toyota Camry parked nearby. A detective spoke with the three men about the shooting, and all three denied any involvement. Police departed without further investigation at that time.

¶ 8 Later that evening, the identification of Defendant and Jerry Green on the video renewed police interest in the two men's potential involvement in the crime. Officers returned to Proctor Street but were unable to locate Defendant or the Greens; a short time later, however, police detained Terry Green in the green Toyota Camry during a traffic stop. Jerry Green arrived on the scene while the stop was underway and was arrested. Moments later, Defendant drove up in the dark-colored Dodge Avenger seen on the surveillance video; he was then arrested by Sgt. Miller. Police searched Defendant's car and found seven 9 mm shell casings in the vehicle.

¶ 9 Defendant was subsequently indicted on: (1) one count of assault with a deadly weapon with intent to kill inflicting serious injury; (2) two counts of discharging a weapon into occupied property inflicting serious bodily injury; and (3) one count of possession of a firearm by a felon. Prior to trial, Defendant moved to suppress any witness identification of him as the driver seen in the surveillance video. The trial court held a pre-trial *voir dire* hearing on 19 April 2021 before denying Defendant's motion. The State also dismissed the charge of assault with a deadly weapon with a deadly weapon with intent to kill inflicting serious injury.

¶ 10 The jury was impaneled the following day, and various responding officers testified for the State. The surveillance video was published to the jury, and Sgt. Miller was permitted to identify Defendant as the driver seen in the video based on his glasses, dreadlocks, and small frame. At trial, Defendant was not wearing glasses and his hair was longer than depicted in the video. Two other officers also testified that Defendant was the driver seen in the video based on their prior encounters with

him. Defendant's counsel lodged a continuing objection to these identifications. One police witness testified without objection that Defendant declined to answer questions from a detective.

¶ 11 Defendant moved to dismiss all charges at the close of the State's evidence. The trial court denied that motion. Following closing arguments by counsel, instruction by the trial court, and deliberation, the jury found Defendant guilty on all counts. Defendant received a sentence of 120 to 156 months imprisonment on one count of discharging a weapon into occupied property inflicting serious bodily injury and a consolidated, consecutive sentence of the same length for the remaining offenses. Defendant's counsel told the trial court that he intended to give oral notice of appeal immediately after entry of judgment and, following sentencing, the trial court announced that "Defendant gives notice of appeal by way of counsel . . . to the North Carolina Court of Appeals." Defendant also filed a petition for writ of *certiorari* with this Court seeking review in the event that the notice of appeal given at trial failed to comply with the technical requirements of N.C. R. App. P. 4 (2021).[1]

II. ANALYSIS

¶ 12 Defendant argues that the trial court: (1) erred in permitting three officers to offer their lay opinions identifying Defendant on the surveillance video; (2) erred in denying his motion to dismiss; and (3) plainly erred in allowing testimony regarding his silence into evidence. We hold Defendant has failed to demonstrate error under each argument.

A. Standards of Review

¶ 13 We review a trial court's decision to admit lay opinion testimony for an abuse of discretion. *State v. Williams*, 363 N.C. 689, 701, 686 S.E.2d 493, 501 (2009). A denial of a motion to dismiss, by contrast, is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Finally, for evidentiary error subject to plain error review, a defendant must show error and "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Fraley*, 202 N.C. App. 457, 465, 688 S.E.2d. 778, 785 (2010).

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1. The State did not assert a lack of jurisdiction in its brief to this Court, nor did it oppose *certiorari* review in its response to Defendant's petition. In light of these circumstances, and to the extent that Defendant's counsel's notice of appeal and the trial court's recognition thereof on the record failed to comply with the technical requirements of our appellate rules, we allow Defendant's petition for writ of *certiorari* in our discretion.

B. Lay Opinion Testimony

¶ 14 **[1]** In his first argument, Defendant asserts that the trial court abused its discretion in allowing three officers to opine to the jury that Defendant is identifiable as the driver of the Dodge Avenger seen on the surveillance footage. Defendant requests plain error review to the extent that this argument was unpreserved by adequate objection. The State disagrees with Defendant as to preservation and on the merits, noting that the following factors weighed in favor of allowing lay opinion testimony: (1) the testifying officers had encountered Defendant prior to viewing the surveillance video; (2) the Defendant's appearance had changed between the night of the crime and trial; and (3) the quality of the surveillance video itself was poor. We agree with the State and hold that, regardless of whether his counsel's objection preserved this issue below, Defendant has not shown the trial court abused its discretion in allowing this testimony.

¶ 15 Rule 701 of our Rules of Evidence permits lay opinion testimony that is "(a) rationally based on the perception of the witness and (b) helpful to . . . the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2021). In the specific context of lay identification of a defendant on videotape, such testimony is admissible if it "is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony." *State v. Belk*, 201 N.C. App. 412, 415, 689 S.E.2d 439, 441 (2009) (citation and quotation marks omitted). By natural corollary, such testimony is inadmissible when "the jury is as well qualified as the witness to draw the inference and conclusion that the person shown in the surveillance footage is the defendant." *State v. Weldon*, 258 N.C. App. 150, 155, 811 S.E.2d 683, 688 (2018) (cleaned up) (citation and quotation marks omitted).

¶ 16 This Court has identified the following factors as pertinent to the above analysis:

> (1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance [video] was taken or when the defendant was dressed in a manner similar to the individual depicted in the [video]; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial. . . .

> [C]ourts have also considered the clarity of the surveillance image and completeness with which the subject is depicted in their analysis.

Belk, 201 N.C. App. at 415-16, 689 S.E.2d at 441-42 (citations omitted). Critically, we consider the above factors pursuant to the abuse of discretion standard, and "we must uphold the admission of . . . lay opinion testimony if there was a rational basis for concluding that [the witness] was more likely than the jury to correctly identify [the] [d]efendant as the individual in the surveillance footage." *Id.* at 417, 689 S.E.2d at 442 (citation omitted).

¶ 17 Reviewing the evidence in light of the above caselaw, we hold that the trial court could rationally conclude that the officers' lay opinion testimony identifying Defendant on the surveillance video was admissible under Rule 701. First, each of the officers testified that they had previously encountered Defendant before viewing the surveillance video. Second, the first officer to so testify—Sgt. Miller—noted that on the night of the shooting, he recognized Defendant based on the length of his dreadlocks and his distinctively thick eyeglasses, and that both of those identifying characteristics had changed between the crime and trial.[2] Third, the State notes, and Defendant does not dispute, the video's relatively poor quality. As each of these factors weighs in favor of admissibility, we decline to hold that the trial court irrationally allowed the officers' identifying testimony into evidence and abused its discretion as a result. *See Weldon*, 258 N.C. App. at 156, 811 S.E.2d at 689 (holding no abuse of discretion in admission of officer's lay identification from surveillance video when the witness had previously encountered the defendant and the defendant's hairstyle changed between the recording and trial).

¶ 18 We are unconvinced by Defendant's arguments that the trial court could not have conducted a proper Rule 701 analysis because: (1) it did not expressly reference the rule in its pre-trial ruling or during trial; (2) the trial court had not viewed the video at the time of the pre-trial ruling and did not make any express findings as to its quality; and (3) Defendant was not personally responsible for his changed appearance because his glasses were seized and introduced into evidence by the State.

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2. Though the other two officers did not describe in detail what distinguishing physical features led them to identify Defendant on the video, their testimony was largely duplicative and cumulative of Sgt. Miller's admissible testimony. *See*, *e.g.*, *State v. Parker*, 140 N.C. App. 169, 182, 539 S.E.2d 656, 665 (2000) ("When one witness's testimony is properly admitted, erroneous admission of repetitive or cumulative subsequent testimony is not necessarily prejudicial.").

¶ 19 As to Defendant's first argument, we note that Defendant's counsel never expressly argued that the testimony was inadmissible under Rule 701, mentioning only Rules 901, 1001, and 1002. In any event, the pre-trial ruling was entirely preliminary because the admissibility of testimony is not finally adjudged until it is presented into evidence. *State v. McCall*, 162 N.C. App. 64, 68, 589 S.E.2d 896, 899 (2004). The trial court had a full opportunity to consider the admissibility of the officers' testimony based on counsel's objection and in due consideration of all relevant factors—including the self-evident quality of the video published to the jury alongside the officers' testimony.[3] Finally, the exact cause of Defendant's changed appearance is immaterial, as the rule is primarily concerned with whether the change in appearance diminishes an unfamiliar juror's ability to identify the person seen on video. *See Weldon*, 258 N.C. App. at 156, 811 S.E.2d at 688-89 ("[B]y the time of trial, the jury was unable to perceive the distinguishing nature of defendant's hair at the time of the shooting. . . . Accordingly, in that defendant had changed his appearance since the 2 April 2015 surveillance video, not only was [the testifying officer] qualified to identi[f]y defendant in the video, but he was *better* qualified than the jury to do so." (citation and quotation marks omitted)). *See also U.S. v. Farnsworth*, 729 F.2d 1158, 1160 (8th Cir. 1984) ("This criteria is fulfilled where the witness is familiar with the defendant's appearance around the time the surveillance photograph was taken and the defendant's appearance has changed prior to trial. . . . These [differences in appearance] made it difficult for the jury to make a positive identification from the photographs. Because the [witnesses'] frequent contacts [with the defendant] familiarized them with his appearance prior to the robbery, the district court considered their identification testimony helpful to the jury.").

C. Motion to Dismiss

¶ 20 **[2]** Defendant next argues that the trial court erred in denying his motion to dismiss the charges against him, asserting that there was insufficient evidence that he fired the bullets that struck the victim. We disagree.

¶ 21 A motion to dismiss is properly granted only when the State fails to present substantial evidence of each essential element of the charged

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3. The clarity of the video is not dispositive where the testifying officer knew the defendant from prior encounters and the defendant's appearance changed between the video and trial. *See Weldon*, 258 N.C. App. at 156, 811 S.E.2d at 689 (holding such testimony was admissible based on the latter two factors without discussion of the surveillance video's quality).

offense. *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020). We must view the evidence in the light most favorable to the State, giving it the benefit of "every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* Circumstantial evidence is considered equally probative as direct evidence. *State v. Jenkins*, 167 N.C. App. 696, 699, 606 S.E.2d 430, 432 (2005). Here, the State was required to introduce sufficient evidence showing "(1) the willful or wanton discharging (2) of a firearm (3) into any building (4) while it is occupied," *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991), and that Defendant's commission of those acts caused bodily injury to another, N.C. Gen. Stat. § 14-34.1(c) (2021).

¶ 22 Defendant argues that the State's evidence fails to establish that he fired the shots that struck Ms. Tyree. But the testimonial, video, and physical evidence in this case, as well as the reasonable inferences drawn therefrom, show otherwise. Specifically, the video shows a man identified as Defendant get so close to the home that he leaves the camera's field of view, and debris flies on screen moments later. Defendant reenters the frame and returns to his car, after which he points an object at the home and a flash is seen on screen. Then, as Defendant drives away, he points the object at the house again and another flash is observable from the driver's side of the vehicle. The officers' testimony, coupled with the video and several .40 caliber rounds, all fired from the same gun and recovered by police close to the house and in the street, support a reasonable inference that Defendant fired several shots into Ms. Tyree's home. And while it is true that another man can be seen on video pointing a gun at the house, the absence of any casings from another gun at the crime scene, the lack of any muzzle flash on screen, and the man's apparent attempts to manipulate the gun's firing mechanism all support a reasonable inference that he attempted but failed to successfully fire an inoperable firearm at the home. Viewed in the light most favorable to the State, this evidence sufficiently establishes all essential elements of the crime charged, namely that Defendant fired several bullets into Ms. Tyree's home and injured her as a result.

D. Defendant's Silence and Plain Error

¶ 23 **[3]** In his final argument, Defendant argues that the trial court plainly erred in permitting admission of the following testimony from a police officer:

> [THE STATE]: Okay. And, ultimately, you left 1332 Proctor Street?

> [THE WITNESS]: Yes. They weren't cooperative on the scene, and we didn't have charges at the time, so based on what we had, we left the scene.
>
> [THE STATE]: And when you say, "They weren't cooperative," what do you mean?
>
> [THE WITNESS]: They weren't answering a lot of Detective Woods's questions. They weren't particularly happy that we were there speaking to them.

Later, the prosecutor stated in closing argument:

> Now, from there, the officers admitted, "We didn't make an arrest. They didn't want to cooperate, so we had to clear the scene."
>
> Now, ladies and gentlemen, that's what we want officers to do. At that point in time, all they had was a vague vehicle description, and they had no reason to effectuate an arrest. So what did they do? They cleared the scene, and gathered more information.
>
> . . . .
>
> And there is also the fact that it was Sergeant Miller who stopped the Defendant on that night, after they drove around the city trying to find these individuals that they first saw at 1332 Proctor Street. Once law enforcement said, "Hey, can we talk to you about a shooting?" once they said "We don't have anything for you," and got—you heard law enforcement went back to that residence several times that night trying to locate them and trying to locate that vehicle.

Defendant claims the admission of this testimony and the prosecutor's mentions of it in closing argument violated his constitutional right against self-incrimination under the Fifth Amendment to the United States Constitution and Article 1, Section 23 of the North Carolina Constitution.

¶ 24 Defendant has not shown plain error in the above testimony and closing argument. On plain error review, we must consider whether the State "emphasize[d], capitalize[d] on, or directly elicit[ed]" the inadmissible statements. *State v. Moore*, 366 N.C. 100, 106, 726 S.E.2d 168, 173 (2012). The prosecutor did none of those things here. The prosecutor did not ask the witness to comment on Defendant's silence and appears

instead to have sought to contextualize law enforcement's decision to leave Defendant and Terry Green alone in the immediate aftermath of the shooting. The prosecutor's closing argument briefly mentioned Defendant's lack of cooperation only to describe law enforcement's actions in investigating the crime. Finally, the prosecutor did not rely on the challenged testimony to establish Defendant's guilt or any element of the crime charged. We therefore hold that the trial court did not plainly err under *Moore* and the applicable law.

III. CONCLUSION

¶ 25 For the foregoing reasons, we hold Defendant received a fair trial, free from error.

PETITION FOR WRIT OF CERTIORARI ALLOWED; NO ERROR.

Judges GRIFFIN and JACKSON concur.

STATE OF NORTH CAROLINA
v.
JAMEY LAMONT WILKINS

No. COA22-339

Filed 29 December 2022

1. Appeal and Error—preservation of issues—criminal defendant's right to competency hearing—statutory—constitutional—waiver

In a prosecution for multiple drug-related charges, where the trial court entered a pretrial order requiring the State to submit defendant for a competency evaluation but where the evaluation never took place, defendant failed to preserve for appellate review his argument that the court erred in proceeding to trial without the evaluation or a competency hearing. Defendant waived his statutory right to a competency hearing (under N.C.G.S. § 15A-1002) by failing to assert it at trial, and he conceded on appeal that his nonwaivable constitutional right to a competency hearing was not at issue. Further, defendant's main argument on appeal—that the statutory right should be treated as nonwaivable in cases where a trial court orders an evaluation or otherwise inquires into a defendant's competency—was rejected.

2. Appeal and Error—preservation of issues—constitutional argument—waiver—plain error review

In a prosecution for multiple drug-related charges, where several police officers testified that defendant remained silent during a search of his vehicle, defendant waived appellate review—including plain error review—of his argument that the testimony's admission violated his Fifth Amendment rights, given that defendant did not raise this constitutional objection at trial. Even if plain error review had been available on appeal, defendant failed to show that, but for the testimony, the jury probably would have reached a different verdict.

Judge INMAN dissenting.

Appeal by defendant from judgment entered 29 July 2021 by Judge Edwin G. Wilson, Jr., in Caswell County Superior Court. Heard in the Court of Appeals 1 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant.

DIETZ, Judge.

¶ 1 When the competency of a criminal defendant is questioned, there are two sources of rights that can apply: statutory protections and constitutional ones. Our Supreme Court—repeatedly over many decades—has held that the statutory protections can be waived if not timely asserted by the defendant's counsel. The constitutional protections, by contrast, cannot be waived by failure to assert them.

¶ 2 In this appeal, Defendant Jamey Lamont Wilkins concedes that he is not raising a constitutional competency issue, and that he did not preserve his statutory competency issue in the trial court. So he asks this Court to reshape decades of settled law from our Supreme Court distinguishing statutory issues (waivable) and constitutional ones (nonwaivable) by creating a new subcategory of statutory competency cases that are treated the same way that our Supreme Court treats the constitutional ones.

¶ 3 That is not an appropriate task for this Court. We are an error-correcting court, not a law-making one. If, as Wilkins argues, the long

line of cases concerning waiver of statutory competency should be subject to a new, court-created exception, that change must come from our Supreme Court.

Facts and Procedural History

¶ 4 In 2018, Defendant Jamey Lamont Wilkins was riding in the front passenger seat of an SUV when police pulled the vehicle over on suspicion of having thrown contraband into a nearby prison yard. Wilkins remained silent while officers searched the SUV. The search revealed two footballs on the floorboard behind Wilkins's seat that had been cut open, filled with drugs and other contraband, and duct-taped closed. Police also found a large sum of cash within the center console. Law enforcement arrested both Wilkins and the driver of the SUV.

¶ 5 The State charged Wilkins with multiple drug possession offenses, several counts of attempting to provide contraband to an inmate, and attaining habitual felon status. Two days later, Wilkins's counsel filed a motion requesting a competency hearing. At the competency hearing, Wilkins's counsel informed the trial court that, in addition to counsel's own concerns regarding his client's competency, jail staff reported that Wilkins was "exhibiting some odd behaviors" and had recommended an evaluation. The trial court entered an order finding that Wilkins's "capacity to proceed is in question." The order required the State to transport Wilkins to a mental health facility for a forensic evaluation.

¶ 6 That never happened. Wilkins was not transported to the mental health facility and he never received any competency evaluation. Instead, Wilkins was jailed for a brief period and then released on bail.

¶ 7 Several years later, in 2021, Wilkins's case went to trial. By this point, Wilkins had hired new counsel. His new counsel never asserted that the trial court's order requiring a competency evaluation had not been followed, and never asserted that Wilkins required a competency evaluation or hearing.

¶ 8 During the trial, the State elicited testimony from three witnesses concerning Wilkins's silence during the stop and search. Wilkins did not object to this testimony.

¶ 9 The jury acquitted Wilkins of attempting to provide contraband to an inmate but convicted him of the drug possession charges. Wilkins then pleaded guilty to attaining habitual felon status. The trial court consolidated the convictions into one judgment and sentenced Wilkins to a term of 51 to 74 months in prison. Wilkins timely appealed.

Analysis

I. Failure to conduct competency hearing

¶ 10 **[1]** Wilkins first argues that the trial court erred because it ordered a competency evaluation but then proceeded to trial several years later without one. Although Wilkins never objected to the lack of a competency evaluation and hearing, he contends that "once a trial court finds a defendant's capacity to proceed is in question, the right to a competency determination cannot be waived."

¶ 11 Wilkins's argument is not an accurate statement of the law as it exists today. There are two potential sources of a criminal defendant's right to a competency hearing: constitutional and statutory. The constitutional right, which stems from the Due Process Clause, provides that when "a trial court possesses information regarding a defendant that creates sufficient doubt of his competence to stand trial to require further inquiry on the question," the trial court *must* conduct a competency hearing. *State v. Sides*, 376 N.C. 449, 458, 852 S.E.2d 170, 176 (2020). This constitutional right cannot be waived by the defendant because the "trial court has a *constitutional duty* to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court" that meets the due process criteria. *Id.*; *see also State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007). Importantly, Wilkins did not assert an argument under this due process standard in his appellate briefing and conceded at oral argument that he is not raising this due process claim.

¶ 12 Criminal defendants also can have a statutory right to a competency hearing that arises from Section 15A-1002 of our General Statutes. That provision states that when the competency of a defendant is questioned, the trial court "shall hold a hearing" to determine capacity to proceed:

> (a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, *or the court*. . . .
>
> (b) (1) When the capacity of the defendant to proceed is questioned, *the court shall hold a hearing* to determine the defendant's capacity to proceed. If an examination is ordered . . . the hearing *shall be held* after the examination. . . .

N.C. Gen. Stat. § 15A-1002(a)–(b)(1) (emphasis added).

¶ 13 Ordinarily, this sort of compulsory statutory language might be considered a "statutory mandate" and fall within a long line of cases holding

that compliance with the statute cannot be waived by failure to timely assert it to the trial court. *See In re E.D.*, 372 N.C. 111, 121–22, 827 S.E.2d 450, 457 (2019) (collecting cases).

¶ 14 But beginning nearly half a century ago, our Supreme Court held that Section 15A-1002 was subject to ordinary preservation requirements and, thus, defendants must timely raise noncompliance with the statute or the issue is waived on appeal. *State v. Young*, 291 N.C. 562, 566, 231 S.E.2d 577, 580 (1977). Since *Young*, our Supreme Court repeatedly has held that "the statutory right to a competency hearing is waived by the failure to assert that right at trial" and if a defendant proceeds to trial without raising Section 15A-1002 with the trial court, the defendant's "statutory right to a competency hearing was therefore waived by the failure to assert that right at trial." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221; *see also State v. King*, 353 N.C. 457, 466, 466 S.E.2d 575, 584–85 (2001).

¶ 15 Wilkins argues that we should find his statutory competency argument preserved for appellate review by further subdividing the Supreme Court's precedent in *Young*, *King*, *Badgett*, and *Sides*. Wilkins contends that the *Young*, *King*, and *Badgett* cases should be interpreted to apply only when the trial court did not order an evaluation or otherwise inquire into the defendant's competency. But, if the trial court makes that inquiry—for example, by ordering an evaluation as occurred in this case—then *Young*, *King*, and *Badgett* no longer apply and the defendant's counsel need not raise the issue at trial in order to preserve it.

¶ 16 The flaw in this argument is that the Supreme Court in *Young*, *King*, *Badgett*, and the rest of this line of cases never made the sort of distinction that Wilkins asserts here. Instead, these cases focus solely on one factor: that the defendant proceeded to trial and entry of judgment without asserting the right to the hearing. There is no basis in any of these cases to draw factual distinctions that would permit *some* statutory competency issues to be waivable but not others. In these cases, the Supreme Court's holding was straightforward and categorical: the constitutional issue is not waivable; the statutory one is. *See*, *e.g.*, *King*, 353 N.C. at 466, 466 S.E.2d at 584–85; *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221; *Sides*, 376 N.C. at 458, 852 S.E.2d at 176. If this case presents a need for a new subcategory of statutory cases that are not waivable, like the corresponding constitutional ones, that change must come from our Supreme Court.

¶ 17 Having set out the applicable law, we hold that Wilkins's statutory competency argument is not preserved for appellate review. In 2018, shortly after Wilkins's arrest, his counsel questioned his competency

and the trial court ordered that Wilkins be transported to a mental health facility for evaluation. That evaluation never took place and instead Wilkins was released on bail. Three years later, in 2021, Wilkins's case was called for trial and Wilkins appeared with new counsel. He proceeded to trial without raising any competency issues or requesting that the court conduct the evaluation and review it previously had ordered.

¶ 18 Under *Young*, *King*, *Badgett* and their progeny, the failure to assert the statutory right to a competency hearing at trial, before entry of the judgment, waived the *statutory* issue on appellate review. And, because Wilkins did not assert a *constitutional* competency argument on appeal and conceded at oral argument that the constitutional standard is not at issue in this appeal, that nonwaivable issue is not applicable in this appeal. Accordingly, under controlling precedent from our Supreme Court, Wilkins's competency argument is not preserved for appellate review.

¶ 19 Our dissenting colleague finds it "ironic" that, as an error-correcting court, we are unwilling to correct the error that the dissent sees in this case. But what occurred here is commonplace. There are countless examples of cases where an error occurred in the trial court but it was not a *reversible* error—that is, the type of error this Court can correct. This often happens because the error is not prejudicial, but it also happens for the reason presented in this case—because the error was not preserved for appellate review.

¶ 20 Indeed, this case highlights precisely why we have preservation requirements. If Wilkins's counsel believed the competency evaluation was necessary (although due process did not require one), there was ample opportunity to raise the issue and have the trial court act on it. By saving this argument for appeal, Wilkins was able to await the jury's verdict and then, after the verdict was unsatisfactory, seek a second bite at the apple by arguing for a new trial. All the while, the issue producing that new trial easily could have been brought to the trial court's attention and corrected in the first go round. *See State v. Black*, 260 N.C. App. 706, 817 S.E.2d 506, 2018 WL 3734703, at *2 (2018) (unpublished). The dissent may not care about encouraging this sort of gamesmanship, but the Supreme Court does. *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019).

II. Evidence concerning Wilkins's silence

¶ 21 **[2]** Wilkins next argues that the trial court committed plain error by admitting testimony from several law enforcement officers concerning Wilkins's silence during the traffic stop and search of the vehicle.

¶ 22 Wilkins concedes that he did not object to this testimony at trial and requests that this Court review for plain error. The plain error test consists of three factors. First, the defendant must show that "a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Second, the defendant must show that the error had a probable impact on the outcome—that is, "that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Finally, because plain error "is to be applied cautiously and only in the exceptional case," the defendant must show that the error is the type that seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334.

¶ 23 As an initial matter, it is not clear that this issue is reviewable on appeal, even for plain error. Our Supreme Court has long held that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." *State v. Buchanan*, 253 N.C. App. 783, 789, 801 S.E.2d 366, 370 (2017). Although Rule 10 of the Rules of Appellate Procedure does not preclude plain error review of constitutional issues, the Supreme Court has not overturned this precedent. Wilkins concedes that this testimony would be admissible but for his Fifth Amendment argument—in other words, he acknowledges that this argument is solely a constitutional one. Thus, is it an issue that is fully waived if not timely asserted in the trial court.

¶ 24 In any event, even if subject to plain error review, Wilkins has not shown that, but for the references to his silence, the jury probably would have reached a different result. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Nor has he shown that these purported errors were so fundamental, given the weight of the State's evidence at trial, that they call into question the integrity of our justice system. *Id.* We therefore find no error, and certainly no plain error, in the trial court's judgment.

Conclusion

¶ 25 For the reasons explained above, we find no error in the trial court's judgment.

NO ERROR.

Judge DILLON concurs.

Judge INMAN dissents with separate opinion.

INMAN, Judge, dissenting.

¶ 26 I fully agree with the majority that "[w]e are an error-correcting court, not a law-making one." And there does not appear to be any serious disagreement over whether error occurred here: the State ignored a lawful order compelling it to submit Defendant for a competency evaluation, and the trial court ignored a statutory mandate directing it to conduct a competency hearing. Where the majority and I differ, ironically enough, is whether we may perform our error-correcting function in this case to set right the mistakes made below, just as this Court has done in other cases with analogous facts. Because in my view we may provide such redress in this case without running afoul of Supreme Court precedent, I respectfully dissent from the majority's determination that Defendant is not entitled to relief here.

I. ANALYSIS

¶ 27 The statute at issue, N.C. Gen. Stat. § 15A-1002(a)-(b)(1) (2021), contains a statutory mandate compelling the trial court to conduct a hearing on defendant's competency once judicially questioned. *See State v. Myrick*, 277 N.C. App. 112, 2021-NCCOA-146, ¶ 13 ("By failing to make a determination of Defendant's capacity (which had been questioned) and failing to make findings of fact to support that determination, the trial court acted contrary to [Section 15A-1002's] statutory mandate."). As a general rule, such violations are automatically preserved for appellate review without objection. *See In re E.D.*, 372 N.C. 111, 121-22, 827 S.E.2d 450, 457 (2019) (collecting cases). And in at least two cases, this Court has remedied such a violation notwithstanding a defendant's failure to object at trial. *Myrick*, ¶ 13; *State v. Tarrance*, 275 N.C. App. 981, 2020 WL 7973946 (2020) (unpublished).[1]

¶ 28 The majority rightly notes that, in another line of decisions beginning with *State v. Young*, 291 N.C. 562, 231 S.E.2d 577 (1977), our Supreme Court has created a specific exception to this general rule of preservation in the context of statutory competency hearings. But, based on a close reading of those cases and the distinguishing facts of this case, I disagree with the majority that *Young* and its progeny require us to hold that Defendant—unlike the defendants in *Myrick* and *Tarrance*—cannot obtain relief from the trial court's error below.

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1. *Tarrance* lacks precedential value as an unpublished decision, but I find it instructive given it is the only decision from a North Carolina appellate court addressing this issue on procedural facts identical to this case.

1. Young *and Waiver of the Statutory Mandate*

¶ 29 In *Young*, a trial court found the defendant's competency to be in question, involuntarily committed the defendant, and ordered a psychiatric evaluation. 291 N.C. at 566, 231 S.E.2d at 580. Following the evaluation, a psychiatrist opined that the defendant was competent to stand trial. *Id.* at 566-67, 231 S.E.2d at 580. However, the trial court never convened a hearing to judicially determine the defendant's competency, and the case proceeded to judgment. *Id.* at 568, 231 S.E.2d at 581. The Supreme Court declined to entertain the defendant's argument on appeal that the failure to hold a competency hearing constituted error based on the facts including that the defendant's psychiatric evaluation showed him to be competent:

> In the case before us we find no indication that the failure to hold a hearing under [Section 15A-1002] was considered or passed upon by the trial judge. Neither defendant nor defense counsel, although present at trial, *questioned the correctness of the diagnostic finding that defendant was competent to stand trial, understood the charges and was able to cooperate with his attorney*; and neither objected to the failure to hold the hearing. When arraigned, defendant entered a plea of not guilty. The defense of insanity was not raised. *On these facts* we hold that defendant's statutory right, under [Section 15A-1002], to a hearing *subsequent to his commitment*, was waived by his failure to assert that right. His conduct was inconsistent with a purpose to insist upon a hearing to determine his capacity to proceed.

Id. at 567-68, 231 S.E.2d at 580-81 (emphasis added).

¶ 30 Our appellate courts have since applied *Young* to hold a defendant waives his statutory rights to a competency hearing under two general fact patterns: (1) when, as in *Young*, *the ordered psychiatric examination reveals the defendant to be competent*, and the case proceeds to conviction and sentencing without objection or any indication from the defendant that he may lack competency; or (2) when there is no indication of record suggesting incompetency and the question of defendant's competency is never raised in the trial court. *See State v. Dollar*, 292 N.C. 344, 350-51, 233 S.E.2d 521, 525 (1977) (holding a defendant's statutory right to a competency hearing was waived under *Young* and "under the circumstances of this case" because "[t]he report of the psychiatric

examination is admissible in evidence at such [a] hearing" and "[t]he record in the present case shows that the report of the examining psychiatrist was to the effect that the defendant did have the requisite mental capacity to plead to the indictment and to stand trial"); *State v. King*, 353 N.C. 457, 466, 546 S.E.2d 575, 584-85 (2001) (holding a defendant waived application of Section 15A-1002 because "neither defendant nor defense counsel questioned defendant's capacity to proceed"); *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (same).

¶ 31 In sum, the above decisions held the statutory right to a competency hearing had been waived when all the circumstances showed the defendants to be competent, either through uncontradicted evidence in the form of a psychiatric evaluation or through a failure to raise the question at all. The majority has not identified, and I cannot find, any case holding that a defendant waives his right to a mandated competency hearing under facts similar to this case, *i.e.*, when: (1) the issue of a defendant's competency is raised; (2) a trial court judicially determines the defendant's competency to be in question and orders the State submit him to an evaluation; (3) the State ignores the order and no evaluation is conducted; and (4) the case proceeds to judgment without any further action to determine the defendant's competency.

2. Cases Remedying Statutory Violation Absent a Defendant's Motion for Competency Hearing

¶ 32 Defendant has directed us to two decisions by this Court holding that the trial court erred when a defendant's competency was judicially questioned but never determined notwithstanding the defendant's failure to request such a ruling before judgment. In *Myrick*, the defendant filed a motion requesting a competency evaluation, which the trial court granted. *Myrick*, ¶ 2. The defendant was evaluated, and the examining physician opined that he was "incapable to proceed due to untreated psychosis." *Id.* ¶ 3. The defendant was then involuntarily committed at the request of the State, and the trial court found the defendant not guilty by reason of insanity without ever entering an order determining whether the defendant was competent to stand trial. *Id.* ¶ 4. We vacated the trial court's order, holding that "[b]y failing to make a determination of [the d]efendant's capacity (which had been questioned) and failing to make findings of fact to support that determination, the trial court acted contrary to [Section 15A-1002's] statutory mandate." *Id.* ¶ 13.

¶ 33 We reached a similar result in *Tarrance*, which is procedurally identical to the present case. There, the defendant requested and was ordered to undergo a competency evaluation. 2020 WL 7973946 at *1. The

evaluation was never conducted, and the trial court never held a hearing to determine whether the defendant was competent. *Id.* Nonetheless, the trial court proceeded with trial and the defendant was convicted and sentenced. *Id*. On appeal, we held that the matter required a remand for a retroactive competency determination because "[t]he plain language of [Section 15A-1002's] statutory provisions compels the conclusion that once [a trial judge] found that [the d]efendant's capacity to proceed was 'in question,' a competency hearing was statutorily required." *Id.* at *2.

¶ 34 *Tarrance* is an unpublished decision and therefore not binding. But in my view it is persuasive.

3. Reconciling Young, Myrick, *and* Tarrance

¶ 35 At first blush, *Myrick* and *Tarrance* appear inconsistent with *Young* and its progeny; neither of the defendants in those cases raised the lack of a final competency hearing at trial, and yet this Court remedied the statutory violation that *Young* had held, more than thirty years earlier, was waived. But a critical factual distinction resolves this conflict: the *Young* cases all involved defendants who never had their competency questioned at all or who underwent examinations showing them to be competent, while *Myrick* and *Tarrance* involved defendants whose competency remained an open question prior to and at the time of trial.

¶ 36 I draw this distinction largely from the text of *Young* and *Dollar*. In *Young*, our Supreme Court concluded the defendant waived a challenge to the denial of a competency hearing because "[n]either defendant nor defense counsel, although present at trial, questioned the correctness of the diagnostic finding that defendant was competent to stand trial, understood the charges and was able to cooperate with his attorney[.]" 291 N.C. at 568, 231 S.E.2d at 580-81. The Supreme Court in *Dollar* relied on this same fact to conclude that the defendant was not entitled to relief:

> The record in the present case shows that the report of the examining psychiatrist was to the effect that the defendant did have the requisite mental capacity to plead to the indictment and to stand trial. Nothing in the record indicates that before going to trial the defendant requested a hearing or otherwise indicated any adherence to his contention of lack of mental capacity. He offered no evidence on the question.

292 N.C. at 350-51, 233 S.E.2d at 525. Later decisions have followed *Young* and *Dollar* only under similar circumstances, *i.e.*, when a subsequent evaluation and all other evidence showed the defendant to be

competent,[2] or when the defendant's competency was never questioned in the first place. *See*, *e.g.*, *State v. Hoover*, 174 N.C. App. 596, 601, 621 S.E.2d 303, 306 (2005) (holding a defendant waived his statutory right to a competency hearing after the trial court summarily adopted, without objection, the conclusion of competency reached by a forensic examiner); *State v. Ashe*, 230 N.C. App. 38, 40, 748 S.E.2d 610, 613 (2013) ("Here, no one requested a hearing on his capacity to stand trial. Thus, defendant waived his statutory right to such a hearing.").

¶ 37 These substantial factual distinctions lead me to respectfully disagree with the majority's assertion that *Young* and decisions following it "focus solely on one factor: that the defendant proceeded to trial and entry of judgment without asserting the right to the hearing." If the failure to assert the statutory right to a competency hearing were truly the sole factor necessary to establish waiver when competency has been judicially questioned, our Supreme Court would not have specifically noted the expert evaluations in *Young* and *Dollar* in explaining their holdings. *See Young*, 291 N.C. at 568, 231 S.E.2d at 580-81 (expressly including the fact that counsel did not "question[] the correctness of the diagnostic finding that defendant was competent to stand trial" as one of the "facts" on which its holding of waiver was based); *Dollar*, 292 N.C. at 350-51, 233 S.E.2d at 525 (citing *Young* and holding waiver of the right to a statutory competency hearing was shown "under the circumstances of this case," including an expert opinion that the defendant was competent). That this particular fact did not appear in the statutory waiver analyses conducted in the other cases cited by the majority such as *King* and *Badgett* is unsurprising, because the records in those cases contain no indication—such as a motion and subsequent order judicially questioning competency—that the defendants' competency were in question. *King*, 353 N.C. at 466, 546 S.E.2d at 584-85 (2001) ("[N]either defendant nor defense counsel questioned defendant's capacity to proceed"); *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 ("Nothing in the instant record indicates that the prosecutors, defense counsel, defendant, or the court raised the question of defendant's capacity to proceed at any point during the proceedings, nor was there any motion made detailing the specific conduct supporting such an allegation.").

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2. The significance of this fact in holding waiver occurred neatly correlates with our caselaw holding that a trial court need not enter a formal written competency order when all the evidence demonstrates the defendant is competent. *See*, *e.g.*, *State v. Gates*, 65 N.C. App. 277, 283, 309 S.E.2d 498, 502 (1983) ("Although the better practice is for the trial court to make findings and conclusions when ruling on a motion under [Section] 15A-1002(b), it is not error for the trial court to fail to do so where the evidence would have compelled the ruling made.").

¶ 38 I am, of course, mindful of and agree with the majority's statement that "we are an error-correcting court, not a law-making one." But my disagreement with the majority's holding is not based on any policy preference and would vindicate the straightforward statutory command of our General Assembly—unquestionably a law-making body—that the trial court must conduct a hearing once a defendant's competency is judicially questioned. I am cautious to give our Supreme Court's decisions broader application than intended by their text, particularly when doing so raises a potential conflict with decisions of this Court. After all, the Supreme Court's decision in *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), reversed a decision of this Court because it construed a seemingly bright-line rule found in Supreme Court precedent too broadly and, in doing so, effectively overruled a prior decision of this Court that addressed the same legal issue under different facts. 324 N.C. at 378, 384, 379 S.E.2d at 33, 36-37.

¶ 39 I also depart from the majority because our Supreme Court has most recently erred on the side of vindicating a defendant's right to a competency determination—albeit on constitutional rather than statutory grounds—when the evidence as to competency is inconclusive. In *State v. Sides*, 376 N.C. 449, 852 S.E.2d 170 (2020), a defendant was unable to attend her trial due to a suicide attempt and involuntary commitment. 376 N.C. at 451, 852 S.E.2d at 170. The trial court, without conducting a competency hearing, ruled that the defendant's absence was voluntary and proceeded with trial without her present. *Id.* at 455, 852 S.E.2d at 175. The defendant was convicted and argued on appeal that her statutory and constitutional rights to a competency determination were violated. *Id.* at 455-56, 852 S.E.2d at 175. This Court held that both rights, in addition to the defendant's right to be present at her trial, were waived. *Id.* The defendant then appealed that decision to our Supreme Court.

¶ 40 Though the Supreme Court declined to address whether the defendant had waived her statutory right to a competency hearing under Section 15A-1002, *id.* at 457-58, 852 S.E.2d at 177, it did conclude that we erred in holding she had waived her constitutional right to be present at trial without a competency determination, as doing so " 'put the cart before the horse[,]' " *id.* at 456-57, 852 S.E.2d at 176. This was because "a defendant cannot be deemed to have voluntarily waived her constitutional right to be present at her own trial unless she was mentally competent to make such a decision in the first place. *Logically, competency is a necessary predicate to voluntariness*." *Id.* at 459, 852 S.E.2d at 177 (emphasis added). The Supreme Court held the defendant was entitled to a new trial because the trial court erred in failing to conduct a

sua sponte competency hearing prior to concluding the defendant had waived her right to be present for trial, as there was substantial evidence of incompetency sufficient to trigger that constitutionally required procedure. *Id.* at 466, 852 S.E.2d at 182. *Sides* therefore suggests that, in cases like this one, a defendant cannot be said to have waived a right to a competency determination when the question of the defendant's competency is raised by the record. *Cf. Medina v. California*, 505 U.S. 437, 450, 120 L. Ed. 2d 353, 366 (1992) ("[I]t is impossible to say whether a defendant whose competence is in doubt has made a knowing and intelligent waiver of his right to a competency hearing."); *Pate v. Robinson*, 383 U.S. 375, 384, 15 L. Ed. 2d 815, 821 (1966) ("The State insists that Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law. But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.").

¶ 41 In sum, this case is factually distinct from those in which the Supreme Court and this Court have held the defendant waived the statutory right to a competency hearing; in each of those cases, the competency of the defendant was never judicially questioned at all or the unequivocal evidence showed the defendant to be competent. The importance of this distinction is reinforced by *Sides*, which recognized that competency is a necessary predicate to voluntary waiver. I disagree with the majority that *Young*, *Dollar*, and related decisions compel a waiver in cases like the one before us, where a defendant's competency is judicially questioned but an ordered evaluation disclosing his competency is never completed due to the fault of the State. Instead, following the more analogous decisions of *Myrick* and *Tarrance*, I would hold that the trial court's failure to conduct the statutorily mandated competency determination hearing may be raised and remedied on appeal notwithstanding Defendant's failure to renew the issue at trial.

4. Defendant Is Entitled to a New Trial

¶ 42 A defendant who was erroneously denied a competency hearing may receive one of two remedies on appeal, depending on the circumstances: a retroactive competency hearing or a new trial. *Sides*, 376 N.C. at 466, 852 S.E.2d at 182. "Where a retrospective hearing would require the trial court to assess the defendant's competency 'as of more than a year ago,' the Supreme Court has suggested that such a hearing is not an appropriate remedy." *Id.* In this case, Defendant's competency was brought into question over three years ago, his trial concluded more than one year ago, and the State makes no argument in favor of a retroactive

competency hearing. Consistent with *Sides* and absent any countervailing rationale from the State, I would hold that a retroactive competency evaluation is not feasible, vacate Defendant's convictions, and remand for a new trial.

II. CONCLUSION

¶ 43 Defendant's competency in this case was judicially questioned by a trial judge. The State—not Defendant—was required by the trial court's order to submit Defendant to a competency evaluation, and the trial court—not Defendant—bore the express statutory duty to conduct a hearing following that evaluation. The State did not comply with the trial court's order, and the trial court never held the statutorily required hearing because no evaluation had occurred. Under these facts, meaningfully distinct from those in *Young*, *Dollar*, and other decisions finding a waiver of the statutory right to a competency hearing, I would hold that Defendant may seek and receive redress for the trial court's failure to comply with the statutory mandate found in Section 15A-1002. And, given the particular circumstances presented here, Defendant is entitled to a new trial rather than a retroactive competency hearing. Because I do not believe that such a result runs counter to the duties of this Court or conflicts with binding precedent, I respectfully dissent from the majority's holding that Defendant waived his right to correction of the error below.

TAYLOR v. BANK OF AM., N.A.

[287 N.C. App. 358, 2022-NCCOA-912]

CHESTER TAYLOR III, RONDA AND BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE AND ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, PLAINTIFFS-APPELLANTS

v.

BANK OF AMERICA, N.A., DEFENDANT-APPELLEE

No. COA20-160-3

Filed 29 December 2022

Statutes of Limitation and Repose—fraudulent denial of mortgage modification—date of discovery—dismissal for failure to state a claim—sufficiency of allegations

In an action brought against a bank by homeowners who alleged that their applications for mortgage modification were denied as part of a fraudulent scheme, resulting in foreclosure, the trial court improperly dismissed plaintiffs' claims pursuant to Civil Procedure Rule 12(b)(6) as being time-barred by the applicable statute of limitations. Plaintiffs' complaint, which included allegations that plaintiffs were unaware of defendant's alleged fraudulent scheme for many years and that they each suffered a resulting harm, sufficiently stated a claim for relief from fraud to survive defendant's motion to dismiss. Any question regarding when plaintiffs discovered or should have discovered the alleged fraud was one of fact to be resolved at a later stage in the proceedings.

Judge DILLON dissenting.

On remand from the Supreme Court of North Carolina, 2022-NCSC-117, vacating and remanding the decision of the Court of Appeals, 279 N.C. App. 684, 863 S.E.2d 326 (2021). Appeal by plaintiffs from order entered 3 October 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 21 October 2021.

Robinson Elliott & Smith, by William C. Robinson, Dorothy M. Gooding, and Robert F. Orr, and Aylstock, Witkin, Kreis & Overholtz, PLLC, by Samantha Katen, Justin Witkin, Chelsie Warner, Caitlyn Miller, and Daniel Thornburgh, for plaintiffs-appellants.

McGuireWoods, LLP, by Bradley R. Kutrow, and Goodwin Procter LLP, by Keith Levenberg, and James W. McGarry, for defendant-appellee.

CARPENTER, Judge.

¶ 1 This case returned to us on remand from our Supreme Court to address whether the allegations made in Plaintiffs' complaint, if treated as true, are "sufficient to state a claim upon which relief can be granted under some legal theory." *Taylor v. Bank of Am., N.A.*, 2022-NCSC-117, ¶ 9 (citing *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)). After conducting a thorough *de novo* review of the record, we hold the trial court erred when granting Defendant's 12(b)(6) motion.

I. Facts & Procedural Background

¶ 2 We adopt the facts and procedural history of this case as described in this Court's previous opinion, while adding additional key facts considered in our *de novo* review. *See Taylor v. Bank of Am., N.A.*, 279 N.C. App. 684, 2021-NCCOA-556.

¶ 3 On 1 May 2018, eleven Plaintiffs initiated the underlying action against Defendant. On 13 March 2019, an amended complaint was filed after two of the initial Plaintiffs withdrew from the action, leaving nine Plaintiffs remaining. The remaining nine Plaintiffs are domiciled in North Carolina, Wisconsin, Michigan, Arizona, California, and Nevada.

¶ 4 Each Plaintiff sought a modification of their mortgage through Defendant's Home Affordable Modification Program ("HAMP"). Each Plaintiff communicated with loan representatives employed by Defendant regarding their respective HAMP qualification and application.

¶ 5 According to sworn declarations made by its employees, Defendant employed a common strategy of delaying HAMP applications by "claiming that documents were incomplete or missing when they were not, or simply claiming the file was 'under review' when it was not." Defendant's employees were instructed to "inform homeowners that modification documents were not received on time, not received at all, or that documents were missing, even when, in fact, all documents were received in full and on time." Defendant's employees "witnessed employees and managers change and falsify information in the systems of record." One employee of Defendant stated that he was instructed to participate in a "blitz," during which his team "would decline thousands of modification files . . . for no reason other than the documents were more than 60 days old."

¶ 6 Each Plaintiff had their mortgage foreclosed after applying for and being denied a HAMP modification. Plaintiffs allege they are victims of a fraudulent scheme exacted by Defendant.

II. Standard of Review

¶ 7 The sole issue we consider is whether the trial court erred by granting Defendant's motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. "Our review of the grant of a motion to dismiss under Rule 12(b)(6) . . . is de novo." *Bridges*, 366 N.C. at 541, 742 S.E.2d at 796; *See Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 75, 752 S.E.2d 661, 663 (2013) (stating that the court should liberally construe the legal theory under which the requested relief was made.). "We consider '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.* at 541, 742 S.E.2d at 796 (quoting *Coley v. State*, 360 N.C. 593, 631 S.E.2d 121, 123 (2006)).

III. Analysis

¶ 8 At the heart of the underlying matter is whether Plaintiffs' claims are barred by the statute of limitations. In North Carolina a cause of action for a fraud claim must be brought within three years and "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (2021). Discovery means either the actual discovery, or when the fraud should have been discovered in the exercise of "reasonable diligence under the circumstances." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (citing *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 154, 143 S.E.2d 312, 317 (1965)). Generally, the appropriate date of discovery of "alleged fraud or negligence—or whether [the plaintiff] should have discovered it earlier through reasonable diligence—is a question of fact for a jury, not an appellate court." *Piles v. Allstate Insurance Co.*, 187 N.C. App. 399, 405, 653 S.E.2d 181, 186 (2007); *see Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001) (reasoning that when "evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury.").

¶ 9 Here, we hold the trial court erred in granting Defendant's 12(b)(6) motion. Upon review of Plaintiffs' complaint, taking the allegations therein as true, we determine that there are sufficient facts alleged to suggest Plaintiffs remained unaware of Defendant's alleged fraudulent scheme for many years and that they each suffered a resulting harm. Further, the determination of *when* Plaintiffs became aware of the fraud will be dispositive of whether the applicable statute of limitations had expired prior to Plaintiffs bringing their claims. For that reason, we hold that Plaintiffs' complaint sufficiently alleged enough information to withstand a motion to dismiss for failure to state a claim. *See* N.C. R. Civ. P. 12(b)(6).

¶ 10 The dissent states the statute of limitations ceased to be tolled at the time Plaintiffs' homes were foreclosed. This issue may be appropriate to address on a subsequent motion for summary judgment. The determination of *when* Plaintiffs became aware of the alleged fraud may also be appropriate to consider at a later procedural stage—but has no bearing at this juncture—as Plaintiffs have sufficiently pleaded a cause of action, treating all pled allegations as true, to survive dismissal pursuant to N.C. R. Civ. P. 12(b)(6). *See Bridges*, 366 N.C. at 541, 742 S.E.2d at 796. As such, we hold the trial court erred in granting Defendant's 12(b)(6) motion.

IV. Conclusion

¶ 11 We conclude the trial court erred by granting Defendant's 12(b)(6) motion to dismiss. Thus, we reverse the trial court's dismissal of Plaintiffs' complaint and remand for further proceedings.

REMANDED.

Judge JACKSON concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

¶ 12 I dissent for the reasoning stated in my dissent in *Taylor v. Bank of America*, 279 N.C. App. 684, 863 S.E.2d 326 (2021) (Dillon, J., dissenting). As I stated in that dissent, I conclude that the statute of limitations ceased to be tolled, if at all, by the time each plaintiff became aware of his/her injury, that is, when his/her home was foreclosed upon. And since the complaint alleges when the foreclosures took place and that they took place more than three years before the complaint was filed, I conclude that dismissal pursuant to Rule 12(b)(6) was appropriate.

ANTHONY TERRY, PLAINTIFF
v.
PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INCORPORATED, AND
WILLIAM V. LUCAS, DEFENDANT

No. COA22-160

Filed 29 December 2022

1. Premises Liability—common law negligence—landlord's failure to inspect rental property—natural gas explosion—reasonable care

In an action for common law negligence brought against defendant landlord after plaintiff tenant was severely injured by a natural gas explosion that occurred in the rental house, summary judgment was improperly granted in favor of defendant where plaintiff sufficiently forecast evidence that raised a genuine issue of material fact regarding whether defendant's failure to inspect any part of the property during the more than eleven years that plaintiff and his family lived in the house, including the natural gas heating system, or to provide maintenance of that system, constituted reasonable care.

2. Landlord and Tenant—Residential Rental Agreements Act claim—breach of duty of care—failure to inspect gas furnace

The trial court erred by granting summary judgment in favor of defendant landlord on plaintiff tenant's claim under the Residential Rental Agreements Act (RRAA), which plaintiff asserted after being severely injured by a natural gas explosion that occurred in the rental house. Plaintiff's evidence raised a genuine issue of material fact regarding whether defendant breached the statutory duty of care to maintain the premises in a fit and habitable condition by failing to adequately maintain the natural gas furnace and piping in the house.

3. Premises Liability—negligence per se—housing code violation—natural gas explosion—landlord's failure to inspect rental property

In an action brought by plaintiff tenant against defendant landlord after being seriously injured in a gas explosion that occurred in the rental house, the trial court erred by granting summary judgment in favor of defendant on plaintiff's claim of negligence per se. Plaintiff forecast sufficient evidence that defendant violated the city housing code—a public safety statute designed to protect inhabitants of dwellings—by failing to properly inspect and maintain the

natural gas heating system and plumbing and that, as a result of this violation, water leaks led to the severe rusting and corrosion of a gas pipe over a period of many years.

4. Landlord and Tenant—implied warranty of habitability—failure to inspect gas furnace—fit and habitable condition

In an action brought by plaintiff tenant against defendant landlord after being severely injured in a gas explosion that occurred in the rental house, the trial court erred by granting summary judgment in favor of defendant on plaintiff's breach of implied warranty of habitability claim. Plaintiff forecast sufficient evidence that the defective gas pipe that caused the explosion was observable upon reasonable inspection and raised a genuine issue of material fact regarding whether defendant's failure to inspect or maintain any part of the premises in the more than eleven years that plaintiff and his family lived in the house met defendant's obligations under the city housing code and the Residential Rental Agreements Act to maintain the premises in a fit and habitable condition.

Judge CARPENTER dissenting.

Appeal by Plaintiff from order entered 21 September 2021 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 10 August 2022.

Poyner Spruill LLP, by Steven B. Epstein, and Hendren Redwine & Malone, PLLC, by J. Michael Malone, for the Plaintiff-Appellant.

Haywood, Denny & Miller LLP, by Robert E. Levin, for the Defendant-Appellee.

JACKSON, Judge.

¶ 1 Anthony Terry ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of William V. Lucas ("Defendant"). For the reasons detailed below, we reverse the order of the trial court.

I. Background

¶ 2 On 15 September 2006, Plaintiff's wife, Stephanie Terry, entered into a written lease with Defendant for the rental of a three-bedroom, one-bathroom residential property located at 1007 Colfax Street, in Durham, North Carolina. Mrs. Terry, Plaintiff, and their two sons moved

into the home on or around that date. The home contained a crawl space where the water heater and furnace were located. The furnace was located under the home's single bathroom.

¶ 3 In January 2017, Plaintiff and his family were on their way back from taking their oldest son to college when Mrs. Terry received a phone call from her brother, Charles Jones, to inform her that Mr. Jones saw a Public Service Company of North Carolina ("PSNC")[1] truck and fire truck at Plaintiff's home. Mr. Jones also told Mrs. Terry that Plaintiff's neighbor reported smelling natural gas near Plaintiff's home. When Plaintiff and Mrs. Terry returned from their trip there was no one at their home and they received no follow-up information from PSNC, Defendant, or the fire department.

¶ 4 In March 2017, Plaintiff smelled natural gas while in the front yard of his home. In the same month, a neighbor informed Plaintiff that she smelled natural gas around Plaintiff's home. In mid-March 2017, the fire department and PSNC technicians came to Plaintiff's house after a report from someone in the neighborhood about the smell of gas. PSNC technicians used what Plaintiff identified as "leak detectors" around the manhole covers near Plaintiff's house in addition to around the meter at Plaintiff's home. A PSNC technician informed Plaintiff at that time that they did not identify any leaks around the fitting of the meter.

¶ 5 On 13 April 2017, Plaintiff and Mrs. Terry were at home when Plaintiff walked into the bathroom at approximately 6:00 p.m. Immediately as Plaintiff turned on the light, there was an explosion. This explosion caused Plaintiff to catch on fire, resulting in burns over much of his body. Plaintiff was in a coma at the burn center at the University of North Carolina at Chapel Hill Hospital from April 2017 until mid-August 2017. On 21 September 2017, Plaintiff was discharged from the hospital. Following his release, Plaintiff returned to the hospital on a bi-weekly, then monthly basis until he was fully released from care at the end of 2018. Plaintiff continues to suffer constant pain in his legs and feet, nerve damage in his left hand, and is bed-bound for most of his daily life.

¶ 6 After the explosion, the floor of Plaintiff's bathroom was removed for replacement, revealing a severely rusted and corroded pipe leading from the gas meter to the home's furnace. Defendant had not conducted an inspection of the home's furnace, the pipes leading from the gas meter, or any other part of the property since the time that Plaintiff and his family moved into the home in 2005. Defendant did conduct a move-out

1. PSNC has been dismissed from this suit and is no longer a party.

inspection after the prior residents left and before Plaintiff and his family moved in; however, that inspection did not involve Defendant going in the crawl space to examine the furnace or the pipes leading from the gas meter.

¶ 7 On 18 September 2018, Plaintiff initiated this action in Durham County Superior Court asserting claims of negligence against PSNC. On 2 April 2019, Plaintiff filed his First Amended Complaint, with the consent of PSNC, adding Defendant and asserting claims of negligence, violation of the North Carolina Residential Rental Agreements Act ("RRAA"), and breach of warranty of habitability. On 13 July 2020, Plaintiff filed his Second Amended Complaint, alleging violation of North Carolina's RRAA, breach of warranty of habitability, negligence, and negligence *per se* against Defendant. Plaintiff filed a notice of voluntary dismissal of PSNC on 31 August 2021.

¶ 8 On 14 July 2021, Defendant filed a motion for summary judgment. Defendant's motion came on for hearing on 20 September 2021, before the Honorable Orlando F. Hudson, Jr., in Durham County Superior Court. By order dated 21 September 2021, the trial court granted Defendant's motion for summary judgment.

¶ 9 Plaintiff timely filed and served written notice of appeal on 7 October 2021.

II. Analysis

¶ 10 Plaintiff makes four arguments on appeal: (1) genuine issues of material fact preclude summary judgment in Defendant's favor on Plaintiff's common law negligence claim; (2) genuine issues of material fact preclude summary judgment in Defendant's favor on Plaintiff's claim for violation of the RRAA; (3) genuine issues of material fact preclude summary judgment in Defendant's favor on Plaintiff's negligence *per se* claim; and (4) genuine issues of material fact preclude summary judgment in Defendant's favor on Plaintiff's breach of the implied warranty of habitability claim.

¶ 11 We hold that Plaintiff has made a sufficient forecast of admissible evidence on these claims, and that summary judgment in Defendant's favor was therefore improper.

A. Standard of Review

¶ 12 "In a ruling for summary judgment, the court does not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666,

668 (1980). The movant bears the burden of showing "that there is no triable issue of fact and that he is entitled to judgment as a matter of law." *Id.* "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008). "[S]ummary judgment is rarely appropriate in negligence cases." *Nick v. Baker*, 125 N.C. App. 568, 571, 481 S.E.2d 412, 414 (1997). A trial court's grant of summary judgment is reviewed *de novo* on appeal. *Hensley v. Nat'l Freight Transp., Inc.*, 193 N.C. App. 561, 563, 668 S.E.2d 349, 351 (2008). Under *de novo* review, this Court considers the matter anew without deference to the trial court's rulings. *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007).

B. Common Law Negligence

¶ 13 **[1]** Plaintiff first argues that there are triable issues of fact as to his common law negligence claims because there was evidence that Defendant had constructive notice of the alleged hazardous condition and was negligent in failing to warn of or repair the condition. We agree.

¶ 14 Under the ordinary rules of negligence, a landlord may be held liable for personal injury to his tenants if he "knew, *or in the exercise of ordinary care should have known*" that the defect or unsafe condition exists but fails to correct it. *Brooks v. Francis*, 57 N.C. App. 556, 560, 291 S.E.2d 889, 891 (1982) (emphasis added). Whether a party exercised ordinary care is typically a question for the jury. *See Green v. Wellons, Inc.*, 52 N.C. App. 529, 534, 279 S.E.2d 37, 41 (1981) (finding that summary judgment was inappropriate where the "defendant's own evidentiary material contains testimony from which a jury could find that the unsafe condition had existed for such time that [the] defendant should have known of it.").

¶ 15 Here, evidence was introduced that Defendant had not performed any inspection of Plaintiff's property during the entirety of Plaintiff's lease—a period of more than 11 years. Defendant also testified at his deposition that, at the time the tenants prior to Plaintiff moved out of the property, he conducted a "move out inspection," but that this inspection did not involve an examination of the furnace or pipes located in the crawl space under the bathroom. Further, in the summer of 2016, Defendant saw debris in Plaintiff's backyard and became upset at how the property was being maintained. However, despite his concerns, Defendant did not conduct inspections of any other portions of the property to make sure they were being appropriately maintained.

¶ 16 Defendant argues that Plaintiff is seeking for us to impose a duty to inspect on landlords, and further that Plaintiff has provided no evidence

showing that Defendant breached any duty of care owed by Defendant because Plaintiff never informed Defendant of a potential gas leak. We disagree.

¶ 17 Our holding here is not that there is a blanket duty to "inspect the living quarters or crawlspace of a tenant." Rather, we are merely reaffirming the existing and repeatedly recognized common law duty that landlords must "use reasonable care in the inspection and maintenance of leased property." *Bradley v. Wachovia Bank & Trust Co., N.A.*, 90 N.C. App. 581, 585, 369 S.E.2d 86, 88 (1988). In this matter, there remains a question of fact for the jury as to whether Defendant's choice to not inspect any part of Plaintiff's property, including the natural gas heating system, or provide any regular maintenance of the natural gas heating system and related pipes was "reasonable care."

C. Violation of the RRAA

¶ 18 **[2]** Plaintiff also argues that the trial court's grant of summary judgment on his claim for violation of the RRAA was error because there is evidence that Defendant violated the statutory duty of care contained in the RRAA, specifically that Defendant failed to maintain the gas furnace and associated piping in a manner that was safe for tenant occupancy. We agree.

¶ 19 The RRAA creates a statutory duty to "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." N.C. Gen. Stat. § 42-42(a)(2) (2021); *Martin v. Kilauea Props., LLC*, 214 N.C. App. 185, 188, 715 S.E.2d 210, 212 (2011). A breach of this duty is a breach of the implied warranty of habitability, discussed *infra*. In addition, "a violation of the duty to maintain the premises in a fit and habitable condition is evidence of negligence." *Brooks*, 57 N.C. App. at 559, 291 S.E.2d at 891 (cleaned up).

¶ 20 Just as the evidence presented by Defendant and Plaintiff creates a question of fact about whether Defendant's actions constituted "reasonable care," that same evidence presents a jury issue about whether Defendant did "whatever necessary" to maintain the premises in a fit and habitable condition.

D. Negligence *Per Se*

¶ 21 **[3]** Plaintiff next asserts that the trial court improperly granted summary judgment in Defendant's favor on Plaintiff's negligence *per se* claim. Plaintiff contends that the Housing Code of the City of Durham ("the Housing Code") is a statute enacted to protect the public and promote the general welfare of the public and that a triable issue of material fact existed about whether Defendant violated the Housing Code. We agree.

¶ 22 As a threshold matter, we reject Defendant's argument that the Housing Code was not properly submitted to the trial court and that we may not consider them on appeal. The Housing Code complies with the requirements of N.C. Gen. Stat. §§ 160A-79(b)(1) and 160A-77 and are therefore properly before us.

¶ 23 The violation of a public safety statue or ordinance is negligence *per se* unless the statute states otherwise. *Hart v. Ivey*, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992). However, not all statutes or ordinances with general safety implications are subject to this rule. *Mosteller v. Duke Energy Corp.*, 207 N.C. App. 1, 11, 698 S.E.2d 424, 432 (2010). For a safety regulation to be adopted as a standard of care, the purpose of the regulation must be at least in part:

> (a) To protect a class of persons which includes the one whose interest is invaded,
>
> (b) To protect the particular interest which is invaded,
>
> (c) To protect that interest against the kind of harm which resulted, and
>
> (d) To protect that interest against the particular hazard from which the harm resulted.

Id. (cleaned up). If the violation of a safety statute or regulation is punishable as a criminal offense, this weighs in favor of the violation constituting negligence *per se* in a civil trial. *Id.* at 12, 698 S.E.2d at 432.

¶ 24 In *Jackson v. Housing Authority of High Point*, our Court held that a local ordinance regulating the maintenance of heater flues had an "obvious purpose" of protecting the lives and limbs of residents of affected buildings and was therefore a public safety ordinance. 73 N.C. App. 363, 369, 326 S.E.2d 295, 299 (1985). As the legislature had not provided otherwise, a violation of that ordinance constituted negligence *per se*. *Id.*

¶ 25 The Housing Code is a public safety statute, a violation of which would establish negligence *per se*. According to the legislative findings of the Housing Code, the Durham City Council found that:

> [T]here exists in the city, housing which is unfit for human habitation due to dilapidation, defects increasing the hazards of fire, accidents or other calamities, lack of ventilation, light or sanitary facilities and other conditions rendering such housing unsafe or unsanitary or dangerous or detrimental to the health

> or safety or otherwise inimical to the welfare of the residents of the city and that a public necessity exists to exercise the police powers of the city pursuant to G.S. 160D-441 et seq., to cause the repair and rehabilitation, closing or demolishing of such housing in the manner herein provided.

Durham, N.C., Ord. No. 14271, § 2, 6-4-2012. The sections that Plaintiff alleges were violated by Defendant are 10-234(e)(2), 10-234(g)(7), 10-234(h)(1), and 10-234(j)(1). Section 10-234(e)(2) provides:

> (e) Heating.
>
> (2) Central heating units.
>
> a. Every central heating unit shall:
>
> 1. Have every duct, pipe or tube free of leaks and functioning properly to provide an adequate amount of heat or hot water to the intended place of delivery;
>
> 2. Be provided with proper seals between sections of hot air furnaces to prevent the escape of noxious fumes and gases into heat ducts;
>
> 3. Be properly connected to an electric circuit of adequate capacity in an approved manner if electrical power is required; and
>
> 4. Be provided with all required automatic or safety devices and be installed and operated in the manner required by the laws, ordinances and regulation of the city.
>
> b. All liquid fuel used to operate any central heating unit shall be stored in accordance with the city's fire prevention and building codes;
>
> c. All gas and oil heating equipment installed on the premises shall be listed by a testing laboratory and shall be installed, including proper ventilation, in accordance with the applicable provisions of the North Carolina State Building Code.

Section 10-234(g)(7) provides:

> (g) Structural standards.
>
> (7) Floors.

a. Broken, overloaded, excessively decayed or sagging structural floor members are prohibited.

b. Structural floor members shall be supported on foundation walls and piers that are not deteriorated and perform the function for which they were intended.

c. Floor joists shall be supported on structural bearing members and shall not be made structurally unsound by deterioration.

d. Flooring shall be reasonably smooth, not rotten or worn through, and without holes or excessive cracks which permit outside air to penetrate rooms.

e. Flooring shall not be loose.

f. Split, splintered, or badly worn floor boards shall be repaired or replaced.

g. Floors in contact with soil shall be paved either with concrete not less than three inches thick or with masonry not less than four inches thick, which shall be sealed tightly to the foundation walls.

h. All laundry and kitchen floors shall be constructed and maintained so as to be impervious to water.

Section 10-234(h)(1) provides:

(h) Property maintenance.

(1) Structures.

a. Floors, walls, ceilings and fixtures shall be maintained in a clean and sanitary condition.

b. Every dwelling shall be maintained so as to prevent persistent excessive dampness or moisture on interior or exterior surfaces. Building materials discolored or deteriorated by mold or mildew or conditions that may contribute to mold, shall be cleaned, dried, and repaired.

Section 10-234(j)(1) provides:

(j) Plumbing Standards.

(1) General.

a. Every dwelling unit shall be connected to a city water supply and/or sanitary sewer system unless the dwelling unit is connected to a county approved water supply and/or sanitary sewer system.

b. All plumbing, water closets and other plumbing fixtures in every dwelling or dwelling unit shall be installed and maintained in good working condition and repair and in accordance with the requirements of this article and the applicable portions of the North Carolina State Building Code.

c. All plumbing shall be so maintained and used as to prevent contamination of the water supply through cross connections or back siphoning.

d. All fixtures, piping and other plumbing system components shall be in proper working condition with no leaks.

e. No fixtures shall be cracked, broken or badly chipped.

f. All water piping shall be protected from freezing by proper installation in enclosed or concealed areas or by such other means as approved by a city plumbing inspector.

g. At least one three-inch minimum size main plumbing vent shall be properly installed for each building.

h. Soil and water lines shall be properly supported with no broken or leaking lines.

i. Access to all bathrooms shall be through a weather tight and heated area.

j. Every dwelling unit shall contain within a room which affords privacy, a bathtub or shower in good working condition which shall be properly connected to both hot and cold water lines and to the public sanitary sewer or to an approved sewage disposal system. The floor of such room shall be made impervious to water to prevent structural deterioration and any development of unsanitary conditions.

> k. Clean nonabsorbent water-resistant material on bathroom wall surfaces shall extend at least 48 inches above a bathtub and 72 inches above the floor of a shower stall. Such materials on walls shall form a watertight joint with the bathtub or shower.

¶ 26 While the version of the Housing Code in effect at the time of Plaintiff's initiation of this suit provided that a violation of the Housing Code constituted a misdemeanor and was punishable by a maximum fine of $500.00 and 30 days in jail, Durham, N.C., Ord. No. 14271, § 2, 6-4-2012, this section has since been amended to remove criminal liability for a violation of the Housing Code, Durham, N.C., Ord. No. 15982, § 17, 8-1-2022.

¶ 27 The purpose of the Housing Code is explicitly to protect the occupants of affected buildings. The "welfare of the residents of the city" is paramount in the legislative findings. *See* Durham, N.C., Ord. No. 14271, § 2, 6-4-2012. Further, the relevant sections for this action regulate heating units, general structural standards, flooring standards, and plumbing—each of which is clearly designed to prevent structural breakdowns that could result in hazardous conditions for inhabitants. The plain language reveals that the Housing Code is designed to protect inhabitants, such as Plaintiff, of these dwellings, and prevent against injuries that may be caused by failure to maintain the required minimum standards.

¶ 28 Defendant does not appear to dispute that the Housing Code is a public safety statute or ordinance, but instead contests the existence of any evidence of a violation or notice of a violation. Defendant relies on our Court's decision in *Olympic Prods. Co. v. Roof Sys.*, 88 N.C. App. 315, 363 S.E.2d 367 (1988), in support of his contention that he may not be found negligent *per se* for a violation of the Housing Code in the absence of Plaintiff notifying him of a defect.

¶ 29 In *Olympic Products*, the code at issue was the North Carolina Building Code, not a city housing code. *Id.* at 326, 363 S.E.2d at 374. Our Supreme Court has enumerated specific conditions that must be satisfied for a building owner to be found negligent *per se* for a violation of the state Building Code: "(1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage." *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990). Neither this Court nor our Supreme Court has extended these requirements to negligence *per se* in the context of a municipal housing code, and we decline to do so here.

¶ 30 There was a sufficient forecast of admissible evidence that Defendant violated the Housing Code such that summary judgment was improper. There was substantial testimony from both Plaintiff's and Defendant's witness depositions about the severely deteriorated nature of the pipe from which the natural gas leaked. Sam Pendergrass, identified by Plaintiff as a metallurgist expert retained to examine the pipe, testified at his deposition that "[a]s of April 13, 2017, the pipe was severely rusted and corroded and had several holes through which natural gas could have escaped." When asked his opinion on the source of the corrosion on the pipe, Mr. Pendergrass responded that it was from moisture leaking on the pipe. Mr. Pendergrass also opined that it would take approximately seven years for the pipe to have corroded to the level that it was at when he examined it.

¶ 31 Daryl Greenberg, identified by Plaintiff as an expert with a background in real estate brokering, property management, and property management consulting, testified at his deposition that "[i]t would appear that the plumbing standards were not being maintained because they hadn't been inspected, and they had not been functioning properly as the leaks that were occurring under the house apparently were the causation of the rusted gas line."

¶ 32 Defendant questions the credibility of Plaintiff's experts and argues that their testimony should be disregarded. Defendant supports this contention by alleging that Mr. Greenberg's testimony was disregarded in an unrelated matter and that both he and Mr. Pendergrass attempt to create a duty not provided for by law. We are not persuaded.

¶ 33 "Expert testimony is admissible as long as the witness can be helpful to the jury because of his superior knowledge." *Federal Paper Bd. Co. v. Kamyr, Inc.*, 101 N.C. App. 329, 334, 399 S.E.2d 411, 415 (1991). Further, "[q]uestions of expert credibility may not be resolved by summary judgment." *Id.*; *See also City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 657, 268 S.E.2d 190, 195 (1980) (expert credibility questions should be tested by the trier of fact). In this case, the record shows that Mr. Greenberg and Mr. Pendergrass are sufficiently knowledgeable to express an opinion that may be helpful to the jury, particularly in light of the forgiving summary judgment standard.

¶ 34 Defendant testified at his deposition that he viewed the pipe after the explosion and that its condition was "pretty bad." Defendant also conceded that, while he had not read and was not aware of the Housing Code, he agreed that a landlord should maintain their rental property in compliance with the Code. Defendant agreed that heating and plumbing

units degrade over time and need to be maintained and repaired, but also testified that he had not performed an inspection of Plaintiff's property in the 11 years that they had been leasing it.

¶ 35 This forecast of evidence, viewed in the light most favorable to Plaintiff, supports a finding of negligence *per se*. Summary judgment in favor of Defendant was therefore inappropriate on Plaintiff's negligence *per se* claim.

E. Breach of Implied Warranty of Habitability

¶ 36 **[4]** Plaintiff's final argument is that the trial court improperly granted summary judgment in Defendant's favor on Plaintiff's breach of implied warranty of habitability claim because there is evidence supporting Plaintiff's contention that the defective gas pipe was observable upon reasonable inspection by Defendant, and that it violated the Durham Housing Code. Again, we agree.

¶ 37 The RRAA imposes certain duties on landlords and requires them to provide "fit premises." N.C. Gen. Stat. § 42-42(a)(1)-(4) (2021). Specifically, the RRAA mandates that:

> (a) The Landlord shall:
>
> (1) Comply with the current applicable building and housing codes[] . . . to the extent required by the operation of such codes[.]
>
> (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
>
> (3) Keep all common areas of the premises in safe condition.
>
> (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be provided by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

Id.

"The RRAA provides an affirmative cause of action to a tenant for recovery of rent due to a landlord's breach of the implied warranty of

habitability." *Stikeleather Realty & Invs. Co. v. Broadway*, 242 N.C. App. 507, 516, 775 S.E.2d 373, 378 (2015).

¶ 38 Defendant contends that summary judgment was appropriate as Plaintiff did not forecast any evidence as to when the property became unfit. Further, Defendant asserts that there is no evidence that Defendant knew or had reason to know of any defect on the property and can therefore not be liable for breach of the implied warranty of habitability. We disagree.

¶ 39 While Defendant is correct that N.C. Gen. Stat. § 42-42(a)(4) requires written notification of defects in electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities supplied or required to be supplied by the landlord, we have held that such written notification is not required "if the repairs are necessary to put the premises in fit and habitable condition." *Surratt v. Newton*, 99 N.C. App. 396, 405, 393 S.E.2d 554, 559 (1990). The question of whether the conditions requiring repairs render the premises in an unfit and uninhabitable condition is a question of fact for the jury, and therefore is inappropriate for disposition through summary judgment. *See id.* (where the jury found that "the conditions requiring repairs rendered the premises in unfit and uninhabitable condition," no written notice was required of those conditions).

¶ 40 Further, Plaintiff presented sufficient evidence to show that Defendant failed to comply with N.C. Gen. Stat. §§ 42-42(a)(1) and (2), neither of which contain a written notice requirement. As discussed *supra*, there was deposition testimony offered by Plaintiff's experts and by Defendant himself that the residence was not in compliance with the Housing Code, a violation of N.C. Gen. Stat. § 42-42(a)(1).

¶ 41 Defendant also testified that he had undertaken no inspection of the premises in the over 11 years that Plaintiff and his family lived there. N.C. Gen. Stat. § 42-42(a)(2) places an affirmative obligation on landlords to "do whatever is necessary to put and keep the premises in a fit and habitable condition." Defendant is correct that the RRAA contains no mandate that inspections be conducted on any set interval. However, it remains a question for the jury whether failing to conduct any inspection of a residential property for over a decade is doing "whatever is necessary" to maintain the premises in compliance with the RRAA.

¶ 42 Our dissenting colleague theorizes that our decision will potentially allow law enforcement to "enter the homes of tenants to observe inspections by a landlord which may reveal contraband." While we respect our colleague's concern, we do not share it in this matter. This opinion does not modify, or even touch on, the existing framework for searches of

and seizures within rental properties. The Supreme Court of the United States has held that law enforcement may not search a tenant's home based only on the consent of the landlord. *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) ("[S]earch and seizure without a warrant would reduce the Fourth Amendment to a nullity and leave tenants' homes secure only in the discretion of landlords."). We have affirmed this principle, holding that:

> A law enforcement officer may conduct a valid search without a warrant if consent to the search is given "by a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises." G.S. 15A-222(3). A tenant in possession of the premises is such a person.

State v. Reagan, 35 N.C. App. 140, 142, 240 S.E.2d 805, 807 (1978).

¶ 43 We have similarly held, in the context of a hotel room rental, that even where hotel management has a duty to exercise reasonable care in keeping the premises safe, a duty which may include an obligation to inspect a room for damages that may harm other guests, the exercise of that duty does not "excuse law enforcement from complying with the requirements of the Fourth Amendment." *State v. McBennett*, 191 N.C. App. 734, 742, 664 S.E.2d 51, 57 (2008). In *McBennett*, we held that law enforcements' warrantless entry into an occupied hotel room was unlawful, even where the officers were accompanying hotel management in the exercise of their duties. *Id.* "[T]his implied permission to enter was limited to agents of the hotel in the performance of their duties and was an exception to [the] defendant's general expectations of privacy which applied to others, including law enforcement, who were not performing duties on behalf of the hotel." *Id.* at 739, 664 S.E.2d at 55-56. In so holding we noted that the rights of hotel tenants are analogous to the rights of the tenants of a house. *Id.* at 742, 664 S.E.2d at 57.

¶ 44 In this case, the lease between Plaintiff and Defendant already allows Defendant "to enter and inspect said premises at any and all reasonable times." As we have stated above, our decision does not create a blanket duty for landlords to inspect their rental premises; rather, we hold that it is a question for the jury as to whether Defendant's failure, over the course of 11 years, to exercise the right to inspect that he gave to himself in his lease with Plaintiff was reasonable and in compliance with the already existing statutory and common law framework for maintenance of rental properties.

III. Conclusion

¶ 45 For the aforementioned reasons, we reverse the trial court's grant of summary judgment in Defendant's favor and remand the case for further proceedings.

REVERSED AND REMANDED.

Judge MURPHY concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

¶ 46 The majority holds "Plaintiff has made a sufficient forecast of admissible evidence" on his claims of common law negligence, violation of the Residential Rental Agreements Act (the "RRAA"), negligence *per se*, and breach of implied warranty of habitability. Accordingly, the majority reversed and remanded the case to the trial court.

¶ 47 Because Plaintiff failed to forecast evidence showing that Defendant owed a duty to Plaintiff and that Defendant was on notice of dangerous conditions in the home, I disagree and respectfully dissent. For the reasons discussed below, I would hold the trial court did not err in granting Defendant's motion for summary judgment and would thus affirm the trial court's order granting summary judgment in favor of Defendant.

I. Standard of Review

¶ 48 This Court reviews the grant of summary judgment to determine

> whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate when viewed in the light most favorable to the non-movant, 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.

S.B. Simmons Landscaping & Excavating, Inc. v. Boggs, 192 N.C. App. 155, 164, 665 S.E.2d 147, 152 (2008) (citations omitted); *see also* N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 56(c) (2021). The movant bears "the burden of

showing that there is no triable issue of fact and that he is entitled to judgment as a matter of law." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980) (citation omitted). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008) (citation omitted).

¶ 49 Although "summary judgment is seldom appropriate in a negligence case, summary judgment may be granted in a negligence action where there are no genuine issues of material fact[,] and the plaintiff fails to show one of the elements of negligence." *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995) (citations omitted), *disc. rev. denied*, 342 N.C. 656, 467 S.E.2d 715 (1996); *see Croker v. Yadkin, Inc.*, 130 N.C. App. 64, 67, 502 S.E.2d 404, 406 (explaining summary judgment is appropriate when "it is shown the defendant had no duty of care to the plaintiff . . . ."), *disc. rev. denied*, 349 N.C. 355, 525 S.E.2d 449 (1998).

¶ 50 A trial court's grant of summary judgment is reviewed *de novo* on appeal. *Hensley v. Nat'l Freight Transp., Inc.*, 193 N.C. App. 561, 563, 668 S.E.2d 349, 351 (2008) (citation omitted). Under *de novo* review, this Court considers the matter "anew" without "deference to the trial court's rulings[.]" *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (citations omitted).

II. Analysis

A. Common Law Negligence

¶ 51 First, the majority concludes there are genuine issues of material fact as to Plaintiff's common law negligence claim "because there was evidence that Defendant had constructive notice of the alleged hazardous condition and was negligent in failing to warn of or repair the condition." In support of this conclusion, the majority cites Defendant's knowledge of debris in Plaintiff's backyard. The majority also concludes that Defendant's failure to perform an inspection of Plaintiff's property during the lease period creates a question for the jury as to whether Defendant exercised reasonable care; however, no duty to inspect the interior of the private living space of a tenant exists in our common law negligence jurisprudence absent the landlord's knowledge of a dangerous condition. I further disagree that overgrown grass and debris in the backyard served to put Defendant on notice as to the dangerous conditions of the corroded natural gas pipe or plumbing above the furnace. There is no reasonable nexus between the innocuous conditions occurring in the backyard and the apparently dangerous and hidden conditions occurring in the crawlspace of the home. Defendant had no duty

to inspect the property without being put on notice, or otherwise having reason to know, of a hazardous condition.

¶ 52 To establish a *prima facie* action for negligence at common law, a plaintiff must show: "(1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury." *Collingwood v. Gen. Elec. Real Est. Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted). If no legal duty exists between a plaintiff and a defendant, there can be no liability. *Inman v. City of Whiteville*, 236 N.C. App. 301, 303, 763 S.E.2d 332, 333–34 (2014). Traditionally, North Carolina has considered a tenant to be an invitee of the landlord, and "the liability of a landlord for physical harm to its tenant depends on if it knows of the danger." *Prince v. Wright*, 141 N.C. App. 262, 271, 541 S.E.2d 191, 198 (2000) (citation omitted). Therefore, "[a] landlord owes a duty to an invitee to use reasonable care to keep the premises safe and *to warn of hidden dangers*, but he is not an insurer of the invitee's safety." *Id.* at 271, 541 S.E.2d at 198 (citation omitted and emphasis in original). Landlords owe a duty to make repairs and fix hazardous conditions "about which they kn[o]w or ha[ve] reason to know" exist. *Id.* at 271, 541 S.E.2d at 198; *see also Robinson v. Thomas*, 244 N.C. 732, 736–37, 94 S.E.2d 911, 915 (1956) (holding the landlord was not liable to the tenant for the tenant's injuries where the tenant complained of a crack in the floor but did not notify the landlord that the crack was dangerous); *Bradley v. Wachovia Bank & Trust Co., N.A.*, 90 N.C. App. 581, 585, 369 S.E.2d 86, 88 (1988) (holding landlord did not have a duty to tear down the walls of a rented house for purposes of inspection without notice of a hazardous condition). "If the landlord is without knowledge at the time of the letting of any dangerous defect in the premises, he is not responsible for any injuries which result from such defect." *Robinson*, 244 N.C. at 736, 94 S.E.2d at 914 (citation omitted).

¶ 53 Here, there is no evidence that Defendant was aware, or had reason to know, of a plumbing leak above the furnace or that the water leak caused the natural gas pipe to corrode. The liability of the landlord depends on whether the landlord knows of the danger, and in this case, Defendant did not know or have reason to know of the danger. *See Bradley*, 90 N.C. App. at 585, 369 S.E.2d at 88. Defendant did not have reason to know of the corroded pipe because he never received any complaint from Plaintiff about the gas heating system, nor did he know of any fire department or Public Service Company of North Carolina,

Inc. ("PSNC") investigation into natural gas smells around the rental home. *See Robinson*, 244 N.C. at 736, 94 S.E.2d at 914.

¶ 54 It is noteworthy that Plaintiff did not plead that he informed or otherwise put Defendant on notice of the alleged defects and hazardous conditions. In fact, Plaintiff plead bare conclusory allegations in his complaint, not based upon information and belief, indicating Defendant "knew or should have known" that the water pipe was leaking on to the gas pipe. He further alleges the "defective conditions" were "known or *knowable*" by Defendant; however, this is not the standard used in North Carolina for establishing a duty on the part of a landlord. *See Prince*, 141 N.C. App. at 271, 541 S.E.2d at 198. Plaintiff provides no factual basis as to why Defendant would have known of the leak, nor did Plaintiff establish that Defendant was under a duty—recognized in this State—to inspect the property. Additionally, in Plaintiff's response to Defendant's requests for admissions, Plaintiff contradicts the allegations in his complaint that Defendant "knew or should have known" of the dangerous conditions and admits Defendant's knowledge of the facts and circumstances leading up to the explosion were "unknown" to Plaintiff.

¶ 55 Finally, an inspection of the bathroom may have revealed the gas pipe's condition because in the light most favorable to the nonmovant, it was visible through a hole in the floor, but Defendant had no reason and no duty to conduct an inspection without knowledge of any possibly hazardous condition. *See Prince*, 141 N.C. App. at 271, 541 S.E.2d at 198. The record reveals Defendant regularly asked Plaintiff how things were at the rental home, and Plaintiff always told Defendant things were "fine."

¶ 56 Because there is no evidence Defendant had actual or constructive notice of the dangerous conditions, I conclude Defendant did not owe a duty to Plaintiff to warn of or correct the conditions. *See Prince*, 141 N.C. App. at 271, 541 S.E.2d at 198; *see also Robinson*, 244 N.C. at 736, 94 S.E.2d at 915. Accordingly, I would hold the trial court did not err in granting Defendant summary judgment on the common law negligence claim because Defendant did not owe Plaintiff a duty to repair or warn of dangers without actual or constructive knowledge that the defect existed. *See S.B. Simmons Landscaping & Excavating, Inc.*, 192 N.C. App. at 164, 665 S.E.2d at 152.

¶ 57 The majority is inventing a duty to inspect the interior living space of a tenant's residential premises and placing that duty upon the landlord. This is an endeavor better suited for the Legislature. By creating this duty to inspect, there are many questions that will necessarily require an answer, including, but not limited to:

(1) How often **must** the landlord inspect the interior living space of a tenant?;

(2) How often **may** a landlord inspect the interior living space of a tenant?;

(3) What is the scope of the inspection that **must** be conducted?;

(4) What **may** be included in the inspection pursuant to the duty created by the majority?;

(5) Who may conduct these inspections? Can the landlord delegate the duty to a property manager or other third party?;

(6) Can a party authorized to inspect be joined by a law enforcement officer?;

(7) Can the duty to inspect be delegated to law enforcement? (If so, the warrant requirement to enter one's home in the residential tenant setting is practically moot);

(8) Does the duty to inspect apply to government-owned public housing?;

(9) Does the duty to inspect apply to dorms and apartments owned by colleges and universities? If so, can campus police conduct the inspections?;

(10) Can furniture be moved and closets, doors, and cabinets be opened during the inspection?

¶ 58 The duty to inspect created by this majority opinion falls outside the protections of our Constitution against unreasonable searches as the "inspections" are judicially permitted and required, apparently without limitation.

B. Violation of the RRAA

¶ 59 Next, the majority concludes the trial court's grant of summary judgment on Plaintiff's claim for violation of the RRAA was in error because "Defendant failed to maintain the gas furnace and associated piping in a manner that was safe for tenant occupancy." I disagree with this conclusion because Plaintiff failed to show he complied with the statute by providing Defendant with written notice of the needed repairs.

¶ 60 The RRAA creates a statutory duty of care between landlords and their tenants and requires landlords to "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." *Prince*, 141 N.C. App. at 270, 541 S.E.2d at 198 (quoting N.C. Gen. Stat. § 42-42(a)(2)). Under the RRAA, a landlord is required to "[m]aintain in good and safe working order and promptly repair . . . heating [units and other facilities] *provided that notification of needed repairs is made to the landlord in writing by the tenant*[.]" N.C. Gen. Stat. § 42-42(4) (2021) (emphasis added). The RRAA allows a tenant to recover rent based on "a landlord's breach of the implied warranty of habitability." *Stikeleather Realty & Invs. Co. v. Broadway*, 241 N.C. App. 152, 161, 772 S.E.2d 107, 114 (2015). "However, the statute requires that a landlord must have knowledge, actual or imputed, or be notified of a hazard's existence before being held liable in tort." *DiOrio v. Penny*, 331 N.C. 726, 729, 417 S.E.2d 457, 459 (1992) (citing N.C. Gen. Stat. § 42-42(a)(4)); *see also Stikeleather Realty & Inv. Co.*, 241 N.C. App. at 163, 772 S.E.2d at 115 (holding landlord was not liable for defective carbon monoxide detectors because landlord did not know, or have reason to know, they were not in working order).

¶ 61 Here, Plaintiff failed to forecast evidence showing Defendant received written notification from Plaintiff regarding the conditions of the gas furnace and related piping. *See* N.C. Gen. Stat. § 42-42(a)(4). To the contrary, the record reveals Defendant regularly asked Plaintiff how things were at the rental home, and Plaintiff always told Defendant things were "fine." Therefore, I conclude Defendant did not violate the RRAA. *See* N.C. Gen. Stat. § 42-42(4). Accordingly, I would hold the trial court did not err in granting Defendant summary judgment on Plaintiff's RRAA claim. *See S.B. Simmons Landscaping & Excavating, Inc.*, 192 N.C. App. at 164, 665 S.E.2d at 152.

C. Negligence *Per Se*

¶ 62 Third, the majority concludes summary judgment in Defendant's favor was inappropriate because "a triable issue of material fact existed about whether Defendant violated the Housing Code." The majority declined to extend the requirements for establishing violation of a state building code to that of a municipal housing code. I conclude these conditions are equally applicable to building and housing codes.

¶ 63 To make out a *prima facie* claim for negligence *per se*, a plaintiff must establish:

> (1) a duty created by a statute or ordinance; (2) that the statute or ordinance was enacted to protect a

> class of persons which includes the plaintiff; (3) a breach of the statutory duty; (4) that the injury sustained was suffered by an interest which the statute protected; (5) that the injury was of the nature contemplated in the statute; and (6) that the violation of the statute proximately caused the injury.

Asher v. Huneycutt, 2022-NCCOA-517, ¶ 22 (citation omitted). "The general rule in North Carolina is that the violation of a [public safety statute] constitutes negligence *per se*." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (citation omitted). A public safety statute imposes a duty on a defendant for the protection of others. *Id.* at 326, 626 S.E.2d at 266. Violations of a housing or building code constitute negligence *per se* because both ordinances promote the safety of the public. *See Lassiter v. Cecil*, 145 N.C. App. 679, 684, 551 S.E.2d 220, 223 (2001).

¶ 64 Our Supreme Court has enumerated specific conditions, or elements, that must be satisfied for a building owner to be found negligent *per se* for a violation of the North Carolina Building Code: "(1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage." *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (citing *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 329, 363 S.E.2d 367, 375, *disc. rev. denied*, 321 N.C. 744, 366 S.E.2d 862 (1988)).

¶ 65 I disagree with the majority's refusal to conclude the specific conditions, or elements, that must be satisfied for an owner to be found negligent *per se* under the state building code do not equally apply to a municipal housing code violation. *See Olympic Products Co.*, 88 N.C. App. at 329, 363 S.E.2d at 375; *Lamm*, 327 N.C. at 415, 395 S.E.2d at 114. North Carolina law requires a landlord to "[c]omply with the current applicable building and housing codes . . . ." N.C. Gen. Stat. § 42-42(a)(1) (2021). The Legislature did not create separate duties for compliance with building and housing codes, and I can discern no logical reason why this Court should create separate duties where the Legislature has addressed the issue and chose not to do so. Therefore, the requirements for establishing negligence *per se*, set out by this Court in *Olympic Products* and cited by our Supreme Court in *Lamm*, should apply to building and housing codes alike.

¶ 66 In this case, Defendant cannot be found liable for negligence *per se* because the notice condition is not satisfied. *See Olympic Products Co.*,

88 N.C. App. at 329, 363 S.E.2d at 375; *Lamm*, 327 N.C. at 415, 395 S.E.2d at 114. Accordingly, I would hold the trial court did not err in granting Defendant summary judgment on the negligence *per se* claim. *See S.B. Simmons Landscaping & Excavating, Inc.*, 192 N.C. App. at 164, 665 S.E.2d at 152.

D. Breach of Implied Warranty of Habitability

¶ 67 Finally, the majority concludes the trial court erred in granting summary judgment in favor of Defendant with respect to Plaintiff's breach of implied warranty of habitability claim "because there is evidence supporting Plaintiff's contention that the defective gas pipe was observable upon reasonable inspection by Defendant, and that it violated the Durham Housing Code." As discussed above, Defendant did not owe a duty to inspect the gas pipe without notice of its defective condition.

¶ 68 "Tenants may bring an action for breach of the implied warranty of habitability, seeking rent abatement, based on their landlord's noncompliance with [N.C. Gen. Stat. §] 42-42(a)." *Surrat v. Newton*, 99 N.C. App. 396, 404, 393 S.E.2d 554, 558–59 (1990) (citation omitted). Our Court has stated that N.C. Gen. Stat. § 42-42(a)(4) "require[s] written notification of needed repairs involving electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord"; however, written notice is not required for "needed repairs if the repairs are necessary to put the premises in a fit and habitable condition or if the conditions constitute an emergency." *Id.* at 405, 393 S.E.2d at 559 (tenant established a *prima facie* case of breach of implied warrant of habitability and provided verbal notice to landlord of needed repairs). This does not obviate the requirement that a tenant must give notice to the landlord of the repair that is needed to put the premises in a fit and habitable condition. *See DiOrio*, 331 N.C. at 729, 417 S.E.2d at 459; *see also* N.C. Gen. Stat. § 42-42(a)(4).

¶ 69 The majority correctly states the RRAA imposes certain duties on landlords to provide "fit premises." The majority then concludes there was sufficient evidence "Defendant knew or had reason to know of any defect on the property" and thus violated N.C. Gen. Stat. § 42-42(a). Here, the record contains ample evidence that Plaintiff did not provide Defendant with notice of the issues with, or concerns about, hazardous conditions. Defendant did not have notice an inspection was warranted. *See Prince*, 141 N.C. App. at 271, 541 S.E.2d at 198. Therefore, Defendant cannot be liable for repairs of which he had no knowledge were needed. *See id.* at 271, 541 S.E.2d at 198. Accordingly, I would hold the trial court did not err in granting Defendant summary judgment on the breach of

implied warranty of habitability claim. *See S.B. Simmons Landscaping & Excavating, Inc.*, 192 N.C. App. at 164, 665 S.E.2d at 152.

¶ 70 It appears the majority is judicially creating a duty of a landlord to inspect that is not established by statue or common law. Under the approach to this case taken by the majority, law enforcement could potentially partner with landlords "for safety and/or accountability purposes" to enter the homes of tenants to observe the inspections by a landlord which may reveal contraband. That "public service" provided by law enforcement may well result in many lawful seizures and arrests that would otherwise be unlawful or not permitted absent probable cause to enter the home. This newly created duty poses the risk of severely undermining the constitutional protections of residential tenants, to the exclusion of those fortunate enough to own their homes, to be free from searches of their homes without probable cause and the issuance of a search warrant.

III. Conclusion

¶ 71 For the foregoing reasons, I disagree with the majority's conclusion that genuine issues of fact existed as to Plaintiff's four claims, and I respectfully dissent. I would hold the trial court did not err in granting Defendant's motion for summary judgment. Accordingly, I would affirm the Order.

WRIGHT CONSTRUCTION SERVICES, INC., ET AL., PLAINTIFFS
v.
LIBERTY MUTUAL INSURANCE COMPANY, ET AL., DEFENDANTS

No. COA21-583

Filed 29 December 2022

Discovery—North Carolina Uniform Interstate Depositions and Discovery Act—discovery objections of nonparty—attorney-client privilege—subject matter jurisdiction

While ordinarily North Carolina courts have subject matter jurisdiction over the discovery objections of a nonparty to an underlying foreign action when a subpoena is issued in North Carolina pursuant to the North Carolina Uniform Interstate Depositions and Discovery Act, here, a nonparty's (defendant's counsel) discovery objections based on the attorney-client privilege were subject to the subject matter jurisdiction of the out-of-state court where the underlying action was pending, not the trial court in North Carolina. Because the attorney-client privilege belongs to the client (defendant here), discovery objections based on the client's privilege are "disputes between the parties to the action" and therefore fall under the jurisdiction of the court where the underlying foreign suit is pending, pursuant to N.C.G.S. § 1F-6.

Appeal by Defendants from order entered 30 July 2021 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 March 2022.

Bell, Davis & Pitt, P.A., by Joshua B. Durham, Jason B. James, and Alan M. Ruley, for plaintiff-appellee.

Sigmon Law, PLLC, by Mark R. Sigmon, and Shumaker, Loop & Kendrick, LLP, by Steven A. Meckler and Daniel R. Hansen, for defendants-appellants.

MURPHY, Judge.

¶ 1 Ordinarily, where a subpoena is issued in North Carolina in connection with a case tried in a different state pursuant to the North Carolina Uniform Interstate Depositions and Discovery Act ("NCUIDDA"), N.C.G.S. § 1F-1, *et seq.*, North Carolina courts have subject matter jurisdiction over the discovery objections of a nonparty to the underlying

foreign action. However, since the attorney-client privilege always belongs to the client, discovery objections based on the attorney-client privilege must fall under the jurisdiction of the court where the underlying foreign suit is pending. Here, where Defendant's counsel objected to discovery after being issued a subpoena pursuant to the NCUIDDA in connection with an ongoing Missouri suit, the Missouri court, not the trial court in North Carolina, had subject matter jurisdiction over the objection, notwithstanding the fact that Defendant's counsel objected only in its own name.

BACKGROUND

¶ 2 This appeal arises out of a discovery request by Plaintiff Wright Construction Services, Inc., associated with an interstate subpoena pursuant to the NCUIDDA. The foreign action for which Plaintiff sought a subpoena in North Carolina was a Missouri insurance dispute concerning whether Defendant Liberty Mutual, which had issued performance and payment bonds to Plaintiff for a failed construction project, had a right to indemnify Plaintiff for legal fees incurred resolving its claims.

¶ 3 During the Missouri action, Plaintiff sought discovery from Defendant, including "all [Defendant's] correspondence and communications with Shumaker, Loop, & Kendrick[,] [LLP] [("SLK"),]" the law firm representing Defendant in all matters relevant to this case. In response, Defendant produced a ten-page privilege log asserting the attorney-client privilege and work product doctrine. Plaintiff moved to compel, arguing, *inter alia*, that (1) "[r]outine[] investigative documents," of which many of the requested documents allegedly are, "cannot be protected under the work product doctrine" because SLK was operating in the capacity of a claims adjuster; (2) the documents at issue were "created well before litigation was reasonably foreseeable"; (3) Plaintiff alleged that it acted in good faith in part based on its reliance on counsel, which waives the attorney-client privilege; and (4) "[c]ommon sense requires that, in order to defend against the indemnity claim, [Plaintiff] should obtain discovery into whether [Defendant] acted reasonably in incurring the charges in the first place." After an in camera review of five of the items, the Missouri trial court denied the motion, ruling in an order entered 25 February 2021 that all of the documents were protected under both the work product doctrine and the attorney-client privilege.

¶ 4 However, on 1 November 2019, long before the Missouri court's ruling on Plaintiff's motion to compel, the Missouri court entered a *Commission to Serve Subpoena for Testimony and the Production of Documents* pertaining to SLK, pursuant to which Plaintiff served a

subpoena directly on SLK in Mecklenburg County Superior Court in compliance with N.C.G.S. § 1F-3. *See* N.C.G.S. § 1F-3(a)-(b) (2021) ("To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this State. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this State. . . . When a party submits a foreign subpoena to a clerk of court in this State, the clerk, in accordance with that court's procedure, shall promptly open an appropriate court file, assign a file number, collect the applicable filing fee pursuant to [N.C.G.S. §] 7A-305(a)(2), and issue a subpoena for service upon the person to which the foreign subpoena is directed."). In doing so, Plaintiff sought "all documents" in SLK's possession pertaining to the construction bonds and the resulting litigation. SLK objected, and Plaintiff moved to compel, with Plaintiff making substantially the same arguments as it made before the Missouri court. However, unlike the Missouri court, which denied the motion entirely, the North Carolina trial court granted the motion in part and denied it in part, producing an itemized list of documents by privileged status. The resulting order, entered 12 April 2021, provided that, "[t]o the extent [it] may conflict with the Missouri [o]rder . . . the Missouri [o]rder shall control."

¶ 5 The following day, on 22 April 2021, Defendant filed a *Motion to Amend or Clarify Order* under Rule 52(b) arguing that, with respect to the conflict provision in the trial court's April order, all documents the trial court ruled were unprotected conflicted with the Missouri order because the underlying theories Plaintiff used to contest the privileged status of the documents in its North Carolina motion to compel were substantially the same as those rejected by the Missouri trial court in its Missouri motion to compel. On 11 May 2021, while that motion was pending, Defendant appealed; and, in a separate order entered 30 July 2021, the trial court clarified that this conflict provision referred only to direct conflicts between specific documents.

¶ 6 Defendant timely appealed from the 30 July 2021 order.

ANALYSIS

¶ 7 On appeal, Defendant argues that (1) based on N.C.G.S. § 1F-1 *et seq.*, the trial court lacked subject matter jurisdiction over SLK's discovery objection; (2) the trial court erred by failing to make adequate findings of fact and conclusions of law with respect to whether the documents at issue were privileged; and (3) the trial court erred in holding that some of the documents were not protected by the work product

doctrine or the attorney-client privilege. For the reasons discussed below, we hold the trial court lacked jurisdiction over SLK's discovery objection, rendering the other issues moot.

¶ 8 Defendant argues the trial court lacked subject matter jurisdiction to hear SLK's discovery objection because, under the terms of the NCUIDDA, only the Missouri court may exercise subject matter jurisdiction over discovery objections. Under N.C.G.S. § 1F-6,

> [a]n application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under [N.C.G.S. §] 1F-3 must comply with the rules or statutes of this State and be submitted to the court in the county in which discovery is to be conducted. Where a dispute exists between the parties to the action, the party opposing the discovery shall apply for appropriate relief to the court in which the action is pending and not to the court in the state in which the discovery is sought.

N.C.G.S. § 1F-6 (2021). Defendant admits that "the North Carolina [trial] court has jurisdiction to rule on objections from the non-party target of [a] subpoena[,]" but contends that, in this case, because "[b]oth SLK and [Defendant] have objected to the subpoena on privilege and work-product grounds[,]" the "trial court lacked jurisdiction to rule on the objection, and the only court that can resolve Liberty's objections is the Missouri court." In the alternative, Defendant argues that the official comments to N.C.G.S. § 1F-6 indicate its terms should apply in cases such as these where, in asserting a privilege, a party's protection is contingent on the privileged status of a non-party's document. Plaintiff, meanwhile, argues that only SLK, not Defendant, objected to the production of documents in North Carolina, rendering N.C.G.S. § 1F-6 inapplicable.

¶ 9 At the threshold, we clarify that, as a factual matter on the Record, SLK's objection to document production appears to have been on its own behalf and not, in any part, on Defendant's. The only objection to the subpoena—tellingly entitled *Objection of Shumaker, Loop & Kendrick, LLP to Subpoena and Deposition Notice*—neither states nor implies that the objection is being made on behalf of Defendant in a representative capacity. (Emphasis added.) Similarly, the response to Plaintiff's North Carolina motion to compel—entitled *Shumaker Loop & Kendrick's Brief in Opposition to Plaintiff's Motion to Compel*—also makes no mention of speaking for Defendant in a representative

capacity. (Emphasis added.) On the other hand, both documents explicitly identify the affected interests as those of SLK itself. Accordingly, we must evaluate, in light of the fact that SLK objected to discovery only on its own behalf, where jurisdiction over SLK's objection exists under the NCUIDDA.

¶ 10 "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992). Here, N.C.G.S. § 1F-6's language indicates that recourse to the court where the original action is pending is required "[w]here a dispute exists between *the parties to the action*[.]" N.C.G.S. § 1F-6 (2021) (emphasis added). Furthermore, it is well-established in our canons of statutory interpretation that, "[u]nder the doctrine of *expressio unius est exclusion alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Cooper v. Berger*, 371 N.C. 799, 810 (2018). Thus, we can infer that, by specifying that a discovery dispute between *parties* to the underlying foreign case must be resolved in the court where the original action is pending, the General Assembly intended that disputes involving a *nonparty* to the underlying case be resolved domestically.

¶ 11 The official comments to N.C.G.S. § 1F-6 support this view. Very explicitly, the example laid out in Comment 1 specifies where jurisdiction exists with respect to both parties and nonparties to the underlying foreign case:

> Example 1: A dispute is pending in Tennessee. Plaintiff, by issuance of a North Carolina subpoena in accordance with [N.C.G.S. §] 1F-3, notices the deposition of defendant's ex-wife, who resides in North Carolina. During the deposition held in North Carolina, plaintiff asks a question about information to which the joint spousal privilege applies. The attorneys for the ex-wife and defendant object on grounds of the spousal privilege. If plaintiff believes the privilege has been invoked inappropriately by the ex-wife, plaintiff must resort to the North Carolina court issuing the North Carolina subpoena, which would apply its laws on privilege and its conflicts of laws principles. However, to overcome defendant's objection on grounds of the spousal privilege or to have that information admitted at trial, plaintiff must resort to the trial court in Tennessee, which would apply its own laws, including its conflicts of laws principles.

N.C.G.S. § 1F-6, N.C. cmt. 1 (2021). Comments, while not binding authority, are highly persuasive. *See Crowder Const. Co. v. Kiser*, 134 N.C. App. 190, 206 (1999) ("Consistent with the practice of our Supreme Court, we have given the Commentary 'substantial weight[.]' "); *Porter v. Beaverdam Run Condo. Ass'n*, 259 N.C. App. 326, 332 (2018) ("In interpreting this statutory provision, we are guided by the Official Comment to the statute[] . . . ."). Especially in cases where, as here, the North Carolina Comments corroborate a plain reading of the statute, we see no reason to deviate from the General Assembly's guidance. Accordingly, we hold that a nonparty, when objecting on its own behalf to a subpoena issued in North Carolina pertaining to an underlying foreign case, is ordinarily subject to the jurisdiction of the trial court in North Carolina.

¶ 12 However, having established the general rule under N.C.G.S. § 1F-6, our inquiry is still incomplete as to the facts in this case. In the hypothetical posed by North Carolina Comment 1, the subpoena issued to the non-party—the ex-wife—seeks documents allegedly protected by the spousal privilege. N.C.G.S. § 1F-6, N.C. cmt. 1 (2021). The ex-wife then objects on her own behalf, which results in North Carolina having jurisdiction over the objection. *Id.* Critically, not only does the ex-wife in this scenario *in fact* object to discovery on her own behalf, but she also raises the spousal privilege—a privilege conceptually belonging, at least in part, to her. *See State v. Godbey*, 250 N.C. App. 424, 430 (2016) (marks omitted) (emphasis added) ("The marital communications privilege is premised upon the belief that the marital union is sacred and that its intimacy and confidences deserve legal protection. Whatever is known by reason of that intimacy should be regarded as knowledge confidentially acquired, and *neither spouse should be allowed to divulge it to the danger or disgrace of the other*.") (quoting *State v. Rollins*, 363 N.C. 232, 236 (2009), and *Hicks v. Hicks*, 271 N.C. 204, 205 (1967)).

¶ 13 Not so here. Although, like the ex-wife in North Carolina Comment 1, SLK objected strictly in its own name, *see supra* ¶ 9, the privilege it invoked does not conceptually belong to it or exist for its benefit. Rather, "[t]he law of privileged communications between attorney and client is that the privilege is that of the client. *He alone is the one for whose protection the rule is enforced*." *In re Miller*, 357 N.C. 316, 339 (2003) (emphasis in original). In other words, SLK's objection, though in its own name, was *not* for its own benefit; instead, SLK's objection to the production of documents pertaining to Defendant's representation must necessarily have been for Defendant's benefit, as the privilege belongs to Defendant alone. *See Crosmun v. Trustees of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 440 (2019) ("[The attorney-client privilege] is

the client's alone[;] . . . '*[i]t is not the privilege of the court or any third party.*' ") (quoting *id.* at 338) (emphasis in original).

¶ 14 This, we believe, renders the case at bar distinguishable from the scenario posited in North Carolina Comment 1. While North Carolina courts will ordinarily have jurisdiction over the discovery objections of a nonparty to the underlying foreign action when a subpoena is issued pursuant to N.C.G.S. § 1F-1, *et seq.*, *see supra* ¶¶ 10-11, this general rule does not apply to an attorney objecting on the basis that documents pertaining to her client's representation are privileged. Instead, because the attorney-client privilege always belongs to the client and the client alone, discovery objections based on the client's privilege—even where purportedly invoked only in the name of the attorney—are necessarily "dispute[s] [] between the parties to the action" and must therefore fall under the jurisdiction of the court where the underlying foreign suit is pending. N.C.G.S. § 1F-6 (2021). Accordingly, pursuant to N.C.G.S. § 1F-6, the Missouri court, not the trial court in North Carolina, had subject matter jurisdiction over SLK's objection, notwithstanding the fact that SLK objected only in its own name.

¶ 15 Having determined the trial court lacked subject matter jurisdiction, the parties' remaining arguments are moot. Furthermore, as "the court must [] have subject matter jurisdiction[] . . . in order to decide a case[,]" we must vacate the order of the trial court and dismiss the case. *In re T.R.P.*, 360 N.C. 588, 590 (2006). SLK must obtain a ruling on its objection by seeking a valid order on the privileged status of the documents at issue from the Missouri court.

CONCLUSION

¶ 16 Under the NCUIDDA, the trial court lacked subject matter jurisdiction over SLK's objection and therefore lacked the authority to enter the challenged order. Accordingly, we vacate the order and dismiss the case.

VACATED AND DISMISSED.

Judges INMAN and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 29 DECEMBER 2022)

BATES v. STAPLES, INC. 2022-NCCOA-915 No. 22-431	Mecklenburg (21CVS823)	Affirmed
BOYLES v. ORRELL 2022-NCCOA-916 No. 22-309	Forsyth (16CVD4920) (18CVD2726)	Vacated
BRADSHAW v. MAIDEN 2022-NCCOA-917 No. 21-380	Mecklenburg (14CVS14445)	Affirmed
C.G.C. v. PETTEWAY 2022-NCCOA-918 No. 22-56	Wake (20CVS13466)	Other
EST. OF CHANCE v. FAIRFIELD INN & SUITES BY MARRIOTT 2022-NCCOA-919 No. 22-449	Cumberland (19CVS4910)	Affirmed
GANTT v. CITY OF HICKORY 2022-NCCOA-920 No. 21-767	Catawba (20CVS1183)	Affirmed
GEHRKE v. GATES AT QUAIL HOLLOW HOMEOWNERS' ASS'N, LTD. 2022-NCCOA-921 No. 22-460	Mecklenburg (21CVS4280)	Affirmed
GYGER v. CLEMENT 2022-NCCOA-922 No. 22-81	Guilford (16CVD5358)	Affirmed
IN RE C.H. 2022-NCCOA-923 No. 22-476	Durham (21SPC2564)	Affirmed
JAYAWARDENA v. DAKA 2022-NCCOA-924 No. 22-384	Cumberland (19CVS3319)	Affirmed
KOENIG v. KOENIG 2022-NCCOA-925 No. 22-282	Pitt (20CVD969)	Affirmed

LECHOWICZ v. GOODRICH CORP. 2022-NCCOA-926 No. 22-319	Mecklenburg (20CVS14021)	Affirmed
NEW VISION TR. v. ELIZA, LLC 2022-NCCOA-927 No. 22-559	Wake (21CVD5634)	Affirmed
PRICE v. PRICE 2022-NCCOA-928 No. 21-273	Currituck (17CVD102)	Vacated and Remanded
SCOTT v. CITY OF CHARLOTTE 2022-NCCOA-929 No. 21-547	Mecklenburg (18CVS16700)	Reversed in Part, Dismissed in Part, and Remanded
SMITH v. WISNIEWSKI 2022-NCCOA-930 No. 22-457	Wake (19CVD15443)	Affirmed in Part; Reversed in Part; and Remanded.
STATE v. BROWN 2022-NCCOA-931 No. 22-492	Rockingham (20CRS51143) (20CRS539)	Dismissed
STATE v. CHRISTMAN 2022-NCCOA-932 No. 22-330	Brunswick (16CRS55123-27) (16CRS55131)	No Error
STATE v. DAWKINS 2022-NCCOA-933 No. 22-138	Mecklenburg (17CRS239077) (17CRS239079) (17CRS239465-70)	No Error
STATE v. ECKENROD 2022-NCCOA-934 No. 22-7	McDowell (18CRS50438) (18CRS50441) (18CRS50477) (18CRS50478)	No Error
STATE v. HALL 2022-NCCOA-935 No. 21-496	Yancey (20CRS245) (20CRS50006)	No error in part; no plain error in part.
STATE v. JONES 2022-NCCOA-936 No. 22-518	Columbus (19CRS478)	Reversed and remanded for a new trial.
STATE v. SANDERS 2022-NCCOA-937 No. 22-274	Johnston (21CRS264) (21CRS292) (21CRS50312)	Vacated and Remanded

STATE v. WHITING 2022-NCCOA-938 No. 22-36	New Hanover (17CRS60179) (18CRS694) (18CRS695)	Affirmed
THOMPSON v. J.H. HONEYCUTT & SONS, INC. 2022-NCCOA-939 No. 22-581	N.C. Industrial Commission (18-028971)	Affirmed
EST. OF WYER v. ALAMANCE REG'L MED. CTR. 2022-NCCOA-940 No. 22-320	Alamance (20CVS2215)	Affirmed in part; vacated and remanded in part.

DIECKHAUS v. BD. OF GOVERNORS OF UNIV. OF N.C.

[287 N.C. App. 396, 2023-NCCOA-1]

DEENA DIECKHAUS, GINA McALLISTER, BRADY WAYNE ALLEN, JACORIA STANLEY, NICHOLAS SPOONEY AND VIVIAN HOOD, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, DEFENDANT

No. COA21-797

Filed 17 January 2023

1. Appeal and Error—abandonment of issues—dismissal of unjust enrichment claim—applicability of sovereign immunity—failure to brief

In an action in which plaintiffs (university students) asserted breach of contract and unjust enrichment claims against defendant (the state-wide university system) for shutting down campuses due to the COVID-19 pandemic and failing to adequately refund prepaid tuition and fees, plaintiffs abandoned the issue of whether sovereign immunity was a valid ground for dismissal of their unjust enrichment claims because plaintiffs did not argue this issue on appeal. Even if plaintiffs had raised the issue, the appellate court noted that contracts implied in law—which allow recovery based on quantum meruit, an equitable remedy, to prevent unjust enrichment—do not waive sovereign immunity.

2. Immunity—sovereign—waiver—breach of contract action—contract implied in fact—adequacy of pleadings

In an action in which plaintiffs (university students) sued defendant (the state-wide university system) for failing to adequately refund prepaid tuition and fees after campuses were shut down due to the COVID-19 pandemic, where plaintiffs adequately pleaded offer, acceptance, and consideration for each of their four contract claims (with regard to tuition, student fees, on-campus housing, and meals), they sufficiently demonstrated the existence of valid implied-in-fact contracts; therefore, their claims were not barred by the doctrine of sovereign immunity.

3. Immunity—statutory—section 116-311—applicability to breach of contract action

In an action in which plaintiffs (university students) sued defendant (the state-wide university system) for failing to adequately refund prepaid tuition and fees after campuses were shut down due to the COVID-19 pandemic, defendant was immune from liability regarding plaintiffs' breach of contract and unjust enrichment

claims pursuant to N.C.G.S. § 116-311 where all statutory requirements for immunity were met and where the statute did not limit immunity only as to tort claims.

4. Constitutional Law—North Carolina—as-applied challenge—immunity statute—university campuses shut down during pandemic—claims specific to plaintiffs

In an action in which plaintiffs (university students) sued defendant (the state-wide university system) for failing to adequately refund prepaid tuition and fees after campuses were shut down due to the COVID-19 pandemic, where plaintiffs sought to recover money they had paid for tuition, fees, on-campus housing, and meals, they had not waived their constitutional challenges to N.C.G.S. § 116-311, under which defendant sought immunity, because they raised an as-applied rather than a facial challenge.

5. Constitutional Law—federal and North Carolina—as-applied challenge—immunity statute—claims barred

In an action in which plaintiffs (university students) sued defendant (the state-wide university system) for failing to adequately refund prepaid tuition and fees after campuses were shut down due to the COVID-19 pandemic, the appellate court concluded that plaintiffs' claims for breach of contract and unjust enrichment were barred by statutory immunity pursuant to N.C.G.S. § 116-311 after determining that the statute was constitutional and did not violate plaintiffs' rights under the federal and state constitutions regarding the impairment of contracts, equal protection, due process or Law of the Land considerations, the Takings Clause, and separation of powers. The statute, which was enacted to allow institutions of higher education to continue their missions during the pandemic, constituted a reasonable response to a public health emergency and there was a rational relationship between the statute's grant of immunity and its purpose of maintaining the quality of education.

Appeal by plaintiffs from order entered 17 June 2021 by Judge Edwin G. Wilson, Jr. in Superior Court, Orange County. Heard in the Court of Appeals 10 May 2022.

Anastopoulo Law Firm, LLC, by Blake G. Abbott, for plaintiffs-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr. and Jennifer K. Van Zant, and Attorney General

Joshua H. Stein, by Special Deputy Attorneys General Laura McHenry and Kari R. Johnson, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiffs Deena Dieckhaus, Gina McAllister, Brady Wayne Allen, Jacoria Stanley, Nicholas Spooney, and Vivian Hood appeal an order granting Defendant Board of Governors of the University of North Carolina's Motion to Dismiss Plaintiffs' Amended Complaint.The Amended Complaint included both contract and unjust enrichment claims. Because sovereign immunity bars the unjust enrichment claims and because statutory immunity bars both the unjust enrichment and contract claims, we affirm the trial court's order dismissing all claims.

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 System, and that System includes 17 "constituent institutions throughout the State" (collectively "Universities"). "As a precondition for enrollment" for the Spring 2020 Term, Defendant required students planning to attend the Universities to pay tuition. When charging tuition, Defendant charged students different rates depending on which of two types of programs the students chose, an "in-person, hands-on program[]" and a "fully online distance-learning program[.]" In addition to the differential pricing, Defendant marketed the two programs differently through its and the Universities' "website[s], academic catalogues, student handbooks, marketing materials and other circulars, bulletins, and publications" that differentiate between "fully online" programs and "non-online" programs with "references to and promises about the on-campus experience[.]"

¶ 3 Plaintiffs here all paid tuition and enrolled in the in-person program for the Spring 2020 Term, with one exception. Plaintiffs Dieckhaus, McAllister, Allen, Stanley, and Spooney all enrolled as undergraduates in different Universities in the system. Plaintiff Hood paid tuition to enroll her daughter at one of the Universities' campuses for the Spring 2020 Term.

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1. We focus on the Amended Complaint because the order on appeal ruled on Defendant's Motion to Dismiss the Amended Complaint. On 22 May 2020, Plaintiffs filed their original Complaint. On 14 August 2020, Defendant filed a Motion to Dismiss the Complaint. Before that motion was heard, Plaintiffs filed their Amended Complaint on 30 December 2020, as discussed more below.

¶ 4 Beyond the tuition students paid to enroll, they paid additional fees. Defendant charged students, including Plaintiffs, "certain mandatory student fees." In Defendant and its Universities' "publications" including "catalogs" and "website[s]," Defendant "specifically describe[d] the nature and purpose of each fee." The student fees paid by students were then "intended by both the students and Defendant to cover the services, access, benefits and programs for which the fees were described and billed." Plaintiffs paid all applicable fees for the Spring 2020 Term. Finally, a certain subset of students, including Plaintiffs McAllister, Spooney, and Hood paid additional fees "for the right to reside in campus housing and for access to a meal plan providing for on campus dining opportunities."

¶ 5 Plaintiffs and other students started the Spring 2020 Term with on-campus, in-person education and with access to the services for which they paid student fees, housing fees, and on-campus meal fees. "On or about March 11, 2020, in response to the COVID-19 pandemic, Defendant issued a system-wide directive to all" the Universities "requiring that they transition from in-person to online instruction no later than March 23, 2020." As a result, starting on 23 March 2020 through the end of the Spring 2020 Term, "there were no in person classes at" the Universities, "and all instruction was delivered online." Another directive from Defendant to all the Universities "[o]n or about" 17 March 2020 "instruct[ed] students living in campus housing to remain at or return to their perme[n]ant residences." As a result of this directive, the Universities closed their on campus residences and prevented student access to dining facilities. The campus shutdowns also meant students "no longer ha[d] the benefit of the services for which" they paid student fees. Defendant "announced" it would be offering "pro-rated credits or refunds for students who pre-paid housing and meal costs for the Spring 2020" Term—and did offer some refunds—but it did not offer refunds for tuition or student fees.

¶ 6 Based on these alleged facts, Plaintiffs filed their Amended Complaint on 30 December 2020. The Amended Complaint includes both breach of contract claims and unjust enrichment claims seeking "refunds . . . on a pro-rata basis" for "tuition, housing, meals, [and student] fees . . . that Defendant failed to deliver for the second half of the Spring 2020" Term after shutting down the Universities' campuses in response to COVID-19. As to all these claims, the Amended Complaint alleges the General Assembly "has explicitly waived sovereign immunity in suits against Defendant" because Defendant "is a body politic" that is, *inter alia*, "capable in law to sue and be sued in all courts whatsoever." The Amended Complaint also asserts Plaintiffs "bring this action on

behalf of themselves and as a class action" on behalf of four classes for each of the four categories of payments: tuition, fees, on-campus housing, and on-campus meals. 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 As to the tuition breach of contract claim, the Amended Complaint alleges Defendant offered to Plaintiffs and the proposed class its on-campus "live, in-person education" for the Spring 2020 Term in contrast to its "separate and distinct" online-only educational program. In addition to the descriptions through online and written materials discussed above, Defendant and its Universities differentiated between the two programs with respect to the Spring 2020 Term specifically by differences in how students registered for on-campus versus online instruction and "the parties' prior course of conduct" in starting classes "for which students expected to receive in-person instruction" with such instruction and with class materials with in-person "schedules, locations, and . . . requirements." Plaintiffs and the proposed class then "accepted that offer by paying tuition and attending classes during the beginning of the Spring 2020" Term. The Amended Complaint alleges Defendant then breached the contract by shutting down its campuses and shifting "all classes" to online learning "without reducing or refunding tuition accordingly." Finally as to this claim, the Amended Complaint states "[t]his cause of action does not seek to allege 'educational malpractice' " but instead focuses on how "Defendant provided a materially different product," online learning, from the one Plaintiffs and the proposed class paid for, "live[,] in-person[,] on-campus education[.]" As a result of this breach, Plaintiffs allege they suffered damages "amounting to the difference in the fair market value of the services and access for which they contracted, and the services and access which they actually received."

¶ 8 The Amended Complaint also alleges a breach of contract claim for student fees. Defendant and its Universities offered "services, access, benefits and programs" by "specifically describ[ing] the nature and purpose of each fee" in "publications," in particular in "catalogs . . . and website[s.]" Plaintiffs and the proposed fees class then accepted the terms and paid the fees, thereby forming a contract. The Amended Complaint alleges Defendant then breached the contract by shutting down the Universities' campuses and "cancelling most student activities" halfway through the Spring 2020 Term—thereby not providing "recreational and intramural programs; fitness centers or gymnasiums; campus technology[,] infrastructure[,] or security measures; or Spring intercollegiate competitions"—without giving students any "discount or

refund" on "any fees" as Defendant does for "fully online students[.]" As a result of Defendant's breach, Plaintiffs and the rest of the proposed class suffered damages.

¶ 9 The Amended Complaint includes two final breach of contract claims for on-campus housing and meals. The Amended Complaint alleges Defendant offered the relevant Plaintiffs and proposed classes "on-campus housing" and "meals and on-campus dining options" in return for additional fees. The relevant Plaintiffs and proposed class members then accepted by paying those fees. When the Universities shut down their campuses, they "requir[ed] students to move out of on-campus housing facilities" and closed "most campus buildings and facilities, including dining facilities[,]" thereby breaching the contract. Defendant then "issued arbitrary and insufficient refunds" for on-campus housing and meals for most students because the campus shutdowns started earlier than the date applied to pro-rate the refunds. According to the Amended Complaint, the relevant Plaintiffs and proposed class members suffered damages for the additional amounts they should have been refunded.

¶ 10 In the alternative to each of the four breach of contract claims, the Amended Complaint alleges unjust enrichment claims. Each of the claims follows a similar pattern. The Amended Complaint alleges Plaintiffs and the proposed class "conferred a benefit" non-gratuitously on Defendant by paying the relevant tuition or fees, and Defendant "realized this benefit by accepting such payment." Plaintiffs and the class members did not receive "the full benefit of their bargain[,]" i.e. the services and benefits they paid for, but Defendant "retained this benefit" unjustly. The Amended Complaint then alleges "[e]quity and good conscience require" Defendant "return a *pro-rata* portion of the monies paid" as tuition or the relevant fees, especially considering the money Defendant and its Universities saved by operating online rather than in-person, their "billions of dollars in endowment funds," and the "significant aid from the federal government" Defendant received. Finally, the claims request Defendant "be required to disgorge this unjust enrichment[.]"

¶ 11 On 15 January 2021, Defendant filed a "Motion to Dismiss [the] Amended Complaint" under Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6) based on five grounds. (Capitalization altered.) First, Defendant argued Plaintiffs' claims were barred by N.C. Gen. Stat. § 116-311, which is part of Article 37 entitled "An Act to Provide Immunity for Institutions of Higher Learning." Next, Defendant contended Plaintiffs' claims were "barred by sovereign immunity." According to Defendant, Plaintiffs also failed to state claims for relief for breach

of contract and unjust enrichment, including on the grounds that the Amended Complaint was "an attempt to assert a claim for educational malpractice which is not a cognizable claim under North Carolina state law." Then, Defendant argued the Amended Complaint failed to allege "damages were proximately caused by Defendant." Finally, Defendant contended Plaintiffs lacked standing because they "failed to allege a sufficient injury and they purport to allege claims against [U]niversities with whom they had no relationship."

¶ 12 The trial court held a hearing on Defendant's Motion to Dismiss on 19 May 2021. At the hearing, Defendant discussed each argument raised in its Motion to Dismiss. When discussing statutory immunity under North Carolina General Statute § 116-311, the parties argued about both the applicability and constitutionality of the statute. Plaintiffs argued the statute was unconstitutional on a number of grounds, including "the federal contracts clause."[2] In addition to arguing Plaintiffs had failed to show § 116-311 was unconstitutional on the merits, Defendant argued Plaintiffs were making a facial constitutional challenge to the statute but had not followed the correct procedure to make such a challenge so Plaintiffs had "waived their right to challenge the statute." Plaintiffs repeatedly argued they were not raising a facial challenge but instead were making an as-applied challenge to the constitutionality of § 116-311. The trial court ended the hearing without making a ruling on Defendant's Motion to Dismiss or any discussion of whether Plaintiffs were making an as-applied or facial challenge to §116-311.

¶ 13 On 17 June 2021, the trial court entered an order granting Defendant's Motion to Dismiss without specifying the grounds for that decision. On 15 July 2021, Plaintiffs filed a written notice of appeal from the order granting Defendant's Motion to Dismiss.

II. Analysis

¶ 14 On appeal, Plaintiffs argue, "The trial court erred in granting Defendant's Motion to Dismiss because Plaintiffs adequately plead claims for breach of a contract and unjust enrichment." (Capitalization

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2. Our record does not include information about all the grounds on which Plaintiffs argued § 116-311 was unconstitutional. The transcript only includes this reference to "the federal contracts clause[,]" an argument "this law was passed specifically because of this case[,]" and a couple other references to impairing contracts in violation of the federal Constitution. Based on the transcript, the parties filed briefing on Defendant's Motion to Dismiss, but we do not have those briefs in our record. As a result, we do not know the details of Plaintiffs' arguments before the trial court as to the unconstitutionality of § 116-311.

altered.) As part of this overarching argument, Plaintiffs make five contentions. First, Plaintiffs argue they "state[d] a claim for breach of contract." (Capitalization altered.) Plaintiffs also argue they "state[d] a claim for unjust enrichment." (Capitalization altered.) Third, Plaintiffs assert "Defendant is not entitled to sovereign immunity." (Capitalization altered.) Plaintiffs then contend "N.C. Gen. Stat. § 116-311 is unconstitutional and inapplicable to this action." (Capitalization altered.) That statute grants "institution[s] of higher education . . . immunity from claims" for "tuition or fees paid . . . for the spring academic semester of 2020" when the claims "allege[] losses or damages arising from an act or omission by the institution of higher education during or in response to COVID-19, the COVID-19 emergency declaration, or the COVID-19 essential business executive order."[3] N.C. Gen. Stat. § 116-311(a) (2021). Finally, Plaintiffs argue they "hav[e] standing on all claims." (Capitalization altered.)

¶ 15 We will address Plaintiffs' contentions as to why the trial court erred in granting Defendant's Motion to Dismiss in the following order. First, we will address the immunity issues—both sovereign immunity and the potential statutory immunity of N.C. Gen. Stat. § 116-311—because of the special nature of immunity as more than "just a mere defense in a lawsuit" in comparison to other defenses raised under Rule of Civil Procedure 12. *See Lannan v. Board of Governors of the University of North Carolina*, 2022-NCCOA-653, ¶¶ 23, 29 (citation and quotation marks omitted) (when considering the interlocutory nature of an appeal, recognizing this nature of sovereign immunity means its loss affects a substantial right but requiring a petition for writ of certiorari to address the Rule 12(b)(6) failure to state a claim issue); *see also Stahl v. Bowden*, 274 N.C. App. 26, 28, 850 S.E.2d 588, 590 (2020) (recognizing claims of immunity in general, including specifically statutory immunity, affect a substantial right when considering an interlocutory appeal). Within the two types of immunity, we will address sovereign immunity first because Plaintiffs raise constitutional issues around statutory immunity and "it is well settled that 'the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " *See Holdstock v. Duke University Health System, Inc.*, 270 N.C. App. 267, 277, 841 S.E.2d 307, 314 (2020) (quoting *Anderson v. Assimos*, 356 N.C. 415,

3. The statute has additional requirements we will discuss more below. *See* N.C. Gen. Stat. § 116-311(a) (including four subsections of requirements). We only include enough information here to demonstrate the relevance of Plaintiffs' argument about the statute.

416, 572 S.E.2d 101, 102 (2002)). Because we ultimately hold sovereign and/ or statutory immunity bar all of Plaintiffs' claims, we do not reach the remaining issues of stating claims for breach of contract and for unjust enrichment or the standing issue.

A. Sovereign Immunity

¶ 16 Focusing on sovereign immunity first, Plaintiffs argue "Defendant is not entitled to sovereign immunity." (Capitalization altered.) Sovereign immunity is at issue because "[s]overeign immunity protects the State and its agencies from suit absent waiver or consent" and "Defendant Board of Governors is an agency of the State" that "can claim the protection of sovereign immunity." *See Lannan*, ¶ 22 (citations and quotation marks omitted). As a result, if Defendant is entitled to sovereign immunity, Plaintiffs' claims are barred and the trial court did not err in dismissing them.

¶ 17 Turning to Plaintiffs' specific arguments against the application of sovereign immunity, Plaintiffs contend as to the contract claims the State, including Defendant as a state agency, waives sovereign immunity when entering into an implied-in-fact contract. Defendant responds only an express contract, not a contract implied-in-fact, waives sovereign immunity. Then, Defendant contends even if an implied-in-fact contract is sufficient to waive sovereign immunity, "the Amended Complaint is completely void of any factual allegations establishing the existence of even an implied contract." Plaintiffs do not include any argument on the waiver of sovereign immunity for their unjust enrichment claims, which Defendant highlights. After setting out the standard of review, we examine whether Defendant has sovereign immunity first as to the unjust enrichment claims and then as to the contract claims.

¶ 18 At the outset, we note many of these questions have been addressed by this Court's recent decision in *Lannan v. Board of Governors of the University of North Carolina*. That case also involved contract claims arising out of a "switch from in-person to online learning" during the COVID-19 pandemic, although it covered the Fall 2020 Term rather than the Spring 2020 Term at issue in this case. *See Lannan*, ¶¶ 5-6. And in *Lannan* this Court addressed identical issues surrounding the applicability of sovereign immunity to implied-in-fact contract claims. *See id.* ¶¶ 30-31 (involving issues of whether an implied-in-fact contract could waive sovereign immunity and whether the plaintiffs had "pled a valid implied-in-fact contract"). While we now have the benefit of *Lannan* in making our decision, *Lannan* had not come out when the parties originally briefed this case.

1. Standard of Review

¶ 19 In *Lannan*, this Court explained the standard of review on sovereign immunity issues as follows:

> 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* [*v. Kinston Charter Academy*, 379 N.C. 560, 2021-NCSC-163], ¶ 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) ("Questions 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))).
>
> 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, 858 S.E.2d 788 ("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).

See id. ¶¶ 32-33 (brackets from original omitted).

2. Unjust Enrichment Claims

¶ 20 **[1]** As Defendant identifies, Plaintiffs do not argue on appeal Defendant consented to suit or otherwise waived its sovereign immunity. Under our Appellate Rules, Plaintiffs have therefore abandoned the issue of whether sovereign immunity was a valid ground on which to dismiss their unjust enrichment claims. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

¶ 21 Even if Plaintiffs had argued sovereign immunity did not bar their unjust enrichment claims, we would reject that argument. As this Court recently reaffirmed in *Lannan*, "contracts implied in law, which are also called quasi contracts and which permit recovery based on *quantum meruit*, do not waive sovereign immunity." *See Lannan*, ¶ 37 (citing, *inter alia*, *Whitfield v. Gilchrist*, 348 N.C. 39, 41-42, 497 S.E.2d 412, 414 (1998)). As *Whitfield* in turn explains, "*Quantum meruit* is a measure of recovery for the reasonable value of services rendered *in order to prevent unjust enrichment*. It operates as an equitable remedy based upon a quasi contract or a contract implied in law." *Whitfield*, 348 N.C. at 42, 497 S.E.2d at 414-15 (emphasis added) (citations omitted). Thus, claims for unjust enrichment do not waive sovereign immunity because they involve contracts implied in law. *See M Series Rebuild, LLC v. Town of Mount Pleasant, Inc.*, 222 N.C. App. 59, 67, 730 S.E.2d 254, 260 (2012) ("[W]e decline to imply a contract in law in derogation of sovereign immunity to allow a party to recover under a theory of unjust enrichment." (citation and quotation marks omitted)). Since Plaintiffs have provided no other reason Defendant waived sovereign immunity, their unjust enrichment claims are barred by sovereign immunity. The trial court did not err in dismissing those claims.

3. Contract Claims

¶ 22 **[2]** Turning to Plaintiffs' remaining contract claims, the parties' arguments present two questions: (1) whether a valid implied-in-fact contract can waive sovereign immunity and (2) whether Plaintiffs pled valid implied-in-fact contracts.

¶ 23 *Lannan* answers the first question; "a contract implied in fact can waive sovereign immunity under the contractual waiver holding" in *Smith v. State*. *See Lannan*, ¶ 51 (referencing *Smith v. State*, 289

N.C. 303, 222 S.E.2d 412 (1976)); *see also 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."). *Lannan* reached that conclusion after an extensive analysis of our caselaw on contracts waiving sovereign immunity. *Lannan*, ¶¶ 35-50. *Lannan* also explained the existence of N.C. Gen. Stat. § 116-311, i.e., the basis of the statutory immunity issue here, indicated the General Assembly did not believe the contract claims were already barred by sovereign immunity because otherwise "[t]here would be no need for this separate immunity statute[.]" *See Lannan*, ¶ 50.

¶ 24 In undertaking that analysis, this Court also rejected the same arguments Defendant now advances when arguing a valid implied-in-fact contract does not waive sovereign immunity. First, the *Lannan* Court rejected Defendant's argument *Whitfield* and *Eastway Wrecker Service, Inc. v. City of Charlotte*, 165 N.C. App. 639, 599 S.E.2d 410 (2004), require an express contract for a waiver of sovereign immunity because those two cases were limited to situations involving contracts implied in law even though they included "overly broad" statements at times. *See Lannan*, ¶¶ 38-41 (analyzing cases before concluding "*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").

¶ 25 *Lannan*'s rejection of Defendant's arguments also relied on "another line of cases holding the State waives its sovereign immunity when it enters into a contract implied in fact." *Id.* ¶ 41; *see also*, *id.* ¶¶ 41-43 (full analysis of that line of cases, namely *Archer v. Rockingham County*, 144 N.C. App. 550, 548 S.E.2d 788 (2001), *Sanders v. State Personnel Com'n*, 183 N.C. App. 15, 644 S.E.2d 10 (2007), and *Lake v. State Health Plan for Teachers and State Employees*, 234 N.C. App. 368, 760 S.E.2d 268 (2014)). Defendant here contends those cases were limited to "employment settings" rather than the "educational setting" present here, (emphasis omitted), but the *Lannan* court rejected a similar argument for several reasons. *See Lannan*, ¶¶ 44-48. First, the reasoning of that line of cases "extends beyond the employment context." *Id.* ¶ 45. Second, "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." *Id.* ¶ 46. Finally, extending that line of cases "beyond the employment context is consistent with our treatment of implied in fact contracts in general" because "[o]ur Supreme Court has long held 'an implied in fact contract is valid and enforceable as if

it were express or written.' " *Id.* ¶ 47 (quoting *Snyder v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980)) (brackets omitted).

¶ 26 Since *Lannan* already determined a "contract implied in fact can waive sovereign immunity[,]" we turn to the remaining question, whether Plaintiffs pled a valid implied-in-fact contract. *See id.* ¶ 51. "[T]o plead a valid implied-in-fact contract, Plaintiffs needed to plead offer, acceptance, and consideration." *Id.* ¶ 54. We examine this issue as to each of the four contract claims: tuition, student fees, on-campus housing, and meals.

¶ 27 Plaintiffs adequately pled their tuition claim. Specifically, the Amended Complaint alleges "Defendant offered to provide, and members of the Tuition class expected to receive, instruction on a physical campus" rather than the "separate and distinct product[]" of "online distance education" based on: (1) Defendant and the Universities' "website[s], academic catalogues, student handbooks, marketing materials and other circulars, bulletins, and publications" that differentiate between "fully online" programs and "non-online" programs with "references to and promises about the on-campus experience," which Plaintiffs included examples of in the Amended Complaint; (2) differences in how students register for on-campus versus online instruction; and (3) "the parties' prior course of conduct" in starting classes "for which students expected to receive in-person instruction" with such instruction and with class materials with in-person "schedules, locations, and . . . requirements." Turning to acceptance, Plaintiffs allege they accepted the offer for "live, in-person education" by "paying tuition and attending classes during the beginning of the Spring 2020" Term. Finally, the Amended Complaint states Plaintiffs and the proposed class "paid valuable consideration in exchange" for in-person learning, which refers back to the tuition money they paid to accept the offer.

¶ 28 For the student fees contract claim, Plaintiffs allege Defendant "[i]n its publications and, particularly in its catalogs and website" described the "purpose of each fee" such that everyone understood "the monies Plaintiff[s] and other members of the [proposed class] paid towards these fees were intended . . . to cover the services, access, benefits and programs for which the fees were described and billed," thereby constituting an offer. The Amended Complaint includes various descriptions of these fees. Plaintiffs then allege they paid the fees to the Universities, which constituted acceptance and consideration and therefore formed a contract.

¶ 29 Similarly, as to the on-campus housing and meals claims, the Amended Complaint alleges the Universities offered "on-campus

housing" and "meals and on-campus dining options" to students who agreed to pay certain fees. As pled, the students then accepted those offers and gave consideration when they paid the required fees to receive on-campus housing or dining and meals. Thus, Plaintiffs adequately pled a valid implied-in-fact contract as to each of the four contract claims.

¶ 30 None of Defendant's arguments persuade us otherwise. While Defendant's section on sovereign immunity only includes a single sentence arguing "the Amended Complaint is completely void of any factual allegations establishing the existence of even an implied contract," Defendant later includes additional arguments about the ways in which "Plaintiffs' Amended Complaint fails to identify a contract" in its section on how Plaintiffs failed to state a claim for breach of contract. (Capitalization altered.) Specifically, Defendant first argues "every contract requires a promise" and Plaintiffs did not include any such allegations of promises or, specifically, promises to refunds. This argument is partially premised on two cases, *Ryan v. University of North Carolina Hospitals*, 128 N.C. App. 300, 494 S.E.2d 789 (1998) and *Montessori Children's House of Durham v. Blizzard*, 244 N.C. App. 633, 781 S.E.2d 511 (2016), that, according to Defendant, require allegations to be based on "identifiable contractual promises" such that "statements made in a university policy manual or other university publication are insufficient to support a breach of contract claim unless they are explicitly included or incorporated into a contract." (Emphasis omitted.)

¶ 31 Defendant's contention the Amended Complaint does not allege promises underlying a contract cannot be squared with the pleading. While the Amended Complaint does not include the specific term "promise" when describing what the Universities offered to students, the offers constitute promises to act nonetheless. As laid out above, the Universities offered in-person education, benefits as described in the student fee descriptions, and on-campus housing and meals according to the Amended Complaint. Those offers were promises to provide those services if Plaintiffs and other members of the proposed classes paid the fees. In other words, by their acceptance and payment of consideration, Plaintiffs converted Defendant's offer into promises. *See Wilkins v. Vass Cotton Mills*, 176 N.C. 72, 81, 97 S.E. 151, 155 (1918) ("An acceptance by promise or act, and communication thereof when necessary, while an offer of a promise is in force, changes the character of the offer. It supplies the elements of agreement and consideration, changing the offer into a binding promise, and the offer cannot afterwards be revoked without the acceptor's consent." (citation and quotation marks omitted)). Thus, by properly alleging the contract, Plaintiffs have pled a promise necessary to form a contract.

¶ 32 Defendant's reliance on *Ryan* and *Montessori Children's House* is also misplaced. As this Court explained in *Lannan*, *Ryan* and *Montessori Children's House* both involved pre-existing written contracts. *See Lannan*, ¶¶ 57-58. As such, they differ from the case here where Plaintiffs allege the statements made in university publications "are the contract." *See id.* ¶ 62. And thus their statements about requiring an "identifiable contractual promise" or incorporation of publications into a contract do not apply here to bar Plaintiffs' contract claims. *See id.* ¶¶ 57-58 (citation and quotation marks omitted).

¶ 33 Next, Defendant argues none of the described fees "support[] Plaintiffs' claim that a contract exists entitling them to a refund for fees in the event the format of instruction changed" because Plaintiffs did not plead they took advantage of services, services ceased with the shift to online learning, or the pre-existing refunds for meals and housing were insufficient. First, while these arguments are under a heading labeled "Plaintiffs' Amended Complaint fails to identify a contract and thus fails to state a contract claim[,]" they address breach because they all focus on the provision of services or remedy for lack of the allegedly contracted for services. This matters because the waiver of sovereign immunity only requires pleading a valid contract, not pleading breach; pleading breach is only relevant when looking at Rule of Civil Procedure 12(b)(6) and dismissal for failure to state a claim. *See Lannan*, ¶¶ 27-28 (explaining a valid contract is necessary to both waive sovereign immunity and survive a Rule 12(b)(6) motion to dismiss but breach is also necessary to state a breach of contract claim that survives such a motion) and ¶ 66 (addressing only breach to rule on 12(b)(6) motion to dismiss contract claims because this Court had "already determined above [the p]laintiffs pled a valid contract").

¶ 34 Even if Defendant's arguments on breach could impact whether Plaintiffs pled a valid contract sufficient to waive sovereign immunity, we would still reject its contentions. As to the contention Plaintiffs did not plead they took advantage of the services for which they paid student fees, the Amended Complaint alleges "as a result of being moved off campus," Plaintiffs and the proposed class "no longer have the benefit of the services for which these fees have been paid" and lists numerous services. The language "no longer" suggests the Plaintiffs had used the services in the past. Further, some of the services, such as "campus . . . security measures" are things Plaintiffs would passively benefit from rather than actively take advantage of in many circumstances. As to Defendant's argument Plaintiffs failed to plead services ceased when students shifted to online instruction, the Amended Complaint plainly

states that transition included "closing most campus buildings and facilities, and cancelling most student activities." That followed a more specific allegation that "as a result of being moved off campus" Plaintiffs "were unable to participate in recreational and intramural programs; no longer had access to campus fitness centers or gymnasiums; no longer benefit[t]ed from campus technology[,] infrastructure[,] or security measures; and no longer had the benefit of enjoying Spring intercollegiate competitions." The Amended Complaint also includes allegations detailing why the refunds for housing and meals failed to fully reimburse Plaintiffs for the services they could not access due to campus shutdowns by calculating the dates of the shutdowns versus the dates upon which the refunds were based.

¶ 35 Finally, Defendant argues "Plaintiffs' claims are veiled educational malpractice claims which are not allowed in North Carolina," again relying on *Ryan* as the only binding authority. (Capitalization altered.) While Defendant is correct North Carolina does not permit educational malpractice claims, *see Ryan*, 128 N.C. App. at 302-03, 494 S.E.2d at 791 (only permitting claim to go forward because it "would not involve an inquiry into the nuances of educational processes and theories" (quotation marks omitted)), Plaintiffs are not making such a claim. In *Ryan*, this Court clarified educational malpractice claims require "an inquiry into the nuances of educational processes and theories." *See id.* at 302, 494 S.E.2d at 791. The *Ryan* Court also relied heavily on a Seventh Circuit case that clarified an educational malpractice claim alleged "the school breached its agreement by failing to provide an effective education" or "simply . . . that the education was not good enough." *See id.* (quoting *Ross v. Creighton Univ.*, 957 F.2d 410, 416-17 (7th Cir. 1992)).

¶ 36 Reviewing Plaintiffs' contract claims does not require an investigation into educational processes or theories or a determination of whether the education was adequate. The student fees, housing, and meals claims do not involve education practices at all; they involve separate amenities Plaintiffs allege they paid to access as discussed above. And Plaintiffs' tuition claim alleges they paid for "live, in-person, on-campus education" but instead received instruction via "online distance learning platforms[.]" Defendants do not indicate any place where Plaintiffs' tuition claim turns on whether one of those types of education is better than the other in terms of educational quality. Defendant's best argument to the contrary is that calculating damages for Plaintiffs' tuition claim would require determining "the difference in value between in-person and distance learning." But the trial court would not need to do that in the future if this case reaches a damages stage because Defendant

has already set different tuitions for on-campus and distance learning programs according to the allegations in the Amended Complaint. At its heart, Plaintiffs' tuition claim alleges they contracted and paid for product A and received product B for part of the Spring 2020 Term. Products A and B can represent anything in that scenario, demonstrating that the claim does not rely on reviewing educational processes or even on the educational setting itself.

¶ 37 Having rejected all Defendant's arguments, we conclude after our *de novo* review sovereign immunity does not bar Plaintiffs' contract claims, although it does bar their unjust enrichment claims.

B. Statutory Immunity

¶ 38 As the contract claims survive sovereign immunity, we next turn to statutory immunity. As explained above, Plaintiffs argue N.C. Gen. Stat. § 116-311, which provides immunity to claims for tuition and fees for COVID-19 related university closures, "is unconstitutional and inapplicable to this action." (Capitalization altered.) *See* N.C. Gen. Stat. § 116-311(a). Following the doctrine of constitutional avoidance, *see Holdstock*, 270 N.C. App. at 277, 841 S.E.2d at 314 ("[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds."), we will first consider whether § 116-311 is applicable here and then address the constitutionality of the statute.

1. Applicability of North Carolina General Statute § 116-311

¶ 39 **[3]** Plaintiffs first argue § 116-311 is "inapplicable to this action." (Capitalization altered.) North Carolina General Statute § 116-311 provides, in relevant part:

> Notwithstanding any other provision of law and subject to G.S. 116-312, an institution of higher education shall have immunity from claims by an individual, if all of the following apply:
>
> > (1) The claim arises out of or is in connection with tuition or fees paid to the institution of higher education for the spring academic semester of 2020.
> >
> > (2) The claim alleges losses or damages arising from an act or omission by the institution of higher education during or in response to

> COVID-19, the COVID-19 emergency declaration, or the COVID-19 essential business executive order.
>
> (3) The alleged act or omission by the institution of higher education was reasonably related to protecting the public health, safety, or welfare in response to the COVID-19 emergency declaration, COVID-19 essential business executive order, or applicable guidance from the Centers for Disease Control and Prevention.
>
> (4) The institution of higher education offered remote learning options for enrolled students during the spring academic semester of 2020 that allowed students to complete the semester coursework.

N.C. Gen. Stat. § 116-311(a). Plaintiffs' first argument is that the "plain meaning of this statute is to provide immunity for tort claims" because it includes the language "act or omission." Plaintiffs also contend "Defendant's refusal to provide fair tuition and [fee] refunds" is not "reasonably related to protecting public health or safety."

¶ 40 As questions of statutory interpretation, we review Plaintiffs' arguments *de novo*. *See Winkler v. North Carolina State Board of Plumbing*, 374 N.C. 726, 730, 843 S.E.2d 207, 210 (2020) ("Thus, this case presents an issue of statutory interpretation, which we review de novo." (citing *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013))). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Id.* (quoting *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (brackets omitted)).

¶ 41 Section 116-311(a), by its plain language, provides "immunity from claims[.]" N.C. Gen. Stat. § 116-311(a). Plaintiffs argue the term claims should be limited to tort claims, and thus not cover their contract claims, because the claim must "allege[] losses or damages arising from an act or omission." N.C. Gen. Stat. § 116-311(a)(2). But this argument ignores the statutory definition of claims. N.C. Gen. Stat. § 116-310 defines "Claim" as, "A claim or cause of action seeking any legal or equitable remedy or relief" for the purpose of the article on "Covid-19 Immunity for Institutions of Higher Education," which includes § 116-311. N.C. Gen. Stat. § 116-310(1) (2021). That definition includes any claim or cause of action that could be brought, so it necessarily

includes Plaintiffs' contract claims, and, as an alternative basis for our decision, Plaintiffs' unjust enrichment claims. "If a statute 'contains a definition of a word used therein, that definition controls.' " *Lovin v. Cherokee County*, 248 N.C. App. 527, 529, 789 S.E.2d 869, 871 (2016) (quoting *In re Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974)). Therefore, we reject Plaintiffs' argument the statutory immunity provided by § 116-311 applies only to tort claims; it applies to all claims, including all of Plaintiffs' contract and unjust enrichment claims.

¶ 42 The remainder of § 116-311 provides five requirements for immunity to apply. First, the statute imports the limits provided in § 116-312, which limits the timeframe of the immunity to "alleged acts or omissions occurring on or after the issuance of the COVID-19 emergency declaration until June 1, 2020." *See* N.C. Gen. Stat. § 116-311 (making clear the immunity is "subject to G.S. 116-312"); N.C. Gen. Stat. § 116-312 (including quoted language on timeframe of immunity). Then, § 116-311 has the four individually numbered requirements listed above.

¶ 43 Of these five requirements, Plaintiffs only contest the requirement in § 116-311(a)(3) that the "alleged act or omission by the institution of higher education was reasonably related to protecting the public health, safety, or welfare in response to . . . COVID-19 . . . ." N.C. Gen. Stat. § 116-311(a)(3). Specifically, Plaintiffs contend "Defendant's refusal to provide fair tuition and [fee] refunds" is not "reasonably related to protecting public health or safety." In making that argument, Plaintiffs misunderstand the relevant "alleged act or omission." N.C. Gen. Stat. § 116-311(a)(3). The alleged act or omission that gave rise to Plaintiffs' claims was, at least in part, Defendant and its Universities shutting down their campuses and moving classes online according to Plaintiffs' own Amended Complaint. For example, the tuition contract claim explains: "However, the University breached the contract with Plaintiffs and other members of the Tuition Class by moving all classes for the Spring 2020 semester to online distance learning platforms, and restricting the on-campus experience without reducing or refunding tuition accordingly." Similarly, the tuition unjust enrichment claim states:

> Instead, Plaintiffs and other members of the Tuition Class conferred this benefit on Defendant in expectation of receiving one product, *i.e.*, live in-person instruction in a physical classroom along with the on-campus experience of campus life as described more fully above, but they were provided with a materially different product carrying a different fair market value, *i.e.*, online instruction devoid of the on-campus experience, access, and services.

And Plaintiffs' Amended Complaint also pleads the shift to online instruction was a result of the COVID-19 pandemic: "On or about March 11 , 2020, *in response to the COVID-19 pandemic*, Defendant issued a system-wide directive to all constituent institutions requiring that they transition from in-person to online instruction no later than March 23, 2020." (Emphasis added.) As part of that paragraph on the transition to online instruction, Plaintiffs include a footnote to a press release on Defendant's website about the directive, which clarifies the decision to transition to online classes was related to "the health and safety of [the Universities'] students, faculty, and staff . . . ." *UNC System Issues Update on Coronavirus Preparations*, The University of North Carolina System (Mar. 12, 2020).[4] Thus, contrary to Plaintiffs' argument, the alleged acts or omissions were "reasonably related to protecting the public health, safety, or welfare in response to . . . COVID-19 . . . ." N.C. Gen. Stat. § 116-311(a)(3).

¶ 44 The remaining four requirements for statutory immunity under § 116-311(a) are also met here. As to timing, the above allegation about the system-wide directive indicates the decision to shift to online learning was announced on 11 March 2020. Governor Roy Cooper had already entered "the first of many emergency orders . . . in response to the COVID-19 pandemic" on 10 March 2020, *Hall v. Wilmington Health, PLLC*, 282 N.C. App. 463, 2022-NCCOA-204, ¶ 6; *see also* E.O. 116, Cooper, 2020, § 1 (declaring a state of emergency based on "the public health emergency posed by COVID-19"), which started the period of immunity under § 116-312. *See* N.C. Gen. Stat. § 116-312 (applying immunity to "alleged acts or omissions occurring on or after the issuance of the COVID-19 emergency declaration until June 1, 2020"). The remaining actions related to the campus shutdowns all took place within this time period as well.

¶ 45 Turning to the next requirement, the claims all arose "out of or [are] in connection with tuition or fees . . . for the spring academic semester of 2020." *See* N.C. Gen. Stat. § 116-311(a)(1). The Amended Complaint's introduction explains the claims arise from "Defendant's decision not to issue appropriate refunds for the Spring 2020 semester" for "tuition, housing, meals, fees and other costs that Defendant failed to deliver for the second half of the Spring 2020 semester . . . ." Similarly, the four groups of claims (one each for breach of contract and unjust enrichment) are for: tuition, student fees, on-campus housing fees, and meal fees. Further, as we have already discussed, the actions by Defendant

4. Available at: https://www.northcarolina.edu/news/unc-system-issues-update-on-coronavirus-preparations/.

and the Universities were taken "in response to COVID-19[.]" *See* N.C. Gen. Stat. § 116-311(a)(2). Finally, Plaintiffs acknowledge "[f]rom March 23, 2020 through the end of the Spring 2020 semester, there were no in-person classes at Defendant's institutions, *and all instruction was delivered online*[,]" (emphasis added), thereby meeting the final requirement in § 116-311(a)(4). *See* N.C. Gen. Stat. § 116-311(a)(4).

¶ 46 Since all the statutory requirements are met here, § 116-311(a) applies to Plaintiffs' claims, both their contract claims and their unjust enrichment claims. Thus, after our *de novo* review and under the statute's plain language, Defendant has immunity from these claims. N.C. Gen. Stat. § 116-311(a).

2. Constitutionality of North Carolina General Statute § 116-311

¶ 47 Having decided § 116-311 applies to Plaintiffs' claims and grants Defendant immunity, we now address Plaintiffs' argument the statute is unconstitutional. Plaintiff argues the law is unconstitutional for five reasons: (1) "such a law squarely violates U.S. Con[s]t. art. I, § 10 cl. 1 which reads, in pertinent part, '[n]o State shall . . . pass any . . . law impairing the Obligation of Contracts[;]' " (2) "the statute would violate the equal protection clause of both the United States and North Carolina Constitutions[;]" (3) "the statute violates the due process clauses of the United States and North Carolina Constitutions[;]" (4) "the statute would violate U.S. Const. amend. V which prohibits the taking of private property without just compensation[;]" and (5) "the statute intrudes upon the separation of powers because it is a law that was passed in response to specific litigation already pending in the courts with the purposes of directing the courts on how to adjudicate the pending actions."

¶ 48 Before arguing § 116-311 "is not unconstitutional[,]" Defendant contends "Plaintiffs have waived any purported constitutional challenges to" the statute. After discussing the standard of review, we first review whether Plaintiffs have waived the issue and then the merits of Plaintiffs' argument the statute is unconstitutional.

a. Standard of Review

¶ 49 For challenges under both the federal and State Constitutions, we review the constitutionality of statutes *de novo*. *See North Carolina Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016) (stating, in a case where a party argued a statute was unconstitutional under Article I, § 10 of the United States Constitution, "we review de novo any challenges to a statute's constitutionality"); *Cooper*

v. Berger, 376 N.C. 22, 33, 36, 852 S.E.2d 46, 56, 58 (2020) (stating, in a case challenging the constitutionality of a statute under our State Constitution, "[a]ccording to well-established North Carolina law," appellate courts "review[] constitutional questions using a de novo standard of review"). "In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Cooper*, 376 N.C. at 33, 852 S.E.2d at 56 (citation and quotation marks omitted); *see also North Carolina Ass'n of Educators*, 368 N.C. at 786, 786 S.E.2d at 262 ("This Court presumes that statutes passed by the General Assembly are constitutional, and duly passed acts will not be struck unless found unconstitutional beyond a reasonable doubt[.]" (citations omitted)).

b. Waiver

¶ 50 **[4]** In its waiver argument, Defendant specifically asserts "[a] facial constitutional challenge to a state statute is governed by the procedure found in N.C. Gen. Stat. §§ 1-267.1, 1-81.1, and [1A-1,] N.C. R. Civ. P. 42(b)(4)." Defendant alleges "Plaintiffs failed to comply with the requirements of Rule 42(b)(4)[5] for raising a facial challenge to the constitutionality" of § 116-311 and thus "have waived their ability to do so."

¶ 51 Defendant's argument rests on a faulty premise because Plaintiffs only raised as-applied constitutional challenges below. During the hearing on Defendant's Motion to Dismiss the Amended Complaint, Plaintiffs' attorney emphasized four separate times they were making as-applied challenges:

- "The first thing I will say and that I want to make very clear is that we have not made a facial challenge to the statute. We are alleging as applied in this case, as they wish to apply it, it is unconstitutional particularly among a number of other sections against the federal contracts clause."
- "Again, I would posit that we are not making a facial challenge but an as-applied challenge."
- "We're making an as-applied challenge."

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5. The requirements of Rule 42(b)(4) control the application of the other two statutes Defendant previously mentioned, §§ 1-267.1 and 1-81.1. *See Holdstock*, 270 N.C. App. at 273, 276, 841 S.E.2d at 312, 314 (explaining how Rule 42(b)(4) "limits the application of N.C.G.S. § 1-267.1(a1)" and then discussing how § 1-81.1 also "restricts" its "requirement to only properly raised challenges as set forth in Rule 42(b)(4)" (emphasis from original omitted)).

- "That is not what we're trying to do is make a facial challenge to this."

¶ 52 The as-applied nature of the challenge matters because the statutes Defendant directs our attention towards "only apply to 'facial challenges to the validity of an act of the General Assembly, not as applied challenges.' " *See Cryan v. National Council of Young Men's Christian Associations of the United States*, 280 N.C. App. 309, 2021-NCCOA-612, ¶ 19 (quoting *Holdstock*, 270 N.C. App. at 271, 841 S.E.2d at 311). And Plaintiffs clarifying they were not making a facial challenge, combined with the lack of a trial court ruling that Plaintiffs were actually making a facial challenge, means no facial challenge was made to trigger the requirements set out by §§ 1-267.1, 1-81.1, and 1A-1, Rule 42. *See Cryan*, ¶ 21 ("As Defendant made clear they were only making an as applied challenge to the 2019 amendments, and the trial court did not make a determination itself that Defendant's constitutional challenges were in fact a facial challenge, no facial challenge was made in the time prescribed by Rule 42(b)(4) for a court to be able to transfer a facial challenge to a three-judge panel.").

¶ 53 Although Plaintiffs argued their constitutional challenge was only an as-applied claim, we recognize that Plaintiffs' own characterization of the claim is not necessarily the end of the analysis. Recently, this Court in *Kelly v. State* held "a court is not restricted *per se* by a party's categorization of its challenge as facial or as-applied and may conduct its own review to determine whether the party's challenge is facial or as-applied." *Kelly v. State*, 2022-NCCOA-675, ¶ 23. As Judge Hampson's dissent in *Kelly* indicates, *id.* ¶¶ 47-48 (Hampson, J. dissenting), this holding may conflict with *Cryan* because *Cryan* focused primarily on whether a party itself said they were making a facial or as-applied challenge. *Cryan*, ¶ 21 ("As [the d]efendant made clear they were only making an as applied challenge . . . no facial challenge was made . . . ."). If the tests from *Cryan* and *Kelly* were to lead to different outcomes, we would need to address this potential conflict in precedent. *See, e.g.*, *Huml v. Huml*, 264 N.C. App. 376, 395, 826 S.E.2d 532, 545 (2019) (explaining how to resolve "a conflict in cases issued by this Court addressing an issue").

¶ 54 But we do not need to address this potential conflict in precedent. Whether we apply the test announced in *Kelly* or we rely upon *Cryan*, the result is the same: Plaintiffs' challenge to § 116-311 here is an as-applied challenge. *See Kelly*, ¶¶ 24, 26 (setting out test for "determining whether a challenge is as-applied or facial"). The *Kelly* Court explained the test to differentiate between as-applied and facial challenges requires a

court to "look to the breadth of the remedy requested." *Kelly*, ¶ 24. The *Kelly* Court then differentiated between the two types of challenges:

> A claim is properly classified as a facial challenge if the relief that would accompany it "reach[es] beyond the particular circumstances of these plaintiffs." *Doe* [*v. Reed*], 561 U.S. [186,] 194, 130 S. Ct. [2811,] 2817, 177 L. Ed. 2d [493,] 501. A claim is properly classified as an as-applied challenge if the remedy "is limited to a plaintiff's particular case." *Libertarian Party v. Cuomo*, 300 F. Supp. 3d 424, 439 (W.D.N.Y. 2018), *overruled on other grounds by N.Y. State Rifle & Pistol Ass'n v. Bruen*, --- U.S. ----, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022).

Id. (first brackets in original). In *Kelly*, this Court determined the plaintiffs made a facial challenge because (1) the relief requested "would, if successful, effectively preclude all enforcement of the statute[;]" and (2) the plaintiffs did not allege any facts from which an as-applied determination could be made because they had not sought to be part of the challenged program. *Id.* ¶¶ 27-31 (citations and quotation marks omitted).

¶ 55 Here, examining Plaintiffs' challenge with *Kelly*'s test, we again conclude Plaintiffs have made an as-applied challenge. First, looking at the relief requested, *see id.* ¶ 28, Plaintiffs made the constitutional challenge in the context of their specific case where they are seeking to recover money they and the proposed classes paid for tuition, fees, on-campus housing, and meals. This situation differs from *Kelly* where the plaintiffs sought a declaratory judgment the challenged program was unconstitutional and a permanent injunction against continued operation of that program. *See id.* ¶ 27. Here, we could find an as-applied constitutional violation that opens a limited pathway to allow Plaintiffs and the proposed class to recover the monies they seek without "effectively preclud[ing] all enforcement" of § 116-311 since Plaintiffs do not seek a declaratory judgment that the statute is unconstitutional or injunctive relief barring its enforcement. *See id.* ¶ 28. Plaintiffs merely seek a ruling § 116-311 cannot be used to grant Defendant immunity from *their* lawsuit. For example, they argued before the trial court: "That is not what we're trying to do is make a facial challenge to this. I don't care whether the state and Lenoir-Rhyne or Gardner-Webb try to enforce this immunity on any other students that might run this. I'm concerned about the case that I've brought."

¶ 56 Further, unlike the plaintiffs in *Kelly*, Plaintiffs here could and did allege facts on which an as-applied constitutionality determination could

be made because they were impacted by the challenged statute. *See id.* ¶ 30. For example, Plaintiffs' attorney argued below the challenge was partially based on "the federal contracts clause." As discussed above, Plaintiffs' Amended Complaint alleges they personally entered into contracts with the Universities, so they could challenge § 116-311 on the ground it impaired their contracts specifically. *See North Carolina Ass'n of Educators*, 368 N.C. at 786, 786 S.E.2d at 262 (explaining the Contract Clause of the United States Constitution bars a state from passing "any Law impairing the Obligation of Contracts" (quoting U.S. Const. art. I, § 10 (ellipses omitted))). Although we do not have in our record Plaintiffs' precise arguments before the trial court on this ground, *see* Fn. 2, *supra*, their separation of powers argument demonstrates the as-applied nature of their challenge to § 116-311 even more clearly. On appeal, Plaintiffs argue § 116-311 unconstitutionally "intrudes upon the separation of powers because it is a law that was passed in response to specific litigation already pending in the courts with the purposes of directing the courts on how to adjudicate the pending actions." This argument relies on when Plaintiffs filed their specific lawsuit, i.e., before the General Assembly passed the immunity statute, so it necessarily relies on facts "specific to" Plaintiffs "from which to determine whether the statute is unconstitutional as applied." *See Kelly*, ¶ 30 (requiring such facts for a challenge to be as-applied).

¶ 57 Under both of *Kelly*'s factors, *see id.* ¶¶ 27-31, Plaintiffs here make an as-applied challenge to the immunity statute. Thus, applying *Kelly*'s test, we reach the same conclusion as our previous analysis based on *Cryan*. Therefore, we reject Defendant's argument Plaintiffs have waived their constitutional challenges to § 116-311 and the statutory immunity it provides against Plaintiffs' claims.

c. Merits

¶ 58 **[5]** Turning to the merits, Plaintiffs argue § 116-311 is unconstitutional on five grounds: (1) the United States Constitution's clause barring states from impairing contracts; (2) the Equal Protection Clauses of the United States and North Carolina Constitutions; (3) the Due Process Clauses of the United States and North Carolina Constitutions; (4) the Takings Clause in the Fifth Amendment of the United States Constitution; and (5) the separation of powers doctrine. We address each of those five arguments in turn.

¶ 59 Under the Contract Clause of the United States Constitution, "no State shall pass any Law impairing the Obligation of Contracts." *North Carolina Ass'n of Educators*, 368 N.C. at 786, 786 S.E.2d at 262 (quoting

U.S. Const. art. I, § 10) (ellipses and brackets omitted). Our courts use a three-factor test to "determine whether a Contract Clause violation exists." *Id.* (citing *Bailey v. State*, 348 N.C. 130, 141, 500 S.E.2d 54, 60 (1998)). That test, adopted from the Supreme Court of the United States's decision in *U.S. Trust Co. of N.Y. v. New Jersey*, "requires a court to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey*, 348 N.C. at 140-41, 500 S.E.2d at 60 (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 52 L.Ed.2d 92 (1977)). Here, we have already determined Plaintiffs pled a valid contractual obligation when we decided the contract claims survived sovereign immunity, thereby meeting the first prong of the test. Assuming *arguendo* the second prong, impairment of the contract, is met, Plaintiffs fail at the third prong.

¶ 60 The third prong, "whether the impairment was reasonable and necessary to serve an important public purpose[,]" recognizes "[n]ot every impairment of contractual obligations by a state violates the Contract Clause" because the state can still permissibly use its police power. *Bailey*, 348 N.C. at 151, 500 S.E.2d at 66 (citing *U.S. Trust Co.*, 431 U.S. at 21, 25-26, 52 L.Ed.2d at 109, 111-12). The third prong "involves a two-step process, first identifying the actual harm the state seeks to cure, then considering whether the remedial measure adopted by the state is both a reasonable and necessary means of addressing that purpose." *North Carolina Ass'n of Educators*, 368 N.C. at 791, 786 S.E.2d at 265 (citing *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412, 74 L.Ed.2d 569, 581 (1983)); *see also Lake v. State Health Plan for Teachers and State Employees*, 380 N.C. 502, 2022-NCSC-22, ¶ 64 (quoting that portion of *North Carolina Ass'n of Educators*).

¶ 61 Here, the Article on immunity explains the purpose of the statute: "It is a matter of vital State concern affecting the public health, safety, and welfare that institutions of higher education continue to be able to fulfill their educational missions during the COVID-19 pandemic without civil liability for any acts or omissions for which immunity is provided in this Article." N.C. Gen. Stat. § 116-313 (2021). In *North Carolina Ass'n of Educators*, our Supreme Court explained "maintaining the quality of the public school system is an important purpose." *See North Carolina Ass'n of Educators*, 368 N.C. at 791, 786 S.E.2d at 266. While the case did so in the context of elementary and secondary school public education, *see id.* at 781, 786 S.E.2d at 259 (referencing history of N.C. Gen. Stat. § 115C-325 (2012)); N.C. Gen. Stat. Chapter 115C (covering elementary and secondary education), the quality of post-secondary education is

also an important purpose for the State, especially when it has decided to create a public university system to, *inter alia*, "improve the quality of education[.]" *See* N.C. Gen. Stat. § 116-1(a) (2021) ("In order to foster the development of a well-planned and coordinated system of higher education, to improve the quality of education, to extend its benefits and to encourage an economical use of the State's resources, the University of North Carolina is hereby redefined in accordance with the provisions of this Article.").

¶ 62 Turning to the second part of the third prong, we must determine "whether the remedial measure adopted by the state is both a reasonable and necessary means of addressing that purpose." *See North Carolina Ass'n of Educators*, 368 N.C. at 791, 786 S.E.2d at 265. The immunity statute was a reasonable means of ensuring the quality of education because it allowed the Universities to focus on how to best deliver education online rather than trying to continue in person and expending resources on all the public health measures necessary to try to achieve that prospect safely. With the benefit of hindsight, there are many different opinions on the effectiveness or wisdom of closures of educational institutions as a response to the COVID-19 pandemic, but this Court need not attempt to resolve these questions as they are not presented by this case. The General Assembly limited the application of N.C. Gen. Stat. §116-311 to the spring semester of 2020 only, and this was the only semester during which the Universities had to deal with an immediate response to the COVID-19 pandemic for students who were already enrolled and on campus when the Governor's Emergency Directives were issued. *See* N.C. Gen. Stat. § 116-311(a)(1) ("The claim arises out of or is in connection with tuition or fees paid to the institution of higher education for the spring academic semester of 2020."); *see generally* E.O. 116, Cooper, 2020, § 1 (first COVID-19 Emergency Directive). The immunity statute was a reasonable response to the COVID-19 pandemic at the time it was adopted, in the context of the Governor's Emergency Directives. *See*, *e.g.*, E.O. 116, Cooper, 2020, § 1 (declaring a state of emergency based on "the public health emergency posed by COVID-19"); E.O. 120, Cooper, 2020, § 4 (closing other educational institutions, namely public schools, from 16 March 2020 to 15 May 2020 pursuant to, *inter alia*, the state of emergency); E.O. 121, Cooper, 2020, § 1-2, 7 (imposing a 30-day stay-at-home order effective 30 March 2020 pursuant to, *inter alia*, the state of emergency with a limited exception for educational institutions, including public colleges and universities, only for "facilitating remote learning, performing critical research, or performing essential functions, provided" social distancing of at least six feet from other people was respected). The statute was also a necessary response

to the COVID-19 pandemic and the need to ensure educational quality during the early days of the pandemic. Removing the possibility of liability from the Universities ensured they could shift to online learning and focus on education without worrying about either public health measures to continue in person or the prospect of lawsuits arising from having to change the method of instruction mid-semester. Put another way, it is unclear what else the General Assembly could have done to achieve the same goal of ensuring the focus was on continuing the Universities' educational mission in light of the uncertainty caused by the early days of the COVID-19 pandemic. Because we find the immunity statute to be reasonable and necessary, we reject Plaintiffs' argument the statute violates the federal Constitution's Contract Clause.

¶ 63 Second, Plaintiffs argue § 116-311 violates the equal protection clauses of the federal and State Constitutions because it "aimed at protecting only one group of specific entities[,]" Defendant and its Universities "against the claims of another specific group" and did not extend to other industries that also "suffered financially from the pandemic" such as "[g]yms, restaurants, and countless other businesses . . . forced to close their physical locations." Since Plaintiffs' argument rests on differing classifications of universities versus other businesses affected by the COVID-19 pandemic, the tests under the federal and State Constitutions are identical. *See Liebes v. Guilford County Dept. of Public Health*, 213 N.C. App. 426, 428, 724 S.E.2d 70, 72 (2011) ("Our courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis." (quoting *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996))). This Court has described those tests as follows:

> Upon the challenge of a statute as violating equal protection, our courts must "first determine which of several tiers of scrutiny should be utilized" and then whether the statute "meets the relevant standard of review." *Department of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). Where "[t]he upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," we apply the lower tier or rational basis test if the statute neither classifies persons based on suspect characteristics nor impinges on the exercise of a fundamental

> right. *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983).

See Liebes, 213 N.C. App. at 428-29, 724 S.E.2d at 72-73. Here, Plaintiffs do not argue any suspect classification or fundamental right is involved, so we apply only rational basis. *See id.* at 428-29, 724 S.E.2d at 73.

¶ 64 "The pertinent inquiry under rational basis scrutiny is whether the 'distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest.' " *Id.* at 429, 724 S.E.2d at 73 (quoting *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980)). While we need not determine the actual purpose when conducting rational basis review, *see id.*, here the statutory explanation in § 116-313 we excerpted above provides the required rational basis. Not only are the educational missions of institutions of higher learning a legitimate government interest, but the importance of education is also enshrined in our State's Constitution. *See* N.C. Const. Art. IX, § 1 ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and *the means of education shall forever be encouraged*." (emphasis added)). And the immunity law helped further that purpose by allowing the Universities to focus on educational quality rather than worry about lawsuits or what public health measures would be needed to allow schools to continue in person during the early stages of the pandemic. Since there is a rational basis for treating institutions of higher learning different than gyms or restaurants, the immunity statute survives equal protection analysis.

¶ 65 Third, Plaintiffs argue § 116-311 "violates the due process clauses of the United States and North Carolina Constitutions" because they were "deprived of their property rights in the contract, and their property rights in the chose of action that they have acquired as a result of Defendant's breach of said contract." Plaintiffs provide no authority in support of this argument. As with the Equal Protection Clauses, the Due Process Clause of the Fourteenth Amendment to the United States Constitution is "synonymous" with the "term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina," *see, e.g.*, *In re Moore's Sterilization*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976), so our analysis is identical under both the federal and State Constitutions.

¶ 66 The Supreme Court of the United States has long made clear "the State remains free to create substantive defenses or immunities for use in adjudication . . . ." *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 71 L.E.2d 265, 276 (1982). In such a case, "the legislative

determination provides all the process that is due." *Id.* at 433, 71 L.E.2d at 276 (citing *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46, 60 L.Ed. 372 (1915)). For example, in *Martinez v. California*, 444 U.S. 277, 62 L.Ed.2d 481 (1980), the Supreme Court of the United States "upheld a California statute granting officials immunity from certain types of state tort claims." *See Logan*, 455 U.S. at 432, 71 L.E.2d at 276. While "the grant of immunity arguably did deprive the plaintiffs of a protected property interest . . . they were not thereby deprived of property without due process" because of the legislative determination. *Id.* at 432-33, 71 L.E.2d at 276. The only requirement was that the legislative action had "a rational relationship" to the legislature's "purposes." *Martinez*, 444 U.S. at 282, 62 L.Ed.2d at 487 (quotation marks omitted); *see also Martinez*, 444 U.S. at 282, 62 L.Ed.2d at 487 ("[E]ven if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.").

¶ 67 Here, faced with another immunity statute, we also only need to determine if there was a rational relationship between § 116-311 and its purpose. S*ee id.* As laid out above, the statute grants immunity to allow the Universities to fulfill their academic missions. *See* N.C. Gen. Stat. § 116-313. As noted above in our discussion of the reasonableness of the immunity statute when discussing the Contract Clause, there is a rational relationship between the grant of immunity and that goal because immunity freed up the Universities to focus on how to best deliver education online rather than trying to continue in person and take all the public health measures necessary to do that, which would have necessarily taken resources away from efforts to ensure educational quality. Therefore, we reject Plaintiffs' contention § 116-311 violates the Fourteenth Amendment's Due Process Clause or our Constitution's corresponding Law of the Land Clause.

¶ 68 Fourth, Plaintiffs argue the immunity statute violates the Takings Clause of the Fifth Amendment to the United States Constitution because their "chose in action" from Defendant's breach of contract is property that was taken without just compensation. The only authority Plaintiffs cite in support of this contention is *Frost v. Naylor*, 68 N.C. 325 (1873) and its statement "a chose in action is property." *See Frost*, 68 N.C. at 326. But *Frost* focused on "our Constitution," not the federal Constitution's Takings Clause. *See id.* Plaintiffs present no caselaw showing a chose in action, or a right to sue in general, *see Chose in*

Action, Black's Law Dictionary (11th ed. 2019) (defining a chose in action as "[t]he right to bring an action to recover a debt, money, or thing"), can be the basis of a Takings Clause violation under the United States Constitution. Therefore, we reject this argument.

¶ 69 Finally, Plaintiffs argue § 116-311 unconstitutionally "intrudes upon the separation of powers because it is a law that was passed in response to specific litigation already pending in the courts with the purposes of directing the courts on how to adjudicate the pending actions." Plaintiffs provide no other argument, law, or citations to support that argument; the entire argument is that sentence. As such, even assuming *arguendo* passing a law in response to specific litigation already pending would violate separation of powers, Plaintiffs have failed to provide any evidence this law was passed in such a manner. Therefore, we reject Plaintiffs' separation of powers argument.

¶ 70 Thus, after our *de novo* review we are not convinced beyond a reasonable doubt that § 116-311 is unconstitutional. Because we uphold the constitutionality of § 116-311 against all of Plaintiffs' arguments and have already decided it applies to this case, we now hold Plaintiffs' claims are barred by statutory immunity. This holding applies to bar Plaintiffs' contract claims that survive sovereign immunity, and it also represents an alternative bar to Plaintiffs' unjust enrichment claims. Therefore, the trial court did not err in dismissing Plaintiffs' claims.

III. Conclusion

¶ 71 We affirm the trial court's dismissal of Plaintiffs' claims. Sovereign immunity bars Plaintiffs' unjust enrichment claims, but it does not bar their contract claims because they have pled valid implied-in-fact contracts. Statutory immunity from N.C. Gen. Stat. § 116-311 bars Plaintiffs' contract claims and, in the alternative, their unjust enrichment claims, because the statute applies to their claims based on its plain language and meaning and is constitutional.

AFFIRMED.

Judges COLLINS and CARPENTER concur.

PELC v. PHAM

[287 N.C. App. 427, 2023-NCCOA-2]

JAMES HOWARD PELC, PLAINTIFF
v.
MONICA ELIZABETH PHAM, DEFENDANT

No. COA22-175

Filed 17 January 2023

1. Contracts—breach—husband sponsoring immigrant wife—failure to provide financial support under Form I-864—subject matter jurisdiction

In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife), where the husband had signed a United States Citizenship and Immigration Services Form I-864 "Affidavit of Support" promising to sponsor and financially support the wife when she immigrated to the U.S., the trial court had subject matter jurisdiction to hear the wife's breach of contract claim alleging that the husband failed to continue paying support under the Form I-864 for years after they separated. Although the support obligation under a Form I-864 is calculated on an annual basis, the wife was not required to renew her breach of contract claim every year after the date of separation where her complaint prayed for all monetary damages resulting from the alleged breach; therefore, the husband's argument—that the only year the court possessed jurisdiction over the wife's claim was the year that the parties separated—was meritless.

2. Divorce—breach of contract—husband sponsoring immigrant wife—failure to pay support under Form I-864—calculation of payments owed—household size

In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife), where the husband had signed a United States Citizenship and Immigration Services Form I-864 "Affidavit of Support" promising to sponsor and financially support the wife when she immigrated to the U.S., and where the trial court ruled in favor of the wife on her breach of contract claim alleging that the husband failed to make support payments under the Form I-864 after they separated, the court erred in calculating the damages owed to the wife using the Federal Poverty Level Guidelines for a two-person household rather than for a one-person household. Although the parties did have a son together, the child could not be considered part of the wife's household for Form I-864 purposes because the husband had promised in the Form to support only the wife and because the child was a U.S. citizen.

3. Divorce—breach of contract—husband sponsoring immigrant wife—failure to pay support under Form I-864—calculation of payments owed—sponsored immigrant's income

In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife), where the husband had signed a United States Citizenship and Immigration Services Form I-864 "Affidavit of Support" promising to sponsor and financially support the wife when she immigrated to the U.S., and where the trial court ruled in favor of the wife on her breach of contract claim alleging that the husband failed to make support payments under the Form I-864 after they separated, the court did not err by using the wife's adjusted gross income as listed on her federal tax returns when calculating the damages that the husband owed her (the support obligation under a Form I-864 is the difference between the sponsored immigrant's annual "income" and the amount equal to 125 percent of the federal poverty level).

4. Appeal and Error—preservation of issues—waiver—conflicting arguments offered before trial, at trial, and on appeal

In a divorce case where, during the marriage, the wife loaned money to the husband so that he could purchase a rental home in Georgia but he never paid her back, the husband failed to preserve for appellate review his argument that the trial court erred in awarding equitable damages to the wife based on a finding that a quasi-contract existed between the parties in relation to the loan. Specifically, the husband could not argue for the first time on appeal that the parties had an implied-in-fact contract regarding the loan after having argued in his pretrial filings that no loan existed and then having argued at trial that the parties had in fact entered into a quasi-contract regarding the loan.

5. Damages and Remedies—equitable remedy—breach of quasi-contract—loan to purchase rental home—no credit given for "sweat equity"

In a divorce case where, during the marriage, the wife loaned money to the husband so that he could purchase a rental home in Georgia but he never paid her back, the trial court did not abuse its discretion in awarding equitable relief to the wife—based on a finding that a quasi-contract existed with respect to the loan—without crediting the husband for his "sweat equity" in repairing some of the wife's properties in Australia. The quasi-contract between the parties concerned only the rental home, and therefore the court did not have to consider any of the parties' other properties when fashioning

an equitable remedy. Further, the court also declined to credit the wife with the "sweat equity" she purportedly put into repairing the parties' residential property in North Carolina.

6. Damages and Remedies—equitable remedy—breach of quasi-contract—loan to purchase rental home—North Carolina Foreign-Money Claims Act—currency for payment of damages

In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife) where, during the marriage, the wife loaned money to the husband so that he could purchase a rental home in Georgia but he never paid her back, and where the trial court awarded equitable relief to the wife based on a finding that the parties had a quasi-contract with respect to the loan, the court erred by awarding damages in U.S. dollars. Under the North Carolina Foreign-Money Claims Act, relief should have been awarded in Australian dollars (AUD) because: (1) the wife loaned the money in AUD, and the husband regularly made interest payments on the loan in AUD; (2) the parties used AUD "at the time of the transaction"; and (3) the wife's loss was "ultimately felt" in AUD.

7. Judges—discretion—conference held after close of evidence but before entry of final order—delay in entering final order

The trial judge in a divorce case had the discretion to hold a conference after the close of evidence and before entering its final order—to hear the parties' proposals on how to draft the order—but it erred in waiting eighteen months to enter the final order, as the delay impeded appellate review of the judge's holdings in the case.

8. Appeal and Error—record on appeal—missing portions of trial transcript—no prejudice shown

The appellant in a divorce case failed to show that he was prejudiced on appeal where portions of the trial transcript were missing from the record due to technological glitches. The existing record still allowed the husband to adequately present (and even prevail on some of) his arguments on appeal.

9. Attorney Fees—divorce action—husband sponsoring immigrant wife—breach of contract—failure to provide financial support under Form I-864

In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife), where the husband had signed a United States Citizenship and Immigration Services Form I-864 "Affidavit of Support" promising to sponsor and financially support the wife

when she immigrated to the U.S., the trial court did not err in awarding attorney fees to the wife on her breach of contract claim (alleging that the husband breached his obligation to make support payments under the Form I-864 after they separated) because she was the prevailing party on that claim. Further, the applicable federal law (8 U.S.C. § 1183a(c)) lists "payment of legal fees" as one of the available remedies for enforcing a Form I-864, and the Form I-864 that the husband signed stated that he might be required to pay attorney fees if a person or agency successfully sued him in relation to his payment obligations.

Appeal by defendant from judgment entered 7 June 2021 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 29 November 2022.

Arnold & Smith, PLLC, by Matthew R. Arnold and Ashley A. Crowder, for the plaintiff-appellant.

Miller Bowles Cushing, PLLC, by Brett Holladay, for the plaintiff-appellant.

Thurman, Wilson, Boutwell & Galvin, P.A., by John D. Boutwell for the defendant-appellee.

TYSON, Judge.

¶ 1 James Howard Pelc ("Father") appeals from order entered on 7 June 2021, which awarded to Monica Elizabeth Pham ("Mother"): (1) monetary damages under an United States Citizenship and Immigration Services ("USCIS") Form I-864 Affidavit of Support; (2) equitable damages for Father's failure to repay a loan; and, (3) attorney's fees for Mother's Affidavit of Support claims. The order also denied attorney's fees for both Mother's and Father's child custody claims. We affirm in part, reverse in part, and remand.

I. Background

¶ 2 Father and Mother began a romantic relationship in Perth, Australia, and began cohabitating in 2007. The relationship evolved into a "*de facto* relationship" per Australian law, which is analogous to a common-law marriage. Mother and Father are parents of one minor son born on 26 June 2009. The parties resided in Australia until 2014, when they moved to the United States (U.S.).

¶ 3 Father holds dual citizenship in the U.S. and Australia. Mother holds dual citizenship in Australia and New Zealand. Their son is a U.S. and Australian citizen because Father is a U.S. citizen. At the time of trial, Father was 62 years old, and Mother was 50 years old.

¶ 4 Father desired to return to the U.S. in 2014 to be closer to his aging parents. Mother was reluctant, but she agreed to move "on a trial basis" to determine whether she would enjoy living in the U.S. Mother was required to obtain a Fiancée Visa prior to immigrating and entering the U.S. Mother and Father completed and signed a USCIS Form I-134, entitled "Intent to Marry," and confirmed their intent to marry within ninety days upon entry into the U.S. Mother and Father married on 21 July 2014 in the U.S.

¶ 5 For Mother to remain in the U.S., Father also signed and submitted a USCIS Form I-864, titled an "Affidavit of Support," on 7 August 2014. The Affidavit of Support allows the "intending immigrant [to] establish that he or she is not inadmissible to the United States as an alien likely to become a public charge" by requiring the future spouse to promise to financially support the alien.

¶ 6 The trial court found Father "represented that he was not working but had assets and income from his property from which to support [M]other" on the USCIS Form I-864. Father signed the USCIS Form I-864 Affidavit of Support, promising to maintain his alien wife, an Australian/New Zealand citizen, for her to lawfully remain in the United States for permanent residence.

¶ 7 The parties resided together in the U.S. with the minor son until they separated on 4 November 2016. Father failed to pay any support to Mother after the parties separated.

¶ 8 From November 2016 until April 2017, the parties "nested" with the minor son, meaning "Mother and Father would alternate weeks living in Father's residence with the minor child." The parties eventually stopped "nesting" with their son. The parties have maintained separate households since April 2017.

¶ 9 Neither Mother nor Father were employed for 2014 through 2017. Father has not maintained traditional employment since February 2014. Mother resigned from her job in Australia when she moved to the U.S., per Father's request. Mother, however, later secured a part-time employment during 2018 and a full-time position in 2019.

¶ 10 Prior to moving to the U.S., Father identified various properties located in different geographic areas. He intended to use one as the family

home, and another to be used as a rental property to generate income. In May 2013, Father purchased residential property located in Charlotte. He also purchased property located in Suwanee, Georgia, in August 2013, which he hoped to rent.

¶ 11 Prior to closing on the property in Suwanee, Mother offered funds to Father to avoid financing the property through a traditional loan and borrowing from a lender. Mother was to receive equity in the home for her investment, or alternatively, Father promised to re-pay Mother the interest she was obligated to pay on her separate line of credit. Mother provided $110,000 Australian dollars ("AUD") to Father in two transactions on 11 and 12 June 2013, which Father subsequently transferred to a U.S. bank account and, upon conversion, received currency proceeds of $104,099 U.S. Dollars ("USD"). Father used those funds to partially purchase the property in Suwanee.

¶ 12 The trial court found that Mother "trusted Father" because of their personal relationship, and Mother considered the transaction as a "loan to Father and not a gift." The trial court also found Mother had relied upon Father's promises to re-pay the funds loaned from her line of credit and her reliance was reasonable.

¶ 13 Father paid Mother $4,071 towards the loan proceeds in 2013 and part of 2014, which amount equaled the interest accruing on Mother's line of credit. Father subsequently stopped paying Mother in 2014. In one of Father's responses to a motion before the trial, he "admitted that Mother had loaned him the money, admitted that he had paid for a time on the loan, and admitted that it had not been paid in full." Father sold the Suwanee property for a profit in 2018. Father did not re-pay Mother any of the proceeds from the sale nor make any additional payments on the loan.

¶ 14 Following the dissolution of Mother's and Father's relationship in late 2016, Father initiated this litigation after Mother had threatened to take their minor son back to Australia. He sought permanent child custody, temporary emergency custody, and, in the alternative, a motion for temporary parenting arrangement. The litigation has sadly proceeded in a protracted, expensive, contentious, and a highly-conflicted manner since it began.

¶ 15 Mother counterclaimed for a decree of divorce, child custody, child support, attorney's fees, recovery of personal property, monetary damages resulting from breach of contract for support, specific performance of the contract for support, equitable distribution, interim allocation, postseparation support, alimony, unjust enrichment, constructive trust, and resulting trust.

¶ 16 Mother voluntarily dismissed her post-separation support, alimony, and temporary and permanent child support claims without prejudice when trial began. The remaining claims were tried between 9-11 December 2019. No written order was entered until eighteen months later on 7 June 2021.

¶ 17 The trial court found and concluded: (1) Father owed Mother damages for failing to meet his contractual obligation under the USCIS Form I-864 Affidavit of Support; (2) Mother's claim for *quantum meruit*/unjust enrichment should be granted for the funds Mother provided to finance the purchase of the Georgia rental home and awarded Mother $100,028 USD, the converted amount of the funds minus the payments Father made in 2013 and 2014, together with $33,697.10 USD in interest; (3) Mother's claim for attorney's fees arising out of the Affidavit of Support should be allowed in the amount of $20,000 USD; and, (4) both Mother and Father's claims for attorney's fees related to the child custody agreement should be denied. Father timely appealed on 6 July 2021.

II. Appellate Jurisdiction

¶ 18 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

¶ 19 Father presents extensive arguments regarding the trial court's order on appeal. Those arguments relate to the trial court's findings regarding: (1) the USCIS Form I-864 Affidavit of Support; (2) Mother's loan to Father to purchase the property located in Suwanee, Georgia; and, (3) the award of mother's attorney's fees for those fees related to the Affidavit of Support.

¶ 20 Father also argues he was prejudiced and should be granted a new trial because: (1) a hearing conducted after trial, but before entry of the final order, allowed Mother to make additional arguments; and, (2) certain portions of the trial transcript are missing due to technological glitches.

IV. Affidavit of Support

¶ 21 Father first argues the trial court lacked subject matter jurisdiction to adjudicate Mother's Affidavit of Support claim for 2017 and 2018. Father asserts he could only be in breach of the agreement at the end of each year, because the trial court uses the annual income of the sponsored alien immigrant to determine whether he breached his obligations

under the Affidavit of Support. He argues Mother should have brought forth new claims regarding Defendant's breach at the end of each year during the litigation.

¶ 22 Father also argues the trial court erred by considering the 125% of the Federal Poverty Level ("FPL") Guidelines values for a two-person household instead of a one-person household when determining whether Mother's annual income fell below the 125% FPL threshold. He similarly asserts the trial court erred by excluding certain tax-deductible depreciation expenses from mother's income when calculating damages. If those tax deductions were not excluded from Mother's income and the trial court applied the guidelines for a one-person household, Father argues he would not owe Mother damages for breaching his contractual obligations under the USCIS Form I-864 Affidavit of Support.

¶ 23 The following chart compares the 125% FPL Guidelines for both household sizes for the years the trial court awarded Mother damages arising from Father's obligations under the Affidavit of Support. Although Mother also sought damages for 2015, the trial court did not award damages for that year because her income exceeded the FPL Guidelines for a two-person household in 2015.

125% of the Federal Poverty Level Guidelines (in USD)		
Year	**One-Person Household**	**Two-Person Household**
2016	$ 14,850	$ 20,025
2017	$ 15,075	$ 20,300
2018	$ 15,175	$ 20,575

¶ 24 Mother's adjusted gross income on her federal tax returns for the requisite years is displayed in the table below, along with Mother's income without deducting her depreciation expenses:

Mother's Adjusted Gross Income		**Mother's Income Before Subtracting Depreciation Expenses**	
Year	**Amount in USD**	**Year**	**Amount in USD**
2016	$ 8,511	2016	$18,066
2017	$ 7,173	2017	$16,728
2018	$ 6,703	2018	$16,258

A. Subject Matter Jurisdiction

¶ 25 **[1]** Mother asserted a breach of contract claim in her First Amended Answer and Counterclaims, filed on 13 December 2016. Father argues the only possible year the trial court possessed subject matter jurisdiction over Mother's claim for damages arising from the Affidavit of Support was 2016, and he asserts the "threshold for determining liability under the Affidavit of Support is 125% of the [FPL], [which is] calculated on an annual level, rather than monthly [basis]." Mother renewed her claim in her Second Amended Answer and Counterclaims filed on 14 February 2017. Defendant asserts his potential liability for 2017 and 2018 was speculative, as 2017 had not ended when Mother renewed her claim and 2018 had not begun, making both claims premature and not "ripe."

1. Standard of Review

¶ 26 "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). "Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Id.* (citation and internal quotation marks omitted).

2. Suozzo v. Suozzo

¶ 27 The defendant in *Suozzo v. Suozzo* argued "the trial court erred by awarding damages for the monthly installments that became due only after Wife commenced th[e] action," because "[w]ife did not sue for claims which came due subsequent to the filing [of] the complaint." 285 N.C. App. 425, 2022-NCCOA-620, ¶ 10, 876 S.E.2d 915 (2022) (unpublished) (internal quotation marks and alterations omitted). This Court held the trial court did not err by awarding damages for monthly installments the defendant-husband had missed after wife had filed her complaint. *Id.* ¶ 13. Wife did not "limit her prayer for relief to the recovery of installments prior to the filing of her complaint" and she prayed for " 'all damages incurred as a result of Defendant's breach' and for 'such other and further relief as the Court may deem just and proper.' " *Id.* ¶ 12.

¶ 28 Here, Mother was not required to renew her breach of contract claim arising under the USCIS Affidavit of Support at the end of each new year the litigation proceeded into, as she had prayed for all monetary damages resulting from Father's breach and "such other and further relief [as] the Court may deem just and proper." *Id.* ¶ 13.

¶ 29 North Carolina courts have jurisdiction to adjudicate breach of contract claims deriving from a supporting spouse's failure to comply with an Affidavit of Support. *See Zhu v. Deng*, 250 N.C. App. 803, 794 S.E.2d 808 (2016). The trial court possessed subject-matter jurisdiction to hear and adjudicate Mother's claims under her prayer for relief for Father's breach as they accrued for the years 2017 and 2018. Father's argument is overruled.

B. USCIS Form I-864 Affidavit of Support

1. Standard of Review

¶ 30 The contents of a USCIS Form I-864 Affidavit of Support "are specified in 8 U.S.C. § 1183a, and . . . [are] [ ] an issue of statutory interpretation." *Id.* at 817, 794 S.E.2d at 817 (citation omitted). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *Martin v. N.C. Dep't. of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (citation and quotation marks omitted); *Anderson v. Anderson*, 840 F. App'x 92, 94 (9th Cir. 2020) (unpublished) (explaining that whether the court correctly instructed the jury they were allowed to consider TRICARE health insurance benefits and a judgment for attorney's fees as "income" should be reviewed *de novo*, not for an abuse of discretion, because the appellate court was determining "whether the challenged instruction correctly state[d] the law").

2. Analysis

¶ 31 Federal statutes in the U.S. Code mandate compliance with certain immigration requirements before an alien from another country or jurisdiction may lawfully enter sovereign borders of the United States. A potential immigrant or "alien who . . . is likely at any time to become a public charge is inadmissible," and cannot lawfully enter, although if properly filed, "the consular officer or the Attorney General may also consider any [A]ffidavit of [S]upport under section 1183a of this title" before reaching a decision about whether to allow entry. 8 U.S.C. § 1182(a)(4)(A)-(B)(ii) (2018).

¶ 32 A United States citizen, or a "lawfully admitted" alien, may "sponsor" an immigrant or alien petitioning for admission and lawful entry into the United States by signing an Affidavit of Support USCIS Form I-864A contract and promising "to maintain the sponsored alien at an annual income that is not less than 125 percent of the [FPL]." 8 U.S.C. § 1183a(a)(1)(B), (f)(1) (2018).

¶ 33 "Form I-864A is considered a legally enforceable contract between the sponsor and the sponsored immigrant." *Zhu*, 250 N.C. App. at 807, 794 S.E.2d at 812 (citation and internal quotation marks omitted). The sponsoring spouse is, nevertheless, only obligated to pay the sponsored immigrant if the immigrant's income is less than 125% of the FPL for the requisite household size. 8 U.S.C. § 1183a(a)(1)(A); *Zhu*, 250 N.C. App. at 807, 794 S.E.2d at 812 (citation omitted); *Barnett v. Barnett*, 238 P.3d 594, 598-99 (Alaska 2010) (explaining "[e]xisting case law supports the conclusion that a sponsor is required to pay only the difference between the sponsored non-citizen's income and the 125% of [FPL] threshold" and denying support for any amount above the 125% threshold because "the parties have referred us to no authority supporting the proposition that federal law requires a sponsor to pay spousal support when the sponsored non-citizen's earned income exceeds 125% of the [FPL]").

¶ 34 "The sponsor's obligation under the affidavit does not terminate in the event of divorce." *Id.* (citation and quotation marks omitted); *Erler v. Erler* (*Erler I*), 824 F.3d 1173, 1177 (9th Cir. 2016) ("[U]nder federal law, neither a divorce judgment nor a premarital agreement may terminate an obligation of support."); *Wenfang Liu v. Mund*, 686 F.3d 418, 419-20 (7th Cir. 2012) (explaining the "right of support conferred by federal law exists apart from whatever rights [a sponsored alien] might or might not have under [state] divorce law").

¶ 35 In addition, "child support is a financial obligation to one's non-custodial child, not a monetary benefit to the other parent. . . . [C]hild support payments do not offset the defendant's obligation under the affidavit." *Younis v. Farooqi*, 597 F. Supp. 2d 552, 555 (D. Md. 2009).

a. Household Size

¶ 36 **[2]** The federal regulation defining the terms used in the USCIS Form I-864 Affidavit of Support provides: "Income means an individual's total income (adjusted gross income for those who file IRS Form 1040EZ) for purposes of the individual's U.S. Federal income tax liability, including a joint income tax return[.]" 8 C.F.R. § 213a.1. This definition, however, only defines "income" for the supporting spouse, and not the dependent spouse intending to lawfully immigrate and enter. *See Flores v. Flores*, 590 F. Supp. 3d 1373, 1380 (W.D. Wash. 2022) (citation omitted) ("The Immigration and Nationality Act [ ] does not define income with respect to the sponsored immigrant.").

¶ 37 North Carolina's courts have never defined "income" for the purpose of determining what amount a supporting spouse is obligated to pay a dependent spouse, who they agreed to sponsor by signing an USCIS I-864

Affidavit of Support, and this issue is of first impression. The approaches other courts have taken, when resolving the issue of which household size may be considered to calculate damages, is persuasive guidance, although not binding. *N.C. Ins. Guar. Ass'n v. Weathersfield Mgmt.*, 268 N.C. App. 198, 203, 836 S.E.2d 754, 758 (2019) (citation omitted) ("When this Court reviews an issue of first impression, it is appropriate to look to decisions from other jurisdictions for persuasive guidance.").

¶ 38 In *Flores*, a couple were parents of three children: two children who "were born after Plaintiff immigrated to the United States and, therefore, are citizens of the United States," and one lawfully residing child who was a "citizen of the Philippines and Lawful Permanent Resident of the United States." *Flores*, 590 F. Supp. 3d at 1378 n.1. When the supporting spouse in *Flores* submitted the USCIS Form I-864 Affidavit of Support, only the first child, who was a citizen of the Philippines, was listed on the form along with the dependent spouse. *Id.* (citing *Erler I*, 824 F.3d at 1180).

¶ 39 The court in *Flores* held the supporting spouse only agreed to sponsor both the dependent spouse and their first child, per the terms of the contractual agreement in the Affidavit of Support. *Id.* The supporting spouse did not agree to sponsor the two children who were U.S. citizens. *Id.* The proper household size used to calculate the supporting spouse's obligation was two, not four. *Id.* (citing *Erler I*, 824 F.3d at 1180 ("If the sponsor agreed to support more than one immigrant, and those immigrants separate from the sponsor's household and continue to live together, then the sponsor must provide them with whatever support is necessary to maintain them at an annual income of at least 125% of the [FPL] guidelines for a household of a size that includes all the sponsored immigrants.")).

¶ 40 The reasoning in *Flores* is supported by two independent lines of reasoning. First, children who are U.S. citizens are not aliens capable of becoming a "public charge" under the immigration statutes. *See* 8 U.S.C. § 1182(a)(4) (explaining that an "alien who . . . is likely at any time to become a public charge is inadmissible") Second, given the contractual nature of the Affidavit of Support, the supporting spouse in *Flores* was only contractually obligated to support the dependent spouse and their first child because those two were the only dependent alien individuals listed on the Affidavit of Support. *Flores*, 590 F. Supp. 3d at 1378 n.1.

¶ 41 Defendant cannot be liable for contractual damages to support individuals not required to be listed, per federal immigration law, in the terms of the "contract." *See Erler I*, 824 F.3d at 1179 (explaining that a

"sponsor would not reasonably expect to have to support the immigrant *and* any others with whom she chooses to live," nor would "the U.S. Government, who is also a party to the contract created by the affidavit, . . . reasonably expect the sponsor to support any others with whom the immigrant might choose to live following [their] separation").

¶ 42 Here, Father only promised to support *Mother* in the Affidavit of Support, as she was the only *alien* intending to immigrate and enter the U.S. Their child was born before Father signed the Affidavit of Support. Father initially and knowingly omitted the child as an *immigrant* he intended to sponsor on the USCIS Form I-864, as his son is a U.S. citizen, to whom the Affidavit of Support *does not apply*. The trial court erred by calculating the damages Defendant owed to Plaintiff using the FPL Guidelines for a two-person household. *Flores*, 590 F. Supp. 3d at 1378 n.1.

¶ 43 Whether Father owes Mother child support for their son is a separate issue governed by *state* law. Mother is not barred from bringing her action for temporary and permanent child support, as she had voluntarily dismissed those claims *without prejudice*. *Wenfang Liu*, 686 F.3d at 419-20 ("The right of support conferred by *federal law exists apart from whatever rights* Liu might or might not have under *[state] divorce law*.") (emphasis supplied). The trial court's order is affected by error on this issue and is reversed.

b. Sponsored Immigrant's Income

¶ 44 **[3]** Father also argues the trial court erred by using Mother's Adjusted Gross Income when determining whether Father owed Mother damages arising from breaching the Affidavit of Support. He asserts the trial court should have considered Mother's gross income, prior to deduction of certain depreciation expenses, instead of the adjusted gross income listed on her federal tax returns.

¶ 45 Federal law does not define how to calculate a sponsored immigrant's income. *Erler I*, 824 F.3d at 1177 ("[A]lthough several provisions of the statutes and the regulations contain instructions for calculating the sponsor's income and household size for purposes of determining whether the sponsor has the means to support the intending immigrant, *see* 11 U.S.C. § 1183a(f)(6)(A)(iii); 8 C.F.R. § 213a.1 (defining 'household income,' 'household size,' and 'income'); 8 C.F.R. § 213a.2(c)(2), there are no similar provisions for calculating the sponsored immigrant's income and household size for purposes of determining whether the sponsor has breached his or her duty to support the immigrant.").

¶ 46 Other courts, which have addressed whether the inclusion or exclusion of certain benefits, awards, grants, supplements, gifts, or agreements should be considered as part of the sponsored immigrant's "income," provide guiding principles. One court held educational grants should be treated as income because they offset the living expenses of a sponsored immigrant. *Anderson*, 840 F. App'x at 95 ("The [ ] inclusion of 'educational grants received by plaintiff' [as income] was not erroneous. To the extent [immigrant]'s educational grant covered her tuition and did not require repayment, it was income because it allowed her to put money she would otherwise use for tuition to other uses.").

¶ 47 Other courts have not considered public benefits for U. S. citizens, such as food stamps, as income, reasoning: (1) "[f]ood stamps contribute to keeping an individual above 125% of the [FPL] Guidelines, and the Affidavit's stated goal is to keep people from being public charges"; and, (2) the only reason the Internal Revenue Service (IRS) fails to tax food stamps is because "it makes little sense for the government to award a public benefit to an individual and then tax the individual on it." *Erler v. Erler* (*Erler II*), 2017 WL 5478560, *6 (N.D. Cal. Nov. 15, 2017), *aff'd*, 798 F. App'x 150 (9th Cir. 2020) (unpublished).

¶ 48 Apart from the treatment of food stamps and educational grants, most courts have not considered other gifts, supplements, agreements, judgments, and benefits as part of a sponsored immigrant's income. For example, an informal agreement of board for work between a mother and son, where the mother agreed to perform certain housekeeping duties in exchange for living with her son, was not counted in a sponsored immigrant's income. *Id.* at *6 ("[Mother] never contracted with her son to provide domestic housework in exchange for rent coverage. The rent she is allegedly responsible for covering is not income under 8 U.S.C. § 1183a.") (citation omitted). Without a formal contract or agreement, it is difficult to "appraise[ ] [an immigrant's] domestic work," nor does such an agreement increase an immigrant's cash flow. *Id.* (citation omitted).

¶ 49 The court in *Erler II* also held a divorce judgment, which is owed to the sponsoring spouse and never collected, does not constitute income for two reasons. *Id.* at *5. First, a divorce judgment "relates to the division of the couple's assets," is "not relevant," and "does not qualify as income." *Id.* (citation omitted). Second, if a sponsoring spouse "desires to collect his [or her] [ ] judgment against [sponsored immigrant], he [or she] can take this matter up with [the respective] Family Court." *Id.*

¶ 50 The U. S. Court of Appeals in *Anderson* explained the district court erred by "defining income as 'constructively-received income,' " and

thus "permit[ing] the inclusion of TRICARE benefits as part of [sponsored immigrant's] income." *Anderson*, 840 F. App'x at 95 ("The health insurance benefits [sponsored immigrant] received through [sponsoring spouse's] TRICARE coverage were not income because [sponsoring spouse] did not pay an enrollment fee[,] and he should not receive a windfall at [sponsored immigrant]'s expense.") (citing *Erler I*, 824 F.3d at 1179). Health insurance coverage extended via marriage is different than other means-tested benefits, such as food stamps, "because the state providing the benefits could seek reimbursement from the sponsor." *Id.* at 95 n.3.

¶ 51 The Alaska Supreme Court simplified the analysis by using the income reported on a sponsored immigrant's tax form in *Villars v. Villars*:

> [A]n EITC, [Earned Income Tax Credit], is not income for federal income tax purposes. The Internal Revenue Code defines "taxable income" as "gross income minus deductions." *See* 26 U.S.C. § 63(a) (2018) Gross income is defined as "all income from whatever source derived," *see id.* § 61(a), but the Code specifically excludes certain items from the definition, *see id.* §§ 101–40 ("Items Specifically Excluded from Gross Income"), including tax credits. *See Id.* § 111. Therefore, an EITC, which is by definition a tax credit, is not "income for purposes of the individual's U.S. Federal income tax liability" and cannot be used to offset [supporting spouse]'s I–864 obligations. The superior court did not err in concluding that any EITC [sponsored immigrant] received was not income.

336 P.3d 701, 712-13 (Alaska 2014) (alterations omitted).

¶ 52 Here, Mother entered evidence demonstrating the costs and expenses she had incurred to repair one of the properties she owned. Those costs were then deducted from her gross income on her U.S. federal tax returns. The trial court did not err as a matter of law by deducting these expenses when calculating Mother's income. *See id.*; *Erler II* at *5-6; *Anderson*, 840 F. App'x at 95.

V. Mother's Loan to Father to Finance the Property in Suwanee, Georgia

¶ 53 Father asserts the trial court erred by finding a quasi-contract existed and awarding Mother equitable damages resulting from his failure to repay Mother for a loan. Father argues the trial court should have found

an implied-in-fact contract existed and, as a result, fashioned a remedy stemming from a breach of contract.

¶ 54 If this Court were to hold the trial court properly found a quasi-contract existed, Father argues the trial court abused its discretion in fashioning an equitable remedy by failing to credit Father for his "sweat equity" in repairing some of Mother's other properties in Australia.

A. Quasi-Contract

¶ 55 **[4]** An appellate court must have jurisdiction to consider an argument on appeal. *See Tohato, Inc. v. Pinewild Mgmt.*, 128 N.C. App. 386, 390, 496 S.E.2d 800, 803 (1998) (citation omitted) (explaining an appellate court may not reach a conclusion on issues that were not raised at trial); *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (explaining that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount") (citations and internal quotation marks omitted).

¶ 56 In Father's response to Mother's Second Amended Answer and Counterclaims in August 2017, Father twice denied a loan existed. He first "explicitly denie[d]" Mother's assertion that "any note or other writing evidencing a loan from Mother to Father" existed. Later, he asserted "Mother never explicitly requested that [he] repay the money."

¶ 57 At trial in 2019, Father's counsel stated in closing arguments: "[T]he problem here is the [c]ourt is going to enter a judgment. And I think, analytically, these facts as they have come out, I think it's a quasi-contract." On appeal, Father now asserts the "evidence presented at trial[ ] tended to show the existence of a *contract* between the parties for the loan of $110,000 AUD," not a quasi-contract.

¶ 58 Father's argument on appeal about whether a quasi-contract or implied-in-fact contract existed is not properly preserved for this Court on appeal. Father cannot "swap horses" on appeal, and his argument is waived. *Tohato*, 128 N.C. App. at 390, 496 S.E.2d at 803; *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5; *accord Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order get a better mount[.]").

B. Award of Equitable Damages

1. Standard of Review

¶ 59 This Court reviews unjust enrichment awards under an abuse of discretion standard "[b]ecause the fashioning of equitable remedies is a

discretionary matter for the trial court." *Kinlaw v. Harris*, 364 N.C. 528, 533, 702 S.E.2d 294, 297 (2010) (citation omitted).

2. Unjust Enrichment

¶ 60 **[5]** "Unjust enrichment is an equitable doctrine[,]" and "[t]rial courts have the discretionary power to grant, deny, limit, or shape equitable relief as they deem just." *Bartlett Milling Co. v. Walnut Grove Auction & Realty*, 192 N.C. App. 74, 80, 665 S.E.2d 478, 485 (2008) (citations and internal quotation marks omitted).

¶ 61 The equitable relief the trial court awarded to Mother related to the trial court's finding and conclusion that a quasi-contract existed to finance an income-producing property located in Suwanee, Georgia, not any of Mother's or Father's other properties located elsewhere. The trial court did not abuse its discretion by not crediting Father with any purported "sweat equity" he put into repairing some of Mother's other properties located in Australia. *Bartlett Milling Co.*, 192 N.C. App. at 80, 665 S.E.2d at 485. The trial court similarly declined to credit Mother with the "sweat equity" she purportedly put into repairing their residential property in Charlotte. Father's argument is without merit.

C. Currency for Payment of Damages

¶ 62 **[6]** Father also argues the trial court erred by awarding Mother repayment of the loan in USD instead of AUD. Mother argues Father wishes to pay Mother back in Australian funds on today's exchange rate because the exchange rate is currently lower than when Father originally converted the money to USD.

1. Standard of Review

¶ 63 "The determination of the proper money of the claim pursuant to G.S. 1C-1823 is a question of law." N.C. Gen. Stat. § 1C-1825(d) (2021). This Court reviews questions of law *de novo*. *Martin*, 194 N.C. App. at 719, 670 S.E.2d at 632 (citation omitted).

2. Foreign-Money Claims Act

¶ 64 The North Carolina Foreign-Money Claims Act provides "rules to fill gaps in the agreement of the parties with rules as to the allocation of risks of fluctuations in exchange rates." N.C. Gen. Stat. § 1C-1823(b), cmt. 2 (2021). Those rules are as follows:

> (b) If the parties to a transaction have not otherwise agreed, the proper money of the claim, as in each case may be appropriate, is *the money*:

> (1) Regularly *used between the parties* as a matter of usage or course of dealing;
>
> (2) Used *at the time of a transaction* in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or
>
> (3) In which the loss was ultimately felt or will be incurred by the party claimant.

Id. § 1C-1823(b) (emphasis supplied). The three rules in subpart b "will normally apply in the order stated," but the "[a]ppropriateness of a rule is to be determined by the judge from the facts of the case." *Id.* § 1C-1823(b) cmt. 2.

¶ 65 The evidence at trial indicated Father "[r]egularly used" AUD to pay Mother for the interest accruing on her Australian line of credit. § 1C-1823(b)(1). Second, AUD were "[u]sed at the time of the transaction." § 1C-1823(b)(2). Finally, Mother's loss was "ultimately felt" or "incurred" in AUD. N.C. Gen. Stat. § 1C-1823(b)(3) (2021).

¶ 66 "If [ ] the contract fails to provide a decisive interpretation, the damage should be calculated in the currency in which the loss was felt by the plaintiff or which most truly expresses his loss." *M.V. Eleftherotria v. Owner of M.V. Despina R*, [1979] App. Cas. 685, 701 (internal quotation marks omitted) (cited favorably by N.C. Gen. Stat. § 1C-1823(b), cmt. 2).

¶ 67 Applying the rules in the "order stated," all three prongs of § 1C-1823(b) dictate Mother's equitable relief should have been awarded and paid in AUD, not USD. The trial court erred as a matter of law by awarding Mother equitable relief payable in USD and its order on this issue is reversed in part. On remand, the trial court is to correct and convert Mother's equitable award and any interest thereon as re-payable in AUD for any outstanding balance.

VI. Additional Hearing Before Entry of the Order

¶ 68 **[7]** After the hearing in December 2019, Mother's attorney initially drafted a proposed order in this case. Father's attorney revised Mother's initial draft, and the two subsequently exchanged various versions of the proposed judgment. Mother and Father did not reach an agreement concerning the final version to present to the trial court to sign, file, and enter. As a result, the trial court held an additional conference on 9 February 2021. Father argues Mother "improperly reargued the

merits of the case and submitted additional evidentiary information" at this conference.

¶ 69 Father asserts Mother's proposed judgment, circulated after the conference, "improperly altered the Order such that the substantive rights of the parties were changed." Father and Mother again submitted additional drafts and exchanged several electronic communications regarding remaining issues before the court entered a final order on 7 June 2021, over *eighteen months after* the hearing and oral rendition in December 2019. Father argues Mother "improperly attempted and succeeded at a back-door Rule 60 [of the North Carolina Rules of Civil Procedure] argument."

¶ 70 This over *eighteen months* delay in entry of the order following hearing and rendition is unexplained in the order, and this delay also impeded the appeal and appellate review of the trial judge's holdings and conclusions. The mission of the North Carolina Judicial Branch is "to protect and preserve the rights and liberties of all the people, as guaranteed by the Constitution and laws of the United States and North Carolina, by providing a fair, independent, and accessible forum for the *just, timely, and economical resolution of their disputes*." *About North Carolina Courts*, North Carolina Judicial Branch, http://www.nccourts.gov/about/about-the-north-carolina-judicial-branch (last visited Jan. 4, 2022) (emphasis supplied); *see also* Cannon 3 of the North Carolina Code of Judicial Conduct ("A judge should perform the duties of the judge's office impartially and *diligently*. The judicial duties of a judge take *precedence* over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the *performance of these duties*, the following standards apply. . . . (5) A judge should *dispose promptly* of the business of the court.") (emphasis supplied).

¶ 71 Father cites *Buncombe County ex rel. Andres v. Newburn*, which explains "Rule 60(a) allows the correction of clerical errors, but it does not permit the correction of serious or substantial errors." 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993) (citation omitted) (explaining the purpose of N.C. Gen. Stat. § 1A–1, Rule 60(a) (2021)). Father also acknowledges: "The general rule is that it is in the discretion of the trial judge whether to allow additional evidence by a party after that party has rested or whether to allow additional evidence after the close of the evidence." *Gay v. Walter*, 58 N.C. App. 360, 363, 283 S.E.2d 797, 799 (1981) (citations omitted).

¶ 72 The additional conference held regarding the final form of the order to be entered occurred *before* the trial judge had entered the final order.

Rule 60(a) only applies to changes made to a final order. Trial judges may exercise discretion about whether to hold a conference after the close of the evidence and before the final order is filed and entered. *Id.* While Father has failed to show the trial court violated N.C. R. Civ. P. 60(a), the long year and one-half delay in entry and, consequently appellate review, did not further nor promote "the *just, timely, and economical resolution of their disputes*."

VII. Unavailability of Portions of the Trial Transcript

¶ 73 **[8]** "The unavailability of a verbatim transcript does not automatically constitute error. To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006) (citations omitted). "Overall, a record must have the evidence necessary for an understanding of all errors assigned." *Madar v. Madar*, 275 N.C. App. 600, 608, 853 S.E.2d 916, 922 (2020) (quotation marks omitted) (quoting *Quick*, 179 N.C. App. at 651, 634 S.E.2d at 918).

¶ 74 Father does not show how the missing portions of the transcript prejudiced him on appeal. *Quick*, 179 N.C. App. at 651, 634 S.E.2d at 918. Sufficient portions of the transcript exist for this Court to understand the errors Father argued and assigned to the trial court and the order eventually entered. The existing record allowed Father to adequately present and argue this appeal. He has successfully argued several issues and errors before this Court. Father has failed to show any prejudice by the missing portions of the trial transcript.

VIII. Attorney's Fees

¶ 75 **[9]** "Remedies available to enforce an affidavit of support under this section include . . . an order for specific performance and payment of legal fees and other costs of collection[.]" 8 U.S.C. § 1183a(c). The USCIS Form I-864 Affidavit of Support, which Father signed, also provides notice to sponsoring spouses: "If you are sued, and the court enters a judgment against you, the person or agency who sued you may use any legally permitted procedures for enforcing or collecting the judgment. You may also be required to pay the costs of collection, including attorney fees."

¶ 76 While the trial court should have calculated Mother's damages using a household size of one, and is ordered to do so upon remand, Father still breached his obligations to support Mother under the Affidavit of Support for 2016, 2017, and 2018. Mother was a prevailing party on her claim, and she may recover reasonable attorney's fees. *Iannuzzelli*

v. Lovett, 981 So.2d 557, 560-61 (Fla. Dist. Ct. App. 2008) ("In order to recover attorney's fees and costs under 8 U.S.C. § 1183a(c), the claimant must obtain a judgment for actual damages based upon the opposing party's liability under the Affidavit."). The trial court did not err by awarding Mother's attorney's fees. In light of the errors Father successfully argued and prevailed in, regarding the reduction of the amounts owed under the USCIS Form I-864 herein, the trial court may in its discretion re-consider the amount previously awarded upon remand using the elements and guidance stated in N.C. Rev. R. Prof. Conduct 1.5.

IX. Conclusion

¶ 77 The trial court possessed subject matter jurisdiction to hear Mother's claims for Father's breach under the USCIS Form I-864 Affidavit of Support. The trial court erred by calculating the damages Defendant owed to Plaintiff using the 125% of FPL Guidelines for a two-person household. *See Flores*, 590 F. Supp. 3d at 1378 n.1. The amounts entered at trial on this issue are vacated. On remand, the trial court should calculate Mother's damages arising from the Affidavit of Support as follows:

Year	125% FPL Guidelines for a One-Person Household (USD)	Mother's Adjusted Gross Income (USD)	Mother's Damages (USD)
2016	$ 14,850	$ 8,511	$14,850 - $8,511 = $6,339
2017	$ 15,075	$ 7,173	$15,075 - $7,173 = $7,902
2018	$ 15,175	$ 6,703	$15,175 - $6,703 = $8,472

¶ 78 The trial court did not err as a matter of law by failing to add depreciation expenses Mother lawfully deducted from her adjusted gross income on her federal tax returns back into her "income" when calculating damages under the Affidavit of Support. *See Villars*, 336 P.3d at 712-13; *Erler II* at *5-6; *Anderson*, 840 F. App'x at 95.

¶ 79 Father failed to preserve his argument about whether an express, quasi-contract, or implied-in-fact contract for debt repayment existed on appeal, because he offered contradictory arguments at trial. *See Tohato*, 128 N.C. App. at 390, 496 S.E.2d at 803; *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5; *Weil*, 207 N.C. at 10, 175 S.E. at 838.

¶ 80 The trial court did not abuse its discretion when fashioning an equitable remedy by failing to credit Mother or Father with any purported "sweat equity" either may have exerted into repairing other properties. The loan proceeds from Mother were used to purchase the income-producing property located in Suwanee, Georgia, which was sold by Father without repayment of Mother's loan from the proceeds. *Bartlett Milling Co.*, 192 N.C. App. at 80, 665 S.E.2d at 485.

¶ 81 Mother loaned and paid Father in AUD, and Father re-paid the interest in AUD. Mother's loss occurred in AUD, and her re-payment and interest to her bank's line of credit is payable in AUD. Father received loan proceeds in AUD and took the risk of conversion rate to USD after receipt.

¶ 82 The trial court erred as a matter of law by awarding mother equitable relief payable in USD instead of AUD. *See* N.C. Gen. Stat. § 1C-1823(b); *The Despina R*, [1979] App. Cas. 685, 701 (internal quotation marks omitted). On remand, the trial court is to correct and convert Mother's equitable award from the loan amount and any interest due from USD into AUD, with credit for payments Father made.

¶ 83 Trial judges are granted discretion about whether to hold a conference after the close of the evidence. *Gay*, 58 N.C. App. at 363, 283 S.E.2d at 799. The missing portions of the transcript were not shown to have prejudiced Father, as Father successfully argued several issues of error on appeal. *Quick*, 179 N.C. App. at 651, 634 S.E.2d at 918.

¶ 84 The trial court did not err by awarding Mother reasonable attorney's fees arising from her claims for breach of the USCIS I-864 Form Affidavit of Support, because Mother prevailed on her claim, subject to any adjustments noted above upon remand. *Iannuzzelli*, 981 So.2d at 560-61. The order appealed from is affirmed in part, reversed in part, and is remanded for further proceedings not inconsistent with this opinion. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges CARPENTER and GRIFFIN concur.

SR AUTO TRANSP., INC. v. ADAM'S AUTO GRP., INC.

[287 N.C. App. 449, 2023-NCCOA-3]

SR AUTO TRANSPORT, INC., Plaintiff
v.
ADAM'S AUTO GROUP, INC. AND ALI DARWICH, Defendants/Third-Party Plaintiffs
v.
ALFIDA ANTONIA RODRIGUEZ, DARIANA SAMALOT, SORANA RUIZ, LUIS GUILLERMO MARTINEZ, JORGE LUIS MARTINEZ, LUIS HERMINIO MARTINEZ, and SAGA AUTO SALES, INC., Third-Party Defendants

No. COA22-463

Filed 17 January 2023

Appeal and Error—interlocutory order—no Rule 54(b) certification—no petition for certiorari—failure to argue substantial right in main brief

In a breach of contract action arising from the sale of a luxury car, defendants' appeal from an order dismissing their third-party claims was dismissed where: (1) the order was interlocutory, since it left all other claims in the action unresolved; (2) the trial court had declined to certify the order as a final judgment under Civil Procedure Rule 54(b); (3) defendants did not petition the appellate court for a writ of certiorari; and (4) in their main appellate brief, defendants failed to include any facts or argument in their statement of grounds for appellate review asserting that the challenged order affected a substantial right. Although defendants did argue in a reply brief that the order deprived them of a substantial right to avoid inconsistent verdicts on the dismissed and remaining claims, they failed to show that separate proceedings on these claims would involve the same factual issues.

Appeal by Defendants from Order entered 29 November 2021 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 2022.

James, McElroy, & Diehl, P.A. by Preston O. Odom, III, J. Alexander Heroy, and Alexandra B. Bachman, for plaintiff-appellee SR Auto Transport, Inc. and third-party defendants-appellees Dariana Samalot, Sorana Ruiz, Luis Guillermo Martinez, Jorge Luis Martinez, and Saga Auto Sales, Inc.

Alexander Ricks PLLC, by Nathan A. White and John (Jack) Spencer, for defendants-appellants Adam's Auto, Inc. and Ali Darwich.

DeVore, Acton, & Stafford, P.A., by Derek P. Adler, for third-party defendants-appellees Alfida Antonia Rodriguez and Luis Herminio Martinez.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Adam's Auto Group, Inc. and Ali Darwich (collectively, Defendants) appeal from an Order entered 29 November 2021 dismissing Defendants' third-party claims against Dariana Samalot, Sorana Ruiz, Luis Guillermo Martinez, Jorge Luis Martinez, Saga Auto Sales, Inc., Alfida Antonia Rodriguez, and Luis Herminio Martinez (collectively, Third-Party Defendants) pursuant to Rules 12(b)(6) and 14(a) of the North Carolina Rules of Civil Procedure. SR Auto Transport, Inc. (Plaintiff) along with Third-Party Defendants have filed Motions to Dismiss Defendants' Appeal in this Court arguing the trial court's Order dismissing the third-party claims is interlocutory and Defendants have not shown a right to an immediate appeal. The Motions to Dismiss Appeal were referred to this panel for decision. For the reasons that follow, we allow the Motions to Dismiss Appeal. The Record before us tends to reflect the following:

¶ 2 On 11 August 2020, Plaintiff filed a Complaint and Motion for Injunctive Relief alleging, among numerous claims, Defendants had breached an agreement with Plaintiff regarding the purchase of a Ferrari Spider. The Record does not include Defendants' initial responsive pleading; however, it appears Defendants filed an Answer which included third-party claims and named the Third-Party Defendants. The Record does reflect Third-Party Defendants filed Motions to Dismiss a Third-Party Complaint. It further appears Defendants then filed a Motion for Leave to Amend their initial responsive pleading and third-party complaint. On 12 July 2021, the parties filed what they termed a "Consent Stipulation Regarding Defendants' Motion to Amend and Third-Party Defendants' Motions to Dismiss." In this filing, the parties stipulated that Defendants would be permitted to amend their responsive pleading and that the Third-Party Defendants' previously filed Motions to Dismiss would constitute valid responsive pleadings to the Amended Answer, Counterclaims, and Third-Party Complaint.

¶ 3 The same day, 12 July 2021, Defendants filed their Amended Answer, Counterclaims, and Third-Party Complaint. The Amended Answer, Counterclaims, and Third-Party Complaint asserted counterclaims against Plaintiff and third-party claims against Third-Party

Defendants for fraud and civil conspiracy to commit fraud. Additionally, the amended pleading also asserted additional third-party claims for conversion, as well as seeking punitive damages against Third-Party Defendants. The counterclaims and third-party claims related to several transactions not alleged in Plaintiff's Complaint and included allegations Third-Party Defendants had provided over $200,000 in worthless checks to Defendants and owed Defendants other debts related to a Lamborghini and a Land Rover.

¶ 4 On 2 August 2021, the trial court heard and orally granted the Third-Party Defendants' Motions to Dismiss. On 14 September 2021—before the trial court's written Order was entered—Defendants filed a Motion Requesting Certification that the Court's Order Dismissing Defendants' Claims Against Third-Party Defendants is Final pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

¶ 5 On 22 November 2021, the trial court heard the Motion to Certify its Order dismissing the claims against Third-Party Defendants for immediate appeal. The trial court declined to certify the yet-to-be filed Order dismissing the third-party claims for immediate appeal pursuant to Rule 54(b). On 24 November 2021, the trial court entered an Order granting Third-Party Defendants' Motions to Dismiss, dismissing all claims against Third-Party Defendants pursuant to Rules 12(b)(6) and 14(a) of the North Carolina Rules of Civil Procedure on the basis the third-party claims constituted improper third-party practice. Specifically, the trial court dismissed the third-party claims without prejudice to Defendants filing a separate action against any or all Third-Party Defendants, asserting the same claims. The Order did not address the status of Defendants' counterclaims against Plaintiff. On 22 December 2021, Defendants filed written Notice of Appeal from the Order dismissing the third-party claims.

Appellate Jurisdiction

¶ 6 On 14 June 2022, Plaintiff and Third-Party Defendants filed Motions to Dismiss the Appeal for lack of appellate jurisdiction, contending the trial court's Order was not a final order or judgment, but rather an interlocutory order and not subject to immediate appeal. On 24 June 2022, Defendants responded to these Motions, arguing the Order is final as to Third-Party Defendants and the "Order impairs [Defendants'] substantial right to have this common issue of fact heard in the same forum." Thus, Defendants submit the Order is subject to immediate appellate review.

¶ 7 As a general matter, with certain exceptions not applicable here: "appeal lies of right directly to the Court of Appeals . . . [f]rom any final

judgment of a superior court." N.C. Gen. Stat. § 7A-27(b)(1) (2021). An appeal may also be taken to this Court from "any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [a]ffects a substantial right." N.C. Gen. Stat. § 7A-27(b)(2) (2021). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 354, 361-62, 57 S.E.2d 377, 381 (1950). On the other hand, "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.*

¶ 8 Here, Defendants seek an immediate appeal of the Order granting Third-Party Defendants' Motions to Dismiss. "An order granting a motion to dismiss certain claims in an action, leaving other claims to go forward, is an interlocutory order." *Mills Pointe Homeowner's Ass'n v. Whitmire*, 146 N.C. App. 297, 298, 551 S.E.2d 924, 926 (2001). In the case *sub judice*, the trial court's Order left Plaintiff's claims against Defendants, as well as Defendants' counterclaims against Plaintiff, to go forward. As such, the trial court's Order is interlocutory.

¶ 9 Generally, there is no right to appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "However, immediate appeal of interlocutory orders and judgments is available in at least two instances: when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1)." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation and quotation marks omitted). "It is appellant's burden to present appropriate grounds for . . . acceptance of an interlocutory appeal . . . ." *Hanesbrands, Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation and quotation marks omitted).

¶ 10 Here, the trial court declined to certify the Order pursuant to Rule 54(b). Defendants contend this decision was error. This Court has, however, previously observed:

> Although a trial court's decision to grant a Rule 54(b) certification is not binding on our Court and is fully reviewable on appeal, *Giles v. First Virginia Credit Services, Inc.*, 149 N.C. App. 89, 94-95, 560 S.E.2d 557, 561 (2002), a trial court's *denial* of a motion for a Rule 54(b) certification has not previously been

> directly reviewed by our Court in that our rules do not provide an appellant with relief from the denial of a motion for a Rule 54(b) certification. Rather, the proper methods for appealing an underlying interlocutory order are to argue the interlocutory order affects a substantial right, or to petition our Court for a writ of certiorari pursuant to N.C. R. App. P. 21(b).

Van Engen v. Que Scientific, Inc., 151 N.C. App. 683, 686-87, 567 S.E.2d 179, 182 (2002) (emphasis added). Defendants did not petition our Court for a Writ of Certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure.[1]

¶ 11 In the absence of a valid Rule 54(b) certification or Petition for Writ of Certiorari, Defendants must, therefore, demonstrate the trial court's Order affects a substantial right in order to establish a right of immediate appeal. Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure expressly requires an appellant to include a statement of grounds for appellate review. N.C. R. App. P. 28(b)(4). "When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Id.* Here, Defendants' principal brief contains no facts or argument to support appellate review on the ground the challenged order affects a substantial right. Instead, Defendants contend in conclusory fashion that the Order was final as to their third-party claims or was otherwise appealable as an interlocutory order. It is true, "[o]ur Supreme Court has held that noncompliance with 'nonjurisdictional' rules such as Rule 28(b) 'normally should not lead to dismissal of the appeal.' " *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77-78, 772 S.E.2d 93, 95-96 (2015) (quoting *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008)).

¶ 12 "However, when an appeal is interlocutory, Rule 28(b)(4) is not a 'nonjurisdictional' rule. Rather, the *only way* an appellant may establish appellate jurisdiction in an interlocutory case, absent Rule 54(b) certification, is by showing grounds for appellate review based on the order affecting a substantial right." *Id.* As such, Defendants' failure to comply with Rule 28(b)(4) in this case subjects their appeal to dismissal.

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1. At oral argument, Defendants requested we treat this appeal as a Petition for Writ of Certiorari. Defendants have not filed a Petition for Writ of Certiorari with this Court, and we decline to invoke N.C. R. App. P. 2 and waive the requirements of N.C. R. App. P. 21.

¶ 13 Having failed to establish any right to an immediate appeal in their principal brief, Defendants did file a reply brief in which they summarily contend the trial court's Order affects a substantial right. Defendants' reply brief purports to incorporate their arguments advanced in their response to the Motions to Dismiss Appeal. It is well-established in this Court, however, that "[w]e will not allow Defendants to use their reply brief to independently establish grounds for appellate review." *Id.* at 78, 772 S.E.2d at 96.

¶ 14 Nevertheless, presuming without deciding, Defendants properly raised the allegation of a substantial right deprivation in their response to Plaintiff's and Third-Party Defendants' Motions to Dismiss the Appeal, Defendants have not met their burden of demonstrating the Order deprives them of a substantial right.[2] "Whether an interlocutory appeal affects a substantial right is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002) (citation omitted).

¶ 15 "In order to determine whether a particular interlocutory order is appealable pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1), we utilize a two-part test, with the first inquiry being whether a substantial right is affected by the challenged order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011). "A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation and quotation marks omitted).

¶ 16 Defendants contend the trial court's Order affects a substantial right because the trial court's dismissal without prejudice of the third-party claims may lead to inconsistent verdicts. Indeed, "[a] party has a substantial right to avoid two trials on the same facts in different forums where the results would conflict." *Clements v. Clements*, 219 N.C. App. 581, 585, 725 S.E.2d 373, 376 (2012) (citing *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 639, 652 S.E.2d 231, 237 (2007)). "Where a party is appealing an interlocutory order to avoid two trials, the party must 'show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.' "

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2. We observe that both the Motions to Dismiss Appeal and Defendants' Responses were filed before Defendants' principal brief was filed with this Court.

Id. (quoting *N.C. Dep't. of Transp. v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995)).

¶ 17 In the case *sub judice*, Defendants have not demonstrated the same factual issues in the various claims alleged by Plaintiff against Defendants would be present in a separate trial litigating the Defendants' fraud, civil conspiracy to commit fraud, and conversion claims against Third-Party Defendants, which arise from different factual allegations than those made by Plaintiff. Further, Defendants have also not demonstrated the possibility of inconsistent verdicts arising from the factual allegations made in their third-party claims involving a completely different set of transactions and different parties than the transaction alleged in Plaintiff's Complaint.

¶ 18 Moreover, to the extent Defendants are entitled to any set-off or recovery arising from their pending counterclaims against Plaintiff, that too may be litigated in the underlying case and would not necessarily be inconsistent with any verdict in a separate action against Third-Party Defendants. At this preliminary stage of litigation, we simply conclude Defendants have not adequately demonstrated the possibility that inconsistent verdicts exist for these separate issues against different parties justifying immediate review. Thus, Defendants' appeal in this case is interlocutory, and Defendant has not demonstrated any substantial right would be lost absent immediate appeal. Therefore, we are without jurisdiction to review this matter on immediate appeal. Consequently, we must dismiss Defendants' appeal.

Conclusion

¶ 19 Accordingly, for the foregoing reasons, we allow Plaintiff's and Third-Party Defendants' Motions to Dismiss this appeal as interlocutory.

APPEAL DISMISSED.

Judges TYSON and ZACHARY concur.

STATE v. DAVIS

[287 N.C. App. 456, 2023-NCCOA-4]

STATE OF NORTH CAROLINA
v.
HARRY LEVERT DAVIS

No. COA22-222

Filed 17 January 2023

1. Indictment and Information—sufficiency—allegations of the crime's essential elements—attempted first-degree murder—malice

In a criminal prosecution arising from a domestic dispute that culminated in defendant setting fire to the house where his girlfriend had been staying—believing that his girlfriend was inside the house when, in fact, her friend's family was inside—the trial court had subject matter jurisdiction over defendant's three charges of attempted first-degree murder, where each indictment alleged that defendant "unlawfully, willfully, and feloniously did attempt to kill and murder [each victim] by setting the residence occupied by the victim on fire." Because the indictments alleged specific facts from which malice aforethought—an essential element of the offense—could be shown, defendant's argument that the indictments failed to allege malice at all was meritless.

2. Homicide—attempted first-degree murder—specific intent to kill—transferred intent doctrine

In a criminal prosecution arising from a domestic dispute that culminated in defendant setting fire to the house where his girlfriend had been staying—believing that his girlfriend was inside the house when, in fact, her friend's family was inside—the trial court properly denied defendant's motion to dismiss a charge of attempted first-degree murder pertaining to one of the family members, even though defendant did not know that this particular family member was inside the house when he burned it down. The State presented sufficient evidence of defendant's specific intent to kill his girlfriend, and this intent transferred to the family member under the doctrine of transferred intent.

3. Evidence—prior bad acts—admissibility under Rules 401, 402, 403, and 404(b)—murder and attempted murder

In a prosecution for multiple counts of murder and attempted murder, where defendant set fire to the house where his girlfriend had been staying—believing that his girlfriend was inside the house when, in fact, her friend's family was inside—the trial court properly

admitted evidence regarding defendant's prior attempt to burn down his girlfriend's father's car, another incident where he successfully burned down a vehicle belonging to the mother of his former romantic partner, and various acts of violence toward both the girlfriend and former partner. The evidence was relevant under Evidence Rules 401 and 402 because it was probative of defendant's identity, common scheme or plan, motive, knowledge, and *modus operandi*; and it was admissible under Rule 404(b) as evidence tending to show defendant's intent, motive, malice, premeditation, and deliberation. Further, defendant's prior acts were not too temporally remote from the charged crimes to warrant exclusion under Rule 403.

Appeal by defendant from judgments entered 26 March 2021 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 29 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa M. Postell, for the State.

Widenhouse Law, by M. Gordon Widenhouse, Jr., for defendant-appellant.

TYSON, Judge.

¶ 1 Harry Levert Davis ("Defendant") appeals from judgments entered upon a jury's verdicts finding him guilty of two first-degree murders and of three attempted first-degree murders. Our review of Defendant's arguments shows no error.

I. Background

¶ 2 Pamela Pickett, Beverly Pickett, Makayla Pickett, Jasmine Sumpter, Shatara Pickett, and William Pickett lived in a house located at 1901 Lingo Street in Wilmington ("House"). Makayla and Sumpter were sisters. After their mother passed away in 2012, both moved into the House with their aunt, Pamela. Beverly, Pamela's mother and Makayla and Sumpter's grandmother, moved into the House as well. Makayla and Sumpter's other sister, Deseree, moved in with their other aunt, Tina Pickett, in Raleigh. Deseree spent holidays with her sisters at the House in Wilmington.

¶ 3 Shatara, who is another niece of Pamela, also moved into the House. Shatara's boyfriend, Lamarcus Davis, also occasionally stayed at the House. In 2013, William, Pamela's brother and Makayla and Sumpter's

uncle, also moved into the House. William worked a twelve-hour overnight shift from 7:00 p.m. to 7:00 a.m.

¶ 4 In 2014, Pamela was fifty-one years old, suffered from an abnormal heartbeat, and required an oxygen tank to provide supplemental oxygen. Makayla was fourteen years old, diagnosed with autism, and completely blind. Beverly, the mother and grandmother, had been confined to a bed or wheelchair for thirty years due to multiple sclerosis.

¶ 5 Nicole Thrower, a certified nursing assistant, came to the House to assist Beverly several times every day. Thrower and Shatara were friends from high school and had renewed their friendship when Thrower began assisting Beverly. Thrower had also dated Defendant since high school. Thrower would stay and visit with Shatara when she was not working. Shatara's boyfriend, Lamarcus, was also friends with Defendant. Defendant came to the House to visit Lamarcus and Thrower.

¶ 6 On 7 August 2014 at 7:24 p.m., Defendant broke into the home of Doris Saadeh at 622 Jennings Drive in Wilmington. Doris is the mother of Linda Saadeh, a romantic partner of Defendant. Defendant caused property damage and assaulted Linda. A short time later Defendant was arrested, taken into custody, and transported to the New Hanover County Jail. Defendant's mother posted bond at 11:35 p.m. on 7 August 2014, and Defendant was released.

¶ 7 Early the next morning at 1:06 a.m., Doris called 911 to report her car, parked in front of her home, was on fire. Police officers determined the fire had been intentionally set. Police recovered several items from the scene: a butane disposable lighter, a can of aerosol spray, and balled-up tin foil. Wilmington Police officers located Defendant at a Scotchman convenience store at 1:13 a.m. The drive from 627 Jennings Drive to the Scotchman convenience store located at Third Street and Dawson Street is approximately nine minutes. Doris sought and was granted a protective order against Defendant on behalf of her minor daughter, Linda, on 11 August 2014.

¶ 8 On 30 August 2014, Defendant also assaulted Thrower and was charged. On 8 December 2014, Thrower sought and was granted a protective order against Defendant. She alleged Defendant had been released from jail the night before and was making threats against her.

¶ 9 Defendant attempted to reconcile with Thrower on 22 December 2014. Thrower rebuffed Defendant's advances and asked to stay with Shatara for her own protection. While Shatara and Thrower were driving, Defendant spotted the women and followed the vehicle until Shatara

drove to the Wilmington Police Department. Upon arrival, Defendant quit following their vehicle and drove away.

¶ 10 Defendant called Robert Hale at 3:51 a.m. on 23 December 2014 and asked him for a gun. Hale told Defendant he did not have a gun, hung up the phone, and went back to sleep. Defendant purchased a gas container at the Wilmington Scotchman convenience store and filled it with gas at 4:12 a.m. on 23 December 2014. A security video camera recorded Defendant driving away from the Wilmington Scotchman, holding the gas container outside of the driver's window of the vehicle. At 5:04 a.m. that same morning, a 911 call was made reporting the House was on fire.

¶ 11 Wilmington Police Corporal Brandon McInerney was the first to arrive upon the scene at 5:06 a.m. Corporal McInerney was familiar with the residents of the House and had previously responded to medical issues reported at the House. Corporal McInerney observed power lines were down in the front of the House and laying across the road. After exiting his vehicle, Corporal McInerney saw two women attempting to climb out of a window. He rushed to assist them and identified them as Deseree and Jasmine.

¶ 12 Tina, the aunt from Raleigh, had driven and dropped Deseree off at the House to spend the upcoming Christmas holiday with her sisters, Makayla and Sumpter. After sending Deseree and Jasmine across the road to safety, he turned the corner to the east side of the House and saw a female screaming and unable to get out. He later identified that person as Pamela, hanging halfway out of a side window. Corporal McInerney and Officer Clark helped get Pamela out through the window. Pamela said two more individuals remained inside the House, including one person laying by that window, who had begun to crawl away from the window. Corporal McInerney and Officer Clark leaned inside the window, found Beverly's leg, and pulled her out of the window and passed her to other first responders to get her to safety and receive medical attention.

¶ 13 Pamela struggled to breathe and became unresponsive. First responders began cardiopulmonary resuscitation. Emergency Medical Services officials attempted additional, but unsuccessful, lifesaving procedures. Pamela was pronounced dead at the scene.

¶ 14 Corporal McInerney, who also served as a volunteer firefighter, attempted to look for Makayla inside the House. He reported seeing "heavy smoke, again, coming from every crack. There was a back door, but again with the amount of smoke coming out, I didn't think it was advisable to try to get in through the door."

¶ 15 Wilmington Fire Department had dispatched two firetrucks to the House, but with the live power lines down in the front yard and street, the firemen had to enter the House without water to locate Makayla. The first vent entry into the House was unsuccessful. Wilmington Fire Department Captain Michael Browning ordered every firefighter to perform another vent entry into the House into all four bedrooms and in the kitchen to find Makayla.

¶ 16 Captain Shannon Provencher used a thermal imaging camera and located Makayla unconscious, wedged between a living room wall and bags of adult diapers. Captain Provencher carried Makayla out to EMS personnel, who were unable to revive her. Makayla was also pronounced dead from smoke inhalation on the scene.

¶ 17 Fire investigators determined two separate fires had been intentionally set at the House. One fire had been set on the front porch, the site of one entrance, and another at the rear entrance. Outside of the House, investigators located a blue butane disposable lighter and a gas can spout. Investigators also located the presence of gasoline in the fire debris.

¶ 18 Defendant was indicted for one count of first-degree arson, two counts of first-degree murder, and three counts of attempted first-degree murder on 30 March 2015. The jury found Defendant guilty of all charges, including both first-degree murders on two bases of malice, premeditation, and deliberation, and also under the felony-murder rule.

¶ 19 Defendant was sentenced to life imprisonment without the possibility of parole for the first-degree murder convictions and 207 to 261 months for each of the attempted first-degree murders, all sentences to run concurrently. The trial court arrested judgment on the first-degree arson conviction. Defendant appeals.

II. Jurisdiction

¶ 20 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2021).

III. Issues

¶ 21 Defendant argues the trial court: (1) lacked subject matter jurisdiction over the charges of attempted first-degree murder because the indictments did not allege an essential element of the offense; (2) erred by refusing to dismiss the charge of attempted first-degree murder of Deseree Pickett; and, (3) erred by admitting evidence of prior incidents of violence and abuse.

IV. Sufficiency of Indictments of Attempted First-Degree Murder

¶ 22 **[1]** Defendant argues the trial court lacked jurisdiction to enter judgment because his indictments for attempted first-degree murder failed to allege an essential element of the crime. He asserts the indictment failed to include "with malice aforethought."

¶ 23 Defendant failed to challenge the sufficiency of the indictment at trial. It is well established that "when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2008) (citation omitted). This jurisdictional challenge is properly before us.

A. Standard of Review

¶ 24 This Court reviews the jurisdictional sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008) (citation omitted).

B. Analysis

¶ 25 The purpose of an indictment is "to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Creason*, 313 N.C. 122, 130, 326 S.E.2d 24, 29 (1985) (citations omitted).

¶ 26 Under the North Carolina Constitution, an indictment is sufficient to confer jurisdiction if it alleges every element of the offense. *See State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). "An indictment need not conform to any technical rules of pleading, but instead, must satisfy both the statutory strictures of N.C.G.S. § 15A-924 and the constitutional purposes which indictments are designed to satisfy[.]" *State v. Oldroyd*, 380 N.C. 613, 617, 2022-NCSC-27, ¶8, 869 S.E.2d 193, 196-97 (2022) (internal citation omitted). "[I]ndictments need only allege the ultimate facts constituting each element of the criminal offense." *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995) (citation omitted).

¶ 27 Our Supreme Court has recently held: "[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." *Oldroyd*, 380 N.C. at 617-18, 2022-NCSC-27, ¶8, 869 S.E.2d at 197.

¶ 28 Defendant's purported reliance on this Court's decisions in *State v. Wilson*, 236 N.C. App. 472, 474-75, 762 S.E.2d 894, 895-96 (2014); *State v. Bullock*, 154 N.C. App. 234, 243-44, 574 S.E.2d 17, 23 (2002); and *State v. Wilson*, 128 N.C App. 688, 691-92, 497 S.E.2d 416, 419 (1998) is both misplaced and unavailing. Defendant maintains the indictment on its face failed to include the essential element of "malice aforethought," and the judgment must be arrested. *Bullock*, 154 N.C. App. at 244, 574 S.E.2d at 24.

¶ 29 Defendant's indictments for attempted first-degree murder alleged "the defendant named above unlawfully, willfully, and feloniously did ATTEMPT TO KILL AND MURDER [NAMED VICTIM] BY SETTING THE RESIDENCE OCCUPIED BY THE VICTIM ON FIRE." In *Bullock*, the indictment for attempted first-degree murder stated: "[t]he jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above unlawfully, willfully, and feloniously did attempt to kill and murder [victim's name]." *Id.* at 244, 574 S.E.2d at 23. This Court arrested judgment in *Bullock*. This Court also arrested judgment in the separate cases of *Wilson* and *Wilson*, which excluded "malice aforethought." *Wilson*, 236 N.C. App. at 474-75, 762 S.E.2d 895-96; *Wilson*, 128 N.C. App. at 691-92, 497 S.E.2d at 419.

¶ 30 The indictments that Defendant challenges include the specific facts from which malice is shown, by "unlawfully, willfully, and feloniously . . . setting the residence occupied by the victim(s) on fire." The indictments allege "the ultimate facts constituting each element of the criminal offense." *Rambert*, 341 N.C. at 176, 459 S.E.2d at 512 (citation omitted). Defendant's argument is overruled.

V. Attempted First-Degree Murder – Transferred Intent

¶ 31 **[2]** Defendant argues the trial court erred by denying his motion to dismiss the attempted first-degree murder charge of Deseree Pickett.

A. Standard of Review

¶ 32 Our Supreme Court has held: "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted).

¶ 33 "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). "The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted).

B. Analysis

¶ 34 Defendant asserts the trial court erred by denying his motion to dismiss the attempted first-degree murder charge of Deseree Pickett. He argues insufficient evidence tends to show a specific intent to kill her because he did not know she would be inside the House.

¶ 35 The elements of attempted first-degree murder are: (1) specific intent to kill another person unlawfully, (2) an overt act calculated to carry out that intent, going beyond mere preparation, (3) the existence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing. *See State v. Gartlan*, 132 N.C. App. 272, 275, 512 S.E.2d 74, 77 (1999). Defendant argues he was unaware Deseree was present inside the House at the time he set the fires, and he could and did not form the specific intent to attempt to kill her. Defendant's argument is misplaced and ignores longstanding precedents.

¶ 36 The doctrine of transferred intent applies where one engages in an action against another and unintentionally attempts to or kills a third person. *See State v. Locklear*, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992). The actor's conduct toward the victim is "interpreted with reference to his intent and conduct towards his adversary[,]" and criminal liability for the third party's death is determined "as [if] the fatal act had caused the death of [the intended victim]." *Id.* (citation and quotation marks omitted).

¶ 37 "[I]t is immaterial whether the defendant intended injury to the person actually harmed; if he in fact acted with the required or elemental intent toward someone[,] that intent suffices as the intent element of the crime charged as a matter of substantive law." *State v. Andrews*, 154 N.C. App. 553, 559, 572 S.E.2d 798, 802 (2002) (citation omitted).

¶ 38 Here, the State's evidence tended to establish Defendant was involved in a domestic dispute with Thrower. Defendant set two fires at both points of natural entry, ingress, and egress in a house, which he

believed contained Thrower, his intended victim. Defendant acted with the requisite intent to injure or kill towards a specific person, which intent transferred to another. The true identity of that individual is immaterial. The evidence tends to show and is sufficient for the jury to find Defendant in fact acted, and with the necessary transferred intent to attempt to kill, Deseree. Defendant's argument is without merit and overruled.

VI. Prior Acts

¶ 39 **[3]** Defendant argues the admission of various prior acts of violence and abuse against Linda and Thrower, his setting Linda's mother's vehicle on fire, and attempting to burn Thrower's father's car were improperly admitted over his objections.

A. Rules 401 and 402

1. Standard of Review

¶ 40 "Although a trial court's rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (citation omitted), *disc. rev. denied*, 361 N.C. 223, 642 S.E.2d 712 (2007).

2. Analysis

¶ 41 Defendant argues the admission of this evidence was irrelevant under North Carolina Rules of Evidence 401 and 402. N.C. Gen. Stat. § 8C-1, Rules 401, 402 (2021).

¶ 42 Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Irrelevant evidence is evidence "having no tendency to prove a fact at issue in the case." *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368 (1992). Under Rule of Evidence 402, relevant evidence is generally admissible at trial, while irrelevant evidence is not admissible. *See* N.C. Gen. Stat. § 8C-1, Rule 402.

¶ 43 The challenged testimony was clearly relevant under Rules 401 and 402. This evidence was probative to issues of Defendant's identity, Defendant's common scheme or plan, Defendant's intent, Defendant's motive, Defendant's knowledge, and Defendant's *modus operandi*. The testimony at issue is relevant and admissible under Rules 401 and 402. N.C. Gen. Stat. § 8C-1, Rules 401, 402. Defendant's argument is without merit.

B. Rule 404(b)

¶ 44 Defendant also challenges the admission of prior bad acts under Rules of Evidence 404(b) and 403.

1. Standard of Review

¶ 45 "We 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).

2. Analysis

¶ 46 Under North Carolina Rules of Evidence 404(b), evidence may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). Evidence of prior criminal activity must be: (1) relevant to the crime charged; and, (2) sufficiently similar and temporally proximate to the crime charged. *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007).

¶ 47 Our Supreme Court has held:

> Rule 404(b) state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

¶ 48 The State argues the relevant evidence of Defendant's prior actions is properly admitted under Rule 404(b) and tends to show his intent, motive, malice, premeditation, and deliberation. We agree. Defendant's argument is overruled.

C. Rule 403

1. Standard of Review

¶ 49 "Rulings under North Carolina Rule of Evidence 403 are discretionary, and a trial court's decisions on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the trial court abused its discretion." *State v. Chapman*, 359 N.C. 328, 348, 611 S.E.2d 794, 811 (2005) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a

reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

2. Analysis

¶ 50 Even relevant evidence, under Rule 403 "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2021). Defendant argues the probative value of admitting this evidence is outweighed by the danger of unfair prejudice, because the prior acts are too remote to have probative value and are a needless presentation of cumulative evidence.

¶ 51 "When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). "[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (citation omitted).

¶ 52 The alleged incident where Defendant set Doris Saadeh's car on fire with gasoline occurred approximately five months prior to the incidents on 24 December. The incident where Defendant had threatened to damage Thrower's father's vehicle occurred the same day of the murders and events charged. Defendant's physical assaults of Thrower and Linda also occurred not too temporally remote from the crimes to warrant exclusion under Rule 403. Defendant has failed to show these incidents are so cumulative or likely to mislead the jury for their admission to constitute an abuse of discretion. *See State v. Stevenson*, 169 N.C. App. 797, 801-02, 611 S.E.2d 206, 210 (2005). Defendant has failed to show the trial court abused its discretion in allowing the admission of testimony regarding Defendant's prior bad actions under Rules 404(b) and 403. His arguments are overruled.

VII. Conclusion

¶ 53 Defendant's jurisdictional challenges to the sufficiency of his indictments for attempted first-degree murder are without merit. The trial court did not err in refusing to dismiss the charge of attempted first-degree murder of Deseree. Defendant's prior acts were properly admitted under North Carolina Rules of Evidence 401, 402, 403, and 404(b).

¶ 54 Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
JOSHUA JEZRELL DUNCAN

No. COA21-794

Filed 17 January 2023

1. Search and Seizure—traffic stop—license plate check—reasonable expectation of privacy

In a prosecution of drug offenses, the trial court erred by granting defendant's motion to suppress on the basis that law enforcement officers lacked reasonable suspicion to stop defendant's car. The officers' discovery, upon conducting a license plate check while surveilling a location with suspected drug activity, that the driver's license of the vehicle's registered owner had been medically canceled, was sufficient information that, at the very least, a traffic infraction had occurred. A license plate check is not a search for Fourth Amendment purposes because there is no constitutionally protected reasonable expectation of privacy in a plainly visible license plate number.

2. Search and Seizure—probable cause—search incident to arrest—medically canceled driver's license—misdemeanor versus infraction

In a prosecution of drug offenses, the trial court erred by granting defendant's motion to suppress evidence obtained during a search incident to arrest, which defendant was subjected to after law enforcement officers conducted a traffic stop of defendant's car on the basis that they ran a license plate number check and discovered that the driver's license of the registered vehicle's owner had been medically canceled. The officers had probable cause to arrest defendant because, interpreting multiple statutory sections together, the offense of driving with a medically canceled license is

comparable to the offense of driving without a license and, absent one of several statutory exceptions that were inapplicable in this case, constituted a misdemeanor (pursuant to N.C.G.S. § 20-35(a)) and not a traffic infraction (for which the officers would not have had authority to make an arrest).

Appeal by the State from order entered 22 June 2021 by Judge Donnie Hoover in Catawba County Superior Court. Heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

The Law Offices of J. Edgar Halstead, III, PLLC, by J. Edgar Halstead, III, for defendant-appellee.

ZACHARY, Judge.

¶ 1 The State appeals from the trial court's order granting Defendant Joshua Jezrell Duncan's motion to suppress. After careful review, we reverse and remand to the trial court for further proceedings.

I. Background

¶ 2 On 31 August 2018, Sergeant Derek Slaughter and another Newton Police Department officer were surveilling a residence and the adjacent parking lot in Newton. The officers had received information that "drug activity" was occurring at that location, and that a "black male with dreadlock-type hair" who had numerous outstanding indictments for trafficking marijuana was "at the residence on a frequent basis."

¶ 3 As the officers watched from an unmarked vehicle, they saw a Cadillac pull into the driveway, drop off a passenger, and depart. While the officers could not positively identify the driver, they observed that he was "a black male with similar hairstyle of the subject in question[.]" They also noted the Cadillac's license plate number, which they pulled up in the CJLEADS database.[1] From CJLEADS, the officers determined that the driver's license of the vehicle's registered owner was "medically canceled," and they called for a marked unit to conduct a traffic stop of the Cadillac.

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1. CJLEADS is "a database which details a person's history of contacts with law enforcement in the form of a list of criminal charges filed against the individual[.]" *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 4.

¶ 4 Patrol Sergeant Brian Bixby of the Newton Police Department responded to the call and conducted the traffic stop of the Cadillac. Officer Bixby approached the vehicle and asked Defendant, the driver, for his driver's license and registration. Through CJLEADS, Officer Bixby confirmed Sergeant Slaughter's report that Defendant's driver's license was medically canceled.

¶ 5 Later, at the hearing on Defendant's motion to suppress, Officer Bixby testified that the officers had discussed the implications of a medically canceled license. Officer Bixby testified that initially, he "was confused[,]" because "medically canceled" "means no operator's license or suspended." Then, however, Officer Bixby "looked at the details of the cancellation, [and] saw it was suspended, which would have corroborated . . . Sergeant Slaughter's statement that it was revoked."

¶ 6 As Officer Bixby spoke with Sergeant Slaughter over the radio, he checked Defendant's criminal record, which included past convictions for violent crimes that "raised [Officer Bixby's] alert level." He called for backup because he had "decided to arrest [Defendant] for driving while license revoked." Once additional officers arrived, Officer Bixby arrested Defendant. During the search of Defendant incident to his arrest, Officer Bixby discovered baggies of a substance that he believed to be crystal methamphetamine hidden in Defendant's hair. Later, while Defendant was being processed at the police station, Officer Bixby discovered a ball of "wadded up aluminum foil" on the ground at Defendant's feet. Defendant explained that it had fallen out of his hair and admitted that it contained more methamphetamine.

¶ 7 On 24 June 2019, a Catawba County grand jury returned indictments charging Defendant with (1) possession with intent to manufacture, sell, or deliver methamphetamine, (2) maintaining a vehicle for keeping and selling methamphetamine or any mixture containing methamphetamine, and (3) attaining the status of habitual felon. On 27 October 2020, the State filed notice of its intent to introduce evidence at trial that law enforcement officers obtained by virtue of a search without a search warrant. On 18 June 2021, Defendant filed a motion to suppress.

¶ 8 On 22 June 2021, Defendant's motion to suppress came on for hearing in Catawba County Superior Court. After considering the testimony of Sergeant Slaughter and Officer Bixby, together with the arguments of counsel, the trial court granted Defendant's motion to suppress. In its order entered the same day, the trial court made the following relevant findings and conclusions:

> THE ORIGINAL TIP TO OFFICER[S] TO BE ON THE LOOK OUT FOR A BLACK/MALE WITH DREADS WAS INSUFFICIENT TO CONSTITUTE REASONABLE SUSPICION TO PURSUE DEFENDANT FURTHER, INCLUDING THE DISCOVERY OF THE-ISSUES WITH DEFENDANT'S DRIVER'S LICEN[S]E; THEREAFTER, THE DRIVING OFFENSE WAS TO BE TREATED AS A NO OPERATOR'S LICENSE PURSUANT TO N.C.G.S. 20-29.1 AND THEREFORE DID NOT CONSTITUTE PROBABLE CAUSE FOR ARREST.

¶ 9 The State gave oral notice of appeal at the conclusion of hearing and also timely filed written notice of appeal.

II. Discussion

¶ 10 On appeal, the State argues that the trial court erred by granting Defendant's motion to suppress based on its erroneous conclusions that law enforcement officers lacked (1) reasonable suspicion to stop the Cadillac, and (2) probable cause to arrest Defendant.

A. Standard of Review

¶ 11 Our appellate courts review a trial court's order granting "a defendant's suppression motion by determining whether the trial court's underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the trial court's ultimate conclusions of law." *State v. Parisi*, 372 N.C. 639, 649, 831 S.E.2d 236, 243 (2019) (citation and internal quotation marks omitted). Under this standard of review, "the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Id.* (citation and internal quotation marks omitted). However, the trial court's "conclusions of law are reviewed de novo and are subject to full review, with an appellate court being allowed to consider the matter anew and freely substitute its own judgment for that of the lower tribunal." *Id.* (citations and internal quotation marks omitted).

B. Analysis

¶ 12 The State contends that the trial court erred by determining that Officer Bixby lacked both reasonable suspicion to stop the Cadillac and probable cause to arrest Defendant, and therefore, by granting Defendant's motion to suppress the evidence seized during the search incident to Defendant's arrest. For the reasons that follow, we conclude that the trial court erred in reaching both conclusions, and in granting

Defendant's motion to suppress. Accordingly, we reverse and remand for further proceedings.

1. Reasonable Suspicion to Stop Defendant

¶ 13 **[1]** The trial court found that Officer Bixby did not have "REASONABLE SUSPICION TO PURSUE DEFENDANT FURTHER, INCLUDING THE DISCOVERY OF THE ISSUES WITH DEFENDANT'S DRIVER'S LICEN[S]E[.]" However, as explained below, a law enforcement officer does not need reasonable suspicion to investigate a plainly visible license plate number, because a license plate check does not implicate a defendant's Fourth Amendment rights. And as the State correctly contends, "[t]he 'original tip' referenced by the trial court is irrelevant because Officer Bixby had reasonable suspicion at the time of the seizure based on the traffic violation."

¶ 14 "Both the Fourth Amendment to the Constitution of the United States and article I, section 20 of the North Carolina Constitution protect private citizens against unreasonable searches and seizures." *Johnson*, ¶ 16. The Supreme Court of the United States has recognized that "the State's intrusion into a particular area, whether in an automobile or elsewhere, cannot result in a Fourth Amendment violation unless the area is one in which there is a constitutionally protected reasonable expectation of privacy." *New York v. Class*, 475 U.S. 106, 112, 89 L. Ed. 2d 81, 89 (1986) (citation and internal quotation marks omitted). In North Carolina, a license plate must be affixed to the exterior of a car and be "plainly readable from a distance of 100 feet during daylight." N.C. Gen. Stat. § 20-63(c)–(d) (2021). "[I]t is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile." *Class*, 475 U.S. at 114, 89 L. Ed. 2d at 90. And "[t]he exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.' " *Id.*

¶ 15 Pursuant to *Class*, it is evident that a license plate check is not a "search" under the Fourth Amendment. Although the State recognizes that our appellate courts have not explicitly ruled on whether a license plate check constitutes a search, the State notes that previous opinions of this Court have hinted at this conclusion. *See State v. Murray*, 192 N.C. App. 684, 688–89, 666 S.E.2d 205, 208–09 (2008) (analyzing the constitutionality of a traffic stop, notwithstanding the fact that the law enforcement officer had already conducted a "check of the license plate" of the defendant's vehicle prior to the stop); *cf. State v. White*, 82 N.C. App. 358, 362, 346 S.E.2d 243, 246 (1986) (concluding that a law enforcement officer's investigation of a driver's license number marked on

stereo equipment in plain view through window of a car was not "sufficiently intrusive as to amount to a constitutionally impermissible search of [the] defendant's automobile"), *cert. denied*, 323 N.C. 179, 373 S.E.2d 124 (1988). Our conclusion is in line with these precedents.

¶ 16 Further, our conclusion is consistent with the analysis of the federal appellate courts that have ruled on this issue. *See*, *e.g.*, *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1152 (9th Cir.) ("[W]hen police officers see a license plate in plain view, and then use that plate to access additional non-private information about the car and its owner, they do not conduct a Fourth Amendment search."), *cert. denied*, 552 U.S. 1031, 169 L. Ed. 2d 410 (2007); *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529 (5th Cir.) ("A motorist has no privacy interest in her license plate number. Like the area outside the curtilage of a dwelling, a car's license plate number is constantly open to the plain view of passersby." (citations omitted)), *reh'g denied*, No. 98-20027, 1999 U.S. App. LEXIS 26265 (5th Cir. 1999). Accordingly, the investigation of the Cadillac's license plate was not a Fourth Amendment search requiring *any* degree of suspicion. To the extent that the trial court implicitly concluded that Defendant had a reasonable expectation of privacy in the Cadillac's license plate number sufficient to implicate his Fourth Amendment rights, this was in error.

¶ 17 This leaves for resolution the issue of whether Officer Bixby had reasonable suspicion to stop the Cadillac based on the investigation of its license plate. "Law enforcement officers may initiate a traffic stop if the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Johnson*, ¶ 16 (citation and internal quotation marks omitted). In this case, the officers learned from their license plate checks that Defendant's "driver's license status was medically canceled[.]"

¶ 18 A law enforcement officer may stop a motorist when the officer "reasonably believes that a driver has violated the law." *State v. Walton*, 277 N.C. App. 154, 2021-NCCOA-149, ¶ 19. Therefore, a law enforcement officer with reasonable suspicion to believe that the driver of a vehicle is driving with a medically canceled license may conduct a lawful traffic stop of that vehicle without running afoul of the Fourth Amendment.

¶ 19 The officer here had sufficient information to believe that Defendant had, at the very least, committed a traffic infraction—if not a misdemeanor, as discussed below—and lawfully conducted a traffic stop of Defendant's vehicle. *Id.* Thus, the trial court erred by concluding otherwise.

2. Probable Cause to Arrest Defendant

¶ 20 **[2]** We next address whether Officer Bixby had probable cause to arrest Defendant, and therefore, to search him incident to that arrest. While "[i]t is a well-established principle that an officer may make a warrantless arrest for a misdemeanor committed in his or her presence[,]" *State v. Brooks*, 337 N.C. 132, 145, 446 S.E.2d 579, 588 (1994); N.C. Gen. Stat. § 15A-401(b)(1), a law enforcement officer has "no authority to arrest [an individual] for the commission of an infraction[,]" *State v. Braxton*, 90 N.C. App. 204, 208, 368 S.E.2d 56, 59 (1988). Accordingly, this issue turns on whether Defendant's alleged act of driving with a medically canceled license was a misdemeanor, or as Defendant argues and the trial court concluded, an infraction. We conclude that the offense of driving with a medically canceled license is a misdemeanor, justifying the warrantless arrest and search incident to the arrest.

¶ 21 Defendant claims that the official notice of his license's medical cancellation provides "in plain language the punishment for noncompliance shall be deemed the equivalent of operating a motor vehicle without any driver's license." However, the four identical notices that DMV sent to Defendant during the period between 28 July 2018 and 1 February 2019 include no such pronouncements.

¶ 22 The notices cite N.C. Gen. Stat. §§ 20-9(g)(2) and 20-29.1 for the statutory authority to cancel Defendant's license. Section 20-9(g) describes the DMV's authority to issue restricted or unrestricted licenses, and subsection (g)(2) provides, in pertinent part, that the DMV "may request a signed certificate from a health care provider duly licensed to practice medicine in the United States that the applicant or licensee has submitted to a physical examination by the health care provider." N.C. Gen. Stat. § 20-9(g)(2). Section 20-29.1 describes the Commissioner of Motor Vehicles' authority to require a driver to submit to a reexamination upon "good and sufficient cause to believe that a licensed operator is incompetent or otherwise not qualified to be licensed[.]" *Id.* § 20-29.1. In appropriate circumstances, the Commissioner "may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions or upon failure of such reexamination may cancel the license of such person until he passes a reexamination." *Id.* Notably, this section also provides that "[r]efusal or neglect of the licensee to submit to such reexamination *shall be grounds for the cancellation of the license of the person failing to be reexamined*, and the license so canceled shall remain canceled until such person satisfactorily complies with the reexamination requirements of the Commissioner." *Id.* (emphasis added).

¶ 23 Section 20-29.1 further describes the Commissioner's discretionary authority to issue restricted or limited driver's licenses, and adds:

> Such a limitation or restriction shall be noted on the face of the license, and it shall be unlawful for the holder of such limited or restricted license to operate any motor vehicle or class of motor vehicle not specified by such restricted or limited license, and *the operation by such licensee of motor vehicles not specified by such license shall be deemed the equivalent of operating a motor vehicle without any driver's license.*

Id. (emphasis added).

¶ 24 Defendant argues that § 20-29.1 "is clear and unambiguous. It clearly states that an infraction shall be deemed the equivalent of operating a motor vehicle without any driver's license." We find no such clear statement in the plain text of § 20-29.1. Section 20-29.1 describes the various circumstances under which a driver's license may be suspended, revoked, restricted, or canceled pursuant to the Commissioner of Motor Vehicles' authority to require a driver to submit to medical examination, and it more specifically provides that a *restricted* licensee's operation of a motor vehicle not specified by the license "shall be deemed the equivalent of operating a motor vehicle without any driver's license." *Id.* But this neither applies to a medically canceled license nor does it provide that the offense is an infraction.

¶ 25 First, we address the nature of a medically canceled license. Section 20-15(a) describes the DMV's authority to cancel a license and provides, in pertinent part, that the DMV "shall have authority to cancel any driver's license upon determining" that "[t]he licensee has failed to submit the certificate required under" N.C. Gen. Stat. § 20-9(g). *Id.* § 20-15(a)(5). Section 20-4.01(2) defines "canceled" for purposes of Chapter 20: "As applied to drivers' licenses and permits, a declaration that a license or permit which was issued through error or fraud, *or to which* [*N.C. Gen. Stat. §*] *20-15(a) applies, is void and terminated.*" *Id.* § 20-4.01(2) (emphasis added). Reading these provisions together, we conclude that a driver's license that is medically canceled pursuant to § 20-29.1 for failure to submit a required medical certificate pursuant to § 20-9(g), thus subjecting the license to cancellation pursuant to § 20-15(a)(5), is "void and terminated" pursuant to § 20-4.01(2).

¶ 26 One argument advanced by the State is that the offense of driving with a medically canceled license is the functional equivalent of the

misdemeanor offense of driving while license revoked, *see id.* § 20-28(a), because Chapter 20 treats the terms "revocation" and "suspension" synonymously and defines them both as the "[t]ermination of a licensee's . . . privilege to drive . . . for a period of time stated in an order of revocation or suspension[,]" *id.* § 20-4.01(36). However, the record does not contain such an order of revocation or suspension for the period in which Defendant's license was medically canceled. We therefore disagree with the State that the offense of driving with a medically canceled license is necessarily akin to the offense of driving while license revoked. Rather, we agree with another of the State's arguments: because a medically canceled license is "void and terminated" under § 20-4.01(2), the offense of driving with a medically canceled license is comparable to the offense of driving without a license.

¶ 27 Yet we do not accept Defendant's blanket assertion that "a person operating a motor vehicle without a license is responsible for an infraction." Section 20-35(a) states generally that "[e]xcept as otherwise provided in subsection (a1) or (a2) of this section, a violation of this Article is a Class 2 misdemeanor unless a statute in the Article sets a different punishment for the violation." *Id.* § 20-35(a).

¶ 28 Subsections (a1) and (a2) enumerate six exceptions to the general Class 2 misdemeanor classification:

> (a1) The following offenses are Class 3 misdemeanors:
>
> > (1) Failure to obtain a license before driving a motor vehicle, in violation of [N.C. Gen. Stat. §] 20-7(a).
> >
> > (2) Failure to comply with license restrictions, in violation of [N.C. Gen. Stat. §] 20-7(e).
> >
> > (3) Permitting a motor vehicle owned by the person to be operated by an unlicensed person, in violation of [N.C. Gen. Stat. §] 20-34.
>
> (a2) A person who does any of the following is responsible for an infraction:
>
> > (1) Fails to carry a valid license while driving a motor vehicle, in violation of [N.C. Gen. Stat. §] 20-7(a).
> >
> > (2) Operates a motor vehicle with an expired license, in violation of [N.C. Gen. Stat. §] 20-7(f).

> (3) Fails to notify the Division of an address change for a drivers license within 60 days after the change occurs, in violation of [N.C. Gen. Stat. §] 20-7.1.

Id. § 20-35(a1)–(a2).

¶ 29 Defendant specifically cites § 20-35(a2)(3) (failure to report address change) to support his assertion that driving with a medically canceled license is an infraction, but we fail to see how that provision supports his claim. Instead, the provision that most plausibly supports Defendant's argument is subsection (a2)(1) (failure to carry a valid license while driving).

¶ 30 However, the State argues that § 20-35(a2)(1) "applies only when a driver has a valid license in the first instance but fails to abide by the requirement set forth in [N.C. Gen. Stat.] § 20-7(a) that he or she 'must carry the license while driving the vehicle.' " Further, the State notes that "[t]he offense of no operator's license encompasses a range of potential punishments" and is classified as a misdemeanor unless the conduct specifically falls within one of the enumerated exceptions to § 20-35(a2), or another statute provides otherwise. For example, each of the Class 3 misdemeanors listed in § 20-35(a1) could also be described as driving without a license. *See* N.C. Gen. Stat. § 20-35(a1). We thus reject the sweeping assertion that the offense of driving with a medically canceled license is necessarily an infraction, absent a showing of specific facts placing the offense within one of the enumerated exceptions to § 20-35(a2), which are not present in the case at bar. We conclude that the offense that Defendant was alleged to have committed does not fall within the enumerated exceptions of § 20-35(a1)–(a2) or another statute, and thus is a Class 2 misdemeanor. *Id.* § 20-35(a).

¶ 31 In that the offense that Defendant allegedly committed was a misdemeanor, the trial court erred by concluding that "[t]he medical cancellation on [Defendant's] license was not an arrestable offense[.]" "[A]n officer may make a warrantless arrest for a misdemeanor committed in his or her presence[,]" *Brooks*, 337 N.C. at 145, 446 S.E.2d at 588, and "[a]n officer may conduct a warrantless search incident to a lawful arrest[,]" *State v. Robinson*, 221 N.C. App. 266, 276, 727 S.E.2d 712, 719 (citation omitted), *appeal withdrawn*, 366 N.C. 247, 731 S.E.2d 161 (2012). The law enforcement officers had probable cause to arrest Defendant and to search Defendant incident to his arrest. Accordingly, the officers lawfully seized the evidence discovered during the search of Defendant incident to his arrest.

III. Conclusion

¶ 32 For the foregoing reasons, the trial court's order granting Defendant's motion to suppress is reversed, and the matter is remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

Chief Judge STROUD and Judge MURPHY concur.

STATE OF NORTH CAROLINA
v.
JORDAN MONTEZ GRAHAM

No. COA22-48

Filed 17 January 2023

1. Appeal and Error—criminal judgment—oral notice of appeal in open court—sufficient to confer jurisdiction

Where defendant properly gave oral notice of appeal in open court immediately upon entry of the final judgment in his criminal prosecution but did not file a written notice of appeal, defendant's petition for writ of certiorari (in the event that his oral notice of appeal was deemed inadequate) was unnecessary and therefore dismissed. Appellate Procedure Rule 4 allows parties to take appeal by giving oral notice of appeal at trial.

2. Burglary and Unlawful Breaking or Entering—habitual breaking and entering status—statement to jury—trial court's opinion

In defendant's trial arising from a home break-in, the trial court did not err during the habitual offender status phase when it told the jury that "the State will present evidence relating to previous convictions of breaking and/or entering." The trial court's statement did not constitute an opinion as to whether defendant did in fact have previous convictions. Even assuming the statement was improper, the State offered ample evidence of defendant's prior felony convictions of breaking and entering from which a jury could reasonably find defendant guilty of the status offense charge.

3. Evidence—expert witness testimony—reliability—plain error analysis

In defendant's trial for charges arising from a home break-in, the trial court erred by admitting a fingerprint expert's opinion where the expert's testimony did not clearly indicate that the expert reliably applied his processes to the facts in the case, and therefore the testimony did not meet the reliability requirements of Evidence Rule 702. However, the error did not amount to plain error because the trial court properly admitted the opinion of a DNA expert who did explain how she reliably applied her processes to the facts in the case (even though she did not provide the error rate associated with her methods), and her testimony was sufficient evidence from which a jury could reasonably conclude that defendant was guilty of felonious breaking or entering and larceny after breaking or entering.

4. Burglary and Unlawful Breaking or Entering—habitual breaking and entering—judgment—Class E status offense—no clerical error

The trial court did not make a clerical error by identifying habitual breaking and entering as a Class E status offense, as compared to a Class E substantive offense. The written judgment clearly indicated the offenses for which defendant was found guilty, the offense classes and punishment classes, the criminal statute governing each offense, and defendant's sentence.

Appeal by defendant from judgment entered 21 May 2021 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 September 2022.

Attorney General Joshua H. Stein, by Special Attorney General Tamara M. Van Pala Skrobacki, for the State.

Daniel J. Dolan and Appellate Defender Glenn G. Gerding for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Defendant appeals from judgment after a jury convicted him of felonious breaking or entering, larceny after breaking or entering, and attaining the status of habitual breaking and entering offender. On appeal, Defendant argues: (1) the trial court prejudicially erred when it instructed the jury "[t]he State will present evidence relating to

previous convictions" during the habitual status offender phase of trial; (2) the trial court committed plain error by admitting expert testimonies without establishing the necessary foundation for reliability under Rule 702; and (3) the case should be remanded for correction of a clerical error on the written judgment relating to the felony class of the habitual breaking and entering status offense. After careful review, we find no prejudicial error.

I. Factual & Procedural Background

¶ 2 The State's evidence at trial tends to show the following: On 16 June 2016 at approximately 5:30 p.m., Marie Broz ("Broz") left her Charlotte home to take three of her children to track practice, leaving her oldest daughter, A.B., alone in the house. Broz received two phone calls from A.B. while Broz was gone. In her first call, A.B. told Broz that she thought she heard footsteps in the home. Broz confirmed to A.B. that Broz and the other children were not inside the house. Before calling Broz again, A.B. stepped out of her bedroom and noticed a window was broken, and the back door was open. In her second call, A.B. told Broz that she believed the home had been broken into. Broz instructed A.B. to call the police. Blood was found on the shattered glass, blinds, and floor. Additionally, fingerprints were left on the window frame. A PlayStation and other gaming equipment belonging to Broz's son were found to be missing from the home.

¶ 3 Shortly after 10:00 p.m. that evening, James Pease ("Pease"), a crime scene investigator for the Charlotte-Mecklenburg Police Department ("CMPD"), responded to Broz's home to investigate the residential breaking and entering and larceny. Pease testified that he gathered photographs of the residence and collected latent evidence, including fingerprints; suspected biological evidence, including blood; and physical evidence, including a shovel and hair from a bucket, which was used to prop open the rear screen door. Pease dusted for and found fingerprints on the frame of the broken window—the suspected point of entry.

¶ 4 Aaron Partridge ("Partridge"), a detective for CMPD, was assigned to investigate the case. Defendant became a suspect in the investigation after Partridge received "a DNA comparison result back [from the crime lab] that identified [Defendant] . . . ." Partridge then obtained a search warrant for a DNA sample from Defendant and took the sample by rubbing a buccal swab in Defendant's mouth. Partridge submitted a lab request to have the swabs of suspected blood be tested for a DNA profile. Partridge submitted another lab request to compare the swab from Defendant with the swabs of suspected blood that were collected

from the crime scene. Partridge also requested that the fingerprints collected from the crime scene be compared with Defendant's.

¶ 5 Todd Roberts ("Roberts"), a fingerprint examiner at the CMPD crime lab, was admitted as a fingerprint expert without objection by Defendant. Roberts testified he analyzed the fingerprints collected from the window frame and compared them with an ink print card containing Defendant's prints. Roberts opined a print on Defendant's ink print card was consistent with the latent fingerprint obtained from the window frame.

¶ 6 Shannon Guy ("Guy"), a DNA criminalist at the CMPD crime lab, analyzed the blood left at the crime scene. Guy was tendered as an expert in DNA analysis and identification without objection by Defendant. Guy testified she generated a DNA profile from the suspected blood swab collected from the blinds and compared it with the full "single-source DNA profile" obtained in Defendant's buccal swab. Guy formed the opinion the sample collected from the blinds matched the DNA collected from Defendant and testified "there were no inconsistencies across all 24 areas" of the DNA samples she analyzed.

¶ 7 On 5 March 2018, a Mecklenburg County grand jury indicted Defendant on the charges of felonious breaking or entering, in violation of N.C. Gen. Stat. § 14-54(a); larceny after breaking or entering, in violation of N.C. Gen. Stat. § 14-72(b)(2); and attaining habitual breaking and entering offender status, in violation of N.C. Gen. Stat. § 14-7.26.

¶ 8 On 13 April 2021, a jury trial began before the Honorable Hugh B. Lewis, judge presiding. The trial was bifurcated, and the jury addressed the issue of Defendant's guilt in relation to the two substantive offenses in the first phase of the trial. In the second phase of the trial, the jury addressed the issue of enhancement as a habitual offender. Defendant was not present for the last day of his trial, 15 April 2021. On 15 April 2021, the jury returned its verdicts, finding Defendant guilty, *in absentia*, of felonious breaking or entering and larceny after breaking or entering.

¶ 9 Following the jury rendering its verdicts in the first phase, the trial court began the second phase of the proceeding for the jury to consider the habitual breaking and entering status. The trial judge announced to the jury: "The State will present evidence relating to previous convictions of breaking and/or entering at this time." The State tendered into evidence a certified copy of Defendant's judgment from a prior conviction for breaking and/or entering. Counsel for Defendant moved to dismiss at the close of the State's evidence and after the close of all

evidence, and the motions were denied. Defendant did not object to the jury instruction regarding habitual breaking and entering. At the conclusion of the second phase of trial, the jury returned a verdict finding Defendant guilty, *in absentia*, of attaining habitual breaking and entering offender status.

¶ 10 Due to Defendant's absence at the last day of trial, Defendant's sentencing hearing took place on 21 May 2022 before the Honorable W. Robert Bell. Defendant was sentenced to a minimum of thirty months and a maximum of forty-eight months in the custody of the North Carolina Department of Corrections. Defendant gave oral notice of appeal in open court after the trial court entered judgment.

II. Jurisdiction

¶ 11 **[1]** As an initial matter, we consider Defendant's petition for writ of *certiorari*. On 13 May 2022, Defendant filed with this Court a petition for writ of *certiorari* contemporaneously with his brief, in the event his oral notice of appeal was deemed inadequate.

¶ 12 Rule 4 of the North Carolina Rules of Appellate Procedure permits a "party entitled by law to appeal from a judgment" to "take appeal by . . . giving oral notice of appeal at trial . . . ." N.C. R. App. P. 4(a)(1).

¶ 13 Here, counsel for Defendant gave oral notice of appeal while the trial court was in open session, and immediately after the trial court entered its judgment against Defendant. Defendant did not file written notice of appeal. The State does not challenge the sufficiency of Defendant's oral notice of appeal.

¶ 14 Because Defendant gave oral notice of appeal in open court immediately upon entry of the final judgment, Defendant properly gave "notice of appeal *at trial*," as required by Rule 4. *See State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019) (explaining oral notice of appeal given before the entry of final judgment is premature, and consequently, inadequate notice); *see also* N.C. R. App. P. 4(a)(1). Thus, we deem Defendant's petition for writ of *certiorari* unnecessary and dismiss the petition. *See State v. Howard*, 247 N.C. App. 193, 205, 783 S.E.2d 786, 794–95 (2016) (dismissing the State's petition for writ of *certiorari* where our Court deemed the petition was not needed to confer the Court's jurisdiction).

¶ 15 Therefore, this Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021) and N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issues

¶ 16 The issues before this Court are: (1) whether the trial court violated N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 when it communicated to the jury that the State would be "present[ing] evidence relating to previous convictions of breaking and/or entering"; (2) whether the trial court plainly erred when it admitted the expert opinions of Roberts and Guy on the grounds their testimonies lacked the necessary foundation for admissibility under Rule 702; and (3) whether the trial court's designation of the habitual breaking and entering status offense as a Class E felony on the written judgment constitutes a clerical error.

IV. Jury Instructions in Second Phase of Trial

¶ 17 **[2]** In his first argument, Defendant contends the trial court prejudicially erred by communicating to the jury that the "State will present evidence relating to [Defendant's] previous convictions of breaking and/or entering" because proof of such prior conviction "was an essential element of the charge that the jury was required to determine." The State argues the trial court did not err in these instructions to the jury because "[t]he trial court was simply informing the jury of what the State was planning to do, not expressing an opinion that would sway the jury." After careful review, we agree with the State and find no error.

A. Standard of Review

¶ 18 This Court reviews a trial court's comments for a violation of N.C. Gen. Stat. §§ 15A-1222 or 15A-1232 using a "totality of the circumstances" test. *State v. Gell*, 351 N.C. 192, 207, 524 S.E.2d 332, 342, *writ denied*, 531 U.S. 867, 121 S. Ct. 163, 148 L. Ed. 2d 110 (2000). "Whenever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of [N.C. Gen. Stat.] §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions." *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005) (citation omitted), *writ denied*, 549 U.S. 855, 127 S. Ct. 130, 166 L. Ed. 2d 96 (2006); *see also In re E.D.*, 372 N.C. 111, 119, 827 S.E.2d 450, 456–57 (2019) (explaining a statutory mandate may be automatically preserved when it either: (1) requires the trial judge to take a specific action, or (2) clearly leaves the responsibility to the presiding judge at trial).

¶ 19 "[A] defendant claiming that he was deprived of a fair trial by the judge's remarks has the burden of showing prejudice in order to receive a new trial." *Gell*, 351 N.C. at 207, 524 S.E.2d at 342; *see also State v. Sidbury*, 64 N.C. App. 177, 179, 306 S.E.2d 844, 845 (1983) ("While

not every improper remark will require a new trial, a new trial may be awarded if the remarks go to the heart of the case."). "Unless it is apparent that [the statutory violation] might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (citation omitted).

B. Analysis

¶ 20 Defendant argues the trial court stated to the jury that Defendant "had prior breaking and entering offenses," which was a "grossly improper and erroneous" remark. We disagree with Defendant as to the substance of the trial court's comment and conclude the trial court's statement did not amount to error, let alone plain error. In addition, the trial court instructed the jury that it was the jury's role to make factual findings and to not draw inferences regarding the evidence from what the trial court did or said.

¶ 21 "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2021). Further, "the judge shall not express an opinion as to whether or not a fact has been proved[,]" while instructing the jury. N.C. Gen. Stat. § 15A-1232 (2021). This is because "[j]urors entertain great respect for [the trial judge's] opinion, and are easily influenced by any suggestion coming from [the trial judge]." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951).

¶ 22 To convict a person of the status offense of habitual breaking and entering, the State must prove the individual "has been convicted of or pled guilty to one or more prior felony offenses of breaking and entering . . . ." N.C. Gen. Stat. § 14-7.26 (2021). "In all cases in which a person is charged [as a habitual breaking and entering] status offender, the record of prior conviction of the felony offense of breaking and entering shall be admissible in evidence, but only for the purpose of proving that the person had been convicted of a former felony offense of breaking and entering." N.C. Gen. Stat. § 14-7.29 (2021).

¶ 23 Defendant cites *State v. Guffey*, 39 N.C. App. 359, 250 S.E.2d 96 (1979), *State v. Whitted*, 38 N.C. App. 603, 248 S.E.2d 442 (1978), and *State v. McEachern*, 283 N.C. 57, 194 S.E.2d 787 (1973) to argue the trial court's remark "goes to the heart of the case." These cases, where the trial courts' comments warranted new trials, are readily distinguishable from the instant case, where the trial court's statement was a forecast of the proceeding—not an expression of opinion.

¶ 24 In *Guffey*, the trial court stated the defendant "was pretty busy that day," in explaining why the indictment charged the defendant with two crimes. 39 N.C. App. at 361, 250 S.E.2d at 97 (emphasis removed). In *Whitted*, the trial court advised the jury what the court believed the evidence tended to show. 38 N.C. App. at 605, 248 S.E.2d at 443. In *McEachern*, the trial court asked a prosecuting witness whether she was raped in the car, where the witness had not testified she had been raped. 283 N.C. at 59, 194 S.E.2d at 789. As discussed in greater detail below, the trial court's comments, unlike the courts' remarks in *Guffey*, *Whitted*, and *McEachern*, were neither an expression of an opinion as to Defendant's guilt nor the evidence in this case.

¶ 25 Here, the trial court informed the jury: "Now at this time, the State has brought against [D]efendant the charge of habitual breaking and/or entering. The State *will present evidence relating to* previous convictions of breaking and/or entering at this time." (Emphasis added). After the presentation of all evidence, the trial court explained to the jury the habitual status offender charge as well as the elements the State must prove: "For you to find [D]efendant guilty of this offense, the State must prove beyond a reasonable doubt that on October 30th of 2015, [D]efendant, in Superior Court of Mecklenburg County, was convicted of the offense of felonious breaking or entering, which was committed on or about May 28th, 2015."

¶ 26 In examining the trial transcript, we conclude the trial court did not offer to the jury the court's opinion as to whether Defendant did in fact have previous convictions. *See Gell*, 351 N.C. at 207, 524 S.E.2d at 342; *see also* N.C. Gen. Stat. § 15A-1222; N.C. Gen. Stat. § 15A-1232. Rather, the trial court notified the jury and the parties of its plan for the outset of the second phase of trial: to allow the State to offer evidence in support of the habitual breaking and entering status offender charge.

¶ 27 After the trial court made its comment, the State admitted into evidence a certified copy of Defendant's prior felony breaking or entering conviction. The State also offered testimony from Partridge, who investigated Defendant's breaking and/or entering case, which resulted in this previous conviction. After the State presented its evidence, the trial court asked Defendant if he would "be putting on any evidence relating to [the charge]?" Defendant did not offer evidence. Presuming, *arguendo*, the trial court's comment was improper, the State offered ample evidence of Defendant's "prior felony offense[ ] of breaking and entering," from which a jury could reasonably find Defendant guilty of the status offense charge. *See* N.C. Gen. Stat. § 14-7.26; *see also State v. Austin*, 378 N.C. 272, 2021-NCSC-87, ¶¶ 26-27 (holding the trial court

did not commit prejudicial error where the State satisfied all elements of the crime charged, and the trial court instructed the jury that it must determine the facts). Defendant has failed to show the jury would have reached a different verdict without the trial court's comment; therefore, we find no prejudicial error. *See Gell*, 351 N.C. at 207, 524 S.E.2d at 342; *see also* N.C. Gen. Stat. § 15A-1443(a) (2021) (defining prejudicial error and explaining the burden of showing prejudice in criminal cases is upon the defendant).

¶ 28 Defendant further argues the trial court's alleged error was "exacerbated" because the trial court did not give the parties the opportunity to make opening and closing statements regarding the habitual breaking and entering charge; Defendant was absent for the habitual breaking and entering phase; and the trial court "did not re-instruct the jury on fundamental principles, including presumption of innocence, burden of proof, reasonable doubt, [D]efendant's right to testify, and the requirement for a unanimous verdict."

¶ 29 The North Carolina Criminal Procedure Act governs the parties' opening and closing statements to the jury. "Each party must be given the opportunity to make a brief opening statement . . . ." N.C. Gen. Stat. § 15A-1221(a)(4) (2021). "At the conclusion of the evidence, the parties may make [closing] arguments to the jury in accordance with the provisions of [N.C. Gen. Stat. §] 15A-1230." N.C. Gen. Stat. § 15A-1221(a)(8) (2021). In order for a defendant "to assert a constitutional or statutory right on appeal, the right must have been asserted and the issued raised before the trial court." *State v. McDowell*, 301 N.C. 279, 291, 271 S.E.2d 286, 294 (1980) (citation omitted), *writ denied*, 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 220.

¶ 30 In *State v. McDowell*, our Supreme Court considered whether the trial court's failure to give the defendant the opportunity to present an opening statement, pursuant to N.C. Gen. Stat. § 15A-1221(a)(4), amounted to prejudicial error. 301 N.C. at 290–91, 271 S.E.2d at 294. The Court held the defendant waived his statutory right to make an opening statement by failing to request the opportunity to do so, and by therefore "engag[ing] in conduct inconsistent with a purpose to insist upon the exercise of a statutory right." *Id*. at 291, 271 S.E.2d at 294.

¶ 31 Here, the trial court properly instructed the jury on the elements of the substantive offenses in the initial phase of trial. The trial court then explained the relevant rules of law, including, *inter alia*: direct and circumstantial evidence, the State's burden of proving Defendant's guilt beyond a reasonable doubt, the presumption of Defendant's innocence,

the jury's duty of determining witness credibility and the weight of the evidence, Defendant's right to not testify, and the presiding judge's duty to be impartial. Finally, the trial court instructed the jury that "[D]efendant's absence is not to create any presumption against him[,] and is not to influence your decision in any way."

¶ 32 Before the jury was brought back in from deliberations on the substantive charges, the trial court advised the State and Defendant's counsel that the court would not be re-instructing on the preliminary instructions. It further advised it would be reading *verbatim*, North Carolina Pattern Jury Instruction 214.20 on habitual breaking and entering, *see* N.C.P.I. – Crim. 214.20, if and when the jury returned with a guilty verdict on the felony breaking or entering charge. Counsel for Defendant did not object to the trial court's plan for the second phase of the trial.

¶ 33 After the jury returned and announced its guilty verdicts as to the felonious breaking or entering, and larceny after breaking or entering, the trial court advised the jury the State would be presenting evidence as to the charge of habitual breaking and entering. The State presented its evidence, and the trial court then proceeded to instruct the jury as follows: "Please recall all the previous jury instructions that I have read to you[,] and now I will instruct you on the substance of this charge and how you are to make your decision in this charge." The trial court then read the pattern jury instruction for the charge of habitual breaking and entering.

¶ 34 Like the defendant in *McDowell*, Defendant did not object to the trial court's failure to provide the parties with an opportunity to present a brief opening statement or a closing argument, nor did Defendant request opening or closing statements. Thus, Defendant waived his statutory right to make such statements in the habitual status offender phase of his trial. *See McDowell*, 301 N.C. at 291, 271 S.E.2d at 294. Furthermore, Defendant has not provided support for his argument that the trial court erred by proceeding in the second phase of trial in Defendant's absence; therefore, we deem this apparent argument abandoned. *See* N.C. App. P. 28(b)(6).

¶ 35 Similarly, we conclude Defendant waived review of his argument as to jury re-instruction. North Carolina General Statute Section 15A-1231 governs the trial court's instructions to the jury. N.C. Gen. Stat. § 15A-1231 (2021). It is well established in North Carolina that courts will not find prejudicial error in jury instructions where, taken as a whole, they "present[ ] the law fairly and clearly to the jury . . . ." *State v. Chandler*, 342

N.C. 742, 752, 467 S.E.2d 636, 641, *writ denied*, 519 U.S. 875, 117 S. Ct. 196, 136 L. Ed. 2d 133 (1996). "[I]solated expressions [of the trial court], standing alone," will not warrant reversal "when the charge as a whole is correct." *Id.* at 751–52, 467 S.E.2d at 641. When a defendant does not object to jury instructions, we review for arguments relating to instructions under the plain error standard. *State v. Collington*, 375 N.C. 401, 410, 847 S.E.2d 691, 698 (2020). In order for our Court to review "an alleged error under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error" in his brief. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (quoting N.C. R. App. P. 10(a)(4)).

¶ 36 Here, counsel for Defendant did not request the trial court to re-instruct on the pertinent rules of law, despite the trial court advising the parties that it did not intend to re-state its earlier instructions. Hence, Defendant would only be entitled to plain error review on appeal. Because Defendant did not "specifically and distinctly" allege in his brief this alleged error amounts to plain error, he has waived review of the issue. *See Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333*; see also* N.C. R. App. P. 10(a)(4).

¶ 37 After examining the totality of the circumstances, including the trial court's instructions to the jury as a whole, and the State's evidence presented at trial, we conclude the trial court did not commit prejudicial error in communicating to the jury that the State would be presenting evidence relating to Defendant's prior convictions. *See Gell*, 351 N.C. at 207, 524 S.E.2d at 342.

V. Admission of Expert Witness Testimony

¶ 38 **[3]** In his second argument, Defendant contends the trial court plainly erred when it admitted the expert opinions of Roberts and Guy because each testimony lacks the necessary foundation for admissibility under Rule 702. The State argues that the trial court did not err by admitting the expert opinions of Roberts and Guy because both testimonies were relevant and reliable, and meet the requirements of Rule 702. After careful review of the expert testimonies, we discern no prejudicial error.

A. Standard of Review

¶ 39 Generally, this Court reviews the admissibility of expert testimony under Rule 702 for an abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). However, where a defendant does not preserve his or her objection as "to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal

trial," we review the alleged error under the plain error standard. *State v. Hunt*, 250 N.C. App. 238, 246, 792 S.E.2d 552, 559 (2016); *see also* N.C. R. App. P. 10(a)(4) (specifying plain error review may be used in some circumstances when an issue is not preserved, and the defendant "specifically and distinctly" alleges plain error on appeal).

¶ 40 Defendant concedes he did not challenge the trial court's admission of the expert testimony, and therefore, asserts plain error review is the proper standard for our review. We agree and note Defendant "specifically and distinctly" contends on appeal that the trial court's admission of the expert testimony at issue constitutes plain error; thus, we proceed in reviewing these arguments for plain error. *See Hunt*, 250 N.C. App. at 246, 792 S.E.2d at 559; *see also* N.C. R. App. P. 10(a)(4).

B. Analysis

¶ 41 Rule 702 of the North Carolina Rules of Evidence governs the trial court's admission of expert testimony. Rule 702 provides in pertinent part:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(1)-(3) (2021). "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (explaining the United States Supreme Court's *Daubert* factors, including a technique's known or potential rate of error, "are part of a 'flexible' inquiry" and do not create "a definitive checklist or test"). In any event, "[t]he primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate." *Id.* at 890, 787 S.E.2d at 9 (citations and quotation marks omitted).

1. Roberts' Latent Fingerprint Testimony

¶ 42 Defendant argues that the trial court committed plain error in admitting Roberts' expert testimony because Roberts did not testify that the process he used was scientifically accepted in the community, how he applied that process in this case, or the rate of error associated with the process that he uses.

¶ 43 Defendant relies on *State v. McPhaul* in arguing the trial court abused its discretion by permitting Roberts to provide his expert testimony. 256 N.C. App. 303, 808 S.E.2d 294 (2017). As explained above, the issue before this Court is not whether the trial court abused its discretion in admitting Roberts' testimony, but rather, whether it *plainly erred*. In *McPhaul*, our Court concluded the fingerprint expert's testimony was insufficient to meet the requirement of Rule 702(a)(3) because the witness did not testify *how* she "applied the principles and methods reliably to the facts of th[at] case." *Id.* at 316, 808 S.E.2d at 305; *see also* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(3). Nevertheless, we held that although the trial court abused its discretion, the error did not prejudice the defendant because "[t]he State presented abundant additional evidence," which tended to demonstrate the defendant's guilt. *Id.* at 316–17, 808 S.E.2d at 305.

¶ 44 Defendant cites *State v. Koiyan*, 270 N.C. App. 792, 841 S.E.2d 351 (2020) in his reply brief as further support for his assertion the trial court plainly erred. In *Koiyan*, our Court reviewed the testimony from fingerprint examiner Todd Roberts—the same fingerprint examiner in this case—under the plain error standard. *Id.* at 794, 841 S.E.2d at 353. There, Roberts provided sufficient testimony to demonstrate his "qualifications, training, and expertise, and showed that [he] uses reliable principles and methods." *Id.* at 797, 841 S.E.2d at 354. Yet Roberts "never explained what—if any—characteristics from the latent fingerprints matched with [the d]efendant's fingerprints"; therefore, his conclusions failed to meet the statutory requirement of Rule 702(a)(3). *Id.* at 798, 841 S.E.2d at 355. Despite this deficient expert testimony, we declined to conclude the trial court committed plain error due to "the otherwise overwhelming evidence that [the defendant] was the perpetrator of the robbery." *Id.* at 798, 841 S.E.2d at 355.

¶ 45 Here, Roberts was admitted as a fingerprint expert without objection by Defendant after Roberts testified as to his training, experience, and education, as well the basics of fingerprint analysis. He worked for the CMPD for over twenty-two years and earned a Bachelor of Science in criminal justice and an associate's degree in correctional and juvenile

services. Apart from in-house training, Roberts also received "formal training in fingerprint comparisons, latent fingerprint photography, forensic ridgeology, advance palm print comparison techniques, logical latent analysis, analysis of distortion in latent prints, and . . . advanced latent analysis[.]"

¶ 46 Roberts described the basics of fingerprint analysis, including friction ridge skin and inked prints. "Friction ridge skin is the raised and lowered areas of your skin that's located on your fingers, palms, and also on the soles of your feet." "An inked print is the intentional reproduction of . . . friction ridge skin[.]" Roberts explained that fingerprints can be used for human identification because they are unique to every individual, and no two people have the same fingerprints.

¶ 47 Roberts explained how and when a latent print is transferred onto a surface. Roberts then testified to the unique characteristics of fingerprints and the level of detail fingerprints possess:

> The fingerprints themselves have three levels of detail. One is simply ridge flow, which allows us to easily exclude a potential donor to a fingerprint. There's level II detail, which is made up of bifurcations and ending ridges, which I will—do you have a pencil or pen? When I talk about level I detail, it's simply the ridge flow. This print here has the ridge flow coming in from the right side of the print looping around what I refer to as a core, and then right back out the right side, so this is referred [to] as a right slant loop. The distance between the core, here, and the delta is also a level I detail in which we could use to help narrow down an identification.
>
> But the important part are all of these ending ridges and bifurcations throughout this print, and their spatial relationship to each other. That's what makes that print unique, and unique to everyone. And not only is it unique to everyone, it's unique to that finger, so none of the 10 figures are the same. Even though this is a right slant loop, you can see this one has more of a circular pattern, but still coming in from the right and going out to the right, and this is a left slant loop.
>
> But ultimately[,] it's those ending ridges and bifurcations, their relationship to each other, and I can't zoom in any further but there is a third type of detail

> which includes the pores. Where the pores actually lay in the ridge[s] themselves also bears weight to our identification process when [they] need to[.] Very rarely used, just because that amount of detail usually doesn't exist within the latent print collected from a crime scene, but sometimes.

¶ 48 Roberts further explained basic fingerprint types, the different levels of detail found in a print, and the tool he uses to examine fingerprints:

> [Roberts]: There are loops, whorls, and arches.
>
> [Prosecutor]: And can you describe what each looks like for the jury?
>
> [Roberts]: Sure. A loop is like I described on the screen. It comes in one side of the screen, goes around what we refer to as a core, and right back out the same side. A whorl-type pattern would be more of a circular, in some way, shape or form, it is a circular pattern or bullseye pattern in the fingerprint. The third is the arch, which means that it pretty much comes in one side of the finger, kind of elevates, and then goes right back out the other side.
>
> [Prosecutor]: So when you were explaining just the different characteristics of fingerprints, you mentioned bifurcations. What other—and you called them level II details. What are other level II details that you look at?
>
> [Roberts]: [T]here are bifurcations and ending ridges. [T]wo opposing bifurcations make, like, an island, or an enclosure, which makes them both unique. Two ending ridges fairly close together could be a short ridge, but ultimately[,] it's all bifurcations. It's all ending ridges, and it all boils down to their relationship to each other.
>
> [Prosecutor]: Now, what type of instrument do you use, if any, back at the lab to examine fingerprints?
>
> [Roberts]: We use a type of magnifier, a magnifying glass, not microscopic, but we do magnify the image.

¶ 49 Roberts described the process of analyzing and comparing a latent print obtained from a crime scene with an ink print:

[Roberts]: "Physically, I take the latent fingerprint card collected from the crime scene. I fold it so that I can sit it right next to the print that I want to compare it to. They are both placed under magnification, and I am looking mainly at that level I and level II detail for both similarities and dissimilarities.

[Prosecutor]: So when you look at a latent . . . and an ink print, . . . are you trying to find areas where there is disagreement?

[Roberts]: Yes.

[Prosecutor]: So basically[,] you're trying to prove that the latent and the ink print are not a match. Is that correct?

[Roberts]: Well, both. I'm looking for areas of agreement along with areas of disagreement.

[Prosecutor]: If you find one area of disagreement, do you continue with your analysis?

[Roberts]: No, ma'am.

[Prosecutor]: Does it matter, if you have 10 areas of agreement, if there is one area of disagreement?

[Roberts]: No, ma'am.

[Prosecutor]: And so, what happens if you're looking—you're examining the print and you don't see any areas of disagreement?

[Roberts]: Then that would steer me toward an identification.

[Prosecutor]: So if you don't see any disagreement, would you consider those fingerprints consistent with each other?

[Roberts]: If there is enough information present within both, yes.

[Prosecutor]: What if there's not enough information?

[Roberts]: Then that may result in what we refer to as an inconclusive.

> [Prosecutor]: So, if you do have enough, and you're able to come to a conclusion, what's the next step in your process?
>
> [Roberts]: The next step would be a verification process with my supervisor.
>
> [Prosecutor]: And what does a verification process with your supervisor mean?
>
> [Roberts]: He is given the case along with the 10-print card, and he is asked to agree or disagree with my conclusions.
>
> [Prosecutor]: So does he do the same analysis that you did?
>
> [Roberts]: Yes, ma'am.
>
> [Prosecutor]: And do you guys do this in every case?
>
> [Roberts]: Yes, ma'am.
>
> [Prosecutor]: So you testified that you've conducted fingerprint analysis quite a few times. Do you find prints that are consistent with one another every single time you do a fingerprint analysis?
>
> [Roberts]: No, ma'am.
>
> [Prosecutor]: Do you find fingerprints that are consistent with one another in the majority of the fingerprint analysis that you do?
>
> [Roberts]: No, ma'am.

¶ 50 Under plain error review, Defendant fails to provide support for his argument that Roberts' expert testimony was erroneously admitted into evidence on the grounds Roberts did not testify his process was scientifically accepted in the community, and he did not disclose error rates related to his processes. Therefore, we consider these arguments abandoned. *See* N.C. R. App. P. 28(b)(6). Our Supreme Court has "recognized that fingerprinting is an established and scientifically reliable method of identification." *State v. Parks*, 147 N.C. App. 485, 490, 556 S.E.2d 20, 24 (2001); *see State v. Rogers*, 233 N.C. 390, 398, 64 S.E.2d 572, 578 (1951). Additionally, neither factor proffered by Defendant is required by statute or caselaw in this state. *See* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a); *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9.

¶ 51 We next consider whether Roberts "applied [his fingerprint analysis] principles and methods reliably to the facts of th[is] case." *See* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(3). Here, Roberts testified he compared the latent fingerprint card collected at the crime scene with a card containing Defendant's ten ink fingerprints retrieved from the Automated Fingerprint Identification System (the "AFIS"), "a state maintained database for fingerprints." The prosecutor asked Roberts to describe the comparison and analysis process he used in this case:

> [Prosecutor]: After you received this latent print for examination, did you then do a comparison, as you previously described you do in your work, to the known 10-inkprint card that belongs to [D]efendant?
>
> [Roberts]: Not initially. I was not—I did not compare the prints to [D]efendant until I was requested to by the detective.
>
> [Prosecutor]: And once you were requested, did you then compare it to [D]efendant's known ink prints?
>
> [Roberts]: Yes, ma'am.
>
> [Prosecutor]: Were you able to find a print on [D]efendant's ink print card that was consistent with this latent print that was found at the crime scene?
>
> [Roberts]: Yes, ma'am.
>
> [Prosecutor]: And when you say consistent, does that mean that you found no dissimilarities between the two prints?
>
> [Roberts]: That is correct.
>
> [Prosecutor]: Had you found one dissimilarity, would your analysis have stopped right there?
>
> [Roberts]: A dissimilarity, yes, it would have stopped.
>
> [Prosecutor]: Was your conclusion submitted to your supervisor for peer review?
>
> [Roberts]: Yes, ma'am.
>
> [Prosecutor]: And did they agree with your findings?
>
> [Roberts]: Yes, ma'am.

> [Prosecutor]: And this latent print that I've marked as State's Exhibit 18, do you recall to which of [D]efendant's finger it was consistent with?
>
> [Roberts]: It's the number one finger, and just to clarify, there are two prints on that card. Both were identified to the number one finger of Jordan Montez Graham, number one being the right thumb.

¶ 52 In this case, Roberts' testimony does not clearly indicate that Roberts used the comparison process he described in his earlier testimony when he compared Defendant's ink print card to the latent fingerprints recovered at the crime scene. Like the testimonies in *McPhaul* and *Koiyan*, Roberts' testimony lacks detail concerning the methodology he used in comparing the prints and the fingerprint characteristics he considered in reaching his conclusions. Instead, Roberts' testimony, which is strikingly similar to the testimony he gave in *Koiyan*, demonstrates he compared the two sets of prints, found the prints to be consistent, identified no dissimilarities, and his supervisor reached the same result. Thus, Roberts did not "establish that [he] reliably applied [his] procedure to the facts" in the instant case. *See McPhaul*, 256 N.C. App. at 315, 808 S.E.2d at 304; *see also* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(3). Therefore, we conclude again Roberts' testimony is insufficient to meet the reliability requirements of Rule 702, and the trial court erred in admitting it. *See Koiyan*, 270 N.C. App. at 798, 841 S.E.2d at 355; *see also* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a).

2. Guy's DNA Analysis Testimony

¶ 53 Defendant argues that the trial court committed plain error in admitting Guy's expert testimony because Guy, like Roberts, failed to explain how she applied her processes to this case and did not indicate the error rate associated with her methods.

¶ 54 In *State v. Coffey*, our Court considered whether the trial court established a sufficient foundation under Rule 702(a)(3) to qualify a North Carolina State Crime Lab employee as an expert in DNA analysis. 275 N.C. App. 199, 853 S.E.2d 469 (2020). The expert witness testified as to the four-step process she uses to extract DNA from a defendant's buccal sample. *Id.* at 211–12, 853 S.E.2d at 479. The witness confirmed her procedures in analyzing DNA evidence were widely accepted as valid in the scientific community. *Id.* at 212, 853 S.E.2d at 479. Next, the witness testified she compared the defendant's buccal sample with a DNA profile extracted from a semen sample taken from the victim's clothing using her four-step process. *Id.* at 203, 853 S.E.2d at 473. She concluded

the DNA profile obtained from the clothing matched the DNA profile obtained from the defendant. *Id.* at 213, 853 S.E.2d at 480. In concluding the testimony met the requirements of Rule 702(a)(3), our Court reasoned the witness "thoroughly explained the methods and procedures of performing autosomal testing and analyzed [the] defendant's DNA sample following those procedures." *Id.* at 213, 853 S.E.2d at 480. We also acknowledged this "particular method of testing has been accepted as valid within the scientific community and is a standard practice within the state crime lab." *Id.* at 213, 853 S.E.2d at 480.

¶ 55 Defendant contends *Coffey* is distinguishable because "Guy did not provide a sufficiently detailed description of the process used and how it applied to this case." We disagree and find no meaningful difference between the expert witness testimony in *Coffey* and Guy's testimony.

¶ 56 Before Guy was tendered as an expert in DNA analysis and identification, Guy testified as to her training, education, duties as a DNA criminalist, and professional background working in the field. She earned a Bachelor of Science degree in forensic chemistry from Ohio University and a master's degree from the University of Florida with specialization in forensic DNA and serology. As of the date of trial, she had analyzed tens of thousands of DNA samples over her twenty-one-year career in forensics. Guy further testified the CMPD crime lab is accredited and explained the standards that must be met for the lab to comply with the accreditation, as well as the measures taken by the lab for quality assurance. Guy met the crime lab's accreditation requirements for annual continuing education. She also described the peer review process and how that process ensures the reported results are correct.

¶ 57 After the trial court qualified Guy as an expert, Guy described what DNA is and explained that DNA is present in the cells of every person. DNA samples fall into two categories: (1) "forensic unknowns," which are collected from crime scenes, and (2) "reference samples," which are taken from a known individual. A buccal swab is an example of a reference sample.

¶ 58 Guy testified as to the process she and her lab use to analyze DNA samples, which is "widely accepted and used in the scientific community." Guy explained the DNA from a crime scene can be matched with an individual after referencing buccal samples taken from swabs inside the cheek of an individual. Once the swabs are collected, DNA is available for extraction, and a DNA criminalist can estimate the amount of DNA found in the sample, which is referred to as "quantitation." The DNA would then be copied through "amplification," a process that turns

DNA into a representation that allows for comparison of the DNA sample to known DNA standards from an individual.

¶ 59 Guy explained a full DNA profile means the "results were obtained at every single area of the DNA," and allows for the determination on whether the profile was male or female. A full DNA profile enables a DNA criminalist to analyze twenty-four areas of the DNA. A partial profile is one in which some areas of the DNA are missing. Moreover, a single source sample contains information from only one individual, rather than multiple individuals.

¶ 60 Lastly, Guy testified that she generated a DNA profile from the suspected blood swab collected from the blinds and compared it with the full "single-source DNA profile" obtained in Defendant's buccal swab. In reviewing the profiles, Guy found "no inconsistencies across all 24 areas" of the DNA she analyzed. From this data, Guy opined the sample collected from the blinds matched the DNA collected from Defendant because she estimated there was a 1 in 130 octillion "probability of selecting a person at random that had the DNA profile obtained from the blinds . . . ."

¶ 61 Like the expert witness in *Coffey*, Guy thoroughly explained her credentials, education, and expertise, as well as the methods and procedures she uses to analyze DNA profiles. Guy confirmed the process is widely accepted in the scientific community. Guy testified she applied those methods and procedures in her analysis and comparison of Defendant's DNA profile with the suspected blood sample. Guy explained she arrived at her conclusion that the sample matched Defendant's DNA profile after reviewing all twenty-four areas of his full DNA profile. Although Guy did not provide a rate of error, this omission was not fatal to her testimony. *See McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. Guy's DNA testimony sufficiently detailed how she "applied the principles and methods reliably to the facts of the case"; therefore, the testimony meets the requirement of Rule 702(a)(3). *See Coffey*, 275 N.C. at 213, 853 S.E.2d at 480; *see also* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(3).

3. Prejudicial Error

¶ 62 Based on our conclusion the trial court erred in admitting Roberts' testimony, we now determine whether this error constitutes plain error, warranting a new trial. For error to amount to plain error, "a defendant must demonstrate that a fundamental error occurred at trial" and that "the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted). As our Supreme Court has emphasized,

> the plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is . . . something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

¶ 63 As discussed above, Guy's testimony regarding DNA analysis and identification was properly admitted at trial. This testimony is sufficient evidence from which a jury could reasonably conclude Defendant was guilty of the offenses charged. After examining the entire record, we conclude Defendant cannot show that the trial court's admission of Roberts' testimony had a probable impact on the jury finding that Defendant was guilty. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Therefore, we find no prejudicial error in the trial court's admission of Roberts' testimony. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; *see also* N.C. Gen. Stat. § 15A-1443(a).

VI. Clerical Error in Written Judgment

¶ 64 **[4]** In his third and final argument, Defendant asserts the trial court made a clerical error in its "written judgment [by] erroneously indicat[ing] that [he] was convicted of a [C]lass E felony" for the habitual breaking and entering status offense." The State contends the written judgment correctly reflects the trial court's judgment because it properly indicates that the habitual breaking and entering status offense enhanced the substantive offense of felony breaking and/or entering from a Class H felony to a Class E felony. After careful review, we agree with the State.

¶ 65 A clerical error is "[a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determining." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (citation omitted).

¶ 66 Here, trial court entered its judgment and commitment on Administrative Office of the Courts form AOC-CR-601. The judgment lists three offenses: (1) felony breaking and/or entering, (2) larceny after breaking and/or entering, and (3) habitual breaking and entering. Habitual breaking and entering is identified as a Class E felony. The felony breaking and entering offense is identified as a Class H felony with a Punishment Class E, which the form notes "represents a status or enhancement." The written judgment also indicates, by a checked box, that the trial court "adjudge[d] the defendant to be a habitual breaking and entering status offender, to be sentenced as a Class E felon."

¶ 67 Relying on *State v. Eaton*, Defendant asserts remand is necessary to correct the alleged error on the judgment listing the status offense of habitual breaking and entering as a Class E felony. 210 N.C. App. 142, 707 S.E.2d 642 (2011). In *Eaton*, our Court *sua sponte* remanded the case for correction of a clerical error in the judgment because a substantive offense was incorrectly identified as a Class H felony where it should have been identified as a Class I felony. *Id.* at 155–56, 707 S.E.2d at 651. There, the defendant was found guilty of attaining the status of habitual felon and was properly sentenced for his felony substantive offenses as a Class C felon. *Id.* at 144, 156, 707 S.E.2d at 644, 651. Although this Court's opinion in *Eaton* does not mention in which class the habitual felon status offense was identified on the judgment, our review of the record in that case reveals the judgment designated the status offense as a Class C felony. The statute governing sentencing of habitual felons in effect at the time, provided an habitual felon "must . . . be *sentenced as a Class C felon*" for any felony he or she commits under North Carolina law. N.C. Stat. Gen. § 14-7.6 (2009) (emphasis added); *see also Eaton*, 210 N.C. App. at 150, 707 S.E.2d at 648.

¶ 68 The statute governing sentencing of habitual breaking and entering status offenders provides a status offender "must . . . be *sentenced as a Class E felon*" for any felony offense of breaking and entering the offender commits under North Carolina law. N.C. Gen. Stat. § 14-7.31(a) (2021) (emphasis added).

¶ 69 Thus, the judgment in *Eaton* categorized habitual felon status as Class C, the felony class for which Defendant was to be sentenced for the pertinent substantive offense. Similarly, in this case, the judgment categorized the habitual breaking and entering status offense as a Class E felony, the felony class for which Defendant was to be sentenced for the underlying felony breaking and entering offense. Therefore, Defendant's reliance on *Eaton* for remanding this case is misplaced.

¶ 70 In this case, Defendant is not arguing that he was improperly sentenced or that a substantive offense was incorrectly classified. Rather, Defendant maintains he was not convicted of a Class E felony, and the judgment erroneously indicates that he was. Defendant was in fact convicted of the status offense of habitual breaking and entering; hence, we next consider whether the trial court improperly identified the offense as a Class E felony.

¶ 71 The reason for establishing that an offender has attained habitual breaking and entering status "is to enhance the punishment which would otherwise be appropriate for the substantive [breaking and entering]

felony which [the defendant] has allegedly committed while in such a status." *State v. Penland*, 89 N.C. App. 350, 351, 365 S.E.2d 721, 721 (1988) (citation omitted). Our case law clearly indicates status offenses are not substantive offenses and therefore do "not support a criminal sentence," standing alone. *State v. Taylor*, 156 N.C. App. 172, 175, 576 S.E.2d 114, 116 (2003). Nevertheless, our Legislature did not specify the felony classes for which status offenses should be classified.

¶ 72 We note the North Carolina Judicial Branch publishes on its website a guideline document entitled "N.C. Courts Offense Codes and Classes." N.C. Judicial Branch, *N.C. Courts Offense Codes and Classes* (July 27, 2022), https://www.nccourts.gov/documents/publications/nc-courts-offense-codes-and-classes (last visited Dec. 16, 2022). This document classifies the status offense of habitual breaking and entering as a Class E felony, and habitual felon status as a Class C felony. *Id.* Defendant provides no other authority to support his contention that the written judgment contains a clerical error, and we conclude trial court's identification of habitual breaking and entering as a Class E *status offense*, as compared to a Class E *substantive offense*, was not error.

¶ 73 Because the written judgment clearly indicates the offenses for which Defendant was found guilty as well as the offense classes and punishment classes, properly notates the criminal statute governing each offense, and correctly indicates Defendant's sentence, we discern no clerical error from the trial court's classification of the status offense as a Class E felony.

VII. Conclusion

¶ 74 We dismiss Defendant's petition for writ of *certiorari* as superfluous because Defendant's oral notice of appeal properly conferred jurisdiction to this Court. We hold that the trial court did not err when it communicated to the jury that the State would be presenting evidence relating to Defendant's prior conviction of breaking or entering. Further, we hold the trial court did not plainly err by admitting the expert opinions of Roberts and Guy because their testimonies satisfy foundation requirements for admissibility under Rule 702. Finally, we conclude the written judgment did not contain a clerical error. In sum, our examination of the record reveals Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges TYSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
ROBERT LINWOOD MASSEY, JR.

No. COA22-414

Filed 17 January 2023

1. Evidence—prior bad acts—text messages—identity of substance as marijuana

In a drug prosecution, the trial court did not err by admitting prior bad act evidence in the form of text messages from defendant's cell phone tending to show defendant's interest in purchasing and possessing marijuana, in order to prove motive, intent, and knowledge. The evidence was relevant because it corroborated the State's contention that the substance in defendant's possession was marijuana and not legal hemp. Furthermore, the trial court's decision to admit the evidence was supported by reason and was not an abuse of discretion. Finally, even assuming that photographic evidence from defendant's cell phone was erroneously admitted, the error was harmless because of the substantial amount of unchallenged evidence of defendant's guilt.

2. Drugs—possession of marijuana and paraphernalia—sufficiency of evidence—identity of substance

The State presented sufficient evidence to submit the charges of simple possession of marijuana and possession of marijuana paraphernalia to the jury where the evidence tended to show that defendant used colloquial terms for marijuana in his text messages, that the substance was found along with methamphetamine, that the substance was found in single plastic bags, and that the arresting officer initially identified the substance as marijuana. The evidence was sufficient to allow the jury to determine whether the substance was marijuana or hemp, and the State was not required to provide a chemical analysis of the substance.

3. Drugs—maintaining a dwelling resorted to by persons using methamphetamine—sufficiency of the evidence—no evidence

The trial court erred by denying defendant's motion to dismiss the charge of maintaining a dwelling resorted to by persons using methamphetamine where the State failed to present any, much less substantial, evidence of the crime. There was no evidence that anyone besides defendant used methamphetamine at his home.

Appeal by defendant from judgments entered 21 July 2021 by Judge James F. Ammons, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 15 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan R. Marx, for the State.

Patterson Harkavy LLP, by Christopher A. Brook, for defendant.

ARROWOOD, Judge.

¶ 1 Robert Linwood Massey, Jr., ("defendant") appeals from judgments following jury verdicts of guilty for possession of marijuana paraphernalia, simple possession of marijuana, assault on a government official, possession with intent to sell or deliver methamphetamine,[1] intentionally maintaining a dwelling which is resorted to by persons using controlled substances, and for attaining the status of habitual felon. Defendant argues the trial court erred by improperly admitting prior bad act evidence, denying his motion to dismiss the charges of marijuana possession, possession of marijuana paraphernalia, and maintaining a dwelling which is resorted to by persons using controlled substances. Defendant also argues the trial court committed plain error by giving conflicting jury instructions. For the following reasons, we find no error in part and arrest judgment in part.

I. Background

¶ 2 On 29 March 2019, after receiving information from a confidential informant that defendant possessed methamphetamines, Johnston County Sheriff's Office ("JCSO") executed a search warrant on defendant's home. Based on the recovered evidence, defendant was indicted by a Johnston County Grand Jury for possession of marijuana and marijuana paraphernalia, assault on a government official, resisting a public officer, possession of methamphetamine with the intent to sell or deliver, maintaining a dwelling resorted to by persons using methamphetamine, and for being a habitual felon on 6 May 2019. The matters came on for trial on 19 July 2021, Judge Ammons presiding. The evidence at trial tended to show the following:

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1. We note that although defendant's indictment alleged he "unlawfully . . . possess[ed] with intent to sell and deliver a controlled substance, namely [m]ethamphetamine," we defer to the statutory definition set forth in N.C. Gen. Stat. § 90-95(a)(1), which states it is a felony to "sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[,]" throughout this opinion.

¶ 3 In the morning of 29 March 2019, defendant was outside working on his vehicle when he saw officers from JCSO arrive. Upon seeing the law enforcement vehicles, defendant ran inside his residence. Officers entered and found defendant sitting in a recliner "reaching" his left hand "between the seat cushion and arm rest[.]" Defendant was "noncompliant" and refusing "to show his hands clearly." Defendant was "combative[,]" "kicking[,]" "flailing[,]" and "really hard to control[.]" After this brief physical altercation, defendant was subsequently arrested and taken outside, where he, again, attempted to flee.

¶ 4 During the search of defendant's person, officers recovered a cellphone and what they identified as a bag of marijuana. Forensic scientist Lauren Adcox of the North Carolina State Crime Laboratory ("NCSCL") testified that she did not quantify the percentage of tetrahydrocannabinol ("THC") in the substance, thus unable to determine if the substance was marijuana as opposed to legal hemp. On direct examination, JCSO officer testimony initially identified the substance as marijuana, however, during cross-examination the officer equivocated whether the substance was marijuana or hemp.

¶ 5 During search of the residence, officers found a "Hide-A-Key" device inside the recliner defendant was sitting in, which contained "five baggies" of a "crystal substance." Subsequent testing indicated one bag contained 2.81 grams of methamphetamine; consistent with NCSCL policy, the remaining bags were not tested. Two digital scales were also seized, one containing a "white powder residue[.]" Officer testimony indicated that the division of the substance into five baggies, along with the presence of the scales were consistent with selling drugs. On defendant's coffee table, officers recovered: suspected marijuana, "rolling papers," "a one-hitter[,]" which is "a little device that they smoke marijuana out of[,]" and "some clear plastic baggies[.]"

¶ 6 As an individual "suspected of dealing drugs," certain items from defendant's cellphone were also admitted into evidence via a "Cellebrite extraction [report][,]" ("the extraction report"). Officers were able to recover a series of text messages and photographs the State argued were "relevant information" to show knowledge, motive, and intent to commit the charged offenses. The text messages ranged from 20 October 2018 to 25 February 2019. Each photo was undated, except for one picture of a crystalline substance taken 25 December 2018. Defendant filed a motion to exclude the evidence from the extraction report as violative of Rule 404(b) of the North Carolina Rules of Evidence, which the trial court denied.

¶ 7 On 21 July 2021, the jury found defendant guilty of possession with intent to sell or deliver methamphetamine, intentionally maintaining

a dwelling resorted to by persons using controlled substances, simple possession of marijuana, possession of marijuana paraphernalia, and assault on a government official. Thereafter, defendant pled guilty to being a habitual felon. The court consolidated all of the charges for sentencing purposes. Defendant was sentenced to 58 to 82 months, which is the lowest possible sentence in the mitigated range for these charges. Defendant filed a notice of appeal on 27 July 2021.

II. Discussion

¶ 8 On appeal, defendant argues the trial court erred by (1) admitting text messages and photographs from the extraction report in contravention of Rule 404(b), (2) denying his motion to dismiss the charges of marijuana possession, possession of marijuana paraphernalia, and maintaining a dwelling resorted to by persons using methamphetamine, and (3) providing the jury with inconsistent jury instructions. Defendant does not raise any issues on appeal with respect to his conviction of assault on a governmental official. We address each argument in turn.

A. Rule 404(b) Prior Act Evidence

¶ 9 **[1]** Defendant contends the trial court committed prejudicial error by admitting prior bad act evidence in violation of Rule 404(b). Specifically, defendant argues the extraction report should have been excluded as the challenged text messages and photographs are too temporally attenuated and lack sufficient similarity to the current controversy and that their admission was inherently prejudicial under Rule 403. Thus, defendant asserts the challenged evidence was admitted in error as it tended to show defendant's general propensity to deal in controlled substances. We disagree.

¶ 10 This Court reviews whether prior bad act evidence is admissible under Rule 404(b) *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). If admissible, we then "determine whether the trial court abused its discretion in balancing the probative value of the evidence under Rule 403." *State v. Martin*, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474 (2008).

¶ 11 Rule 404(b) provides:

> 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.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). Rule 404(b) is a "general rule of *inclusion* of relevant evidence[,]" but it operates to exclude evidence if "its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original).

¶ 12 When evidence is introduced pursuant to Rule 404(b), there is a "natural and inevitable tendency" for the judge or jury "to give excessive weight [to the challenged evidence]" and "allow it to bear too strongly on the present charge[s][,] . . . justifying a condemnation [of the accused], irrespective of the accused's guilt of the present charge[s]." *State v. Carpenter*, 361 N.C. 382, 387-88, 646 S.E.2d 105, 109-10 (2007) (citation and internal quotation marks omitted). In order to protect a party from such "perils inherent in introducing" evidence under Rule 404(b), the admissibility of the evidence is constrained by the requirements of "similarity and temporal proximity." *Id.* at 388, 646 S.E.2d at 110 (quoting *State v. Al–Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002)). "Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them, but the similarities need not rise to the level of the unique and bizarre." *State v. Pierce*, 238 N.C. App. 537, 545, 767 S.E.2d 860, 866 (2014) (citation and internal quotation marks omitted).

¶ 13 Although Rule 404(b) has a temporal limitation, our Supreme Court has established "remoteness in time is less significant when the prior conduct is used to show intent, motive, [or] knowledge . . . [;] remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (citation omitted). "[W]hile a . . . lapse in time between the prior and present acts generally indicate a weaker case for admissibility under Rule 404(b) . . . remoteness . . . must be considered in light of the specific facts of each case[.]" *State v. Pabon*, 380 N.C. 241, 2022-NCSC-16, ¶ 63 (citations and internal quotation marks omitted).

¶ 14 The proffered evidence "must also be relevant to a material issue in the case." *State v. Thomas*, 268 N.C. App 121, 134, 834 S.E.2d 654, 664 (2019) (citation omitted), *disc. review denied*, 374 N.C. 434, 841 S.E.2d 531 (2020). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2021).

¶ 15 In the instant case, the challenged evidence includes a series of text messages ranging from October 2018 to February 2019. Defendant concedes that these text messages, generally speaking, illustrate defendant's interest in 1) purchasing marijuana from an unidentified source; or 2) possessing marijuana. The challenged photos include 1) defendant's face; 2) money; and 3) a photo of a crystalline substance dated 25 December 2018.

¶ 16 The State introduced the challenged evidence to prove motive, intent, and knowledge. The State argued the messages using colloquial terms for marijuana (i.e. "bud") and marijuana smoking devices (i.e. "blunt" and "bowl") illustrated that defendant was in possession of marijuana, not hemp, on the day of the offense. The State also argued the messages referencing giving some type of controlled substance to a woman, indicated defendant's intent to sell or deliver methamphetamine. With respect to the foregoing reasons, the trial judge gave the following limiting instruction:

> Now, ladies and gentlemen, evidence has been received which might show some possible criminal conduct on the part of the defendant. The phone–the phone records is what I'm talking about. This evidence was received solely for the following purposes: To show that the defendant had a motive for the commission of the crime which is charged in this case and/or to show that the defendant had the intent, which is a necessary element of some of the crimes charged in this case, and/or that the defendant had the knowledge, which is a necessary element of some of the crimes charged in this case. If you believe this evidence, the cell phone evidence, you may consider it, but only for the limited purposes for which I have just stated which it was received. You may not consider it for any other purpose. You may not convict the defendant in this case solely because of something he may have done in the past.

¶ 17 Initially, we note that the challenged text message evidence is relevant as it reflects defendant's guilty knowledge, an element of the charged crimes, of the substances he possessed on 29 March 2019. *See State v. Weldon*, 314 N.C. 401, 406, 333 S.E.2d 701, 704 (1985) (" '[W]here

guilty knowledge is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, *even though* the evidence reveals the commission of another offense by the accused.' ") (emphasis in original) (citation omitted). Because knowledge was at issue during trial, the challenged evidence is relevant as it corroborated the State's contention that the substance defendant possessed was indeed marijuana and not legal hemp. Therefore, admission of the text message portion of the extraction report was permissible with respect to knowledge.

¶ 18 Having determined the evidence was relevant, the next part of our Rule 404(b) analysis involves determining whether the trial court abused its discretion in admitting the evidence under Rule 403. Pursuant to Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2021). "An abuse of discretion occurs when a trial judge's ruling is manifestly unsupported by reason." *State v. Golden*, 224 N.C. App. 136, 145, 735 S.E.2d 425, 432 (citation and internal quotation marks omitted).

¶ 19 Here, the admission of the text message portion of the extraction report survives a Rule 403 determination. Prior to admitting the evidence, the trial court considered defendant's motion to exclude the challenged evidence and heard arguments from the State as well as defense counsel outside the presence of the jury. The trial judge asked clarifying questions and also considered the interval of time the digital data stemmed from. Defense counsel argued that since all, with the exception of one photo was undated, and there were no text messages in the immediate days preceding the offense, that the admission of the extraction report was simply indicative of someone using drugs, not selling them. The trial court was not persuaded by defendant's arguments, stating "weight [of the evidence] rather than credibility" was impacted by the lack of messages surrounding the date of the offense. Accordingly, the trial court's decision was supported by reason and does not reflect an abuse of discretion.

¶ 20 Although we find the challenged text message evidence is admissible, we reject the State's arguments on appeal that similarity and temporal connection are not necessary requirements to admit evidence under Rule 404(b). Our case law is clear that similarity and temporal proximity are the "twin north stars" to guide the evidentiary considerations inherent to a Rule 404(b) analysis. *Pabon*, ¶ 63.

¶ 21 With respect to the photographs that are also a portion of the extraction report, assuming *arguendo*, that the photographic evidence fails the Rule 404(b) analysis and was admitted in error, we find such error harmless because of the substantial amount of unchallenged evidence introduced, including: two scales, 2.81 grams of methamphetamine, five separate bags of methamphetamine, and items of marijuana paraphernalia.

¶ 22 Because we find that the trial court did not err in admitting the text messages and the admission of the photographic evidence was at most harmless error, defendant's argument is overruled.

B. Motion to Dismiss

¶ 23 Defendant also argues that the trial court erred in denying his motion to dismiss the charges of simple possession of marijuana, possession of marijuana paraphernalia, and maintaining a dwelling resorted to by persons using methamphetamine because there was insufficient evidence from which a reasonable jury could reach a conviction. For the following reasons, we agree in part, and vacate defendant's conviction for maintaining a dwelling resorted to by persons using methamphetamine.

¶ 24 We review the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citations omitted). Substantial evidence is defined as " 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d. 818 (1995) (citation omitted). "The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss." *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997).

¶ 25 On appeal, the question for this Court is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of the offense. If so, the motion is properly denied." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

1. Possession of Marijuana and Marijuana Paraphernalia

¶ 26 **[2]** Our statutes state that a person who possesses marijuana, a Schedule VI controlled substance, shall be guilty of a Class 3 misdemeanor. N.C. Gen. Stat. § 90-95(d)(4) (2021). Thus, in order to convict a defendant of marijuana possession, the State has the burden of proving "(1) that the defendant knowingly possessed a controlled substance and (2) that the substance was marijuana." *State v. Johnson*, 225 N.C. App. 440, 454-55, 737 S.E.2d 442, 451, *mandamus denied*, 366 N.C. 566, 738 S.E.2d 395 (2013) (citation omitted). It is also a separate Class 3 misdemeanor for a person "to possess with the intent to use, [marijuana] drug paraphernalia[.]" N.C. Gen. Stat. § 90-113.22(a) (2021).

¶ 27 At the time of defendant's alleged offenses, marijuana was defined as "all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin[.] . . . The term does not include industrial hemp as defined in [N.C. Gen. Stat. §] 106-568.51[.]" N.C. Gen. Stat. § 90-87(16) (2019). N.C. Gen. Stat. § 106-568.51 is no longer in effect and has since been replaced by Session Law 2022-32, which states the distinction between marijuana and hemp rests on the percentage of THC; hemp contains "no[] more than three-tenths of one percent (0.3%) [of THC] on a dry weight basis."

¶ 28 Here, defendant argues that by failing to introduce evidence of the chemical composition of the seized substance, the State is unable to provide substantial evidence that the substance found was marijuana, as opposed to legal hemp. Defendant is correct that the evidence at trial did not establish the chemical composition of the seized substance and thus did not definitively establish that the substance was marijuana. However, our analysis on appeal is limited to analyzing the sufficiency of the evidence in order to submit the case to the jury.

> In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed before the trial court contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Osborne, 372 N.C. 619, 626, 831 S.E.2d 328, 333 (2019) (citations and quotation marks omitted).

¶ 29 Thus, the distinction between the admissibility of the evidence and the sufficiency of the evidence is imperative. *See id.* at 630-31, 831 S.E.2d at 334-35. "[I]t simply does not matter whether some or all of the evidence contained in the record should not have been admitted[,] . . . all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction[.]" *Id.* at 630, 831 S.E.2d at 335 (citation omitted).

> For that reason, a reviewing court errs to the extent that it determines whether the evidence suffices to support a defendant's criminal conviction by ascertaining whether the evidence relevant to the issue of the defendant's guilt should or should not have been admitted and then evaluating whether the admissible evidence, examined without reference to the allegedly inadmissible evidence that the trial court allowed the jury to hear, sufficed to support the defendant's conviction.

Id. at 630, 831 S.E.2d at 336.

¶ 30 In *State v. Duncan*, 2022-NCCOA-699 (2022) (unpublished), this Court reiterated the principal established in *State v. Osborne*. There, as defendant in this case argues, the defendant alleged the trial court erred in denying her motion to dismiss marijuana possession and marijuana paraphernalia charges. *Duncan*, ¶ 12. In *Duncan*, the defendant contended an officer's opinion identifying a substance as marijuana, as opposed to hemp, was insufficient to raise more than "a suspicion or conjecture of [her] guilt[,]" due to a lay person's inability to distinguish between marijuana and hemp. *Id.* ¶ 14. In that case, the officer's lay opinion was the only evidence identifying the substance found as marijuana. *Id.* ¶ 23. Because our review focused on the sufficiency of evidence to support a criminal conviction, we declared, "[the officer's] lay opinion identification of marijuana must be considered when evaluating all of the evidence in the light most favorable to the State." *Id.* ¶ 26. Based on the officer's testimony, we found the State presented sufficient evidence that the defendant possessed marijuana and marijuana paraphernalia. *Id.* We find the reasoning of *Duncan* instructive.

¶ 31 In the case *sub judice*, we are persuaded based upon our review of all the evidence introduced under the *Osborne* and *Duncan* analysis that when viewed in the light most favorable to the State, the State

produced sufficient evidence establishing the substance was marijuana and the trial court did not err in denying defendant's motion to dismiss. "The trial court's function is to determine whether the evidence allows a '*reasonable inference*' to be drawn as to the defendant's guilt of the crimes charged." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citation omitted) (emphasis in original). The trial court need only determine "whether the evidence presented constitutes substantial evidence" and thus "is a question of law for the court." *Id.* at 66, 296 S.E.2d at 652 (citation omitted). It is for the jury to "weigh evidence, assess witness credibility, [and] assign probative value to the evidence . . . and determine what the evidence proves or fails to prove." *State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012) (citation omitted). Our established precedent illustrates

> the great deference which our courts, whether at trial or appellate level, must give to the vital role of the citizens of our state's local communities who are selected to serve as jurors. Once the trial court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then *it is for the jury to decide* whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

State v. Taylor, 379 N.C. 589, 2021-NCSC-164, ¶ 51 (citation omitted) (quotation marks and brackets omitted) (emphasis in original).

¶ 32 Here, the State's evidence included digital data indicating that the seized substance was marijuana; defendant referred to it as "bud," and he attempted to procure "bud" from someone he was messaging. The substance was also found with methamphetamine, an illegal substance, and found within single plastic bags, commonly associated with drugs. Additionally, the arresting officer initially identified the seized substance as marijuana. That the officer later equivocated as to identity of the substance goes to the weight the jury should give the evidence, not to whether it is sufficient to take the case to the jury. This evidence is sufficient to allow the jury to determine whether the substance was marijuana or hemp. With respect to defendant's argument regarding the necessity of a chemical analysis of the substance to exclude hemp as a potential substance, our courts have never held this is necessary and we decline to establish a new requirement in this case. Because our review is limited to the sufficiency of the evidence to support a criminal conviction, the trial court did not err in denying defendant's motion to dismiss the marijuana-related charges.

2. Maintaining a Dwelling Resorted to by Persons Using Methamphetamine

¶ 33 **[3]** Defendant also contends it was error for the trial court to deny his motion to dismiss maintaining a dwelling resorted to by persons using methamphetamine for insufficient evidence. We agree.

¶ 34 Our statutes declare "it shall be unlawful for any person . . . [t]o knowingly keep or maintain any . . . dwelling house . . . which is resorted to by persons using controlled substances[.]" N.C. Gen. Stat. § 90-108(a)(7) (2021). Thus, in order to survive a motion to dismiss, the State has the burden of providing substantial evidence that defendant intentionally allowed others *to resort to* his house to use controlled substances. *State v. Simpson*, 230 N.C. App. 119, 121, 748 S.E.2d 756, 759 (2013) (emphasis added).

¶ 35 Here, the State failed to establish that anyone outside of defendant, used defendant's home to consume controlled substances. Defendant cannot "resort to" his own residence. *Id.* at 122, 748 S.E.2d at 759. In an effort to prove defendant committed the offense charged, the State attempts to rely solely on ambiguous text messages that do not explicitly refer to methamphetamine nor prove defendant *knowingly allowed others* to use his home in such manner. This argument is not convincing as these text messages fail to rise above the level of creating a mere suspicion of methamphetamine use. As this Court has established previously, "we do not believe the General Assembly intended 'resorted to,' as used in N.C. Gen. Stat. § 90-108(a)(7), to include persons who own the [dwelling] at issue." *Id.*

¶ 36 Because we find that the State failed to provide any, much less substantial evidence, we vacate defendant's conviction of maintaining a dwelling resorted to by persons using methamphetamine. As defendant's third issue on appeal related to the jury instruction given for this offense, we do not reach that issue as we have vacated that conviction.

¶ 37 Remanding defendant's case for resentencing on the vacated conviction is not necessary, however, since all of the offenses for which defendant was convicted was consolidated into a single judgment and defendant received the lowest possible sentence in the mitigated range. "[W]e do not remand for resentencing where [d]efendant has already received the lowest possible sentence[.]" *State v. Cromartie*, 257 N.C. App. 790, 797, 810 S.E.2d 766, 772 (2018) (citation omitted). Remanding is necessary after arresting judgment only if we are "unable to determine what weight, if any, the trial court gave to each of the separate convictions[.]" *Id.* (quoting *State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124,

127-28 (1990)). However, we arrest judgment "so as to avoid any collateral consequences." *Cromartie*, at 797, 810 S.E.2d at 772.

¶ 38 Accordingly, we arrest judgment on defendant's maintaining a dwelling resorted to by persons using controlled substances conviction.

III. Conclusion

¶ 39 For the reasons set forth above, we conclude the trial court erred in denying defendant's motion to dismiss maintaining a dwelling resorted to by persons using methamphetamine, in all other respects we find no error.

NO ERROR IN PART, VACATED AND ARRESTED IN PART.

Judges MURPHY and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
COREY LEE OWENS

No. COA22-517

Filed 17 January 2023

1. Criminal Law—prosecutor's opening statement—forecast of evidence not introduced—not grossly improper

In a trial for taking indecent liberties with a child, the trial court was not required to intervene ex mero motu during the State's opening statement (to which defendant did not object) or to instruct the jury to disregard that opening statement, in which the State forecast evidence from a witness who the State said would corroborate location details that had been described by the victim but who did not testify at trial. The prosecutor's statements were not so grossly improper or prejudicial as to warrant a new trial; further, the trial court properly instructed the jury that opening statements did not constitute evidence and the State's failure to introduce forecast evidence could have been addressed by defense counsel at closing.

2. Evidence—expert testimony—indecent liberties trial—consistency of victim's statements—credibility vouching

In a trial for taking indecent liberties with a child, there was no plain error in the trial court's allowing a sheriff's office investigator

to testify regarding her opinion as to how consistent the child victim was when recounting defendant's conduct. The investigator's testimony did not constitute impermissible vouching of the victim's credibility because she did not substantiate or corroborate defendant as the perpetrator, and she did not testify regarding the victim's propensity for truthfulness.

Appeal by defendant from judgment entered 6 October 2021 by Judge Lisa C. Bell in Rutherford County Superior Court. Heard in the Court of Appeals 29 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

William D. Spence for defendant-appellant.

TYSON, Judge.

¶ 1 Corey Lee Owens ("Defendant") appeals from a jury's verdict finding him guilty of indecent liberties with a child and attaining the status of a habitual felon. Our review shows no error.

I. Background

¶ 2 Defendant engaged in a romantic relationship with Tina Williams between 2009 and 2012. Defendant lived in a single-wide mobile home with Patrick Harrison in 2011. Williams' daughter, "Sue," was between four and seven years old during the period Defendant and Williams dated. *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of minor). Defendant would babysit Sue, while Williams was working on the weekends or when Sue was not in school or at home.

¶ 3 In 2011, Williams left Sue with Defendant. Sue fell asleep on Defendant's couch. Defendant woke Sue, brought her into the bedroom of the trailer, and told her to remove her clothes. Defendant removed his clothes. Defendant grabbed a bottle of lubricant and squirted liquid onto Sue's hands. Defendant told Sue to rub his penis. Sue testified Defendant's penis became hard.

¶ 4 Sue testified Defendant told her to lay down, turn on her side, and laid on his side up against her. Defendant placed his penis between the crack of her buttocks and began pumping her. When Defendant had finished, he told Sue to get dressed. He got down on his knees and asked Sue if she wanted to play a game called "Secrets," which Defendant said

he had played with Williams, and also told Sue not to tell the "secret" to anybody. Sue testified Defendant did not threaten her nor insert his penis inside of either her vagina or anus.

¶ 5 Sue testified the shaft of Defendant's penis had "two bumps." Sue's Mother, Williams, testified Defendant had two "ball bearing" implants inserted near the top of the shaft of his penis during the entirety of their relationship.

¶ 6 Sue later became friends with Defendant's biological daughter in the sixth grade. Sue testified she told Defendant's daughter and another friend the details of this incident, which had occurred five years earlier. Sue did not remember whether she had identified Defendant as the person who committed these acts to his daughter. Defendant's daughter told Sue to tell an adult about the acts.

¶ 7 Sue testified her grandparents had asked her on multiple times in the two preceding years whether Defendant had "done anything" to her, but she always denied it. The summer after completing the sixth grade, Sue told her mother, Williams, about the incident. Williams did not force Sue to report the incident and she left the decision to Sue. While in the seventh grade, Sue asked Williams to report the incident to law enforcement, which she did.

¶ 8 Rutherford County Sheriff's Investigator Julie Greene arranged an interview for Sue at the Children's Advocacy Center in March 2018. Greene viewed Sue's interview through a live video feed in a monitoring room.

¶ 9 Greene spoke with Defendant. Greene asked Defendant how Sue would have been able to describe the appearance of his penis. Defendant told Greene there was no reason for Sue to be able to describe his penis. Greene asked how Sue could have known about the "bumps" on Defendant's penis and whether those "bumps" existed before his relationship began with Williams. Defendant confirmed he had two "bumps" or "ball bearings" implanted in his penis prior to his relationship with Williams. Defendant also told Greene he had given Williams graphic drawings, letters, and photographs of his body during their relationship. Defendant denied doing anything sexually inappropriate with Sue.

¶ 10 Defendant was indicted for one count of indecent liberties with a child and for attaining habitual felon status on 5 June 2019. While Defendant was awaiting trial, he sent his own daughter a letter. In the letter Defendant sought her assistance in a plan to discredit Sue's credibility. He urged his daughter to report Sue had made up the allegations

against him to protect Williams. Defendant specifically asked for his daughter's involvement to "betray" Sue and instructed her to burn the letter after she had read it. A redacted version of the letter was read into evidence during Defendant's trial without objection.

¶ 11 Defendant was convicted of one count of taking indecent liberties with a child, a class F felony, on 6 October 2021. Defendant pleaded guilty to attaining the status of being a habitual felon, which raised his taking indecent liberties with a child conviction from a class F felony offense class level punishment to a class C felony offense class level punishment.

¶ 12 Defendant was sentenced as a prior record level IV offender to an active term of 96 to 125 months. The trial court also entered a permanent no contact order and ordered Defendant to register as a sex offender for life, upon his release from prison. Defendant appeals.

II. Jurisdiction

¶ 13 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2021).

III. Issues

¶ 14 Defendant argues the trial court erred by failing to intervene *ex mero motu* during the State's opening statement and argues the trial court plainly erred by allowing a witness to vouch and bolster the victim's testimony.

IV. State's Opening Statement

¶ 15 **[1]** Defendant argues the trial court erred by failing to declare a mistrial *ex mero motu*, or it alternatively erred by not instructing the jury to disregard the State's opening statement. Defendant failed to object to the challenged statement at trial.

A. Standard of Review

¶ 16 When a defendant fails to object to portions of an opening statement, our review is limited to an examination of whether the trial court was required to intervene *ex mero motu*. *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685 (1986). "Under this standard, [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." *State v. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (citation and quotation marks omitted).

B. Analysis

¶ 17 In her opening statement, the prosecutor stated:

> You are going to hear from Patrick Harrison. He was the defendant's roommate in 2011 at their trailer in Ellenboro when this happened. You are going to hear from Patrick some details. Now, he wasn't around a lot. He wasn't there when this happened to [Sue], but you're going to hear details from him about their trailer and the set up in the room that this happened to show that it is consistent with [Sue's] testimony, specifically that this happened on a mattress on the floor in the back room. And he will corroborate that and say that there was a room like that back in 2011.

Harrison never testified at trial. Defendant contends and argues these statements were facts and matters outside of the record.

¶ 18 To determine whether a prosecutor's statement was grossly improper, this Court must examine the context in which the remarks were made and the factual circumstances to which they refer. *See State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998); *State v. Mills*, 248 N.C. App. 285, 291, 788 S.E.2d 640, 645 (2016).

¶ 19 Our Supreme Court has applied a two-step analysis on prosecutor's statements: "(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) (citation omitted). In order to demonstrate prejudicial error, a defendant must show: "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 . . . is upon the defendant." N.C. Gen. Stat. § 15A-1443(a) (2021).

¶ 20 The purpose of the opening statement is to forecast the evidence likely to be admitted in the case. *Gadden*, 315 N.C. at 417, 340 S.E.2d at 685. "[T]rial counsel [is] granted wide latitude in the scope of jury argument[.]" *State v. Thomas*, 350 N.C. 315, 360, 514 S.E.2d 486, 513 (1999) (citation omitted).

¶ 21 Here, the trial court properly instructed the jury that the party's opening statements are not evidence. While opening statements are merely a "forecast [of] the evidence," failure to deliver evidence as

promised in the opening is fair game for the opposing party to argue in the closing. *See Gadden*, 315 N.C. at 417, 340 S.E.2d at 685.

¶ 22 Defendant further asserts the trial court erred by allowing the corroboration Harrison might have offered. However, the State did not assert Harrison would corroborate the alleged abuse had occurred, only to potentially state Defendant's room in the mobile home contained a mattress on the floor in the back room in 2011 as Sue had described.

¶ 23 Defendant failed to object and did not move to strike. The State did not make improper statements to the jury in its opening argument. Defendant has failed establish the State's opening statement was "grossly improper" and prejudicial to warrant a new trial. *Huey*, 370 N.C. at 179, 804 S.E.2d at 468. Defendant failed to show the State's comments "so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted). Presuming, without deciding, improper statements were made by the State, the trial court did not commit reversible error by failing to intervene *ex mero motu*. The statements were not so "grossly improper" and prejudicial to Defendant as to require the trial court's intervention on its own motion. *Huey*, 370 N.C. at 179, 804 S.E.2d at 468. *Waring*, 364 N.C. at 499, 701 S.E.2d at 650.

V. Alleged Bolstering

¶ 24 **[2]** Defendant argues the trial court committed plain error by allowing Greene to improperly vouch for or bolster Sue's credibility. Defendant concedes his trial counsel also failed to object to the testimony he now challenges and the issue is not preserved at trial and on appeal. Unpreserved evidentiary issues are reviewed for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

A. Standard of Review

¶ 25 "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

¶ 26 This Court's review under plain error is to be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" to overcome dismissal for a defendant's failure to preserve. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted). To constitute plain error, Defendant carries and maintains the

burden to show "not only that there was error, but that absent the error, the jury probably would have reached a different result to demonstrate prejudice" and for this Court to reverse the judgment. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

B. Analysis

¶ 27 Defendant argues the following two lines of questioning during the State's direct examination of Greene constitutes impermissible bolstering:

> [The State]: Was her disclosure on that day consistent with what you heard her testify to today?
>
> [Greene]: It was.
>
> . . .
>
> [The State]: Each time that you have heard [Sue] disclose what happened, has she been consistent in her disclosure?
>
> [Greene]: Yes, ma'am.

¶ 28 The Supreme Court of North Carolina has held "[t]he jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial–determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) (citation omitted). "It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citation omitted).

¶ 29 This Court and our Supreme Court have repeatedly admonished: "a witness may not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010). In *Giddens*, this Court has held reversible error occurs when a DSS child protective services investigator testified the defendant "was substantiated as the perpetrator." *Id*. at 118, 681 S.E.2d at 506.

¶ 30 "In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Chandler*, 364 N.C. 313, 318, 697 S.E.2d 327, 331 (2010) (citations omitted).

¶ 31 Unlike in *Giddens*, the testimony of Greene did not substantiate or corroborate Defendant as the perpetrator. The State asked if Sue's

"disclosure" was consistent. Our Supreme Court has expressed concern and has warned the State of its gross use of "disclosure" in a context to vouch or bolster a prosecuting witness upon proper objection. *See State v. Betts*, 377 N.C. 519, 524, 2021-NCSC-68, ¶19, 858 S.E.2d 604-05 (2021) ("Even if it were error for the trial court to admit testimony of the State's witness who used the term 'disclose,' defendant has not shown plain error . . . . Defendant has not shown that the use of the word 'disclose' had a probable impact on the jury's finding that he was guilty." (citation omitted)). Given the context of the testimony and the limited questions asked by the State, Greene's testimony did not vouch for Sue's credibility to demonstrate error and prejudice under plain error review. *Id.* at 525, 2021-NCSC-68, ¶21, 858 S.E.2d at 605.

¶ 32 Greene did not testify that Sue "was believable, had no record of lying, and had never been untruthful." *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988). Greene testified Sue's statements and accusations remained consistent. Defendant's argument under plain error review is overruled. *Betts*, 377 N.C. at 523, 858 S.E.2d at 605.

VI. Conclusion

¶ 33 The trial court did not err when it failed to intervene *ex mero motu* in the State's opening argument or by failing to instruct the jury to disregard the State's opening statement in the absence of an objection and motion to strike.

¶ 34 The trial court did not err in admitting Greene's testimony about consistency in Sue's accusations without objection. Under plain error review, this testimony did not improperly bolster or vouch for the victim's credibility.

¶ 35 Defendant received a fair trial, free of plain or prejudicial error he preserved and argued. We find no error in the jury's verdict, Defendant's plea, or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 JANUARY 2023)

GILLELAND v. ADAMS 2023-NCCOA-9 No. 21-691	Lincoln (19CVD821)	Affirmed
HWANG v. CAIRNS 2023-NCCOA-10 No. 22-31	Durham (18CVS2942)	Affirmed; Cross-Appeal Dismissed.
IN RE M.W. 2023-NCCOA-11 No. 22-21	Cumberland (20JA252) (20JA253)	Affirmed In Part, Reversed In Part, Vacated In Part And Remanded.
STATE v. ABRAMS 2023-NCCOA-12 No. 22-347	Rutherford (19CRS50950) (20CRS92-93)	Affirmed
STATE v. ANDERSON 2023-NCCOA-13 No. 22-379	Cabarrus (21CRS52152)	No Error.
STATE v. BOYKIN 2023-NCCOA-14 No. 22-542	Sampson (15CRS51148)	Affirmed.
STATE v. BRYAN 2023-NCCOA-15 No. 22-184	New Hanover (19CRS57521) (19CRS58143) (20CRS52616)	Vacated and Remanded
STATE v. COX 2023-NCCOA-16 No. 22-628	Wake (19CRS201042) (19CRS203119) (19CRS703266)	No Error
STATE v. MESSER 2023-NCCOA-17 No. 22-551	McDowell (20CRS280)	No Error
STATE v. THOMAS 2023-NCCOA-18 No. 22-513	Pitt (16CRS57635-38)	Dismissed.
YOUNG v. CITY OF DURHAM 2023-NCCOA-19 No. 22-578	Durham (21CVS2194)	Affirmed

ABBOTT v. ABERNATHY

[287 N.C. App. 522 (2023)]

JAMES CHANDLER ABBOTT, ET AL., PLAINTIFFS
v.
MICHAEL C. ABERNATHY, ET AL., DEFENDANTS

No. COA22-162

Filed 7 February 2023

1. Appeal and Error—preservation of issues—failure to argue element of claim—failure to support argument—failure to raise issue before trial court

In an easement dispute, defendants failed to preserve a number of issues for appellate review: the affirmative defense of laches, by failing to argue the prejudice element of the claim on appeal; adverse possession and the statute of limitations, by failing to cite any case law in support of their arguments; extinguishment of plaintiffs' claims by the Marketable Title Act, the affirmative defense of lack of a dominant estate, and the "material issue" of the easement's precise location, by failing to raise the issues before the trial court; and the grantor's intent, by expressly disclaiming any argument on the issue before the trial court.

2. Easements—appurtenant—access to neighborhood footpaths—standing

In a dispute concerning an appurtenant easement along the border of defendants' property for the use of neighborhood lot owners as part of a larger footpath network throughout the neighborhood, plaintiffs had standing to bring an action, as lot owners in the neighborhood, to enforce their rights to use the easement. The appellate court rejected defendants' argument that plaintiffs lacked standing because they did not reside on any parcels adjoining the easement.

3. Easements—abandonment—unequivocal external act—failure to purchase property connected to easement

In a dispute concerning an appurtenant easement along the border of defendants' property for the use of neighborhood lot owners as part of a larger footpath network throughout the neighborhood, even assuming that the homeowners' association's refusal to purchase a floodplain connected to the easement evinced an intention to abandon the easement, defendants failed to present any evidence of an unequivocal external act by plaintiffs (lot owners within the neighborhood) in furtherance of an intention to abandon the easement and therefore failed to create a genuine issue of material fact that plaintiffs had abandoned the easement.

4. Easements—overburdening and misuse—original scope—pedestrian walkway for neighborhood residents

In a dispute concerning an appurtenant easement along the border of defendants' property for the use of neighborhood lot owners as part of a larger footpath network throughout the neighborhood, the fact that the city purchased the undeveloped floodplain connected to the easement and converted it into a public greenway did not cause plaintiff lot owners' proposed use of the easement to constitute overburdening and misuse. Plaintiffs' proposed use of the easement as a footpath for neighborhood residents to access the greenway fell squarely within the easement's scope as a pedestrian walkway.

5. Easements—dedication of land for public use—connection to public greenway—use of easement by non-residents—trespass

In a dispute concerning an appurtenant easement along the border of defendants' property for the use of neighborhood lot owners as part of a larger footpath network throughout the neighborhood, the appellate court rejected defendants' argument that plaintiffs were attempting to force a public dedication of defendants' land. Although the easement became connected to a government-owned greenway after the city purchased the floodplain connected to the easement, plaintiffs disclaimed any intent to offer the easement to the public and instead stated that the use of the easement by persons who were not residents of the neighborhood would constitute trespassing.

Appeal by defendants Rodney and Lynne Worthington from order entered 9 November 2021 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 September 2022.

Rosenwood, Rose & Litwak, PLLC, by Erik M. Rosenwood, for plaintiffs-appellees.

Arnold & Smith, PLLC, by Paul A. Tharp, for defendants-appellants Rodney and Lynne Worthington.

ZACHARY, Judge.

Defendants Rodney and Lynne Worthington appeal from the trial court's order denying their motion for summary judgment and granting

Plaintiffs' motions for summary judgment and declaratory judgment. After careful review, we affirm.

I. Background

The parties are residents of Park Crossing, a neighborhood development in Charlotte that borders Little Sugar Creek. Park Crossing was developed in the early 1980s by First Carolina Investors of Mecklenburg, Inc., and it "contains approximately 605 homes, along with a swim club, tennis facility, and other amenities." The recorded plats associated with Park Crossing show four easements burdening certain properties; the easements were part of "pedestrian walkway systems" intended to "link the development without the necessity of pedestrian activity along the vehicular roadways" to a "floodway fringe area"—"swampy" land adjacent to the neighborhood. In 2000, the developer offered to sell the "floodway fringe area" to Park Crossing's owners' association, which the association declined. In 2001, the developer sold the land to Mecklenburg County. Thereafter, the City of Charlotte began to develop the Little Sugar Creek Greenway, which included the floodplain. The Greenway contains paved access points to various neighborhoods along its route.

The Worthingtons purchased their home in Park Crossing in 1998. The deed to the Worthingtons' property states that the title is subject to "[a]ll enforceable easements, restrictions and conditions of record." Of the four easements depicted in the Park Crossing development plats, one is a ten-foot-wide easement along the border of the Worthingtons' property, five feet of which crosses the Worthingtons' property (the "Easement"). The Easement is depicted on plats recorded at Map Book 20, Page 421 and Map Book 20, Page 499, Mecklenburg County Registry.

Plaintiffs allege that after the City completed the Greenway, Park Crossing residents increasingly used the four easements to access it. As foot traffic grew, some owners of the properties burdened by the easements "began intentionally obstructing access to the Greenway [pedestrian easements], including erecting and placing obstructions composed of ropes, fencing, and other material designed to interfere with use of the [pedestrian easements] across their property." Some also called the police to report that residents were trespassing on their property when the residents used the easements.

On 23 August 2019, a small group of Park Crossing homeowners filed a complaint in Mecklenburg County Superior Court against the Worthingtons and several other owners of Park Crossing development property burdened by the pedestrian easements. The complainants

sought, *inter alia*, a declaratory judgment "in their favor as to the enforceability" of the easements, as well as injunctive relief to prevent the Worthingtons and other defendants "from constructing any further obstacles, traps, obstructions, fences, and the like" restricting access to the easements.

On 18 December 2019, some of the original defendants filed a motion to dismiss pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure, arguing that the original plaintiffs had failed to add all necessary parties to this action by neglecting to include all homeowners in Park Crossing as parties. The trial court entered an order on 4 February 2020 in which it concluded that "all record owners of lots within Park Crossing are 'necessary parties' to this litigation pursuant to Rule 19 of the North Carolina Rules of Civil Procedure." The court stayed the action and granted the original plaintiffs leave to amend their complaint to join the necessary parties.

The original plaintiffs then sent each Park Crossing homeowner a package that included a copy of the trial court's order, a letter from the original plaintiffs' counsel, and a "Lot Owner Preference Form." The Lot Owner Preference Form allowed each owner to choose to take part in the action either as a plaintiff, a defendant, or a non-participating defendant (a "default defendant"). Those who chose not to participate in the litigation were served with a copy of the lawsuit and named as default defendants. Approximately 350 Park Crossing owners chose to participate as plaintiffs, while roughly 470 others were joined as default defendants in the suit. None of the owners chose to join the action as defendants.

On 8 June 2020, the original and newly added plaintiffs (collectively, "Plaintiffs") filed an amended complaint. In the amended complaint, Plaintiffs sought a declaratory judgment establishing the rights of all Park Crossing residents to use the easements; Plaintiffs also requested injunctive relief preventing the defendants from "interfer[ing] with the use and enjoyment of the" easements. On 17 August 2020, the defendants filed an answer and raised several affirmative defenses.

On 17 November 2020, Plaintiffs filed a motion for summary judgment, and on 29 March 2021, filed an amended motion for summary judgment. A small group of defendants, including the Worthingtons, filed a cross-motion for summary judgment "as to all causes of action" alleged in Plaintiffs' amended complaint on 29 March 2021.

On 8 July 2021, Plaintiffs filed motions for entry of default and judgment by default against the default defendants. On 8 September 2021,

the trial court granted Plaintiffs' motions, concluding that the four pedestrian easements were valid and "for the benefit of each resident of Park Crossing[.]"

The parties' summary judgment motions came on for hearing on 31 August 2021 in Mecklenburg County Superior Court. By the time of the hearing, Plaintiffs had "reached settlements with everybody except the Defendants Worthington." The hearing proceeded, with the Worthingtons contending that the Easement terminated as a matter of law once Mecklenburg County purchased the land to which the Easement leads, as the Easement "has now become a public way" without the Worthingtons' consent. The Worthingtons also asserted that Plaintiffs lacked standing to bring this action, and maintained that the Easement was abandoned. Finally, the Worthingtons argued before the trial court that Plaintiffs' requested use of the Easement constituted overburdening. Plaintiffs contended that the Easement was valid, not abandoned, and for the benefit of all Park Crossing residents.

On 9 November 2021, the trial court entered an order granting declaratory judgment and summary judgment in favor of Plaintiffs, and denying the Worthingtons' motion for summary judgment. The court found that "[t]he express language and clear depictions in the Park Crossing maps and plats . . . recorded by the [d]eveloper dedicate the [pedestrian easements] as appurtenant easements to and for the benefit of each resident of Park Crossing." The court ordered that the Worthingtons remove any obstructions to the Easement and refrain from restricting residents' access to the Easement in the future.

The Worthingtons timely appealed the trial court's order.

II. Appellate Jurisdiction

As a preliminary matter, we address this Court's jurisdiction to review the Worthingtons' appeal of the trial court's order granting Plaintiffs' motions for summary judgment and declaratory judgment, and denying the Worthingtons' motion for summary judgment.

Generally, this Court only hears appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2) (2021). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). By contrast, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381. With

few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974). "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 652, 654 S.E.2d 76, 78–79 (2007) (citation omitted), *petition for disc. review withdrawn*, 362 N.C. 470, 665 S.E.2d 741 (2008).

Although the trial court's order in the instant case involved only the Worthingtons as defendants, to the exclusion of the suit's numerous other defendants, the order on appeal nevertheless constitutes a final judgment in the matter. When the parties' motions came on for hearing, the Worthingtons were the only non-default defendants with whom Plaintiffs had not entered into a settlement agreement. Shortly after the motions hearing, the trial court entered default and granted default judgment against the default defendants. Hence, Plaintiffs and the Worthingtons were the sole remaining parties when the trial court entered the order from which the Worthingtons appeal. Furthermore, the court granted Plaintiffs' motion for declaratory judgment and granted summary judgment in favor of Plaintiffs on all of their claims. As such, the trial court's order "dispose[d] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey*, 231 N.C. at 361–62, 57 S.E.2d at 381. Accordingly, we conclude that this Court has jurisdiction over this matter.

III. Preservation of Issues

[1] The Worthingtons advance several arguments on appeal challenging the trial court's order. They argue that the trial court erred by granting Plaintiffs' motion for summary judgment because (1) Plaintiffs lacked standing to enforce the Easement; (2) Plaintiffs abandoned the Easement; (3) Plaintiffs' proposed use of the Easement constitutes overburdening and misuse; (4) the Worthingtons have not dedicated their lands for public use; (5) the doctrine of laches barred Plaintiffs' action; (6) adverse possession and the statute of limitations barred Plaintiffs' claims; (7) the Marketable Title Act extinguished Plaintiffs' claims; (8) the grant of the Easement was void because it lacked a description of the dominant estate; (9) the material issue of the physical location of the Easement precluded summary judgment; and (10) Plaintiffs' proposals are inconsistent with the grantor's intent. However, the Worthingtons failed to preserve several of these arguments for appellate review.

"Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App.

P. 28(b)(6); *see, e.g.*, *K2HN Constr. NC, LLC v. Five D Contr'rs, Inc.*, 267 N.C. App. 207, 213, 832 S.E.2d 559, 564 (2019) (determining that the plaintiff abandoned issues on appeal from summary judgment where it failed to establish "(1) what the elements of [its] claims are; or (2) how the evidence demonstrates the existence of any genuine issue of material fact"); *Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjust. for Town of Matthews*, 213 N.C. App. 364, 368, 713 S.E.2d 511, 514 (2011) (concluding that the appellants "abandoned [an] issue by failing to provide any reason or argument in support of their assertion"); *Dillingham v. Dillingham*, 202 N.C. App. 196, 203, 688 S.E.2d 499, 508 (2010) ("Though [the] respondent cites this Court to the legal definition of the equitable defense of laches in his brief, he fails to provide any argument as to why this defense should apply to the present case. Thus, his assignment of error . . . is deemed abandoned."); *Williams v. HomEq Servicing Corp.*, 184 N.C. App. 413, 420, 646 S.E.2d 381, 385 (2007) (concluding that six of the plaintiff's arguments pursuant to nine sections of the pertinent statutes were "deemed abandoned pursuant to N.C. R. App. P. 28(b)(6)" where he "only specifically argue[d] in his brief" three sections), *appeal withdrawn*, 362 N.C. 374, 662 S.E.2d 552 (2008).

In addition, "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 348, 712 S.E.2d 328, 332 (citation and internal quotation marks omitted) (concluding that the plaintiffs could not rely upon a theory on appeal that was not raised in the trial court where the plaintiffs sought reversal of summary judgment), *disc. review denied*, 365 N.C. 357, 718 S.E.2d 391 (2011). The principle articulated in *Piraino*—that a party may not rely upon a different theory on appeal than the one presented to the trial court—is well established. *See, e.g.*, *Cobb v. Pa. Life Ins. Co.*, 215 N.C. App. 268, 280, 715 S.E.2d 541, 551 (2011) ("[The plaintiff's] argument on section 58-63-15(11)(n) was not presented to the trial court, and [he] is barred from raising a new theory on appeal to defeat summary judgment."); *Frank v. Funkhouser*, 169 N.C. App. 108, 114, 609 S.E.2d 788, 793 (2005) (declining to review the plaintiff's argument that summary judgment should be reversed based on a theory not included in the complaint and not argued to the trial court in opposing summary judgment); *Holroyd v. Montgomery Cty.*, 167 N.C. App. 539, 546, 606 S.E.2d 353, 358 (2004) (concluding that "[f]ailure to plead or argue a theory of recovery before the trial court precludes the assertion of that theory on appeal" where the plaintiff sought reversal of summary judgment based on a theory not included in the complaint (citation omitted)), *disc. review and cert.*

denied, 359 N.C. 631, 613 S.E.2d 690 (2005); *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 490, 516 S.E.2d 176, 180 (1999) (concluding that a party "is not permitted on appeal to advance new theories or raise new issues in support of [its] opposition to the [summary judgment] motion"), *disc. review and cert. improvidently allowed*, 351 N.C. 342, 525 S.E.2d 173 (2000).

This principle is also incorporated in Rule 10 of the Appellate Rules, which provides that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Importantly, the complaining party must also "obtain a ruling upon [its] request, objection, or motion" from the trial court. *Id.* Our Supreme Court explained the rationale behind this Rule:

> The requirement expressed in Rule 10[(a)(1)] that litigants raise an issue in the trial court before presenting it on appeal goes to the heart of the common law tradition and [our] adversary system. This Court has repeatedly emphasized that Rule 10[(a)(1)] prevent[s] unnecessary new trials caused by errors that the trial court could have corrected if brought to its attention at the proper time. Rule 10 thus plays an integral role in preserving the efficacy and integrity of the appellate process.
>
> We have stressed that Rule 10[(a)](1) is not simply a technical rule of procedure but shelters the trial judge from an undue if not impossible burden.

Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008) (citations and internal quotation marks omitted).

Here, the Worthingtons properly preserved their arguments regarding standing, abandonment, overburdening and misuse, and public use. However, for the reasons explained below, we conclude that they have not sufficiently preserved the remaining arguments for appellate review.

First, although the Worthingtons asserted the affirmative defense of laches in their answer, they have abandoned any argument on appeal concerning this issue by failing to argue the prejudice element of the claim. To successfully assert the affirmative defense of laches, a defendant must establish that (1) "a delay of time has resulted in some change

in the condition of the property or in the relations of the parties"; (2) the delay is "unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches"; and (3) "the claimant knew of the existence of the grounds for the claim." *Johnson v. N.C. Dep't of Cultural Res.*, 223 N.C. App. 47, 55, 735 S.E.2d 595, 600 (2012) (citation omitted), *disc. review denied*, 366 N.C. 566, 738 S.E.2d 377 (2013). "The 'prejudice element' of the laches doctrine refers to whether a defendant has been prejudiced in its ability to defend against the plaintiff's claims by the plaintiff's delay in filing suit." *Id.* at 56, 735 S.E.2d at 601 (citation omitted). On appeal, the Worthingtons assert that "[t]he prejudice Defendants will suffer is manifest. They stand to lose their privacy, the quiet and peaceful enjoyment of their land, and their property value." To the extent that the Worthingtons advance the doctrine of laches on appeal, they have stated no reason or argument in support of the prejudice element for that issue in their brief. Accordingly, this issue is abandoned. *See* N.C. R. App. P. 28(b)(6); *see also*, *e.g.*, *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 650, 801 S.E.2d 150, 156 (2017) (concluding that where an appellant's brief "does not contain any substantive arguments on [an issue presented], this issue has been abandoned").

The Worthingtons have similarly abandoned their argument that Plaintiffs' claims are barred by adverse possession and the statute of limitations. In support of this issue, the Worthingtons contend in their appellate brief: "Plaintiffs' claims are subject to the twenty-year statute of limitations provided in N.C. Gen. Stat. § 1-40. Plaintiffs' failure to bring a claim regarding their purported rights respecting the easements within a twenty-year period following actual or constructive notice of their claims (35-40 years ago) precludes this action." However, the Worthingtons fail to cite any case law in support of this claim. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein. Th[is argument is] deemed abandoned by virtue of N.C. R. App. P. 28(b)(6)." *Lasecki v. Lasecki*, 257 N.C. App. 24, 47, 809 S.E.2d 296, 312 (2017) (citation omitted); *see* N.C. R. App. P. 28(b)(6).

Furthermore, the Worthingtons have failed to preserve their argument that the Marketable Title Act extinguished Plaintiffs' claims. The Worthingtons did not raise any argument concerning the Marketable Title Act below, and thus never obtained the requisite ruling from the trial court. *See* N.C. R. App. P. 10(a)(1). Nor did they argue the affirmative defense of lack of a dominant estate before the trial court. In that "the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts" when "a theory argued on

appeal was not raised before the trial court," *Piraino*, 211 N.C. App. at 348, 712 S.E.2d at 332 (citation and internal quotation marks omitted), the Worthingtons are prohibited from now asserting these arguments on appeal.

Likewise, the Worthingtons' argument regarding the "material issue" of the Easement's location is unpreserved: the Worthingtons did not dispute the location of the Easement before the trial court, and a party "cannot create an issue of material fact for summary judgment by raising it for the first time on appeal." *Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 635 n.1, 870 S.E.2d 269, 273 n.1, *disc. review denied*, 382 N.C. 326, 876 S.E.2d 279 (2022).

Finally, the Worthingtons waived appellate review of their argument regarding the grantor's intent. At the hearing on the summary judgment motions, the Worthingtons' counsel explicitly disclaimed any argument regarding grantor's intent: "First and foremost, the most important thing to get across is that we're not contending that this is an intent issue. . . . [W]e contend that based on the plain language of the plat and -- and the language contained in the record, that this is not an intent issue." By expressing to the trial court that they were *not* arguing grantor's intent as a basis for their motion for summary judgment, the Worthingtons waived their opportunity to obtain a ruling from the court on this ground. Therefore, they have not preserved this issue for review. *See* N.C. R. App. P. 10(a)(1).

We now examine the merits of the Worthingtons' remaining, preserved arguments.

IV. Discussion

The Worthingtons assert that the trial court's grant of summary judgment in favor of Plaintiffs was improper because (1) Plaintiffs lacked standing to bring this action, (2) Plaintiffs abandoned the Easement, (3) Plaintiffs' desired use of the Easement constitutes overburdening and misuse, and (4) the Worthingtons have not dedicated their lands for public use.

A. Standard of Review

A trial court properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "When considering a motion for summary judgment, the trial judge must view the presented evidence in

a light most favorable to the nonmoving party." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

"The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *Badin Shores Resort Owners Ass'n v. Handy Sanitary Dist.*, 257 N.C. App. 542, 549, 811 S.E.2d 198, 204 (2018) (citation omitted). The moving party may meet this burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Id.* (citation omitted).

Once the moving party makes the requisite showing, "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial[.]" *Cummings v. Carroll*, 379 N.C. 347, 358, 866 S.E.2d 675, 684–85 (2021) (citation and internal quotation marks omitted). "[T]he non-moving party must forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment." *Badin Shores*, 257 N.C. App. at 550, 811 S.E.2d at 204 (citation omitted).

"If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision." *Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 204 (2017) (citation omitted). Appellate courts review "decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings*, 379 N.C. at 358, 866 S.E.2d at 684. "When reviewing de novo, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Asher v. Huneycutt*, 284 N.C. App. 583, 588, 876 S.E.2d 660, 666 (2022) (citation and internal quotation marks omitted).

B. Plaintiffs' Standing

[2] The Worthingtons assert that Plaintiffs lacked standing to initiate this action because they did not "reside on any parcels adjoining the easements at issue," thereby divesting them of "any ownership interest in any parcel containing any of the easements at issue," as well as "any ownership interest in the floodplain lands" adjoining the Park Crossing development, to which the Easement leads. We disagree.

"An appurtenant easement is an easement created for the purpose of benefitting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land." *Nelms v. Davis*,

179 N.C. App. 206, 209, 632 S.E.2d 823, 825–26 (2006) (citations and internal quotation marks omitted). Our Supreme Court has explained that lot owners have certain rights to streets, parks, and playgrounds as appurtenant easements in the subdivision where they reside:

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. It is said that such streets, parks and playgrounds are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. *It is a right in the nature of an easement appurtenant.* Whether it be called an easement or a dedication, *the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel.* This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots.

Cleveland Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E.2d 30, 35–36 (1964) (citations omitted) (second and third emphases added); *see also Connolly v. Robertson*, 151 N.C. App. 613, 616–17, 567 S.E.2d 193, 196–97 (2002).

Here, because the Easement at issue is an appurtenant easement, Plaintiffs had standing to bring this action to enforce their rights to use it. The developer of Park Crossing dedicated the Easement as part of a network of paths designed to "link the development without the necessity of pedestrian activity along the vehicular roadways." As such, the Easement was "dedicated to the use of lot owners in the development[,]" creating "a right in the nature of an easement appurtenant" for all who live there. *Hobbs*, 261 N.C. at 421, 135 S.E.2d at 36 (emphasis omitted). Moreover, as our Supreme Court established in *Hobbs*, the right of the lot owners to the use of appurtenant easements within a community "may not be extinguished, altered or diminished except by agreement or estoppel." *Id.* No such agreement exists here; in fact, the Declaration of Covenants, Conditions, and Restrictions for Park Crossing expressly provides that "[t]he Association, *or any Owner*, shall have the right to enforce . . . all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration." (Emphasis added).

In that the Park Crossing developer dedicated the Easement for the use of lot owners as part of a larger footpath network throughout the neighborhood, Plaintiffs had standing to enforce their rights to the use of the Easement as an appurtenant easement. *See id.* The Worthingtons' argument accordingly fails.

C. Abandonment of Easement

[3] The Worthingtons next argue that "[i]f Plaintiffs possessed any rights respecting Defendants' properties, they abandoned them long before this action." They assert that "Plaintiffs showed a clear intention to abandon and terminate the easements" by seeking to convert them "into vehicles of ingress and egress for users of the public greenway[,]" which the Worthingtons contend "pervert[ed] the original nature and purpose of the easements." This argument lacks merit.

"An easement may be abandoned by unequivocable acts showing a clear intention to abandon and terminate the right . . . ." *Combs v. Brickhouse*, 201 N.C. 366, 369, 160 S.E. 355, 356 (1931). "The essential acts of abandonment are the intent to abandon and the unequivocal external act by the owner of the dominant tenement by which the intention is carried to effect." *Skvarla v. Park*, 62 N.C. App. 482, 487, 303 S.E.2d 354, 357 (1983). "Mere lapse of time in asserting one's claim to an easement, unaccompanied by acts and conduct inconsistent with one's rights, does not constitute waiver or abandonment of the easement." *Id.* (concluding that the plaintiffs did not abandon an easement after 70 years of nonuse because there was "no evidence of any external unequivocal act by [the] plaintiffs, or their predecessors in title, indicating an intent to abandon the easement").

In the present case, the Worthingtons contend that because the Park Crossing owners' association declined to purchase the floodplain from the developer, "[t]he community abandoned the plan, the land, and the [four] easements." A review of the record, however, belies this contention. Assuming, *arguendo*, that the association's refusal evinced an intention to abandon the Easement, the Worthingtons nevertheless must present evidence of Plaintiffs' "unequivocal external act" in furtherance of this intention, *id.*, which they have failed to do. In that "[m]ere lapse of time in asserting one's claim to an easement, unaccompanied by acts and conduct inconsistent with one's rights, does not constitute waiver or abandonment of the easement[,]" *id.*, the Worthingtons failed to "forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment[,]" *Badin Shores*, 257 N.C. App. at 550, 811 S.E.2d at 204 (citation omitted).

Therefore, the trial court properly granted summary judgment in favor of Plaintiffs regarding the issue of abandonment.

D. Overburdening and Misuse of Easement

[4] The Worthingtons also argue that Plaintiffs' proposed use of the Easement constitutes overburdening and misuse, as it "allows for access to other properties not included in the [E]asement and allows for usage of a kind not contemplated in the grants." This argument is unavailing.

"If an easement is granted, the user of the easement may neither change the easement's purpose nor expand the easement's dimensions." *Bunn Lake Prop. Owner's Ass'n v. Setzer*, 149 N.C. App. 289, 296, 560 S.E.2d 576, 581 (2002); *see also*, *e.g.*, *Moore v. Leveris*, 128 N.C. App. 276, 281, 495 S.E.2d 153, 156 (1998) (concluding that an easement to use a public neighborhood road did not allow the defendant to place a sewer line under the road); *Swaim v. Simpson*, 120 N.C. App. 863, 864–65, 463 S.E.2d 785, 787 (1995) (concluding that the installation of utility pipes on an easement went beyond the easement's intended use of ingress and egress), *aff'd per curiam*, 343 N.C. 298, 469 S.E.2d 553 (1996).

To determine whether a particular act constitutes overburdening or misuse of an easement, this Court applies the following rules:

> First, the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue. Second, if the conveyance speaks to the scope of the easement in less than precise terms (i.e., it is ambiguous), the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant. Third, if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in this latter situation, a reasonable use is implied.

City of Charlotte v. BMJ of Charlotte, LLC, 196 N.C. App. 1, 17, 675 S.E.2d 59, 69 (2009) (citation omitted), *disc. review denied*, 363 N.C. 800, 690 S.E.2d 533 (2010).

In the case at bar, the plats detailing the Easement label it as a ten-foot-wide pedestrian easement that runs southwest along the property line of the Worthington's property, following the property line to the end of the lot. As the trial court determined, "[t]he express language and clear depictions in the Park Crossing maps and plats . . . recorded

by the [d]eveloper" demonstrate a dedication of the Easement to and for the benefit of each resident of Park Crossing as a pedestrian path. In their amended complaint, Plaintiffs requested a declaratory judgment to establish their right "to access, use, and enjoy the [Easement], including for the purpose of accessing the Little Sugar Creek Greenway[.]" Unlike the challenged use in *Swaim*, Plaintiffs' proposed use of the Easement stays within its original intended scope of pedestrian ingress and egress; the fact that the Easement now leads to a developed Greenway, rather than merely an undeveloped floodplain, is immaterial, as it does not change the purpose for which Plaintiffs seek to use the Easement. *See Swaim*, 120 N.C. App. at 864–65, 463 S.E.2d at 787.

Plaintiffs' proposed use of the Easement as a footpath for Park Crossing residents to access the Greenway falls squarely within the Easement's scope as a pedestrian walkway, and the Worthingtons failed to meet their burden "to produce a forecast of evidence demonstrating that [they] will be able to make out at least a prima facie case at trial" concerning overburdening and misuse of the Easement. *Cummings*, 379 N.C. at 358, 866 S.E.2d at 684–85 (citation and internal quotation marks omitted). We therefore conclude that the trial court did not err in granting summary judgment in favor of Plaintiffs on this claim.

E. Dedication of Land for Public Use

[5] Lastly, the Worthingtons contend that "Plaintiffs are forcing a public dedication of [the Worthingtons'] land, over [the Worthingtons'] objections and despite the lack of any dedication or developer-grantor intention that the [E]asement be open to the public." The Worthingtons further maintain that "[b]ecause an offer of public dedication must be shown by 'clear and unmistakable' intent, and no such unambiguous intention is present on the face of the plat," the trial court erred in entering summary judgment in favor of Plaintiffs. This argument is unpersuasive.

"A private right-of-way or street may become a public street by one of three methods: (1) in regular proceedings before a proper tribunal; (2) by prescription; or (3) through action by the owner, such as a dedication, gift, or sale." *Wright v. Town of Matthews*, 177 N.C. App. 1, 10, 627 S.E.2d 650, 658 (2006) (citation omitted). "[A] dedication must be made to the public, and not to part of the public nor to private owners of particular land." *Tower Dev. Partners v. Zell*, 120 N.C. App. 136, 143–44, 461 S.E.2d 17, 22 (1995), *appeal dismissed*, 342 N.C. 897, 471 S.E.2d 64 (1996). "Because North Carolina does not have statutory guidelines for dedicating streets to the public, the common law principles of offer and acceptance apply." *Id.* at 140, 461 S.E.2d at 20. Accordingly, a "dedication of property to the public consists of two steps: (1) an offer of dedication,

and (2) an acceptance of this offer by a proper public authority." *Dep't of Transp. v. Elm Land Co.*, 163 N.C. App. 257, 265, 593 S.E.2d 131, 137, *disc. review denied*, 358 N.C. 542, 599 S.E.2d 42 (2004) (citation omitted).

"The evidence in support of the intent of an owner to dedicate an easement should be clear and unmistakable." *Wright*, 177 N.C. App. at 11, 627 S.E.2d at 658 (citation and internal quotation marks omitted). "In easements, as in deeds generally, the intention of the parties is determined by a fair interpretation of the grant." *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) (citation omitted). "An offer of dedication may also be implied through conduct of the owner manifesting an intent to set aside land for the public." *Wright*, 177 N.C. App. at 13, 627 S.E.2d at 660 (citation and internal quotation marks omitted). "When proving implied dedication, where no actual intent to dedicate is shown, the manifestation of implied intent to dedicate must clearly appear by acts which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use." *Dep't of Transp. v. Kivett*, 74 N.C. App. 509, 513, 328 S.E.2d 776, 779 (1985).

"Furthermore, a dedication is not valid until the offer to dedicate is accepted by the responsible public authority." *Tower*, 120 N.C. App. at 144, 461 S.E.2d at 22. "A dedication without acceptance is merely a revocable offer[,]" and acceptance "cannot be established by permissive use." *Oliver v. Ernul*, 277 N.C. 591, 598, 178 S.E.2d 393, 396 (1971).

In the instant case, the Worthingtons argue that Plaintiffs seek to open the Easement to the public because the Easement now connects to the Greenway, an area owned by the government and open to the public. Such action, the Worthingtons argue, is improper because the Worthingtons never consented to a public dedication. While it is true that the Worthingtons did not consent to dedicate the Easement to the public and that an easement cannot "be converted into a public way without the consent of the owner of the servient estate[,]" *Wood v. Woodley*, 160 N.C. 17, 20, 75 S.E. 719, 720 (1912), the Worthingtons' claim nevertheless misses the mark. Plaintiffs actively disclaimed any intention of offering the Easement to the public, accurately asserting below that although the Easement "leads from a public street in the neighborhood to some land that is owned by the county, it would be trespassing for anybody to use it who is not a member of Park Crossing[.]" Plaintiffs similarly state on appeal that the Easement "is not a public easement." Moreover, even assuming that Plaintiffs intended that the Easement be dedicated to the public, the Worthingtons' claim fails, as neither party presented any evidence of acceptance by a public authority. *See Oliver*, 277 N.C. at 598, 178 S.E.2d at 396.

In that a "dedication without acceptance is merely a revocable offer" and acceptance "cannot be established by permissive use[,]" *id.*, the Easement was not dedicated to the public without the Worthingtons' consent. Thus, the trial court did not err in granting summary judgment on this claim in favor of Plaintiffs.

V. Conclusion

For the foregoing reasons, we conclude that that the trial court properly granted Plaintiffs' motions for summary judgment and declaratory judgment, and denied the Worthingtons' motion for summary judgment. Accordingly, we affirm the court's order.

AFFIRMED.

Chief Judge STROUD and Judge MURPHY concur.

KIARASH BASSIRI, PLAINTIFF
v.
WADE PILLING, DEFENDANT

No. COA22-411

Filed 7 February 2023

1. Appeal and Error—final judgment—remaining claim voluntarily dismissed—appeal not interlocutory

Although the trial court's order granting defendant's motion to dismiss as to two of plaintiff's claims was not a final judgment at the time it was entered because one claim was left still pending, plaintiff's subsequent voluntary dismissal of the remaining claim rendered the trial court's order a final judgment. When plaintiff thereafter filed his notice of appeal from the order, the appeal was not interlocutory and it was properly before the Court of Appeals.

2. Alienation of Affections—subject matter jurisdiction—kind of action in question—act within a state that recognizes the cause of action

Because the trial courts of this state possess subject matter jurisdiction over actions for alienation of affections, the trial court erred by concluding that it lacked subject matter jurisdiction over plaintiff's claim for alienation of affections. The complaint alleged

that the alienating conduct may have occurred in North Carolina and Utah, both of which recognize the cause of action.

Appeal by plaintiff from order entered 29 November 2021 by Judge Dawn M. Layton in Wake County Superior Court. Heard in the Court of Appeals 2 November 2022.

Mills & Alcorn, L.L.P., by Cynthia A. Mills, for plaintiff-appellant.

Daphne Edwards and Ashley Fillippeli for defendant-appellee.

ZACHARY, Judge.

Plaintiff Kiarash Bassiri appeals from the trial court's order granting Defendant Wade Pilling's motion to dismiss for lack of subject-matter jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2021). After careful review, we reverse and remand for further proceedings.

I. Background

Plaintiff and his wife were married in 2010 and lived together in North Carolina in what Plaintiff describes as a "happy and loving marriage," in which "genuine love and affection existed." In 2019 and continuing until January 2020, Defendant and Plaintiff's wife began a friendship that evolved into a romantic, intimate relationship. Plaintiff and his wife eventually separated, although they remained legally married when Plaintiff commenced this suit against Defendant.

On 1 December 2020, Plaintiff filed a verified complaint against Defendant, asserting claims for alienation of affections, criminal conversation, and intentional infliction of emotional distress. On 12 March 2021, Defendant filed a responsive pleading in which he first moved to dismiss Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and (2), alleging that the trial court lacked both subject-matter and personal jurisdiction. Defendant's responsive pleading also included his answer and affirmative defenses.

On 26 May 2021, Plaintiff served Defendant with discovery, including a set of interrogatories. On 26 July 2021, Defendant served Plaintiff with his verified responses and objections to the interrogatories. In Defendant's responses, Defendant averred, *inter alia*, that he and Plaintiff's wife had "engaged in some intimate activity when [Defendant] first met her in October 2019 in California, in November 2019 in Nevada, and about a month later in Utah, but [they] did not engage in sexual

intercourse." Defendant further acknowledged that he has "only seen [Plaintiff's wife] in person on three occasions"—in California, Nevada, and Utah. Most other contact between them occurred via email, text messages, and social media such as Facebook and Snapchat.

On 26 August 2021, Defendant took a voluntary dismissal with prejudice of his Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, leaving pending his Rule 12(b)(1) motion to dismiss. That same day, Defendant's Rule 12(b)(1) motion to dismiss came on for hearing in Wake County Superior Court.

By order entered on 29 November 2021, the trial court determined that it lacked subject-matter jurisdiction over Plaintiff's claims for alienation of affections and criminal conversation and granted Defendant's motion to dismiss those claims. In its order, the trial court made the following pertinent findings of fact:

> 11. In Plaintiff's Interrogatories, Plaintiff asked Defendant to identify the location of any intimate activity he engaged in with Plaintiff's Wife.
>
> 12. In Defendant's verified Interrogatory Responses to questions 13, 14, 15 and 17, Defendant stated that he had only seen Plaintiff's Wife in person on three occasions:
>
> A. In October 2019 in California at a conference where he initially met her;
>
> B. In November 2019 in Nevada; and
>
> C. In January 2020 in Utah.
>
> 13. In Defendant's verified Interrogatory Responses, Defendant stated he has never met Plaintiff's Wife in the state of North Carolina.
>
> 14. There is no evidence to support Plaintiff's allegation that any intimate act in which Defendant engaged with Plaintiff's Wife occurred in the state of North Carolina.
>
> 15. There is no evidence that Defendant has ever been to North Carolina, traveled to North Carolina, or engaged in any act with Plaintiff's Wife in North Carolina.
>
> 16. There is no evidence that Defendant engaged in any act with Plaintiff's Wife other than meeting her in person outside the state of North Carolina, in California, Nevada, and Utah. There is evidence that Defendant and Plaintiff's

> [W]ife communicated via Facebook, Snapchat, emails and texts while Plaintiff[']s Wife] was in North Carolina.
>
> 17. There is no evidence, as alleged in Plaintiff's Complaint, that Defendant committed the acts alleged in the pleading in the state of North Carolina; on the contrary, there is credible evidence that Defendant has never been to North Carolina, has never traveled to North Carolina, has never met Plaintiff's Wife, for any purpose, in the state of North Carolina, and only met Plaintiff's Wife in person outside the state of North Carolina three times: once initially at a dental conference where he spoke in California in 2019, at another dental conference at which he spoke in November 2019 in Nevada, and in January 2020 in Utah. There is evidence that Defendant and Plaintiff's [W]ife communicated via Facebook, Snapchat, emails and texts while Plaintiff[']s Wife] was in North Carolina.

The trial court thus concluded:

> 1. This Court lacks subject matter jurisdiction, pursuant to N.C. Gen. Stat[.] § 1A-1, Rule 12(b)(1), over Plaintiff's claims for alienation of affection[s] and criminal conversation because there is no evidence that an act underlying a claim for alienation of affection[s] or criminal conversation occurred between Plaintiff's Wife and Defendant within the state of North Carolina.
>
> 2. Alienation of affection[s] and criminal conversation are transitory torts and for North Carolina substantive law to apply a Plaintiff must show that the alleged torts occurred in the state of North Carolina. *See Jones v. Skelley*, 195 N.C. App. 500, 506-513, 673 S.E.2d 385, 389-394 (2009). If the tortious injury occurred in a state that does not recognize alienation of affections and criminal conversation, the matter cannot be tried in North Carolina and North Carolina courts lack subject matter jurisdiction. *See id.*
>
> 3. "A motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure represents a challenge to the trial court's subject matter jurisdiction over the plaintiff's claims. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2018). 'Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question.' *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673,

> 675 (1987). 'Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.[']
> N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2018)." *Dipasupil v. Neely*, 268 N.C. App. 466, 834 S.E.2d 451 (2019) (unpublished). Subject matter jurisdiction is a prerequisite to personal jurisdiction. *Id.*
>
> 4. Because the evidence shows that no alleged intimate act between Plaintiff's Wife and Defendant underlying the actions for alienation of affection[s] and criminal conversation occurred in the state of North Carolina, pursuant to N.C. Gen. Stat[.] § 1A-1, Rule 12(b)(1), this Court lacks subject matter jurisdiction and must dismiss said actions.

On 9 December 2021, Plaintiff took a voluntary dismissal of his claim for intentional infliction of emotional distress. Plaintiff timely filed his notice of appeal from the trial court's order granting Defendant's motion to dismiss on 22 December 2021.

II. Appellate Jurisdiction

[1] Ordinarily, this Court only hears appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). By contrast, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381.

The trial court's order granted Defendant's motion to dismiss as to two of Plaintiff's claims, but left pending Plaintiff's claim for intentional infliction of emotional distress. Therefore, the trial court's order was not a final judgment at the time that it was entered. "At that point, [P]laintiff's appeal would have been interlocutory because the entire case was not disposed of." *Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 507–08, 593 S.E.2d 808, 811, *disc. review denied*, 358 N.C. 739, 603 S.E.2d 126 (2004). However, Plaintiff took a voluntary dismissal of his claim for intentional infliction of emotional distress before filing his notice of appeal. This dismissal rendered the trial court's order a final judgment. *See id.* at 508, 593 S.E.2d at 811 (declining to dismiss the plaintiff's appeal after the plaintiff voluntarily dismissed the remaining claims, as "[a]ll claims and judgments [we]re final with respect to all the

parties, and there [wa]s nothing left for the trial court to determine"). Accordingly, Plaintiff's appeal is properly before this Court, and we proceed to review the merits of his appeal.

III. Discussion

[2] On appeal, Plaintiff argues that the trial court erred by concluding that it lacked subject-matter jurisdiction over his claim for alienation of affections and thus granting Defendant's Rule 12(b)(1) motion to dismiss.[1] Much of the appellate briefing in this case concerns the trial court's finding of fact that there exists "evidence that Defendant and Plaintiff's [W]ife communicated via Facebook, Snapchat, emails and texts while Plaintiff['s Wife] was in North Carolina." Plaintiff contends that this finding undermines the trial court's conclusion of law that it lacked subject-matter jurisdiction. We agree, albeit on a more fundamental basis; unlike the thornier issues of personal jurisdiction and conflict of laws posed by the facts of this case, the issue of subject-matter jurisdiction is resolved simply by recognition of the broad grant of general jurisdiction to our trial courts.

After careful review, we conclude that the trial court erred by concluding that it lacked subject-matter jurisdiction over Plaintiff's claim for alienation of affections. Accordingly, we reverse the trial court's grant of Defendant's motion to dismiss with regard to Plaintiff's alienation of affections claim and remand to the trial court for further proceedings.

A. Standard of Review

Whether a trial court possesses subject-matter jurisdiction over a case is a question of law, which this Court reviews de novo. *Clark v. Clark*, 280 N.C. App. 403, 418, 867 S.E.2d 704, 717 (2021). "Unlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (citation omitted), *appeal withdrawn*, 348 N.C. 284, 501 S.E.2d 913 (1998). Also, "[u]nlike a Rule 12(b)(6) motion, consideration of

1. Plaintiff makes no argument on appeal that the trial court erred in granting Defendant's motion to dismiss as regards the criminal conversation claim. This claim is therefore "deemed abandoned." *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 679, 748 S.E.2d 154, 161 (2013); *see also* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Further, because Plaintiff took a voluntary dismissal of his claim for intentional infliction of emotional distress, the present appeal solely concerns the trial court's dismissal of Plaintiff's claim for alienation of affections.

matters outside the pleadings does not convert the Rule 12(b)(1) motion to one for summary judgment." *Id.* (citation and internal quotation marks omitted).

When conducting de novo review, "this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Farquhar v. Farquhar*, 254 N.C. App. 243, 245, 802 S.E.2d 585, 587 (2017) (citation and internal quotation marks omitted). However, if "the trial court resolves issues of fact" in an order granting a Rule 12(b)(1) motion, then "those findings are binding on the appellate court if supported by competent evidence in the record." *Smith*, 128 N.C. App. at 493, 495 S.E.2d at 397.

B. Analysis

"It is a universal principle as old as the law that the proceedings of a court without subject-matter jurisdiction are a nullity. Put another way, subject-matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act." *Lakins v. W. N. Carolina Conf. of United Methodist Church*, 283 N.C. App. 385, 397–98, 873 S.E.2d 667, 677 (2022) (citations and internal quotation marks omitted). Subject-matter jurisdiction is "the power of the court to deal with the kind of action in question." *Clark*, 280 N.C. App. at 418, 867 S.E.2d at 717 (citation omitted). "A court has jurisdiction over the subject matter if it has the power to hear and determine cases of the general class to which the action in question belongs." *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 324, 244 S.E.2d 164, 165 (1978).

By contrast, personal jurisdiction is "the power to bring the person to be affected by the judgment before the court so as to give him an opportunity to be heard." *Id.* In that subject-matter jurisdiction concerns the kind of action in question rather than the person affected by the action, subject-matter jurisdiction often exists where personal jurisdiction does not. *See High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) ("Properly speaking, there can be no jurisdiction of the person where there is none of the subject matter, although the converse might indeed, and often does, occur.").

Because Defendant took a voluntary dismissal with prejudice of his Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the trial court never considered that issue; hence, the question of whether the trial court had personal jurisdiction over Defendant is not before us. Defendant's Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction was the only motion that the trial court considered and upon which it ruled in the order from which Plaintiff appeals, and therefore we confine our analysis solely to the issue of subject-matter jurisdiction.

"Subject[-]matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). Section 7A-240 of our General Statutes broadly confers subject-matter jurisdiction upon the superior and district courts of this state:

> Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original general jurisdiction of *all justiciable matters of a civil nature* cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.

N.C. Gen. Stat. § 7A-240 (emphasis added).

On the issue of subject-matter jurisdiction, both parties cite *Jones v. Skelley*. 195 N.C. App. 500, 673 S.E.2d 385 (2009), *superseded in part on other grounds*, N.C. Gen. Stat. § 52-13(a) (2015). In *Jones*, this Court stated that "if the tortious injury occurs in a state that does not recognize alienation of affections, the case cannot be tried in a North Carolina court." 195 N.C. App. at 506–07, 673 S.E.2d at 390 (citation and internal quotation marks omitted); *see also Wise v. Hollowell*, 205 N.C. 286, 289, 171 S.E. 82, 83 (1933) ("[I]f the act complained of is insufficient to constitute a cause of action there[,] it is likewise insufficient here."). "Establishing that the defendant's alienating conduct occurred within a state that still recognizes alienation of affections as a valid cause of action is essential to a successful claim since most jurisdictions have abolished the tort." *Hayes v. Waltz*, 246 N.C. App. 438, 443, 784 S.E.2d 607, 613 (2016).

However, it does not necessarily follow that the alleged alienating conduct must have occurred *in North Carolina* in order for a plaintiff to raise a valid alienation of affections claim over which the trial court would have subject-matter jurisdiction. Rather, the alienating conduct must have "occurred within a state that still recognizes alienation of affections as a valid cause of action[.]" *Id.* In the case at bar, there are two states in which allegedly alienating conduct may have occurred and which recognize a cause of action for alienation of affections: North Carolina and Utah. *See Heiner v. Simpson*, 23 P.3d 1041, 1043 (Utah 2001).

Although this Court has previously addressed the issue of subject-matter jurisdiction in the context of alienation-of-affections claims in which the allegedly alienating conduct occurred across multiple states, in each of those prior cases, North Carolina was the *only* jurisdiction involved that recognized the claim of alienation of affections. *See*, *e.g.*, *Dipasupil v. Neely*, 268 N.C. App. 466, 834 S.E.2d 451, 2019 WL 6133850, at *1 (2019) (unpublished) (in which a Florida resident sued a Virginia resident over conduct alleged to have occurred in Minnesota and Washington, D.C., while the plaintiff resided in North Carolina); *Jones*, 195 N.C. App. at 505, 673 S.E.2d at 389 ("Plaintiff contends a material issue of fact exists as to the state in which the alleged alienation of affections occurred, North Carolina, which recognizes the tort, or South Carolina, which has abolished the tort . . . ."); *Darnell v. Rupplin*, 91 N.C. App. 349, 351, 371 S.E.2d 743, 745 (1988) ("[The] defendant's involvement with [the] plaintiff's husband . . . spanned four states: North Carolina, Maryland, Virginia, and Washington, D.C. Of these four states, North Carolina is the only one that recognizes a legal cause of action for the tort of alienation of affections."). Thus, the sufficiency of the claim in each of these cases was dependent upon whether the alleged injury occurred in North Carolina.

The question of whether the trial court has subject-matter jurisdiction is frequently conflated with the question of where the alleged alienating conduct and injury occurred because North Carolina is often the only jurisdiction involved that recognizes the claim. Indeed, the factual determination of where the allegedly injurious conduct occurred is critical to the eventual *choice-of-law* analysis that determines whether a plaintiff has sufficiently alleged a valid cause of action under the applicable substantive law. *See Darnell*, 91 N.C. App. at 351, 371 S.E.2d at 745 ("The substantive law applicable to a transitory tort [such as alienation of affections] is the law of the state where the tortious injury occurred, and not the substantive law of the forum state."). Nonetheless, that factual determination is irrelevant to the foundational question of *whether the trial court has subject-matter jurisdiction* over "the kind of action in question." *Clark*, 280 N.C. App. 403, 418, 867 S.E.2d 704, 717 (citation omitted). Instead, the choice-of-law analysis is more properly assessed pursuant to a Rule 12(b)(6) motion to dismiss for failure to state a claim, rather than a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. *See Church v. Carter*, 94 N.C. App. 286, 289, 380 S.E.2d 167, 169 (1989) ("The alleged failure of a complaint to state a cause of action for which relief can be granted . . . does not equate with a lack of jurisdiction over the subject matter of the complaint.").

Here, the dispositive question of law—whether the trial court possesses subject-matter jurisdiction over the *kind of action* in question—is a deceptively simple one. The kind of action presented is one for alienation of affections, a tort over which the trial courts of this state indisputably possess subject-matter jurisdiction. *See* N.C. Gen. Stat. § 7A-240; *see also*, *e.g.*, *Darnell*, 91 N.C. App. at 351, 371 S.E.2d at 745. Whether Plaintiff has successfully stated a claim for which relief may be granted under the substantive law applicable to his claim consistent with our conflict-of-laws rules is downstream of and irrelevant to the resolution of this straightforward question of law.

Accordingly, even though several of the trial court's findings of fact concerning Defendant's actions or presence in North Carolina are supported by competent evidence, these findings of fact do not support the trial court's conclusion that it lacked subject-matter jurisdiction over Plaintiff's alienation of affections claim. The trial court's order must be reversed and remanded for further proceedings.

On remand, should the evidence persuade the finder of fact that the tort of alienation of affections occurred in either North Carolina or Utah, then the substantive law of the applicable jurisdiction will apply. *See Cooper v. Shealy*, 140 N.C. App. 729, 736, 537 S.E.2d 854, 859 (2000). "Should it be determined that the tort[ ] occurred in [California or Nevada], then no substantive law could apply since none of these alleged acts are [a] tort[ ] in th[ose] state[s]. In that event, the case would, by necessity, be dismissed." *Id.*

IV. Conclusion

For the foregoing reasons, the trial court's order granting Defendant's Rule 12(b)(1) motion for lack of subject-matter jurisdiction is reversed and Plaintiff's claim for alienation of affections is remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges ARROWOOD and GRIFFIN concur.

IN RE A.H.D.

[287 N.C. App. 548 (2023)]

IN THE MATTER OF A.H.D., V.I.D.

No. COA22-382

Filed 7 February 2023

1. Termination of Parental Rights—sufficiency of petition—notice of grounds for termination—willful failure to pay child support

In a private action where a mother sought the termination of a father's parental rights in their children on the ground of willful failure to pay child support (N.C.G.S. § 7B-1111(a)(4)), the petition served as a sufficient basis for the termination proceeding where, although the petition did not explicitly mention section 7B-1111(a)(4), it alleged sufficient factual allegations to put the father on notice that his parental rights could be terminated on that ground. Importantly, the petition alleged that the father not only "failed" to pay child support for over a year, but also "refused" to do so, thereby indicating a willful decision not to pay.

2. Termination of Parental Rights—termination orders—failure to state standard of proof—sufficient evidence to support termination—reversal and remand

In a private termination of parental rights action brought by a mother, the trial court's orders terminating the father's rights in the parties' children on the ground of willful failure to pay child support (N.C.G.S. § 7B-1111(a)(4)) were reversed because the court failed to announce—either in open court or in the written orders—that it had used the required "clear, cogent, and convincing evidence" standard of proof when making factual findings to support termination. Nevertheless, because the mother had presented sufficient evidence on which the court could have terminated the father's rights under section 7B-1111(a)(4), the orders were reversed and remanded—rather than reversed outright—so that the trial court could reconsider the record and apply the correct standard of proof to make new findings of fact.

Appeal by respondent-father from orders entered 7 January 2022 by Judge Robert M. Wilkins in District Court, Randolph County. Heard in the Court of Appeals 10 January 2023.

Kimberly Connor Benton for respondent-father.

No brief filed for petitioner-mother.

STROUD, Chief Judge.

Father appeals from two orders terminating his parental rights as to each of his two children on the grounds he willfully failed to pay child support for a year or more preceding the filing of the termination petitions pursuant to N.C. Gen. Stat. § 7B-1111(a)(4) (2019). Because the Petitions gave Father adequate notice as to the acts, omissions, or conditions at issue in the case, they are a sufficient basis for the termination proceeding. Although the trial court failed to make Findings of Fact based upon the proper standard of proof of clear, cogent, and convincing evidence, the record includes sufficient evidence upon which the trial court could make the required findings to support termination of Father's parental rights under § 7B-1111(a)(4), so we must reverse and remand.

I. Background

On or about 14 January 2020, Mother filed two "Verified Petition[s] For Termination of Parental Rights" to terminate Father's parental rights as to their two children, Ariel and Vanessa.[1] (Capitalization altered.) After including information about Mother's and Father's residences and the names and birthdates of the children, the Petitions alleged, in relevant part, Mother had "physical custody" of both children and alleged the following identical "grounds for termination" of Father's parental rights:

> b. That for more than one (1) year [Father] has had no contact with the minor child. [Father] has not visited or contacted the minor child since May 6, 2018;
>
> c. That for more than one (1) year, [Father] has failed and refused to pay child support. He has not paid child support since May 6, 2018;
>
> d. That [Father] is therefore subject to termination of his parental rights pursuant to North Carolina General Statutes § 7B[.]

On or about 5 March 2020, Father filed responses admitting his and Mother's residences and the children's names and birthdates but denying all other allegations.

1. We use pseudonyms to protect the children's identity.

The trial court held a hearing in the termination proceeding on 1 November 2021. The trial court indicated at the start of the hearing that it first wanted "to hear testimony and evidence about whether there are any grounds for termination of parental rights" and then would receive testimony of the children's best interests after that "if appropriate[.]"

During the portion of the hearing focused on the grounds for terminating parental rights, Mother and Father testified. Mother first testified she took physical custody of the children after the parents separated on 6 May 2018 because Father went to jail for committing a crime against Mother's sister. Following the separation, Father had no contact with the children because "[h]e never asked." Mother also testified she got a custody order granting her permanent custody in June 2018; she had a child support order entered in July 2018. The child support order required Father to pay approximately $1,100 per month. Mother testified between 2018 and 2020 when she filed the Petitions, Father had "just refused to pay" leading to "over $20,000.00 in arrears[,]" although after the Petitions were filed he made "three or four payments" of "at most $500" as a result of "[c]hild support enforcement[.]"

At the grounds portion of the termination hearing, Father testified about his employment and child support payments. Father operated his own store before his arrest, but Mother sold all the contents of his store right after he went to jail. Upon his pre-trial release from jail at the end of May 2018, Father took about six months "to get started back up" running "another small business[,]" and he continued doing that work until he was convicted of the crime against Mother's sister in February 2021 and sentenced to over a decade in prison. Father testified he gave Mother cash payments around the "end of 2018" that were "for the benefit of the children[.]" Father also said he gave Mother "cash a few times" in 2019, but he was not able to pay the full $1,100 per month required by the child support order. Beyond his employment and child support, Father testified he tried to reach out to Mother and the children "[a]t least a couple times a week" but Mother told him to stop calling her. Father could not have visits with the children or contact them because of the conditions of his house arrest.

Following that testimony, both attorneys made arguments on the grounds for termination. The arguments by Mother's attorney focused on the ground Father had failed to pay child support. Father's attorney first argued the abandonment ground did not apply because: the trial court lacked clear, cogent, and convincing evidence given the conflicting testimony; his pre-trial release conditions prevented him from having contact with the children; and he did not have Mother's new

address where he could send letters to the children. As to the willful failure to pay child support ground, Father's attorney argued there was no evidence of the child support order beyond Mother's testimony and there was too much "confusing" and "conflicting" testimony about payments Father made for there to be clear, cogent, and convincing evidence of a willful failure to pay.

Following those arguments, the trial court ruled the abandonment ground was not supported because "there [was] a question as to how willful [sic] his failure to have contact with the children would have been" given the testimony about pre-trial release conditions and the lack of "legal documents" on such conditions. The trial court found the willful failure to pay child support ground "exist[ed]" based on Father's non-compliance "with the terms of the child support order that was reportedly entered approximately July 2018." The trial court then moved on to the best interest stage without making any additional oral findings or indicating the standard of proof it was employing for the Findings of Fact.

At the best interest stage, the guardian *ad litem* ("GAL") for both children, Mother, Mother's new husband, and Father testified. The GAL testified about his investigative steps and recommendation, and the court received his report into evidence. Mother testified about: Father's relationship with the children; Father yelling and making demeaning comments towards her in front of the children; her new husband, and his relationship with the children, including his plan to adopt them; the relationship her family had with the children; and her employment and child care arrangements. Mother's new husband testified about: his relationship with the children, his plan to adopt the children following the termination proceedings, and his family's relationship with the children. Finally, Father testified about: his relationship with the children, his family's relationship with the children, and his lack of child support payments.

After that testimony, Mother's attorney, Father's attorney, and the GAL made arguments on best interests. The trial court then reviewed the required factors under N.C. Gen. Stat. § 7B-1110 and ruled it was in the children's best interests to terminate Father's parental rights.

On 7 January 2022, the trial court entered two Orders, one for each child, terminating Father's parental rights. Each Order began with the trial court making Findings of Fact as to adjudicatory grounds and then as to dispositional best interests, but the trial court did not state the standard of proof for the Findings of Fact. In the adjudicatory grounds portion of each Order, the trial court made Findings on custody and the child's name and residence; the history of Mother and Father's

relationship; and Father's subsequent incarceration. The trial court then made two Findings on child support that were identical in each Order:

> 8. [Mother] testified that in July, 2018, a child support order was put in place for [Father] to pay child support. [Father] has failed and refused for more than one (1) year to pay child support pursuant to the child support order for the use and benefit of the minor child. [Father] has not paid child support since May 6, 2018, and he is more than $20,000.00 in arrears.
>
> 9. Pursuant to 7B-1111(a)(4), [Mother] has custody of the minor child by agreement of the parties, and [Father], whose parental rights are sought to be terminated for a period of one year or more next preceding the filing of the Petition, has willfully and without justification failed to pay for the care, support, education of the minor child as required and decreed by the child support order. Therefore, there are grounds to terminate parental rights against [Father].

The trial court then made best interests Findings as to both children addressing: their relationships with Mother, Father, and Mother's new husband; Mother's allegations about Father's abusive actions towards Mother; the GAL's recommendation; and the plan for Mother's new husband to adopt the children.

Based on these Findings, the trial court concluded all parties were "properly before" it; "[t]here exist grounds for the termination of parental rights" of Father; and "[i]t would be in the best interest of the minor" children if Father's parental rights were terminated. Based upon those Findings and Conclusions, the trial court terminated Father's parental rights. Father timely filed written notice of appeal.[2]

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2. The trial court entered the termination orders on 7 January 2022. Father did not file his written notice of appeal until 18 February 2022, which was more than 30 days after the trial court entered the orders on appeal. *See* N.C. Gen. Stat. § 7B-1001(b) (2021) ("Notice of appeal . . . shall be made within 30 days after entry and service of the order[.]"). But Father was not served with the termination orders until 21 January 2022, so he filed notice of appeal within 30 days "after entry *and service* of the order" as required. N.C. Gen. Stat. § 7B-1001(b) (emphasis added); *see also In re J.M.K.*, 261 N.C. App. 163, 165, 165 n.2, 820 S.E.2d 106, 107, 107 n.2 (2018) (explaining the father timely filed notice of appeal even though more than 30 days had passed since the order was entered because the father was not served until 7 days before he filed the notice of appeal).

II. Analysis

On appeal, Father challenges both the termination Petitions and the adjudicatory portion of the termination Orders. Father argues the Petitions "failed to allege grounds existed to terminate" his "parental rights" under N.C. Gen. Stat. § 7B-1111(a)(4). As to the Orders, Father first contends the trial court violated his "constitutional rights by failing to make findings of fact based upon clear, cogent, and convincing evidence[,]" as required at the adjudicatory stage of a termination proceeding. Father then asserts the trial court "erred in finding" he "had willfully failed to pay child support for more than twelve months prior to the filing of the termination of parental rights petition" such that it erred in terminating his rights under N.C. Gen. Stat. § 7B-1111(a)(4). We address each contention in turn.

A. Sufficiency of Termination Petitions

[1] Father first argues the Petitions in this case "failed to allege grounds existed to terminate" his parental rights under N.C. Gen. Stat. § 7B-1111(a)(4). Specifically, Father contends the Petitions were "insufficient to put him on notice his rights were subject to termination under this" statutory ground because, like in a case from this Court, *In re I.R.L.*, 263 N.C. App. 481, 823 S.E.2d 902 (2019), the Petitions: "failed to reference a specific statutory ground under" N.C. Gen. Stat. § 7B-1111; "failed to allege there was a judicial decree or support order requiring" Father "to financially support" the children; and "failed to allege" Father "willfully failed to pay any support."

Petitions in termination of parental rights cases must state "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." N.C. Gen. Stat. § 7B-1104(6) (2019). "[W]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue." *In re B.C.B.*, 374 N.C. 32, 34, 839 S.E.2d 748, 751 (2020) (citation and quotation marks omitted). The allegations in a petition do not need to include the "precise statutory provision ultimately found by the trial court" as long as the petition includes sufficient factual allegations. *In re A.H.*, 183 N.C. App. 609, 614-15, 644 S.E.2d 635, 638-39 (2007) (indicating a citation to the precise statutory provision is not required before finding adequate notice based on the facts alleged); *see In re B.L.H.*, 190 N.C. App. 142, 147, 660 S.E.2d 255, 257 (2008) ("Where the factual allegations in a petition to terminate parental rights do not refer to a specific statutory ground for termination, the trial court may find any ground for

termination under N.C.G.S. § 7B–1111 as long as the factual allegations in the petition give the respondent sufficient notice of the ground."). For example, in *In re A.H.*, this Court found the termination petition was sufficient even though it "did not specifically" include citation to the statutory grounds for termination because the petition's language "directly parallel[ed]" the statutory language in making factual allegations. *In re A.H.*, 183 N.C. App. at 615, 644 S.E.2d at 638-39.

Here, the trial court terminated Father's parental rights for both children based on N.C. Gen. Stat. § 7B-1111(a)(4). N.C. Gen. Stat. § 7B-1111(a)(4) permits termination of parental rights when:

> One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

N.C. Gen. Stat. § 7B-1111(a)(4). As a result, the Petitions here needed to put Father on notice that Mother sought to terminate his parental rights due to his willful failure to pay child support. *See In re B.C.B.*, 374 N.C. at 34, 839 S.E.2d at 751 (explaining a petition to terminate parental rights "must put a party on notice as to what acts, omissions or conditions are at issue").

Here, the Petitions included the following identical "grounds for termination":

> b. That for more than one (1) year [Father] has had no contact with the minor child. [Father] has not visited or contacted the minor child since May 6, 2018;
>
> c. That for more than one (1) year, [Father] has failed and refused to pay child support. He has not paid child support since May 6, 2018;
>
> d. That [Father] is therefore subject to termination of his parental rights pursuant to North Carolina General Statutes § 7B[.]

While the Petitions' language is not "exhaustive or extensive," *see generally id.* (indicating allegations do not need to be exhaustive or extensive), the Petitions indicated Father had "failed and *refused* to pay child support" for approximately a year-and-a-half, (emphasis added),

thereby fulfilling the requirement of notice of the specific ground on which Mother sought to terminate Father's parental rights, namely willful failure to pay child support for more than a year pursuant to N.C. Gen. Stat. § 7B-1111(a)(4). *See* N.C. Gen. Stat. § 7B-1111(a)(4). Notably, of all eleven statutory grounds to terminate parental rights, only § 7B-1111(a)(4) addresses the failure to pay the other parent in order to support the child pursuant to a court order or custody agreement, *i.e.* child support. N.C. Gen. Stat. § 7B-1111(a).

Father's argument to the contrary does not convince us. Father argues the Petitions here are "substantially like" the petitions in another case from this Court, *In re I.R.L.* Specifically he alleges the Petitions here, like the ones in *In re I.R.L.*, failed to allege: the specific statutory ground for termination; a judicial decree or support order requiring Father to financially support the children; and willful failure to pay.

In *In re I.R.L.*, the mother alleged the father had "failed to provide substantial financial support or consistent care for the minor child[,]" and the trial court terminated the father's parental rights for willful failure to pay child support under N.C. Gen. Stat. § 7B-1111(a)(4). *In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906. This Court found that petition insufficient to put the father on notice his parental rights could be terminated under § 7B-1111(a)(4) based on a combination of four factors. *See id.* First, the petition did not make a "reference to the specific statutory ground of N.C. Gen. Stat. § 7B-1111(a)(4)[.]" *Id.* Second, the petition was "entirely silent as to whether a judicial decree or support order required [the f]ather to pay for [the child's] care or support." *Id.* Third, the petition failed "to include any allegations asserting [the f]ather's failure to pay was willful." *Id.* Fourth, "[a]n allegation that a parent failed to provide financial support or consistent care may be an assertion under the ground of abandonment." *Id.* (citation and quotation marks omitted).

Here, only two of the factors are present. The Petitions here do not reference the specific statutory ground in that they do not cite to § 7B-1111(a)(4), but this factor alone does not have significant weight because of our caselaw indicating "a petition will not be held inadequate simply because it fails to allege the precise statutory provision[.]" *In re A.H.*, 183 N.C. App. at 614, 644 S.E.2d at 638. The only other factor from *In re I.R.L.* present in the Petitions here is the lack of allegation about a "judicial decree or support order" requiring Father to pay child support. *See In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906. While it would be better practice to include such an allegation specifically, Father does not include any caselaw saying the failure to plead the child support order

alone renders a petition insufficient. Thus, even the two factors that make this case similar to *In re I.R.L.* have less significance here. *See id.*

Additionally, the other two factors from *In re I.R.L.*, *see id.*, weigh in favor of the sufficiency of the Petitions here. The Petitions allege Father willfully failed to pay through their use of the word "refused[.]" The word "refused" indicates an active decision not to pay. *See Joyner v. Garrett*, 279 N.C. 226, 233, 182 S.E.2d 553, 558 (1971) ("In Black's Law Dictionary (4th Ed., 1951) *refusal* is defined as 'the declination of a request or demand, or the omission to comply with some requirement of law, *as the result of a positive intention to disobey*.' " (second emphasis added)). Put another way, an active decision not to pay *is* a willful decision not to pay.

Beyond the allegation of willfulness, the Petitions here also differ from *In re I.R.L.* because their language cannot be construed as an allegation of a separate ground. *See In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906 (finding petition insufficient in part because the language could be an assertion of the ground of abandonment in addition to the willful failure to pay child support). In *In re I.R.L.* the petition spoke only of a failure to provide financial support, *id.*, but here the Petitions specifically allege Father "refused to pay child support." While other grounds in § 7B-1111(a) can be based on the *failure* to pay support, *see*, *e.g.*, N.C. Gen. Stat. § 7B-1111(a)(5)(d) (permitting termination of a father's parental rights when the child was born out of wedlock and the father did not "[p]rovide[] substantial financial support"), and even the *failure* to pay child support, *see In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906 (indicating the failure to pay child support could support an allegation of abandonment by citing to this Court's case in *In re C.J.H.*, 240 N.C. App. 489, 504, 772 S.E.2d 82, 92 (2015)), no other ground involves the *willful failure* to pay child support.

Therefore, by alleging Father "refused to pay child support[,]"the Petitions are sufficient to give Father adequate notice "as to what acts, omissions or conditions are at issue." *In re B.C.B.*, 374 N.C. at 34, 839 S.E.2d at 751. As a result, the Petitions are sufficient and can be the basis for a termination of parental rights proceeding. *See id.*

B. Challenges to Adjudicatory Portion of Termination Orders

[2] In addition to challenging the sufficiency of the Petitions, Father argues the trial court committed multiple errors in the Orders terminating his parental rights. Father first asserts the trial court erred by "failing to make findings of fact based upon clear, cogent, and convincing evidence[,]" which it was constitutionally required to do at the adjudicatory

stage. Father then argues the trial court erred in terminating his rights under N.C. Gen. Stat. § 7B-1111(a)(4). After discussing the standard of review, we address Father's arguments.

1. Standard of Review

When reviewing the adjudicatory stage of a termination of parental rights proceeding, we must "determine whether the findings are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020) (citation and quotation marks omitted).

2. Failure to Make Findings Based on Clear, Cogent, and Convincing Evidence

We first address Father's argument the trial court violated his "constitutional rights by failing to make findings of fact based upon clear, cogent, and convincing evidence[.]" Our statutes mandate that adjudicatory Findings "shall be based on clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7B-1109(f) (2019). This "statutory burden of proof . . . protects a parent's constitutional due process rights as enunciated by the United States Supreme Court[.]" *In re J.C.*, 380 N.C. 738, 742, 869 S.E.2d 682, 685 (2022) (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48, 71 L. Ed. 2d 599 (1982); *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499 (2001)). In order to satisfy the requirement of § 7B-1109(f), and therefore appropriately protect parents' constitutional rights, *see id.*, a trial court must "announce[] the 'clear, cogent, and convincing' standard of proof *either* in making findings of fact in the written termination order or in making such findings in open court." *In re B.L.H.*, 376 N.C. 118, 126, 852 S.E.2d 91, 97 (2020) (emphasis in original).

Here, the trial court failed to meet that standard. Both written Orders only state the trial court made "the following findings of fact[.]" The written Orders do not include any standard of proof, including the required clear, cogent, and convincing standard. *See* N.C. Gen. Stat. § 7B-1109(f). The trial court also did not announce the standard of proof in open court when making its ruling at the adjudicatory portion of the hearing. Therefore, the trial court erred by not announcing it was making Findings based on the clear, cogent, and convincing standard of proof. *See*, *e.g.*, *In re M.R.F.*, 378 N.C. 638, 642, 862 S.E.2d 758, 762 (2021) ("In the present case, however, the trial court failed to announce the standard of proof for its adjudicatory findings either in open court *or* in its written order. Therefore, the trial court failed to comply with the statutory mandate." (emphasis in original)).

When a trial court errs by not making findings using the clear, cogent, and convincing standard of proof, the reviewing court must at a minimum reverse for that error. *See In re J.C.*, 380 N.C. at 743, 747, 869 S.E.2d at 686, 688; *In re M.R.F.*, 378 N.C. at 642-43, 862 S.E.2d at 762-63. A case reversed on these grounds can be remanded to the trial court for it to "review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact . . . unless 'the record of th[e] case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination.' " *In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688 (quoting *In re M.R.F.*, 378 N.C. at 648, 862 S.E.2d at 766) (emphasis in original). Two examples are illustrative of the difference between a case that *can* be reversed and remanded to the trial court and a case that *must* be reversed without remand. In *In re J.C.*, our Supreme Court reversed and remanded because it could not "say that remand of this case for the trial court's consideration of the evidence in the record utilizing the proper clear, cogent, convincing standard of proof would be futile, so as to compel us to conclude that the record of this case is insufficient to support findings which are necessary to establish any of the statutory grounds for termination." *In re J.C.*, 380 N.C. at 747, 869 S.E.2d at 688 (citations, quotation marks, and emphasis omitted). By contrast, in *In re M.R.F.*, our Supreme Court was "compelled to simply, *without remand*, reverse the trial court's order" because of the "petitioner's failure to present sufficient evidence to support any of the alleged grounds for the termination of the parental rights of respondent father[.]" *In re M.R.F.*, 378 N.C. at 642-43, 862 S.E.2d at 762-63 (emphasis in original).

Thus, we must determine whether "the record of this case is insufficient to support findings which are necessary to establish any of the statutory grounds for termination." *In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688 (citations, quotation marks, and emphasis omitted). If Mother did not present sufficient evidence of the ground for termination—willful failure to pay child support under N.C. Gen. Stat. § 7B-1111(a)(4)—we must reverse without remand. *See In re M.R.F.*, 378 N.C. at 642-43, 862 S.E.2d at 762-63. If she presented sufficient evidence of that ground, we will reverse and remand for the trial court to "review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact." *In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688. Father's remaining arguments on appeal address the sufficiency of the evidence and Findings on § 7B-1111(a)(4), so we turn to those arguments now.

3. Sufficiency of the Evidence and Findings as to § 7B-1111(a)(4)

Father makes multiple specific arguments as part of his general argument that the trial court erred by terminating his parental rights

under § 7B-1111(a)(4). All of his arguments relate to the sufficiency of the evidence presented by Mother or the sufficiency of the Findings made by the trial court to support its conclusion that Father's parental rights were subject to termination under § 7B-1111(a)(4). Under § 7B-1111(a)(4), the petitioner must present evidence and the trial court must make findings of fact on two elements:

> (1) that an order or parental agreement requiring the payment of child support was in effect . . . and (2) that the party whose parental rights were sought to be terminated had [willfully] not paid child support as required by the order or parental agreement within the year preceding the entry of the petition.

In re S.R., 283 N.C. App. 149, 158-59, 872 S.E.2d 406, 413 (2022) (citing *In re C.L.H.*, 376 N.C. 614, 620, 853 S.E.2d 434, 439 (writing quoted language in the context of what the petitioner must show before going on to discuss the first requirement in the context of whether the "trial court's findings of fact were []sufficient to support the termination" of parental rights); N.C. Gen. Stat. § 7B-1111(a)(4) (including the requirement that the failure to pay be willful).

Father's arguments relate to both elements. As to the existence of a child support order, Father first argues "[t]here was no evidence presented to prove the existence of a valid child support order." Father also argues the trial court's Findings were insufficient to establish the existence of a child support order, and thus the Findings did not support terminating Father's parental rights under § 7B-1111(a)(4), because the only Finding "to address the existence of a child support order[,]" is not "valid" and must be "disregarded" since it only recounts Mother's testimony. Turning to the second element, Father contends "there was insufficient evidence to support the court's conclusion [Father's] failure [to] pay child support was without justification" and the trial court "failed to make any findings of fact regarding the willfulness of his failure to pay child support." Thus, on the two elements Father contests—the existence of a child support order and the willfulness of his failure to pay—he argues both Mother presented insufficient evidence and the trial court's Findings are insufficient to support its Conclusion that his parental rights can be terminated.

Since we must already at least reverse because of the trial court's failure to make Findings by clear, cogent, and convincing evidence, we need only address whether Mother presented sufficient evidence as to each element. As explained above, we can remand based on the trial court's failure to state the proper standard of proof as long as Mother presented

sufficient evidence to support termination under § 7B-1111(a)(4). The same is true if the trial court's Findings are insufficient to support its Conclusion of Law that Father's rights could be terminated on that ground; as long as Mother presented sufficient evidence, we can remand for entry of a new order. *See In re C.L.H.*, 376 N.C. 614, 622-23, 853 S.E.2d 434, 441 (2021) ("Where, as in this matter, the 'trial court's adjudicatory findings were insufficient to support its conclusion that termination of the parent's rights was warranted, but the record contained additional evidence that could have potentially supported a conclusion that termination was appropriate,' we 'vacate[] the trial court's termination order and remand[ ] the case for further proceedings, including the entry of a new order containing findings of fact and conclusions of law addressing the issue of whether [the] ground for termination existed.' " (quoting *In re K.N.*, 373 N.C. 274, 284, 837 S.E.2d 861, 869 (2020) (brackets in original)). Thus, as to each of the two elements Father contests, if Mother presented sufficient evidence of the element, we can reverse and remand the case rather than reverse it outright. *See In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688 (allowing remand only if sufficient evidence has been presented); *In re C.L.H.*, 376 N.C. at 622-23, 853 S.E.2d at 441 (same).

Looking at the first element, Mother presented sufficient evidence of "an order or parental agreement requiring the payment of child support[.]" *In re S.R.*, 283 N.C. App. at 158, 872 S.E.2d at 413. Although our record does not include a child support order, Mother testified about the existence of the child support order, which dated back to July 2018:

> Q. Okay. From 5/6/2018 until today has [Father] paid any child support in this case?
>
> A. He did not pay any until he was forced to by child support. I did have a child support order, but like soon after (inaudible). But, nothing was ever paid on that. I did get taxes back, his taxes back once, and then there was –
>
> . . .
>
> THE COURT: Right. So, back to this child support; you got a child support order approximately June of 2018?
>
> A. I believe it was in July.
>
> THE COURT: Right. July - approximately July of 2018 you got a child support order. How much did they order him to pay?
>
> A. $1,098.00 a month.

> THE COURT: $1,098.00, okay. Is that here in Randolph County?
>
> A. Yes, sir.

Mother's testimony provides sufficient evidence on the issue of the existence of a child support order as the first element of the termination of Father's parental rights under § 7B-1111(a)(4). In *In re C.L.H.*, our Supreme Court had to determine whether there was "evidence in the record which might support a conclusion that grounds existed to terminate respondent's parental rights pursuant to" § 7B-1111(a)(4) that would allow for vacatur and remand given the trial court did not make a finding that the respondent failed to pay as required by a child support order. *In re C.L.H.*, 376 N.C. at 621-23, 853 S.E.2d at 440-41. The *In re C.L.H.* Court found such evidence in the record in part because "petitioner testified that there was a child support order in place at the time of the termination hearing." *Id.* at 621-22, 853 S.E.2d at 440. Similarly here, Mother's testimony about the existence of a child support order is sufficient evidence to meet her burden of presenting evidence for the first element under § 7B-1111(a)(4). *See id.*; *In re S.R.*, 283 N.C. App. at 158-59, 872 S.E.2d at 413 (delineating elements of § 7B-1111(a)(4)).

We also note Father testified, and he never disputed that he was required to pay child support under a court order. Father acknowledged the existence of a child support order but simply claimed he was unable to pay at certain times. For example, Father was asked on cross-examination if he had ever moved the court to reduce his child support when his income went down, and Father stated, "I tried to, yes." Father also stated he "went to court once and got it continued." Father did not dispute the existence of a child support order but admitted he had unsuccessfully tried to reduce his child support obligation. Despite Mother's testimony about the child support order and Father's own testimony acknowledging his child support obligation, Father asks us to place a higher burden on Mother than the law provides by requiring Mother to present a copy of the child support order as evidence. *See In re C.L.H.*, 376 N.C. at 621-22, 853 S.E.2d at 440 (finding testimony a child support order was in place at the time of the termination hearing sufficient to support termination for willful failure to pay child support).

The trial court noted Mother's testimony about the existence of a child support order in the Finding Father challenges, Finding 8. In each Order terminating Father's parental rights, Finding 8 states:

> [Mother] testified that in July, 2018, a child support order was put in place for [Father] to pay child support. [Father]

> has failed and refused for more than one (1) year to pay child support pursuant to the child support order for the use and benefit of the minor child. [Father] has not paid child support since May 6, 2018, and he is more than $20,000.00 in arrears.

Since we must reverse and remand for entry of a new order based upon the failure to identify the standard of proof, we also note that this Finding is defective as it is a recitation of testimony and not a true finding of fact. As Father argues, "[a]ccording to well-established North Carolina law, recitations of the testimony of each witness do not constitute findings of fact by the trial judge." *In re A.C.*, 378 N.C. 377, 383-84, 861 S.E.2d 858, 867 (2021) (citation, quotation marks, and brackets omitted). The first line of Finding 8 merely recites Mother's testimony and thus it is not a Finding of Fact this Court would have been able to rely upon if we had to evaluate the overall validity of the trial court's termination Orders. *See id.* (noting our Supreme Court "disregarded the language" that merely recited testimony by a witness when "determining the validity of the trial court's termination order"). Again this discussion does not impact our decision on whether to remand because Mother presented sufficient evidence to support a finding that a child support order was put in place in July 2018. *See In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688; *In re C.L.H.*, 376 N.C. at 622-23, 853 S.E.2d at 441. But we note this issue for the benefit of the trial court on remand. The trial court's Findings of Fact on remand should not simply recite the testimony on this crucial fact; the existence of a child support order is necessary for termination of parental rights under § 7B-1111(a)(4), *see In re S.R.*, 283 N.C. App. at 158, 872 S.E.2d at 413, and the trial court would need to make this finding by clear, cogent and convincing evidence to support the order of termination. *See* N.C. Gen. Stat. § 7B-1109(f) (requiring trial court to make all findings of fact based on this standard).

Turning to the second element of § 7B-1111(a)(4), we must determine whether Mother presented evidence sufficient to support a Finding that Father willfully failed to pay for a year preceding the filing of the Petitions. *See In re S.R.*, 283 N.C. App. at 158-59, 872 S.E.2d at 413 (delineating this second element); *see also* N.C. Gen. Stat. § 7B-1111(a)(4) (clarifying the failure to pay must be willful). In the context of termination of parental rights for willful failure to pay child support under § 7B-1111(a)(4), the word " 'willful' . . . has been defined as 'disobedience which imports knowledge and a stubborn resistance, doing the act . . . without authority—careless whether he has the right or not—in violation of law' " and "as 'doing an act purposely and deliberately.' " *Bost v. Van Nortwick*, 117 N.C. App. 1, 14, 449 S.E.2d 911, 919 (1994)

(second ellipses in original) (quoting *In re Roberson*, 97 N.C. App. 277, 280-81, 387 S.E.2d 668, 670 (1990)) (defining "willful" under the old version of the statute, N.C. Gen. Stat. § 7A-289.32(5)); *see In re J.D.S.*, 170 N.C. App. 244, 257, 612 S.E.2d 350, 358 (2005) (indicating N.C. Gen. Stat. § 7A-289.32(5) is "now codified as G.S. § 7B-1111(a)(4)"). Father here argues there was "insufficient evidence" to support a Finding "his failure to pay child support was willful" because he lacked the ability to pay.

Focusing on Father's argument about the lack of evidence on his ability to pay, our Supreme Court recently noted with approval this Court's longstanding precedent that "[b]ecause a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, . . . there is no requirement that [the] petitioner independently prove or that the termination order find as fact [the] respondent's ability to pay support during the relevant statutory time period." *In re C.L.H.*, 376 N.C. at 622, 853 S.E.2d at 440-41 (ellipses in original) (quoting *In re J.D.S.*, 170 N.C. App. at 257, 612 S.E.2d at 358, which in turn quoted *In re Roberson*, 97 N.C. App. at 281, 387 S.E.2d at 670) (so noting after explaining it was not necessary to reach the issue of whether a failure to pay was willful because the case was already being remanded on the grounds the trial court failed to make a finding on the existence of a child support order). Thus, because Mother here testified to the existence of a valid child support order, she did not need to "independently prove" Father had an ability to pay in order to present sufficient evidence to support a Finding that Father willfully failed to pay. *Id.*

Father's arguments about his lack of ability to pay do not change our decision that Mother presented sufficient evidence of willful failure to pay, although the trial court will need to make new Findings on remand, as discussed above. Father first indicates he "offered evidence to rebut" Mother's evidence of his ability to pay. Father testified he was unable to pay the full amount of child support during the relevant time period. But Father also testified he was self-employed from late 2018 until 2021, which corresponded with the time Father was on pre-trial release from jail, and that testimony indicates Father had the ability to pay at least some money during the time period. Mother testified, however, Father paid nothing between 2018 and when she filed the Petitions in January 2020. This testimony thus provides evidence Father had at least some ability to pay during the relevant time period.

But this testimony revealing Father had some ability to pay is ultimately not relevant for the current decision of whether we can remand the case or must reverse it outright. While Father could "present evidence to prove he was unable to pay child support in order to rebut a

finding of willful failure to pay[,]" *Bost*, 117 N.C. App. at 16, 449 S.E.2d at 919, to determine whether we can remand the case, we only need to determine whether Mother presented sufficient evidence on which the trial court *could* have found Father willfully failed to pay. *See In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688; *In re C.L.H.*, 376 N.C. at 622-23, 853 S.E.2d at 441. The trial court has the duty of determining the credibility and weight of all the evidence, and only the trial court can make the findings of fact resolving any conflicts in the evidence. *See, e.g.*, *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020) ("[I]t is the duty of the trial judge to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. The trial judge's decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence are not subject to appellate review." (citations, quotation marks, and brackets omitted)). As we have explained, Mother presented such sufficient evidence when she testified a valid child support order required Father to pay. *See In re C.L.H.*, 376 N.C. at 622, 853 S.E.2d at 440-41.

In his other argument, Father contends we should interpret § 7B-1111(a)(4) "in *pari materia*" with N.C. Gen. Stat. § 5A-21's provisions on civil contempt for failure to pay child support because "terminating parental rights is far more severe" than holding a parent in civil contempt and doing so is necessary "[t]o protect a parent's constitutional rights[.]" Specifically, Father asserts, based on this Court's decision in *Cty. of Durham ex rel. Durham DSS v. Burnette*, 262 N.C. App. 17, 821 S.E.2d 840 (2018), the trial court should have looked at his "current circumstances" with regard to ability to pay "regardless of when the original child support order was entered." Father contends the trial court "made no efforts" to undertake that inquiry in this case. We do not need to address this argument from Father because it focuses on the sufficiency of the trial court's Findings rather than on the sufficiency of the evidence Mother presented, the latter of which determines whether we can remand the case. *See In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688; *In re C.L.H.*, 376 N.C. at 622-23, 853 S.E.2d at 441.

Thus, Mother presented sufficient evidence of both elements of § 7B-1111(a)(4). Because Mother presented sufficient evidence upon which the trial court could have made Findings to support a conclusion that Father's parental rights could be terminated under N.C. Gen. Stat. § 7B-1111(a)(4), we can remand the case rather than reverse it outright. *See In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688; *In re C.L.H.*, 376 N.C. at 622-23, 853 S.E.2d at 441. The trial court is not required to make any particular finding on remand; the trial court instead must make the findings, based upon clear, cogent, and convincing evidence, it determines

are appropriate based on the evidence. *See*, *e.g.*, *In re N.W.*, 381 N.C. 851, 857, 874 S.E.2d 498, 504 (2022) ("Although the trial court does have responsibility for evaluating the credibility of the witnesses, weighing the evidence, and determining the relevant facts, its findings of fact must be based upon clear, cogent, and convincing evidence[.]" (citations omitted)); *In re J.C.*, 380 N.C. at 746, 869 S.E.2d at 688 ("[U]pon remand a trial court must review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact.").

III. Conclusion

We reverse and remand this case to the trial court. While the Petitions provided Father sufficient notice of the grounds on which his parental rights could be terminated, we reverse because the trial court failed to announce, either in open court or in the written Orders terminating Father's parental rights, it was making Findings using the required clear, cogent, and convincing standard of proof. Because Mother presented sufficient evidence on which the trial court could have terminated Father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(4), we remand the case rather than reverse it outright. On remand, the trial court shall consider "the record before it in order to determine whether [Mother] has demonstrated by clear, cogent, and convincing evidence" that Father's parental rights could be terminated. *In re J.C.*, 380 N.C. at 747, 869 S.E.2d at 688 (remanding case with such instructions where trial court did not announce the proper clear, cogent, and convincing standard of proof).

REVERSED AND REMANDED.

Judges ZACHARY and COLLINS concur.

IN RE CUSTODIAL L. ENF'T AGENCY RECORDINGS

[287 N.C. App. 566 (2023)]

IN THE MATTER OF CUSTODIAL LAW ENFORCEMENT AGENCY RECORDINGS SOUGHT BY:

APG-EAST LLC d/b/a "The Daily Advance"; Scripps Broadcast Holdings, LLC d/b/a WTKR-TV and WGNT-TV; Capital Broadcasting Company, Inc. d/b/a WRAL-TV; The McClatchy Company, LLC d/b/a "The News and Observer" and "The Charlotte Observer"; Carolina Public Press, Inc. d/b/a "Carolina Public Press"; Grey Media Group, Inc. d/b/a WBTV, WECT and WITN; WUNC, LLC d/b/a "WUNC-FM"; DTH Media Co d/b/a "The Daily Tarheel"; Nexstar Media, Inc. d/b/a "WAVY-TV" and "WVBT-TV"; Cable News Network, Inc. d/b/a "CNN"; WTVD Television, LLC d/b/a WTVD-ABC11; The Associated Press; WP Company, LLC d/b/a "The Washington Post"; Charter Communications d/b/a "Spectrum News"; Chatham Media Group, LLC d/b/a "Chatham News + Record"; and Gannett Co., Inc. d/b/a "Wilmington Star News" and "USA Today", The New York Times Co. d/b/a The New York Times, Media Convergence Group, d/b/a Newsy Court TV Media, LLC d/b/a Court TV,

Petitioners

No. COA22-446

Filed 7 February 2023

1. Public Records—law enforcement agency recordings—media request—standing—statutory requirement to "file an action"

The trial court properly dismissed a petition that was filed by twenty media entities—on a form issued by the Administrative Office of the Courts (AOC)—seeking the release of custodial law enforcement agency recordings (CLEARs) pertaining to a fatal shooting and subsequent protests for lack of standing where petitioners failed to comply with the requirement in N.C.G.S. § 132-1.4A(g) to "file an action." The plain meaning and use of the word "action" in subsection (g), which established a general procedure for release of CLEARs, as opposed to the use of the word "petition" in subsection (f), which established an expedited process for release of CLEARs to a certain category of individuals and provided that the petition shall be filed using an AOC-approved form, evidenced legislative intent that those seeking release under subsection (g) must file a civil action and comply with all attendant procedural requirements.

2. Jurisdiction—one judge overruling another—jurisdictional issue—no prejudicial error

In a matter involving a media request seeking the release of custodial law enforcement agency recordings, which was initiated by petition using a form issued by the Administrative Office of the Courts, where one superior court judge previously determined that the filing of a petition was sufficient to invoke the trial court's jurisdiction but a subsequent judge concluded that the media entities

lacked standing because the relevant statute required them to file a civil action rather than a petition, even if there was any error by the second judge in overruling the first judge, such error was not prejudicial in this instance because issues of subject matter jurisdiction may be raised and addressed at any time.

Appeal by Petitioners from order entered 9 November 2021 by Judge Jerry R. Tillett in Pasquotank County Superior Court. Heard in the Court of Appeals 29 November 2022.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, Karen M. Rabenau, Hugh Stevens, C. Amanda Martin, and Elizabeth J. Soja, for Petitioners-Appellants.

No brief filed for Respondent-Appellee.

GRIFFIN, Judge.

Petitioners, twenty media entities, appeal from Judge Tillett's order dismissing their joint motion for release of custodial law enforcement agency recordings pursuant to N.C. Gen. Stat. § 132-1.4A(g). Petitioners contend that the trial court misconstrued the law applicable to N.C. Gen. Stat. § 132-1.4A(g), and therefore erred in refusing to grant and dismissing their petition for release. Petitioners also allege Judge Tillett improperly overruled prior determinations made by another superior court judge, Judge Foster.

Our review of the relevant statutory scheme shows that our legislature intended two different procedures for individuals seeking release of custodial law enforcement recordings: an expedited petition process for certain enumerated individuals, and an ordinary civil action for all others. We hold that Judge Tillett properly dismissed Petitioners' petition for lack of standing because they failed to "file an action" as required by N.C. Gen. Stat. § 132-1.4A(g). We affirm.

I. Factual and Procedural Background

On 21 April 2021, Andrew Brown, Jr., suffered fatal gunshots during the attempted service of arrest and search warrants on Brown at a property in Elizabeth City. On 26 April 2021, Petitioners filed the first in a series of petitions seeking release of any and all custodial law enforcement agency recordings made from the events of April 21 and protests that followed, pursuant to N.C. Gen. Stat. § 132-1.4A(g). Petitioners filed their petitions for release using the AOC-CV-270 form issued by

the North Carolina Administrative Office of the Courts ("AOC"), entitled "Petition for Release of Custodial Law Enforcement Agency Recording."

On 27 April 2021, Petitioners filed their Second Amended Petition for Release of Custodial Law Enforcement Agency Recording. The Second Amended Petition included a total of twenty media entities as petitioners, which sought recordings from the law enforcement offices in Dare, Perquimans, and Pasquotank Counties, Elizabeth City, and the North Carolina State Bureau of Investigation. The Second Amended Petition used the same form, noted that it was a general request for release pursuant to N.C. Gen. Stat. § 132-1.4A(g), and requested:

> The release of all body cam, dashboard camera, cell phone, fixed camera recordings, or any other recordings as defined by [N.C. Gen. Stat. §] 132-1.4A(a)(6)* regarding this incident, from the time deputies first arrived at the residence through the protests at the scene, and later that evening, which are in the possession or control of the [law enforcement] offices or the [SBI].
>
> . . .
>
> *including, without limitation recordings from Ring and other similar doorbell/security cameras to which law enforcement has access and/or over which the Elizabeth City Police Department or Elizabeth City had control.

On 28 April 2021, Judge Jeffery B. Foster held a hearing on the Second Amended Petition in Pasquotank County Superior Court. At the time of the hearing, there was an active investigation into the events of 21 April 2021. The Pasquotank County district attorney advocated for the State's interest in the "orderly administration of justice," and asked the court to postpone release of any recordings until after the district attorney's office had decided whether to bring any charges. No other interested party objected to the release of any recordings at that time.

On 17 May 2021, Judge Foster entered a written order denying Petitioners' Second Amended Petition constituting a final disposition. In the written order, Judge Foster concluded that Petitioners were "members of a general class of 'any person requesting release of a recording' " as contemplated by N.C. Gen. Stat. § 132-1.4A(g) and had "filed 'an action' " as required by the statute. Nonetheless, Judge Foster held "the release of the videos to the [Petitioners was] not appropriate at [that] time." In balancing the interest of release to the public and the media against the State's interest, Judge Foster found the State's interest weighed more heavily because "[r]elease would create a serious threat to

the fair[] and orderly administration of justice" and there was a need to protect the State's "active internal or criminal investigation." There is no record of an appeal having been taken from Judge Foster's written order denying Petitioners' Second Amended Petition.

On 18 May 2021, the Pasquotank County district attorney announced that he would not bring any charges in relation to the 21 April 2021 incident. On 21 May 2021, as a result of the district attorney's decision, Petitioners filed a Third Amended and Renewed Petition (the "Third Petition") restating their request for release of the 21 April 2021 recordings by law enforcement offices in Dare, Perquimans, and Pasquotank Counties, Elizabeth City, and the North Carolina State Bureau of Investigation. The Third Petition once again was submitted on the AOC-CV-270 petition form, noted that it was a general request for release pursuant to N.C. Gen. Stat. § 132-1.4A(g), and requested:

> On 5/18/21, the District Attorney announced he would not bring charges against the deputies. Petitioners request the release of all recordings as defined by [N.C. Gen. Stat. §]132-1.4A(a)(6)* regarding [the 21 April 2021] incident, from 8:00 a.m. on 21 April 2021 through protests at the scene, and later that evening, which are in the possession or control of the custodial law enforcement agencies identified herein.
>
> . . .
>
> *including, without limitation, recordings from Ring and other similar doorbell/security cameras to which law enforcement has access and/or over which the Elizabeth City Police Department had control or were operated on their behalf).

On 13 September 2021, Judge Tillett held a hearing on the Third Petition in Currituck County Superior Court. Judge Tillett stated during the hearing that he was unsure Petitioners had followed the "appropriate procedure" for N.C. Gen. Stat. § 132-1.4(g), even though they "had plenty of time to go file it" properly. The district attorney then moved for the first time to dismiss the Third Petition pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure. Judge Tillet heard the motion and further stated his belief that, wherever N.C. Gen. Stat. § 132-1.4A(g) is referenced, "it says may file an action," even though the section "appears to allow a broader category of person than otherwise provided for disclosure."

On 9 November 2021, Judge Tillet entered a written order dismissing Petitioners' Third Petition pursuant to Rules 12(b)(1), (b)(2), (b)(4), (b)(5), and (b)(6) of the North Carolina Rules of Civil Procedure. The written order concluded that Petitioners failed to file "an action" in compliance with N.C. Gen. Stat. § 132-1.4A(g), and thereafter had failed to serve notice upon all required parties.

Petitioners timely appeal.

II. Analysis

Petitioners contend that Judge Tillett erred by dismissing their petition because (1) he acted based upon a misinterpretation of the controlling statutes and (2) he inappropriately overruled the prior decisions of Judge Foster.

A. Standing to Request Release

[1] Petitioners contend the trial court erred by dismissing their petition for release of law enforcement recordings under Rules 12(b)(1), (b)(2), (b)(4), (b)(5), and (b)(6), prior to any review of its merits. In so ruling, the court held that Petitioners had failed to file a proper action placing themselves and their claims before the court, and had further failed to comply with the service requirements of an appropriate action.

Though the trial court listed many rules in its order, the core of its decision turned on Petitioners' failure to file and serve a proper action, resulting in a lack of standing. This Court reviews the trial court's decisions regarding standing and jurisdiction *de novo*, substituting our own judgment and considering each question of law anew. *See Catawba Cnty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 87, 804 S.E.2d 474, 478 (2017); *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). Likewise, "[q]uestions of statutory interpretation are questions of law and are reviewed de novo." *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010).

Law enforcement agencies are custodians for the recordings "captured by a body-worn camera, a dashboard camera, or any other video or audio recording device operated by or on behalf of a law enforcement agency or law enforcement agency personnel when carrying out law enforcement responsibilities." N.C. Gen. Stat. § 132-1.4A (2021). By definition, these custodial law enforcement agency recordings ("CLEARs") are neither public nor personnel recordings. N.C. Gen. Stat. § 132-1.4A(b). Law enforcement agencies are not permitted to allow viewing of CLEARs absent compliance with court orders resulting from proceedings under Section 132-1.4A. *See* N.C. Gen. Stat. § 132-1.4A(f), (g).

Section 132-1.4A defines two methods for viewing CLEARs: disclosure and release. Disclosure means "[t]o make a recording available for viewing or listening to by the person requesting disclosure, at a time and location chosen by the custodial law enforcement agency." N.C. Gen. Stat. Ann. § 132-1.4A(a)(4). Subsections 132-1.4A(b1) through (e) provide a mechanism through which certain categories of individuals who appear in or are otherwise involved in a CLEAR are presumptively authorized to receive disclosure. *See* N.C. Gen. Stat. § 132-1.4A(b1)–(e). Under "disclosure," only viewing, and not copying or dissemination, is allowed.

Release means "to provide a copy of a recording." N.C. Gen. Stat. Ann. § 132-1.4A(a)(7). Subsections 132-1.4A(f) and (g) provide instructions for those seeking "release," and for the law enforcement agencies being asked to allow release of CLEARs:

> (f) Release of Recordings to Certain Persons; Expedited Process. —
>
> Notwithstanding the provisions of subsection (g) of this section, *a person authorized to receive disclosure pursuant to subsection (c) of this section*, or the custodial law enforcement agency, may *petition* the superior court in any county where any portion of the recording was made for an order releasing the recording to a person authorized to receive disclosure. There shall be no fee for filing *the petition which shall be filed on a form approved by the Administrative Office of the Courts* and shall state the date and approximate time of the activity captured in the recording, or otherwise identify the activity with reasonable particularity sufficient to identify the recording. If the petitioner is a person authorized to receive disclosure, notice and an opportunity to be heard shall be given to the head of the custodial law enforcement agency. *Petitions* filed pursuant to this subsection shall be set down for hearing as soon as practicable and shall be accorded priority by the court.
>
> . . .
>
> If the court determines that the person to whom release of the recording is requested is a person authorized to receive disclosure pursuant to subsection (c) of this section, the court shall consider the standards set out in subsection (g) of this section and any other standards the

> court deems relevant in determining whether to order the release of all or a portion of the recording. . . .
>
> (g) Release of Recordings; General; Court Order Required.—
>
> Recordings in the custody of a law enforcement agency shall only be released pursuant to court order. Any custodial law enforcement agency or any person requesting release of a recording may *file an action* in the superior court in any county where any portion of the recording was made for an order releasing the recording. The request for release must state the date and approximate time of the activity captured in the recording, or otherwise identify the activity with reasonable particularity sufficient to identify the recording to which the action refers. The court may conduct an in-camera review of the recording. In determining whether to order the release of all or a portion of the recording, in addition to any other standards the court deems relevant, the court shall consider the applicability of [eight enumerated] standards[.]
>
> . . .
>
> In any proceeding pursuant to this subsection, the following persons *shall be notified* and those persons, or their designated representative, shall be given an opportunity to be heard at any proceeding: (i) the head of the custodial law enforcement agency, (ii) any law enforcement agency personnel whose image or voice is in the recording and the head of that person's employing law enforcement agency, and (iii) the District Attorney. *Actions* brought pursuant to this subsection shall be set down for hearing as soon as practicable, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

N.C. Gen. Stat. Ann. § 132-1.4A(f), (g) (emphasis added).

These two statutory subsections are similar in form and function. The differences between them lie in the language our legislature used to describe the individuals who have standing to seek release, how release was to be requested, and who must receive notice of the release request. Subsection (f) creates an "expedited process" for release of CLEARs to specifically identified individuals presumptively authorized to receive disclosure under subsections (b1) through (e). Those specifically identified individuals seeking release under subsection (f) are directed to file a petition using a form made for this process by AOC. Notice is then

to be given to the head of the law enforcement agency in custody of the CLEAR.

Subsection (g) establishes a "general" procedure for release of CLEARs to all individuals and entities other than those contemplated by subsection (f). Subsection (g) instructs anyone else seeking release to "file an action." Both subsection (f) and (g) require the release seeker to provide the date and time of the CLEAR, or other reasonably particular information identifying the requested CLEAR. However, subsection (g) does not direct nor permit the release seeker to use a form created by AOC. The general procedure outlined in subsection (g) also states that notice must be given to not only the head of the law enforcement agency in custody of the CLEAR, but also to the district attorney and to all law enforcement personnel whose images or voices appear in the CLEAR.

Judge Tillett's decision to dismiss Petitioners' petition relied on these distinctions. Judge Tillett held that Petitioners lacked standing because section 132-1.4A(g) requires the party seeking the release to file an "action," but Petitioners had filed only a petition using the AOC-CV-270 form. We must determine whether the legislature's use of the word "action" in section 132-1.4A(g) requires an individual seeking general release of CLEARs to initiate their request by filing a civil action. We hold that it does.

" 'Statutory interpretation properly begins with an examination of the plain words of the statute.' " *Belmont Ass'n, Inc. v. Farwig*, 381 N.C. 306, 310, 873 S.E.2d 486, 489 (2022) (citation omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005). "Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Correction v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (citation omitted).

Where the meaning of words in a statute is unclear, this Court interprets the statute with a focus on giving effect to the intent of the legislature in enacting the statutory scheme:

> Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently.

Shelton v. Morehead Mem'l Hosp., 318 N.C. 76, 81–82, 347 S.E.2d 824, 828 (1986) (citations omitted). "This Court must consider any differences in otherwise identically worded statutes, because these differences in wording strongly suggest that the General Assembly did not intend the words included in one statute, or subsection of a statute, to apply to other statutes or subsections that do not include those words." *State v. McCants*, 275 N.C. App. 801, 824–25, 854 S.E.2d 415, 432 (2020) (citation, quotation marks, and internal editing marks omitted).

Section 132-1.4A(g) states that anyone seeking general release of a CLEAR may "file an action." "Action" is a term of art, defined as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C. Gen. Stat. § 1-2 (2021). The plain meaning and use of the term "action" means that our legislature intended for those seeking release under section 132-1.4A(g) to file an ordinary civil action, not a petition using an AOC form.

This Court has held in a similar circumstance that our legislature's use of the term "action" means that the intended result was an ordinary civil action, not any sort of special proceeding. *Charns v. Brown*, 129 N.C. App. 635, 637, 502 S.E.2d 7, 8 (1998). This Court in *Charns* interpreted our legislature's intent regarding the term "action" in the public records statute, N.C. Gen. Stat. § 132-9, but its logic is nonetheless useful here. Public records are the "property of the people" and, by default, viewable by the public without contest at minimal cost. N.C. Gen. Stat. § 132-1 (2021). The facts in *Charns* concerned actions to compel disclosure of public records after a request for disclosure of those records had been denied. *Charns*, 129 N.C. App. at 637, 502 S.E.2d at 8. The plaintiff successfully compelled access to public records. *Id.* The defendant custodian of those records appealed, arguing the plaintiff failed to comply with the procedural requirements of filing an action. *Id.* The plaintiff argued that, even though the legislature referred to actions to compel disclosure as "actions," the resulting proceedings were "special proceedings," instead. This Court held that the legislature intended an "action," and the party seeking access to the records must comply with all the statutory and procedural requirements of an "action." *Id.* at 638, 502 S.E.2d at 9.

The same conclusion is appropriate in this case. Access to public records is not ordinarily contested, but section 132-9 authorizes public record seekers to initiate an action when their request is denied. CLEARs by statute are not public records, are by default not to be

released, and therefore proceedings for their release are by their very nature contested. It follows that section 132-1.4A(g) would require an action be filed to resolve a contested matter.

Interpreting section 132-1.4A as a whole leads us to the same conclusion. The legislature chose to allow specifically identified release seekers under the "expedited process" in subsection (f) to "petition," while "general" release seekers under subsection (g) are directed to "file an action." Petitioners are not the first to initiate their request for release under subsection (g) using form AOC-CV-270. The form includes a checkbox through which its user may indicate that they seek release under "G.S. 132-1.4A(g) – General."

Nonetheless, section 132-1.4A(g) makes no reference to the creation or use of a form created by AOC for actions filed pursuant to that subsection, while subsections 132-1.4A(b2) and (f) explicitly state that those seeking disclosure or release should use a form developed and/or approved by AOC. We must construe the differences between these subsections materially; if the legislature had intended an AOC form be used in conjunction with subsection (g), it would have instructed as such. *See McCants*, 275 N.C. App. at 824–25, 854 S.E.2d at 432.

We reach our conclusion in this case in full awareness of our judiciary's flexibility in resolving cases in a timely and efficient manner when those cases are initiated improperly:

> Within the guidelines of our Constitution, the legislature is charged with the responsibility of providing the necessary procedures for the proper commencement of a matter before the courts. Occasionally, however, the proscribed procedures of a statutory scheme fail to embrace the unanticipated and extraordinary proceeding such as that disclosed by the record before us. In similar situations, it has been long held that courts have the inherent power to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly.

In re Albemarle Mental Health Ctr., 42 N.C. App. 292, 296, 256 S.E.2d 818, 821 (1979). The Court in *Albemarle* employed this reasoning, though, in an instance where the legislature had failed "to provide precise statutory directions" for the type of proceeding required under the statute. *Id.* Here, section 132-1.4A(g) provides precise directions that those seeking release must "file an action." We are not left to interpret whether filing a petition is sufficient for our courts to assume jurisdiction.

Petitioners failed to properly initiate judicial process under section 132-1.4A(g) by filing an AOC form. Section 132-1.4A(g) requires the party seeking release of CLEARs to "file an action" and to comply with all procedural requirements inherent therein. Judge Tillett did not err by dismissing Petitioners' petition under Rules 12(b)(1), (b)(2), (b)(4), (b)(5), and (b)(6).

B. Overruling a Superior Court Judge

[2] Petitioners also contend Judge Tillett's decision to dismiss their Third Amended Petition was error because he improperly overruled Judge Foster's earlier determination that Petitioners had properly, "pursuant to [subsection 132-1.4A(g),] filed 'an action' " when they used the AOC-CV-270 form to file their Second Amended Petition. Petitioners further contend that Judge Tillett erred by considering the district attorney's Rule 12(b) motion to dismiss because it was made orally at trial without prior notice to Petitioners.

Petitioners correctly state 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). However, even if we were to find that Judge Tillett erred, the error would not be prejudicial in this case because this Court is free to review questions of subject matter jurisdiction no matter when they arise and no appeal was taken from Judge Foster's prior dismissal. "Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re S.E.P.*, 184 N.C. App. 481, 487, 646 S.E.2d 617, 621 (2007) (citation omitted and internal marks omitted). "Therefore, issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by the Court." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878–79 (2002).

III. Conclusion

The plain language of N.C. Gen. Stat. § 132-1.4A(g) instructs those seeking general release of CLEARs to "file an action." The Third Amended Petition filed by Petitioners failed to comply with the statutory requirements. Therefore, Judge Tillett did not err by dismissing Petitioners' petition.

AFFIRMED.

Judges TYSON and CARPENTER concur.

IN RE Z.J.W.

[287 N.C. App. 577 (2023)]

IN THE MATTER OF Z.J.W., A MINOR CHILD

No. COA22-456

Filed 7 February 2023

Termination of Parental Rights—ex parte proceedings after remand—lack of notice and opportunity to be heard for parent—due process violation

In a termination of parental rights matter in which a prior termination order was reversed and the matter remanded to the trial court with instructions to enter a new order containing proper findings of fact and conclusions of law, respondent father did not receive a fundamentally fair proceeding where the trial court held an ex parte in-chambers meeting with only the guardian ad litem and counsel for the department of social services before entering a new order terminating respondent's parental rights to his daughter. Respondent's constitutional due process rights were violated since neither respondent nor his counsel were given notice of the meeting and an opportunity to be heard.

Appeal by Respondent-Father from Order entered 9 September 2021 by Judge Elizabeth Freshwater-Smith in Nash County District Court. Heard in the Court of Appeals 11 January 2023.

Jayne B. Norwood, for petitioner-appellee Nash County Department of Social Services.

Garron T. Michael for respondent-appellant father.

Poyner Spruill LLP, by Caroline P. Mackie and Andrea Liberatore, for guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Father appeals from the trial court's Termination of Parental Rights Order entered 9 September 2021, which adjudicated grounds to terminate Respondent-Father's parental rights in his minor child Jill[1] pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). The Record before us tends to reflect the following:

1. The juvenile is referred to by the parties' stipulated pseudonym.

On 10 January 2018, the Nash County Department of Social Services (DSS) filed a Juvenile Petition (Petition) alleging Jill was an abused and neglected juvenile as defined by N.C. Gen. Stat. § 7B-101. The Petition alleged that on or about 25 June 2017, DSS received a referral alleging Jill to be an abused and neglected juvenile. Both Respondent-Father and Respondent-Mother stipulated a factual and legal basis exists to adjudicate Jill as being abused and neglected as defined in N.C. Gen. Stat. § 7B-101, as alleged in the Petition. Jill was adjudicated abused and neglected on 11 July 2018. DSS obtained custody of Jill, and the trial court adopted a permanent plan of reunification with a concurrent plan of adoption.

On 20 February 2019, DSS filed a Motion to terminate Respondent-Father's parental rights in Jill. In the Motion, DSS alleged Jill was an abused and neglected juvenile and there was a probability the abuse and neglect would continue if Jill was returned to the custody of Respondent-Father. Following hearings on 27 June 2019 and 25 July 2019, the parental rights of both Respondent-Father and Respondent-Mother were terminated. The trial court entered a Termination of Parental Rights Order on 23 September 2019 (2019 Termination Order). Respondent-Father timely filed written Notice of Appeal.[2]

On appeal to the Supreme Court of North Carolina, Respondent-Father challenged numerous findings of fact and the trial court's conclusion grounds existed for the termination of Respondent-Father's parental rights in Jill. *In re Z.J.W.*, 376 N.C. 760, 855 S.E.2d 142 (2021). Our Supreme Court concluded:

> [T]he trial court's determination that respondent-father's parental rights in Jill were subject to termination on the basis of abandonment and neglect by abandonment lacked sufficient support in the trial court's findings of fact and that the trial court's determination that respondent-father's parental rights in Jill were subject to termination on the basis of prior neglect and the likelihood of a repetition of neglect rested upon a misapplication of the applicable law.

Id. at 782, 855 S.E.2d at 158 . The trial court's 2019 Termination Order was reversed, in part; vacated, in part; and remanded, in part, for:

> the entry of a new termination order containing proper findings of fact and conclusions of law concerning the

2. Respondent-Mother did not appeal this Order and is not a party to the proceedings on appeal.

> extent to which respondent-father's parental rights in Jill were subject to termination on the basis of prior neglect coupled with the likelihood of a repetition of neglect and whether the termination of respondent-father's parental rights would be in Jill's best interests.

Id.

Following the issuance of the Supreme Court's opinion and disposition, the trial court held an in-chambers meeting with counsel for DSS and the guardian *ad litem* (GAL) on 14 July 2021. Neither Respondent-Father, counsel for Respondent-Father, nor any other opposing party was notified or participated in this meeting. Outside of this in-chambers meeting, there were no other meetings or hearings held, and Respondent-Father was not provided with any notice of the termination proceedings or the trial court's process and decision in filing a new termination order consistent with the Supreme Court's opinion.

On 9 September 2021, the trial court entered a new Termination of Parental Rights Order (2021 Termination Order). In the 2021 Termination Order, the trial court concluded grounds exist to terminate Respondent-Father's parental rights to Jill based on prior neglect and the likelihood of future neglect. Further, the 2021 Termination Order also concluded the termination of Respondent-Father's parental rights was in Jill's best interest. On 11 October 2021, Respondent-Father timely filed written Notice of Appeal of the 2021 Termination Order.

Issue

The dispositive issue on appeal is whether Respondent-Father was denied a fundamentally fair termination proceeding when the trial court engaged in *ex parte* communications with DSS and the GAL without notice to Respondent-Father prior to the entry of the 2021 Termination Order.

Analysis

Respondent-Father contends the trial court acted under a "misapprehension of the law" in the entry of the 2021 Termination Order, resulting in Respondent-Father being denied a fundamentally fair proceeding.

"[A] parent enjoys a fundamental right 'to make decisions concerning the care, custody, and control' of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (quoting *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49,

57 (2000)). Thus, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures[.]" *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (1992) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 606 (1986)).

"A parent whose rights are considered in a termination of parental rights proceeding must be provided with fundamentally fair procedures consistent with the Due Process Clause of the Fourteenth Amendment." *In re J.E.B.*, 376 N.C. 629, 633, 853 S.E.2d 424, 428 (2021) (citations and quotation marks omitted). Further, Canon 3(A)(4) of the North Carolina Code of Judicial Conduct provides: "[a] judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding." N.C. Code of Judicial Conduct, Canon 3(A)(4).

On remand, the trial court engaged in *ex parte* communications with counsel for DSS and the GAL prior to the entry of the 2021 Termination Order in an unrecorded in-chambers meeting. Respondent-Father contends "the trial court acted under a misapprehension of the law that on remand [Respondent-Father] was no longer a party to the proceedings [and] was not entitled to due process and fundamentally fair procedures, or both."

We agree that the Record reflects the trial court appears to have acted under a "misapprehension of the law" by conducting the in-chambers meeting on remand and that such a misapprehension warrants remand. *See In re M.K.*, 241 N.C. App. 467, 475, 773 S.E.2d 535, 541 (2015) ("Our Supreme Court has held that 'where it appears that the judge below has ruled upon matter before him upon a misapprehension of the law, the cause will be remanded . . . for further hearing in the true legal light.' " (quoting *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960)).

Nothing in the Record indicates Respondent-Father or counsel for Respondent-Father were provided notice of the trial court's proceedings on remand. As such, Respondent-Father was not afforded an opportunity to participate or be heard on the 2021 Termination Order prior to its entry. In briefing to this Court and in response to Respondent-Father's due process argument, both DSS and the GAL appear to suggest any error in this regard was harmless because the trial court was not required to conduct a new hearing or consider new evidence in entering the 2021 Termination Order on remand.

The Supreme Court remanded the case for "further proceedings not inconsistent with this opinion, including the entry of a new termination order containing proper findings of fact and conclusions of law." *Z.G.W.*, 376 N.C. at 782, 855 S.E.2d at 158. As such, the trial court was permitted, but not required, to hear from the parties on remand. Nevertheless, the trial court did hear from two of the parties: DSS and the GAL. Respondent-Father, as a party to the termination proceedings, was still entitled to procedural due process, including proper service of process, notice of proceedings, and fair procedures. *See Santosky*, 455 U.S. at 753-54, 71 L. Ed. 2d at 606 (1982) (holding a state must provide respondents with fundamentally fair procedures when it moves to destroy weakened familial bonds). Once the trial court determined to hear from the GAL and DSS on the matter on remand, Respondent-Father was entitled to basic notice and an opportunity to be heard. The error in this regard is further compounded by the fact there is no record of what was discussed or presented to the trial court in-chambers for us to review.[3]

Thus, on remand, Respondent-Father was entitled to the same due process protections and fundamentally fair procedures afforded to him at the outset of the termination proceedings. Therefore, by engaging with counsel for DSS and the GAL outside the presence and without prior notice to Respondent-Father, the trial court violated Respondent-Father's due process right to notice and an opportunity to be heard. Consequently, we vacate the 2021 Termination Order and remand this matter for the trial court to enter a new Termination of Parental Rights Order with fundamentally fair procedures consistent with the Due Process Clause of the Fourteenth Amendment.

Conclusion

Accordingly, for the foregoing reasons, we vacate the 2021 Termination Order and remand this matter to the trial court for further proceedings as set forth herein and consistent with our Supreme Court's prior decision in this case.

VACATED AND REMANDED.

Judges DILLON and TYSON concur.

3. The Record on Appeal contains a narrative in which the parties simply acknowledge this in-chambers meeting took place.

JANU INC D/B/A STONECRAFTERS, AUM HOSPITALITY SERVICES, PLAINTIFFS
v.
MEGA HOSPITALITY, LLC, MEGA-C HOSPITALITY, LLC, MEGA-B HOSPITALITY, LLC, MEGA-K HOSPITALITY, LLC, G.R. BHAT, AND SUJATA BHAT, DEFENDANTS

No. COA22-194

Filed 7 February 2023

1. Civil Procedure—notice of hearing—uncalendared motion—personal jurisdiction—irregular judgment

In a contract dispute, the portion of the judgment granting defendant's motion to dismiss for lack of personal jurisdiction was irregular and therefore was vacated where defendant failed to give plaintiff prior notice that defendant intended to present the issue of personal jurisdiction at the hearing that had been scheduled on defendant's motion to dismiss for failure to state a claim. Plaintiff did not waive the lack of notice by participating in the hearing because plaintiff immediately notified the trial court that the motion for lack of personal jurisdiction was not calendared before the court.

2. Jurisdiction—personal—waiver of objection—by seeking affirmative relief on other basis

In a contract dispute, the trial court erred in finding that it lacked personal jurisdiction over defendant where defendant waived any jurisdictional objections by calendaring a hearing and seeking affirmative relief from the trial court on its motions to dismiss for failure to state a claim and for attorney's fees.

3. Attorney Fees—prevailing party—statutory requirement—not met

In a contract dispute, the appellate court declined to address defendant's argument that the trial court's denial of attorney fees should be vacated. Defendant was not the prevailing party and therefore was not entitled to attorney fees pursuant to N.C.G.S. § 6-21.5.

Appeal by defendant from judgment entered 13 September 2021 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 21 September 2022.

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

Currin & Currin, by George B. Currin, for the defendant-appellee.

Robert A. Brady, for the defendant-appellee.

TYSON, Judge.

Janu Inc. ("Plaintiff"), a North Carolina corporation, and Defendant, Mega K, LLC ("Mega K"), dispute the breach of a contract over the remodeling of a hotel Defendant owns. Defendant moved to dismiss for failure to state a claim in the complaint and for lack of personal jurisdiction. Defendant noticed a hearing regarding the motion to dismiss for failure to state a claim. Plaintiff vehemently objected to calendaring a hearing on jurisdiction prior to having received requested jurisdictional discovery. The trial court ruled on both motions and concluded it lacked personal jurisdiction over Defendant. We affirm in part, vacate in part, and remand.

I. Background

Plaintiff is a North Carolina corporation doing business as both Stonecrafters and AUM Hospitality Services. Plaintiff remodels hotels and supplies hotel furniture, fixtures, carpet, and craft stonework.

G.R. Bhat is the member-manager of Defendant, Mega K, which owns and operates a Days Inn hotel located in Hayes, Kansas. G.R. Bhat was a charter member of and initially held a 1% interest in Mega K on 3 March 2015. On 9 April 2015, a former member transferred his 69% membership interest in Mega K to G.R. Bhat. G.R. Bhat denies being listed as the registered agent for Mega K for any period of time.

G.R. Bhat resided in North Carolina from 2011 to 2017. He owned personal property and maintained his personal residence in Cary. G.R. Bhat used his personal address in Cary as Mega K's official mailing address during 2016 and 2017.

Plaintiff and G.R. Bhat allegedly reached an agreement to remodel Defendant's hotel and to also supply hotel furnishings and fixtures. Although the record does not contain a copy of a fully-integrated written contract between Plaintiff and Defendant, Defendant presumably believed an agreement existed based on the following information included in the record on appeal:

1. G.R. Bhat agreed via email to pay Plaintiff $116,062 for providing lounge chairs for 104 hotel rooms. That email, sent on 10 March 2016, also acknowledged other costs Defendant would incur for Plaintiff's additional work and supplying products.

2. G.R. Bhat forwarded the contact information for the hotel's "Design Team" to stonecraftersnc@gmail.com on 13 March 2016.

3. G.R. Bhat agreed to pay a $13,520 deposit for draperies before Plaintiff ordered the window treatments in an email dated 19 March 2016.

4. Other emails mention substantial costs Plaintiff had incurred and Defendant agreed to pay for hotel furnishings, specifically including headboards, nightstands, writing desks, ergonomic chairs, artwork, carpet, and lighting, and other installation, painting, and shipping fees.

5. Defendant denied being indebted to Plaintiff in the interrogatories and asserted Plaintiff had "failed to deliver the products and/or services pursuant to the *agreement* between Mega K, LLC and [Plaintiff] and they are therefore in breach of the *agreement*." (emphasis supplied)

6. G.R. Bhat agreed to meet with Plaintiff in North Carolina to discuss several unpaid invoices. He mentioned meeting somewhere in the Raleigh area and promised to "be there with [his] checkbook."

7. Defendant admits on appeal that the "parties disagreed as to whether Plaintiff[']s renovation work at the Days Inn hotel was satisfactory and consistent with the *terms of their agreement*." (emphasis supplied)

8. Mega K mailed several checks to Plaintiff's address in North Carolina, and the invoices Plaintiff addressed to "G.R. Bhat" and "Mega K Hospitality" reference that North Carolina address in the header.

Defendant was displeased with Plaintiff's work, and Plaintiff alleged Defendant had failed to pay Plaintiff according to the terms of their agreement. Plaintiff filed a complaint on 18 December 2018, alleging breach of contract, an action on unverified account and for account stated, and asserting unjust enrichment.

Plaintiff believed G.R. Bhat had acted on behalf of an LLC named "Mega-K Hospitality, LLC," not "Mega K, LLC." When Plaintiff struggled to locate the intended Defendant, it brought forth a lawsuit against: (1) G.R. Bhat, the person they negotiated the contract with; (2) G.R. Bhat's wife, Sujata Bhat; and, (3) all of the "Mega" businesses they could find associated with G.R. Bhat, including Mega Hospitality, LLC; Mega-C

Hospitality, LLC; Mega-B Hospitality, LLC; and Mega-K Hospitality, LLC ("Defendants").

Plaintiff initially alleged the entities listed in their initial complaint operated as "shell corporations solely for the purposes of shielding themselves and their corporate alter egos from liability." Defendants moved to dismiss for failure to state a claim and lack of personal jurisdiction and sought attorney's fees on 9 July 2019.

After Plaintiff identified Mega K, LLC as the company it purportedly contracted with, Plaintiff amended its complaint to correct the misnomer on 8 October 2019. Defendants again moved to dismiss Plaintiff's amended complaint for failure to state a claim and lack of personal jurisdiction on 16 December 2019. They also filed another motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 (2021).

Defendants attempted to calendar a hearing on their motion to dismiss Plaintiff's claims for failure to state a claim *and* for lack of personal jurisdiction. Plaintiff responded to Defendant's request on 19 December 2019, stating: "I'm happy to hear your 12(b)(6) motion before receiving discovery. Much of my discovery request relates to the 12(b)(4) motion. Without that discovery, I have to object to hearing that part of your motion to dismiss."

Defendants brought forth a motion on 10 January 2020 for an extension to respond to Plaintiff's discovery requests, which the court granted.

Twenty-one days later, Defendants attempted, for the second time, to schedule a hearing on *both* motions. Plaintiff explained to Defendant:

> We must have different recollections of the phone call.
>
> My position on this has been consistent: I cannot agree to a hearing on your motion to dismiss for lack of personal jurisdiction until I have received discovery on that issue. I'm willing to waive the request for production of documents and the non-jurisdictional interrogatories. I cannot, in good faith to my client, agree to a hearing on a motion to dismiss for lack of personal jurisdiction when there is jurisdictional discovery outstanding.

Defendants' counsel appeared to comply. The "Calendar Request," submitted by Defendants on the same day they received Plaintiff's email, requested to calendar a hearing *only* on the motion to dismiss for failure to state a claim. Defendants understood the "Calendar Request" was to only cover their motion to dismiss for failure to state a claim, because

Defendants had confirmed via email that "the motion for attorney['s] fees [wa]s not calendared or scheduled for hearing."

On 7 February 2020, Plaintiff voluntarily dismissed Mega Hospitality, LLC, Mega-C Hospitality, LLC, Mega-B Hospitality, LLC, and Sujata Bhat, after Defendants' counsel represented all LLCs were adequately capitalized and not operating as shell entities.

The hearing on the remaining Defendants' motion to dismiss for failure to state a claim was held on 17 February 2020. At the hearing, Defendants nevertheless discussed personal jurisdiction before discussing their motion to dismiss for failure to state a claim: "[T]hen it dawned on me that they may not have personal jurisdiction and the court may not have personal jurisdiction over the actual party in controversy here, which is Mega K, LLC, in Kansas." Defendants' discussion prompted the trial court to ask Plaintiff about personal jurisdiction:

> THE COURT: Thank you. How do you say that you have personal jurisdiction over Mega K, LLC?
>
> [PLAINTIFF'S COUNSEL]: We're not here on that motion, but there's a few facts that we would present at that motion. We're also awaiting some jurisdictional discovery.
>
> . . .
>
> [S]aying, "Well, you can't prove personal jurisdiction; therefore, we should dismiss this complaint for failure to state a claim." Those are two different motions to dismiss. Those are two different standards. Those are two very different considerations for the Court.

Two days after the hearing, Defendants submitted partial responses to Plaintiff's jurisdictional discovery requests. Defendants failed to answer seven interrogatories; partially answered some of the remaining interrogatories; and, included no official response to Plaintiff's requests for production or explanation about which requests for production each of the documents produced answered. Plaintiff filed a motion to compel Defendants to respond to Plaintiff's discovery requests on 26 August 2020.

Plaintiff voluntarily dismissed its claims against G.R. Bhat in August 2020, leaving Mega K, LLC as the only remaining Defendant. The trial court entered an order on 13 September 2021, *574 days after the hearing*, (1) granting Defendant's motion to dismiss for failure to state a claim, (2) denying Defendant's motion for attorney's fees, and (3) granting Defendant's motion to dismiss for lack of personal jurisdiction.

Plaintiffs moved that day to alter or amend the trial court's order, under North Carolina Rules of Civil Procedure Rule 59. The trial court never ruled on Plaintiff's motion. On 13 October 2021, Plaintiffs filed a timely notice of appeal. Plaintiff also withdrew its motion to alter or amend the trial court's order, because the trial court lacked jurisdiction to amend a final order pending appeal.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

Plaintiff argues: (1) the trial court lacked authority to decide the personal jurisdiction issue *sua sponte*; (2) the trial court deprived Plaintiff of due process by ruling on Defendant's motion to dismiss for lack of personal jurisdiction at a hearing held without prior notice and while jurisdictional discovery was pending; and (3) the trial court erred by finding it lacked personal jurisdiction over Defendant.

Defendant filed a cross-appeal, asserting: (1) the trial court erred by denying Defendant's motion for attorney's fees under N.C. Gen. Stat. § 6-21.5; and (2) if this Court holds the trial court erred by ruling on the uncalendared motion to dismiss for lack of personal jurisdiction at the hearing, then this Court should also hold the trial court erred by denying Defendant's uncalendared motion for attorney's fees.

IV. Notice and Hearings on Uncalendared Motions

A. Standard of Review

"Whether a party has adequate notice is a question of law, which we review *de novo*." *Swanson v. Herschel*, 174 N.C. App. 803, 805, 622 S.E.2d 159, 160 (2005) (citation omitted); *see also Brown v. Ellis*, 206 N.C. App. 93, 105, 696 S.E.2d 813, 822 (2010) (citing *Swanson*, 174 N.C. App. at 805, 622 S.E.2d at 160) (stating Rule 59 motions to amend an order are reviewed *de novo* if the judgment involves a question of law or legal inference).

B. Analysis

[1] "Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution." *Swanson*, 174 N.C. App. at 805, 622 S.E.2d at 160-61 (citations and quotation marks omitted).

Forty-three years ago this Court held:

> Although, once a court has obtained jurisdiction in a cause through the service of original process, a party has no constitutional right to demand notice of further proceedings in the cause, *the law does not require parties to dance continuous or perpetual attendance* on a court simply because they are served with original process.
>
> The law recognizes that it must make provision for notice additional to that required by the law of the land and due process of law if it is to be a practical instrument for the administration of justice. *For this reason*, *the law establishes rules of procedure* admirably adapted to secure to a party, who is served with original process in a civil action or special proceeding, an opportunity to be heard in opposition to steps proposed to be taken in the civil action or special proceeding where he has a legal right to resist such steps[,] and principles of natural justice demand that his rights be not affected without an opportunity to be heard.

Laroque v. Laroque, 46 N.C. App. 578, 581, 265 S.E.2d 444, 446 (citation and quotation marks omitted) (emphasis supplied); *see also Swanson*, 174 N.C. App. at 805, 622 S.E.2d at 160-61 ("Notice is adequate if it is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (citations and quotation marks omitted).

The North Carolina Rules of Civil Procedure and the local rules of practice specific to each county or judicial district establish procedural rules requiring prior notice to litigants to protect their due process rights. *Brown*, 206 N.C. App. at 107, 696 S.E.2d at 823 (citing *Laroque*, 46 N.C. App. at 581, 265 S.E.2d at 446) ("Therefore, even though service of the summons and complaint on the defendant gave the court jurisdiction over defendant, due process still requires compliance with procedural rules governing notice."); *see also* N.C. Gen. R. Prac. Super. & Dist. Ct. 22(a) ("Local rules of practice and procedure for a judicial district must be supplementary to, and not inconsistent with, the General Rules of Practice. Local rules should be succinct and not unnecessarily duplicative of statutes or Supreme Court rules.").

Rule 6(d) of the North Carolina Rules of Civil Procedure provides:

> **For motions, affidavits**. – A written motion, other than one which may be heard ex parte, *and notice of the hearing* thereof shall be served *not later than five days*

> *before the time specified for the hearing*, unless a different period is fixed by these rules or by order of the court.

N.C. Gen. Stat. § 1A-1, Rule 6(d) (2021) (emphasis supplied).

The Tenth Judicial District Local Rules for Civil District Court also provides:

> Any party requesting that a motion or non-jury trial be calendared must submit a completed calendar request (WAKE-CVD-01) to the Trial Court Administrator. . . . Under appropriate circumstances, the Trial Court Administrator may set a motion for hearing at any time so long as the notice requirements of Rule (6) (d) of the Rules of Civil Procedure are satisfied or all parties consent. . . . Calendar requests must be served on counsel for all opposing parties and any self-represented person contemporaneously with submission of the calendar request to the Trial Court Administrator."

Tenth Jud. Dist. Loc. R. 3.2.

If a party has no prior required notice of a hearing on a motion, judgment on the motion is irregular, and action thereon is not binding. *See Everett v. Johnson*, 219 N.C. 540, 542, 14 S.E.2d 520, 521 (1941) ("It is readily conceded that the judgment should be set aside for irregularity, if in fact counsel . . . had no notice of the time and place of the hearing."). "An irregular judgment is one entered contrary to the usual course and practice of the court, and [it] will be vacated on proper showing of irregularity and merit." *Id.* (citations omitted).

In *Howell v. Howell*, this Court vacated a trial court's order because the defendant did not receive proper notice of the hearing pursuant to Rule 6 of the North Carolina Rules of Civil procedure. 22 N.C. App. 634, 636-37, 207 S.E.2d 312, 314 (1974) (explaining "Rule 6(d) of the Rules of Civil Procedure requires that motions . . . be served on the opposing party not later than five days before the time specified for the hearing," and thus it was "erroneous for the trial court to continue the hearing because of the lack of adequate notice, and the orders entered must be vacated"). Although the defendant in *Howell* "could have waived the lack of notice and proceeded with the hearing," his actions did not constitute a waiver. *Id.* at 637, 207 S.E.2d at 314. "Rather, he appeared at the hearing, notified the court that he had not received adequate notice, that he was not prepared, and objected to the hearing on the grounds of lack of notice." *Id.*

Here, Defendant failed to provide the required prior notice regarding its intention for the court to hear personal jurisdiction at the hearing, as is required under Rule 6(d) of the North Carolina Rules of Civil Procedure and under the Tenth Judicial District Local Rules for Civil District Court Rule 3.2. Defendant knew Plaintiff was not prepared to discuss personal jurisdiction prior to receiving jurisdictional discovery. Defendant had moved for an extension to provide requested jurisdictional discovery *after* the hearing. Plaintiff and Defendant also exchanged numerous emails regarding Plaintiff's refusal to consent to calendaring a hearing concerning the motion to dismiss for personal jurisdiction.

Plaintiff did not waive the lack of notice defect by participating in the hearing. Plaintiff immediately notified the trial court that the motion for lack of personal jurisdiction was not calendared before the court, as similar to the defendant in *Howell*. *Id.*; *see also Ayscue v. Griffin*, 263 N.C. App. 1, 11, 823 S.E.2d 134, 141 (2018) (holding plaintiff's motion for reconsideration should have been allowed because the trial court only indicated it would rule on the issue "at the end of the hearing" and the "hearing on Plaintiffs' motion was only calendared to consider Plaintiffs' motion *in limine*").

The judgment entered on Defendant's motion to dismiss for lack of personal jurisdiction was irregular. *Everett*, 219 N.C. at 542, 14 S.E.2d at 521. That portion of the trial court's order is vacated.

V. Personal Jurisdiction

[2] Plaintiff also argues the trial court erred as a matter of law by finding it lacked personal jurisdiction over Defendant. N.C. Gen. Stat. § 1-75.7 (2021) provides: "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[.]"

In addition to making a general appearance, "it is well established that seeking affirmative relief from a court on any basis other than lack of jurisdiction constitutes a waiver of jurisdictional objections." *Farm Credit Bank v. Edwards*, 121 N.C. App. 72, 77, 464 S.E.2d 305, 308 (1995) (citation omitted); *see also In re J.T.*, 363 N.C. 1, 4, 672 S.E.2d 17, 18 (2009) (explaining "any form of general appearance waives all defects and irregularities in the process and gives the court jurisdiction") (citation and internal quotation marks omitted).

Here, Defendant waived any jurisdictional objections by calendaring a hearing and seeking affirmative relief from the trial court on its motions to dismiss for failure to state a claim and for attorney's fees. *Id.* The trial court erred by failing to exercise personal jurisdiction over Defendant and dismissing Plaintiff's claims.

VI. Attorney's Fees

[3] Defendant similarly argues the trial court's denial of attorney's fees should be vacated because the attorney's fees motion was not calendared for the hearing.

Our General Statutes provide:

> In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the *prevailing party*, may award a reasonable attorney's fee to the *prevailing party* if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

N.C. Gen. Stat. § 6-21.5 (2021) (emphasis supplied).

We need not address whether the trial court's order denying Defendant's attorney's fees motion should be vacated as an irregular judgment, because Defendant is not a prevailing party and fails to meet the express requirements of N.C. Gen. Stat. § 6-21.5. *Id.* Defendant's argument is overruled.

VII. Conclusion

Defendant failed to comply with the prior notice requirements when calendaring the hearing. *Everett*, 219 N.C. at 542, 14 S.E.2d at 521; N.C. Gen. Stat. § 1A-1 Rule 6(d); Tenth Jud. Dist. Loc. R. 3.2. The judgment entered upon Defendant's motion to dismiss for lack of personal jurisdiction was not properly noticed and is vacated.

Defendant moved for and calendared a hearing for its motions to dismiss for failure to state a claim under Rule 12(b)(6) and for attorney's fees, waiving any jurisdictional objections. Any objections to jurisdictional defects are waived when a party makes a general appearance or invokes and seeks a court's ruling on non-jurisdictional issues. *Farm Credit Bank*, 121 N.C. App. at 77, 464 S.E.2d at 308; *In re J.T.*, 363 N.C. at 4, 672 S.E.2d at 18. The trial court's conclusion it lacked personal jurisdiction over Defendant is also vacated.

Defendant is not a prevailing party under N.C. Gen. Stat. § 6-21.5. The trial court's denial of Defendant's attorney's fees is affirmed. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges CARPENTER and WOOD concur.

JRM, INC., PLAINTIFF
v.
THE HJH COMPANIES, INC. D/B/A THE SALT GROUP, THE HJH CONSULTING GROUP, INC. AND TODD G. SIZER, DEFENDANTS

No. COA22-537

Filed 7 February 2023

Appeal and Error—interlocutory order—substantial right—denial of motion to compel arbitration—no valid arbitration agreement

In a business contract dispute, where the trial court correctly concluded that defendant (a company that acted as an intermediary negotiator of cost savings) failed to demonstrate the existence of a valid arbitration agreement with plaintiff (an irrigation equipment company), defendant's appeal from the trial court's order denying its motion to compel arbitration was dismissed as interlocutory because there was no substantial right shown to warrant immediate review.

Judge DILLON concurring with separate opinion.

Appeal by defendant from judgment entered 21 January 2022 by Judge Susan E. Bray in Davidson County Superior Court. Heard in the Court of Appeals 11 January 2023.

Nelson Mullins Riley & Scarborough LLP, G. Gray Wilson and Lorin J. Lapidus, for the plaintiff-appellee.

Johnston Allison & Hord, PA, by Michael J. Hoefling and Kathleen D.B. Burchette, for the defendant-appellant.

TYSON, Judge.

JRM Inc. ("Plaintiff") sued HJH Co. and Todd G. Sizer after Plaintiff realized Sizer had acted without authority and signed a contract binding Plaintiff to HJH. HJH ("Defendant") moved for an order to compel arbitration. The trial court concluded HJH had failed to meet its burden to prove a valid arbitration agreement existed by mutual agreement of all parties. HJH appeals. We dismiss.

I. Background

Plaintiff manufactures, sells, and distributes irrigation equipment for golf courses and other turf covered surfaces. Plaintiff's office is located in Clemmons. HJH Companies is a Texas corporation doing business as the "The Salt Group." HJH's principal place of business is located in San Antonio, Texas.

HJH's business model centers on generating cost-savings for companies by negotiating lower rates and costs with third-party vendors. HJH then bills those companies for any purported savings. News reports revealed HJH had "overstat[ed] the amount of money clients owed the company so it could tap a line of credit with the bank." A consultant for HJH pled guilty in federal court to knowingly inflating and fabricating figures for unearned estimates of fees to be earned under contingent fee contracts.

During the sentencing hearing, the prosecutor argued the convicted consultant was "only following the orders of his boss," the owner of HJH. The trial court expressed its frustration with the situation, stating: "This court is going to [ ] hav[e] to fashion an appropriate sentence . . . on the man who really is not the person who should be before the court. But, unfortunately, that's the person we have."

Before 2020, HJH had reached out to Plaintiff's officers on numerous occasions, attempting to convince Plaintiff to enter into an agreement for its purported cost-savings services. Plaintiff's officers repeatedly expressed no desire to contract with HJH, as Plaintiff has historically been able to secure efficient and reasonable agreements with vendors, and HJH's services were not needed.

Plaintiff hired Sizer in mid-October of 2020 as its Chief Financial Officer. Within a couple of weeks of hiring Sizer, he entered an agreement for cost-saving services with HJH on 3 November 2020. The purported agreement included a reference to arbitration agreement provisions included on HJH's website.

Plaintiff's President and Chief Executive Officer, James R. Merritt, submitted a sworn affidavit to the trial court. In the affidavit, Merritt stated only he and his wife, Jennifer B. Merritt, the secretary of JRM, were authorized to enter into or execute contracts on behalf of the company.

Sizer concealed the HJH agreement, and other unauthorized agreements, from Plaintiff's management. In the spring of 2021, Merritt learned of an unauthorized contract Plaintiff had entered into with a third party, who is not a litigant in this case. As a result, Plaintiff amended

the company's policy handbook on 22 March 2021, clarifying and listing only Merritt and his wife as having the authority to enter into binding contracts with third parties. Merritt also asked Sizer if he had signed any other contracts. Sizer responded he had not.

Sizer continued to contract with and pay HJH for alleged cost-saving services without authority and without Plaintiff's knowledge or consent. Sizer appeared to know he was unauthorized to contract with HJH, because he waited until HJH's accounts payable manager was out of the office to log into the company's accounting system, add HJH as a vendor, and to secretly pay HJH for alleged cost-savings services on 26 July 2021. Two days after this conduct, Sizer resigned from the company on 28 July 2021.

Sizer, however, continued to contract with HJH after he submitted his resignation. He signed an addendum to the HJH agreement on 11 August 2021, which purported to obligate Plaintiff to pay $92,298.55 to HJH for "merchant card services that had never been obtained." Plaintiff did not learn about this addendum until after Sizer had left the company. Additionally, Plaintiff received a $15,000 invoice from HJH on Sizer's last official day of employment, which Sizer promised to explain in an email, but never addressed.

Plaintiff subsequently sent Sizer a letter informing him they would withhold his final paycheck to partially mitigate their damages, and they informed him they planned to "continue to investigate [his] role in this matter, and reserve[d] the right to pursue all available civil and criminal remedies to the fullest extent of the law."

Plaintiff received numerous invoices, demand letters, and collection calls from HJH. These communications claimed Plaintiff owed HJH a principal amount of $108,798.55. The amount Plaintiff purportedly owed, however, significantly increased after Plaintiff's lawyers asserted claims against HJH. HJH's final demand letter expressed Plaintiff owed them $241,861.47 for both the principal and interest and threatened to force arbitration to be held in Texas.

According to Merritt, it "would impose an extreme hardship on [Plaintiff] to have to defend a meritless claim in [Texas]." Plaintiff brought several claims against HJH, including: declaratory relief regarding the validity and scope of the purported contracts, fraud, unfair and deceptive trade practices, illegal conspiracy, recission of the contract, and punitive damages on 22 October 2021. Plaintiff also alleged Sizer breached his fiduciary duty and committed constructive fraud.

HJH moved to dismiss Plaintiff's claims, or alternatively to compel arbitration and stay litigation, on 29 December 2021. Plaintiff served two affidavits in opposition to the motion. HJH filed an untimely affidavit in support of the motion.

A hearing on the motions was held on 10 January 2022. The trial court entered an order striking the affidavit of Tisha Petty ("Petty Affidavit"), who is the Senior Manager Account Services and Legal Liaison for HJH, and denied both of HJH's motions on 20 January 2022. HJH filed a notice of appeal on 7 February 2022.

II. Jurisdiction

HJH argues the amended order improperly denied its right to compel arbitration, and the trial court's order affects a substantial right and is immediately appealable. HJH also asserts the trial court erred in striking the Petty Affidavit, which supported its motion to compel arbitration.

III. Standard of Review

Precedents governing the review of the enforceability of arbitration clauses in contracts is well-established:

> Because the law of contracts governs the issue of whether there exists an agreement to arbitrate, *the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes*. The trial court's determination of whether a dispute is subject to arbitration is a conclusion of law reviewable de novo.

T.M.C.S., Inc. v. Marco Contr'rs, Inc., 244 N.C. App. 330, 339, 780 S.E.2d 588, 595 (2015) (emphasis supplied) (citations, alterations, and internal quotation marks omitted).

IV. Analysis

Appellate jurisdiction is conferred by statute. This Court only possesses jurisdiction over the appeal of "any interlocutory order or judgment of a superior court or district court in a civil action or proceeding" if it "[a]ffects a substantial right." N.C. Gen. Stat. § 7A-27(b) (2021).

"This Court has repeatedly held 'an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.' " *Earl v. CGR Dev. Corp.*, 242 N.C. App. 20, 22, 773 S.E.2d 551, 553 (2015) (citations omitted).

While courts should not refuse to implement the terms of an arbitration agreement, if a valid agreement to arbitrate *exists*, a motion to compel arbitration is properly denied if a valid agreement to arbitrate *does not exist*. "If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate *unless it finds that there is no enforceable agreement to arbitrate*." N.C. Gen. Stat. § 1-569.7(a)(2) (2021) (emphasis supplied).

> The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. . . . The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary.

Slaughter v. Swicegood, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (quoting *Routh v. Snap–On Tools Corp.*, 108 N.C. App. 268, 271–72, 423 S.E.2d 791, 794 (1992), and *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002)) (citations and internal quotation marks omitted).

For example, in *Evangelistic Outreach Ctr. v. General Steel Corp.*, this Court affirmed the trial court's denial of a motion to compel arbitration where the trial court resolved conflicts in the evidence regarding whether a valid arbitration agreement *existed*. 181 N.C. App. 723, 726-27, 640 S.E.2d 840, 843 (2007). There, the proponent of the alleged arbitration agreement submitted an unverified motion alleging a one-page purchase order, which noted the agreement was subject to the terms and conditions on its face and on the reverse side. *Id.* at 726, 640 S.E.2d at 843. The proponent submitted a copy of the reverse side, which contained an arbitration clause. *Id.* The proponent also submitted an affidavit from a Customer Service Manager alleging the manager faxed both sides of the agreement to the plaintiff. *Id.* To counter this evidence, the plaintiff submitted both a verified response to requests for admissions, in which plaintiff denied ever receiving the reverse side of the agreement, and an affidavit denying receipt of the second page or any document referencing arbitration. *Id.* at 727, 640 S.E.2d at 843. Plaintiff also denied entering into any contract including an arbitration clause. *Id.*

As our Court explained:

> The trial court denied defendant's motion in an order stating in relevant part that "[t]he Defendant has failed in its burden of proof to prove that there was an agreement between the parties to arbitrate." Thus, the trial court denied defendant's motion on the grounds that proof of the

> very *existence* of an arbitration agreement was lacking. We conclude that the evidence supports this conclusion.

Id.

Here, the trial court found and concluded HJH had "failed to meet its burden of proving that [a] valid arbitration agreement exist[ed] by mutual agreement of both parties" pursuant to N.C. Gen. Stat. § 1-569.7(a)(2) (2021). The trial court also concluded HJH "failed to meet its burden of showing clear and unmistakable proof that HJH and JRM agreed to delegate the threshold issue of arbitrability to an arbitrator." A trial court may properly deny a motion to compel arbitration if it determines evidence of the "very *existence* of an arbitration agreement [i]s lacking." *Evangelistic Outreach Ctr.*, 181 N.C. App. at 727, 640 S.E.2d at 843.

The trial court did not err as a matter of law by concluding HJH had failed to prove a valid arbitration agreement existed. *Id.* Plaintiff submitted two affidavits to support the assertion it never entered into a valid arbitration agreement with HJH. Defendant did not offer any evidence to support an agreement to arbitrate existed aside from the disputed agreement and the stricken Petty Affidavit. The trial court struck the Petty Affidavit from the record because HJH did not serve the Petty Affidavit with the motion to compel arbitration, nor was it served at least two days prior to the hearing. N.C. Gen. Stat. § 1A-1, Rule 6(d) (2021) ("When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), opposing affidavits shall be served at least two days before the hearing.").

This Court otherwise lacks jurisdiction to review the portion of the trial court's interlocutory order striking the Petty Affidavit. *See State v. Carver*, 2021-NCCOA-141, ¶23, 277 N.C. App. 89, 94, 857 S.E.2d 539, 543, *writ denied*, *review denied*, 379 N.C. 156, 863 S.E.2d 597 (2021). In *Carver*, this Court held it may not exercise pendant appellate jurisdiction over interlocutory orders that are not immediately appealable, and "if a trial court denies the State's motion to dismiss based on sovereign immunity—a ruling that is immediately appealable—the State ordinarily cannot appeal the denial of its motion to dismiss on other grounds, even if those other rulings are contained in the same order." *Id.*

Without the untimely Petty Affidavit, the trial court did not err as a matter of law by declining to conclude an agreement to arbitrate existed. *Evangelistic Outreach Ctr.*, 181 N.C. App. at 727, 640 S.E.2d at 843; *Gay*, 271 N.C. App. at 13-14, 842 S.E.2d at 643-44. The trial court's ruling denying the motion to compel arbitration in the absence of the existence of an arbitration agreement is affirmed.

If a valid agreement to arbitrate does not exist, Defendant has failed to show a substantial right is affected. This Court lacks jurisdiction to review the trial court's interlocutory order denying HJH's motion to compel arbitration. N.C. Gen. Stat. §§ 7A-27(b)(3)(a) and 1-569.7(a)(2); *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580. Defendant has not filed a petition for writ of certiorari. N.C. R. App. P. 21.

V. Conclusion

The trial court properly concluded HJH had failed to show Plaintiff and HJH entered into a valid agreement to arbitrate their disputes. *Evangelistic Outreach Ctr.*, 181 N.C. App. at 727, 640 S.E.2d at 843; *Gay*, 271 N.C. App. at 13-14, 842 S.E.2d at 643-44.

Without the existence of a valid arbitration agreement, no substantial right is shown to warrant immediate review. HJH's appeal is interlocutory. N.C. Gen. Stat. §§ 7A-27(b)(3)(a) and 1-569.7(a)(2); *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580.

This Court lacks appellate jurisdiction to assess the trial court's other findings contained in the order entered on 20 January 2022, and its purported appeal is dismissed. *See Carver*, ¶23, 277 N.C. App. at 94, 857 S.E.2d at 543. *It is so ordered.*

DISMISSED.

Judge HAMPSON concurs.

Judge DILLON concurs with separate opinion.

DILLON, Judge, writing separately.

I essentially agree with the analysis contained in the majority opinion except for the disposition to *dismiss* Defendants' appeal of the trial court's denial of their motion to compel arbitration. I believe the disposition should be to *affirm* the trial court order. That is, I conclude we do have jurisdiction to consider whether Defendants, in fact, have a substantial right which would be forever lost by the trial court's order.

By dismissing the appeal, the majority, in essence, concludes we do not have appellate jurisdiction to consider whether Defendants have a substantial right which would be forever lost by the trial court's interlocutory order. We should not reach the *merits* of Defendants' claim to that substantial right in answering the threshold jurisdictional

question. To do so would, in the words of the United States Supreme Court, "conflat[e] the jurisdictional question with the *merits* of the appeal." *Arthur Andersen v. Carlisle*, 556 U.S. 624, 628 (2009). As that Court instructs, "[j]urisdiction over the appeal[,] 'must be determined by focusing on the category of order appealed from, rather than upon the strength of the grounds for reversing the order.' " *Id.* (quoting *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996)).

Here, the interlocutory order being appealed by Defendants falls within the category of interlocutory orders over which we have jurisdiction to review immediately: an order which denies litigants their motion to compel arbitration.

The fact that we all ultimately conclude there is no strength in Defendants' grounds for reversing the trial court's interlocutory order should not affect whether we have appellate jurisdiction to evaluate those grounds. *See Arthur Andersen*, 556 U.S. at 629 ("It is more appropriate to grapple with [the] merits question after the court has accepted jurisdiction over the case."). *See also Neusoft Med. v. Neuisys*, 242 N.C. App. 102, 774 S.E.2d 851 (2015) (arbitration matter); *Meherrin v. Lewis*, 197 N.C. App. 380, 385, 86, 677 S.E.2d 203, 207-08 (2009) (*affirming* trial court's order denying dismissal based on sovereign immunity, concluding appellate jurisdiction existed to consider defendant's claim to sovereign immunity as a member of an Indian tribe, but determining on the merits that the defendant, in fact, did not belong to a recognized tribe and therefore did not have sovereign immunity).

I am aware that parties may assert frivolous claims to some substantial right to put an ongoing case on hold. But an appellant who makes a frivolous assertion of a substantial right for an improper purpose (*e.g.*, delay) does so at the risk of being sanctioned by this Court. *See* N.C. R. App. P. 34. *See also Arthur Andersen*, 556 U.S. at 629 (addressing concern that recognizing appellate jurisdiction might result in frivolous appeals by stating that those bringing such appeals subject themselves to sanctions).

In any event, my disagreement with the majority is essentially over a distinction without a difference, as the majority in its opinion also resolves the key issue on appeal; namely, whether the trial court correctly determined that Defendants have no right to arbitrate.

STATE OF NORTH CAROLINA
v.
DARYL SPENCER SCOTT

No. COA22-326

Filed 7 February 2023

1. Search and Seizure—traffic stop—frisk—reasonable suspicion —possession of a firearm by a felon

In a prosecution for possession of a firearm by a felon, the trial court properly denied defendant's motion to suppress evidence of a pistol that a police officer had seized from defendant's vehicle after frisking both defendant and the vehicle (during a lawful traffic stop). The totality of the circumstances showed that the officer had a reasonable suspicion to perform the frisk where the officer: observed defendant visiting a high-crime area and interacting with a known drug dealer; received caution data showing that defendant was a validated gang member who had previously been charged with murder; was aware of an active gang war in the area; and, based on his training and experience, knew that suspects involved in drug and gang activity were likely to be armed and dangerous.

2. Appeal and Error—preservation of issues—motion to suppress —argument not raised at suppression hearing or trial—waiver

In a prosecution for possession of a firearm by a felon, where defendant moved to suppress evidence of a pistol that law enforcement had seized while searching his vehicle, defendant did not argue at the suppression hearing or at trial that the duration of the initial traffic stop leading up to the seizure had been unlawfully extended; therefore, he failed to preserve this argument for appellate review.

3. Sentencing—prior record level—point for committing crime while on parole—notice—waiver—colloquy under the Blakely Act

In a prosecution for possession of a firearm by a felon, the trial court did not err in calculating defendant's prior record level for sentencing purposes where it added a point under N.C.G.S. § 15A-1340.14(b)(7) for committing a crime while defendant was on "probation, parole, or post-release supervision." Although the State failed to provide written notice of its intent to prove the prior record level point as required under subsection (b)(7), defendant waived the written notice requirement where his defense counsel affirmed in open court that he had received notice and then signed

the sentencing worksheet indicating that defendant had committed a crime while on parole. Further, the trial court was not required to conduct a colloquy under the Blakely Act (to confirm that defendant waived notice) because defendant did not object when defense counsel stipulated to the addition of the sentencing point (by signing the sentencing worksheet).

Appeal by Defendant from a judgment entered 21 September 2021 by Judge William W. Bland in New Hanover County Superior Court. Heard in the Court of Appeals 21 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant.

WOOD, Judge.

Defendant appeals from a conviction of possessing a firearm as a felon alleging the trial court erred when it denied his motion to suppress evidence of a firearm found during a search he contends was unconstitutional and increased his prior record level at sentencing. We disagree.

I. Background

Wilmington Police Officer Pagan was surveilling the parking lot of Sam's Minimart in Wilmington on 14 February 2020. The parking lot was located in an area of the city where drug sales and shootings were not uncommon. He observed Defendant's Honda Accord park on the lot next to a silver sedan whose owner Officer Pagan knew had a history of drug dealing. Defendant and a passenger exited the Honda and approached the silver sedan. Shortly thereafter, Defendant and his passenger returned to the Honda and drove away. Officer Pagan followed them a short distance in his patrol car and noticed the Honda's license plate appeared expired. He then activated the blue lights on his patrol car to conduct a traffic stop of Defendant's vehicle. Defendant promptly pulled over.

Officer Pagan approached Defendant and informed him that he was stopped because of the expired license plate. Defendant did not appear nervous and responded that the registration should not be expired. Upon request, Defendant produced his driver's license but was unable to locate the car's registration. Officer Pagan returned to his patrol vehicle

with Defendant's license where he learned from his car's computer system that Defendant was designated as a "validated gang member" and had previously been charged with murder. Relevant to this case, Officer Pagan was aware of a local gang war between two prominent gangs at the time. Officer Pagan retrieved a clip board from his trunk and briefed an arriving officer of the situation before re-approaching Defendant.

Upon returning to Defendant's vehicle, Officer Pagan asked Defendant to step out of the vehicle so that he could perform a weapons frisk. Defendant complied, and Officer Pagan frisked him at the rear of the Honda. Officer Pagan did not find a weapon on Defendant's person. He then asked the three passengers to exit the vehicle as backup officers arrived. After Officer Pagan performed a non-intrusive pat down of Defendant, Defendant informed him that a pocketknife was present in the front, driver-side door compartment. With this information, Officer Pagan returned to the vehicle to retrieve the pocketknife, and Defendant asked Officer Pagan if he would retrieve Defendant's phone near the center console. Officer Pagan obliged Defendant and found an open beer can in the center console. He then rummaged through the front, driver-side door compartment but did not initially find a pocketknife, so he next peered under the driver's seat where he discovered a pistol.

After securing the pistol, Officer Pagan ordered Defendant and all passengers be detained and placed in handcuffs. A further search of the passenger compartment revealed a scale and bags consistent with heroin paraphernalia. On 24 August 2020, Defendant was indicted for possessing a firearm as a felon in violation of N.C. Gen. Stat. § 14-415.1 (2021) and possessing drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22(A) (2021).

On 21 September 2021, in a pretrial motion, Defendant moved to suppress evidence of the firearm. Defendant argued that Officer Pagan's frisk of Defendant's vehicle was constitutionally impermissible and therefore produced unlawfully acquired evidence. Defendant did not argue that the traffic stop was impermissibly extended beyond the scope of Officer Pagan's original mission. The trial court denied Defendant's motion.

During his trial, which took place on 23 September 2021, Defendant generally objected to the evidence obtained during the frisk of his vehicle, specifically the firearm. The trial court overruled Defendant's objection. On the same day, the jury found Defendant guilty of possession of a firearm by a felon and not guilty of possession of drug paraphernalia.

During the sentencing hearing, the trial court calculated Defendant's sentence by using a prior record level worksheet for structured sentencing.

The worksheet listed a subtotal of nine points from the prior crimes of second-degree murder and three misdemeanor convictions. The court then added one point for committing a crime "while the offender was on probation, parole, or post-release supervision." Thus, Defendant's prior record points totaled ten points, and he was sentenced as a prior record level IV offender. Absent the additional point, Defendant would have been sentenced as a prior record level III offender.

The trial court sentenced Defendant to an active term of a minimum of nineteen and a maximum of thirty-two months imprisonment.

Defendant appeals as of right pursuant to N.C. Gen. Stat. § 15A-1444(a) (2021). He contests the trial court's denial of his motion to suppress evidence and contends he did not receive notice of the additional point for committing a crime while on probation, parole, or post-release supervision and was, therefore, sentenced improperly.

II. Standard of Review

We review the denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. 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)). We review conclusions of law *de novo*. *State v. Johnson*, 225 N.C. App. 440, 443-44 (2013). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted).

We review "[t]he determination of an offender's prior record level [as] a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)).

III. Discussion

A. Evidence Suppression

Defendant first alleges error with the trial court's denial of his motion to suppress evidence of the firearm. Defendant argues that the evidence should have been suppressed because it was obtained in violation of Defendant's right to be free from an unreasonable search and seizure and challenges the trial court's conclusion of law holding otherwise. Specifically, Defendant argues that Officer Pagan improperly frisked Defendant and his vehicle and impermissibly extended the duration of the traffic stop. We are not persuaded.

During the motion to suppress, the trial court concluded:

> But up to that point of seeing the firearm under the driver's seat in which the defendant had been driving, the court does not find any constitutional violation of the defendant's rights. The officer has conducted a legitimate stop and taken appropriate actions for his safety and for the safety of the defendant as well as the passengers in the defendant's vehicle; and therefore the motion to suppress is respectfully denied.

We review this conclusion of law *de novo* to determine if Officer Pagan overstepped his constitutional limits.

The State may not unreasonably seize or search people. N.C. Const. art. I, § 20; U.S. Const. amend. IV. If it does, evidence obtained from that illegal conduct must be suppressed at trial. *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992). "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *State v. Fizovic*, 240 N.C. App. 448, 452, 770 S.E.2d 717, 720 (2015) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967)).

Defendant concedes, and we agree, that Officer Pagan's initial traffic stop was proper. "[A] traffic stop is considered a 'seizure' " for our purposes. *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012). Officer Pagan observed Defendant's vehicle bearing an expired license plate, and we have held that this observation alone supports a seizure. *State v. Edwards*, 164 N.C. App. 130, 136, 595 S.E.2d 213, 218 (2004). We therefore next evaluate Defendant's claims that the frisk and time extension were unjustified and, therefore, unconstitutional.

1. Weapons Frisk

[1] If, during a lawful stop, an officer "reasonably believes that the person is armed and dangerous, the officer may frisk the person to discover a weapon or weapons." *State v. Pearson*, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). An officer may also frisk a vehicle to include even the passenger compartment and other such places where a "suspect may gain immediate control of weapons" but "limited to those areas in which a weapon may be placed or hidden." *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 16 (quoting *Michigan v. Long*, 463 U.S. 1032, 1049, 103

S. Ct. 3469, 3481, 77 L. Ed. 2d 1201, 1220 (1983)). This is a limited search and may only be justified if "the officer develops a reasonable suspicion that the suspect of the traffic stop is armed and dangerous." *Id.* The "legitimate and weighty interest in officer safety" supports this intrusion. *State v. Johnson*, 246 N.C. App. 677, 692, 783 S.E.2d 753, 764 (2016) (quotation marks omitted) (quoting *Arizona v. Johnson*, 555 U.S. 323, 331, 129 S. Ct. 781, 786, 172 L. Ed. 2d 694, 702 (2009)). The necessary standard of "[r]easonable suspicion demands more than a mere 'hunch' on the part of the officer but requires 'less than probable cause and considerably less than preponderance of the evidence.' " *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 16 (quoting *State v. Williams*, 366 N.C. 110, 117, 726 S.E.2d 161, 167 (2012)). It "requires only 'some minimal level of objective justification,' and arises from 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion." *Id.* (first quoting *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008); and then quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). "The crucial inquiry is 'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' " *State v. Johnson*, 246 N.C. App. 677, 693, 783 S.E.2d 753, 764-65 (2016) (quoting *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909). Officers are therefore "entitled to formulate 'common-sense conclusions' about 'the modes or patterns of operation of certain kinds of lawbreakers.' " *State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992) (quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)). "A court ' "must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion" exists.' " *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012) (quoting *Styles*, 362 N.C. at 414, 665 S.E.2d at 440).

Here, Officer Pagan observed Defendant visit a parking lot noted for its drug sales and shootings, and while there, Defendant exited his vehicle and briefly approached the vehicle of a known drug dealer. After Defendant was stopped, Officer Pagan received caution data notifying him Defendant was a validated gang member and had previously been charged with murder. Officer Pagan was aware that two local gangs were involved in a gang war, and in his experience, suspects involved with drug and gang activity may be armed and dangerous.

Each of these factors, standing alone, might not be sufficient to justify a weapons frisk. *See State v. Jackson*, 368 N.C. 75, 80, 772 S.E.2d 847, 850 (2015) (stating that defendant's presence in a high-crime area alone is not sufficient), *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 18 n.2

(expressing hesitancy to use a suspect's prior criminal record as a factor except in specific circumstances), *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (stating that officer's experience and defendant's presence around suspected drug dealers are not, on their own, sufficient). However, "[w]e examine the totality of the circumstances surrounding Officer [Pagan]'s interaction with [D]efendant in order to achieve a comprehensive analysis as to whether the officer's conclusion that [D]efendant may have been armed and dangerous was reasonable." *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 18.

For example, our Supreme Court held in *State v. Butler* that the following factors, when taken together, were sufficient to justify a weapons frisk:

> 1) defendant was seen in the midst of a group of people congregated on a corner known as a "drug hole"; 2) [Officer] Hedges had had the corner under daily surveillance for several months; 3) Hedges knew this corner to be a center of drug activity because he had made four to six drug-related arrests there in the past six months; 4) Hedges was aware of other arrests there as well; 5) defendant was a stranger to the officers; 6) upon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight; and 7) it was Hedges' experience that people involved in drug traffic[king] are often armed.

331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992).

In the present case, similar factors are present: 1) Defendant's presence in a high-crime area; 2) Defendant's interaction with a known drug dealer; 3) caution data revealing Defendant's prior charge of murder and gang involvement; 4) Officer Pagan's awareness of an active gang war; and 5) Officer Pagan's own training and experiences. Though Defendant did not exhibit "evidence of flight" as in *Butler*, we hold that the additional factors of Defendant's status as a validated gang member and Officer Pagan's awareness of an active, local gang war are more than sufficient to cause an officer to reasonably suspect the individual is armed and dangerous. This suspicion permitted Officer Pagan to search both Defendant and his vehicle for weapons before continuing with the purpose of the stop. We, therefore, agree with the trial court's ruling and hold that Officer Pagan did not overstep his constitutional bounds when he frisked Defendant and Defendant's vehicle.

2. Extension of Stop

[2] Defendant next argues that evidence of the firearm should have been suppressed because the stop was unlawfully extended beyond the scope of its purpose. *See Rodriguez v. United States*, 575 U.S. 348, 354, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492, 498 (2015). We note, however, that Defendant did not present this argument at the suppression hearing or during trial. Instead, Defendant relied upon the above weapons frisk theory to support his suppression motion.

"[A] criminal defendant is not entitled to advance a particular theory in the course of challenging the denial of a suppression motion on appeal when the same theory was not advanced in the court below." *State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013). Such "argument is deemed waived on appeal." *State ex rel. Boggs v. Davis*, 207 N.C. App. 359, 363, 700 S.E.2d 85, 88 (2010) (citing *State v. Augustine*, 359 N.C. 709, 721, 616 S.E.2d 515, 525 (2005)).

Because Defendant did not raise this argument in the trial court below, it has been waived.

B. Sentencing

[3] Defendant next argues that he did not receive proper notice of the State's intent to prove the tenth prior record point and that the trial court did not properly inquire into whether notice was given or otherwise waived. As with the preceding argument, Defendant did not object to this alleged error with the trial court. However, "[i]t is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Morgan*, 164 N.C. App. 298, 304, 595 S.E.2d 804, 809 (2004)). We therefore review this alleged error *de novo*. *Id.*

Under North Carolina's structured sentencing guidelines, a trial court may assign prior record points to a defendant if the defendant was previously convicted of certain crimes and if the defendant committed the relevant crime while on probation, parole, or post-release supervision. N.C. Gen. Stat. § 15A-1340.14(b) (2021). The sum of these points total the prior record level to be used in calculating the severity of a sentence. § 15A-1340.14(c). Among the list of possible point assignments stands subsection (b)(7):

> If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-

> release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

§ 15A-1340.14(b)(7). Subsection (b)(7) is unique in that, unlike with other point assignments, "[t]he State must provide a defendant with written notice of its intent to prove the existence of . . . a prior record level point under . . . (b)(7) at least 30 days before trial." § 15A-1340.16(a6). However, "[a] defendant may waive the right to receive such notice." *Id.* In either case, "[t]he court shall . . . determine whether the State has provided the notice to the defendant . . . or whether the defendant has waived his or her right to such notice." § 15A-1022.1(a). The court is required to follow this and other procedures outlined in Section 15A-1022.1 "unless the context clearly indicates that they are inappropriate." § 15A-1022.1(e).

In the present case, before signing the worksheet, the trial court asked whether the State gave Defendant proper notice of its intent to seek the additional point of committing a crime while on probation, parole, or post-release supervision.

> [PROSECUTOR]: Your Honor, these convictions began back in 2002 running all the way up to his second-degree murder conviction in 2009 for which he was on parole at the time of this offense, and we have indicated that by adding the proper point in the prior sentencing worksheet.
>
> THE COURT: Had notice been given of that?
>
> [PROSECUTOR]: Yes, sir. We had discussed that.
>
> [DEFENSE COUNSEL]: Yes, Judge.
>
> THE COURT: Okay.

And again, the trial court asked,

> THE COURT: Please. Have you -- you had a chance, [defense counsel], to look at this?
>
> [DEFENSE COUNSEL]: I have, your Honor.
>
> THE COURT: Do you agree that the worksheet is an accurate representation of his prior record?
>
> [DEFENSE COUNSEL]: I do, Judge.

Finally, the Court addressed the point specifically to confirm with both the Defendant and Defendant's counsel as to whether they were

informed of the extra point and that it increased the Defendant from 9 to 10 points (resulting in a Level IV rather than Level III).

> THE COURT: I do see this point is the point that takes it from 9 to 10, that this offense was committed while on probation, parole, or post-release supervision. Any—you have anything to say regarding that point?
>
> [DEFENSE COUNSEL]: Not regarding that particular point, Judge.

After these inquiries, the court found that "the State and the defendant have stipulated in open court to the prior convictions, points, and record level." Both the prosecutor's and defense counsel's signatures appear on the worksheet under the "Stipulation" heading.

1. Notice Requirement

We first look to whether the State provided Defendant with written notice of its intent to prove the prior record point of committing an offense while "on probation, parole, or post-release supervision" as required by Section 15A-1340.16(a6).[1] We note the presence of a prior record level worksheet in the record that defense counsel might have received as part of discovery, and a review of the transcript during sentencing shows defense counsel was familiar with the worksheet; however, there is no certificate of service within the file to allow us to conclude written notice was given to Defendant. The worksheet lists point assignments for Defendant's prior convictions, an additional point assignment for committing a crime while "on probation, parole, or post-release supervision," and a prior record level IV calculation. Moreover, defense counsel's signature appears alongside the prosecutor's signature under the heading "Stipulation" which states, "The prosecutor and defense counsel . . . stipulate to the information set out in Sections I [scoring] and V [prior convictions] of this form and agree with the defendant's prior record level . . . ." However, this court has held that merely providing a defendant with a proposed prior record level worksheet during discovery is not sufficient to effectuate the written notice requirement of Section 15A-1340.16(a6). *State v. Crook*, 247 N.C. App. 784, 797, 785 S.E.2d 771, 780 (2016). In the absence of any other writing, then, we must conclude the State failed to deliver proper written notice to Defendant.

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1. This is a separate inquiry from determining if the State actually *proved* Defendant's prior record level by stipulation or other means. *See* N.C. Gen. Stat. § 15A-1340.14(f) (2021); *State v. Briggs*, 249 N.C. App. 95, 99, 790 S.E.2d 671, 674 (2016).

Therefore, we next look to whether Defendant waived his right to notice. To determine this, we look at the inquiry and responses made at the sentencing hearing. The circumstances in this case are similar to those in *State v. Wright*, 265 N.C. App. 354, 357-58, 826 S.E.2d 833, 836 (2019). In *Wright*, "the trial court inquired about the notice of the State's intent to prove the aggravating factor, and [defense] counsel responded that he was 'provided the proper notice' and had 'seen the appropriate documents.' " *Wright*, 265 N.C. App. at 360, 826 S.E.2d at 837. The trial court also asked the defendant directly if he wished to "waive the right to have the jury determine the aggravating factor and . . . stipulate to the aggravating factor?" to which the defendant replied, "Yes, sir." *Id.* The defendant's and his counsel's affirmations constituted a sufficient waiver of notice. This Court reasoned that the "defendant's knowing and intelligent waiver of a jury trial on the aggravating factor under the circumstances necessarily included waiver of the thirty day advance notice of the State's intent to use the aggravating factor." *Id.* at 361, 826 S.E.2d at 838. "Even though the State had not technically given 'proper notice' because the additional file numbers were added to the notice only twenty days before trial instead of thirty days, defendant and his counsel had sufficient information to give an 'intentional relinquishment of a known right.' " *Id.* (quoting *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 336, 777 S.E.2d 272, 279 (2015)).

In the present case, Defendant's counsel stated affirmatively that he had received notice of the State's intent to assess the sentencing point, which was confirmed by the attorney for the State. When asked by the trial court if the State provided notice of its intent to prove Defendant was on parole at the time of the offense, the prosecutor stated, "Yes, sir. We had discussed that," and defense counsel responded, "Yes, Judge." Though the trial court did not question Defendant directly about his intent to waive notice, as in *Wright*, we hold that defense counsel's stipulation and affirmation on behalf of his client was sufficient to constitute waiver of the notice requirement.

Moreover, Defendant's counsel affirmed that Defendant was on parole at the time of the commission of the present crime and signed the sentencing worksheet which indicated that the Defendant was on parole. Furthermore, the second-degree murder conviction that was the basis for Defendant's conviction for a felon in possession of a firearm was the basis of this sentencing point. This conviction was stipulated to by Defendant at trial, and the judgment in that case was introduced as State's Exhibit 7 at trial. This conviction was also referenced in Defendant's indictment in this case.

2. Court Inquiry

Finally, we consider whether the trial court performed its procedural duties under Section 15A-1022.1, the Blakely Act. This statute requires the court to "determine whether the State . . . provided the notice to the defendant required by G.S. 15A-1340.16(a6) or whether the defendant . . . waived his or her right to such notice." § 15A-1022.1(a). When a defendant admits to a prior record finding for the offense of committing a crime while on probation, parole, or post-release supervision, the trial court must also perform a mandatory colloquy with

> the defendant personally and advise the defendant that:
>
> (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
>
> (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

§ 15A-1022.1(b). Further, it must "determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." § 15A-1022.1(c). These procedures may be ignored, however, if "the context clearly indicates that they are inappropriate." § 15A-1022.1(e).

Exploring the context necessary to cast aside the requirements of Section 15A-1022.1, this Court held in *State v. Marlow* that certain "circumstances under which defendant's prior record was stipulated" were sufficient to fall within this exception. 229 N.C. App. 593, 602, 747 S.E.2d 741, 748, (2013).

> After asking defense counsel if they had a chance to review the prior record level and have a discussion with defendant, defense counsel responded "[h]e did [stipulate], yes, sir." Defense counsel had the opportunity to inform defendant of the repercussions of conceding certain prior offenses and defendant had the opportunity to interject had he not known such repercussions. Yet, even after being informed, defendant neither objected to nor hesitated when asked about such convictions. With such a routine determination as to whether defendant was convicted of possession of drug paraphernalia while on

> probation for another offense, we see no reason to have engaged in an extensive colloquy with defendant.

Id.

Here, we likewise hold that the court's interaction with defense counsel amounted to the same "routine determination." Defense counsel affirmed he had seen the prior record level worksheet and that it was "an accurate representation of his prior record." Defendant, through his counsel, stipulated to the addition of the prior record point as evidenced by defense counsel's signature. As in *Marlow*, defense counsel "had the opportunity to inform defendant of the repercussions of conceding certain prior offenses and defendant had the opportunity to interject had he not known such repercussions" and did not object to the point at sentencing. *Id.* Therefore, the trial court was not required to follow the precise procedures prescribed in N.C. Gen. Stat. § 15A-1022.1 (2021), as defendant acknowledged his status and violation by arrest in open court.

IV. Conclusion

Evidence of the firearm was properly obtained such that the trial court did not err by denying Defendant's motion to suppress. Though the State did not provide written notice of its intent to prove a unique prior record point, Defendant waived such notice, and the trial court was not required to perform a colloquy under the Blakely Act. N.C. Gen. Stat. § 15A-1022.1 (2021). We find no error in the jury's verdict or the judgment entered by the trial court.

NO ERROR.

Judges TYSON and CARPENTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 FEBRUARY 2023)

AZEVEDO v. ONSLOW CNTY. DEP'T OF SOC. SERVS. No. 22-376	Onslow (19JRI2)	Affirmed.
CARPENTER v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 22-170	N.C. Industrial Commission (TA-28759)	Affirmed
DENTON v. BAUMOHL No. 22-500	Buncombe (19CVD2859)	Affirmed
GROOMS v. GROOMS No. 22-536	Wake (21CVD3464)	Dismissed
IN RE E.D.S. No. 22-507	Henderson (11JT109) (11JT110) (11JT140)	Dismissed
IN RE L.L.J. No. 22-386	Mecklenburg (16JT333)	Affirmed
IN RE S.N.B. No. 22-405	Craven (17JT135)	Vacated and Remanded
IN RE T.H. No. 22-452	Durham (17JT207) (17JT208) (17JT209)	Affirmed
IN RE T.M.R. No. 22-367	Yancey (13JT36) (19JT19) (19JT20)	Affirmed
JORDAN CONSULTANTS, ASLA, P.A. v. TRINITY CONSULTING & DEV., LLC No. 22-458	Guilford (20CVD6667)	Dismissed
KNECHTGES v. N.C. DEP'T OF PUB. SAFETY No. 22-213	Office of Admin. Hearings (20OSP02124)	Affirmed
LIRA v. FELTON No. 22-666	Harnett (21CVS1883)	Affirmed.

STATE v. ADAMS No. 22-315	Mecklenburg (17CRS15693) (17CRS15695)	Denied in part and affirmed in part.
STATE v. BASKINS No. 22-264	Guilford (14CRS88609)	No Prejudicial Error.
STATE v. DOUGLAS No. 22-528	Mecklenburg (19CRS225438-40) (19CRS225442-43) (19CRS225449)	No Error
STATE v. FLOWERS No. 22-534	Forsyth (20CRS2003) (20CRS60137)	No Error
STATE v. GARY No. 22-232	Lee (21CRS206)	Affirmed.
STATE v. LIVELY No. 22-575	Henderson (17CRS731)	No Error
STATE v. MARTIN No. 22-428	Caswell (15CRS465-468) (15CRS50340)	No Error
STATE v. MINTON No. 22-306	Catawba (17CRS55200) (17CRS55201)	No Error
STATE v. REAVIS No. 22-556	Davie (20CRS50412-13) (20CRS50574) (19CVD2859)	Vacated and Remanded
STATE v. RUFF No. 22-485	Polk (19CRS62)	No Error
STATE v. SMITH No. 20-692	Durham (18CRS1769) (18CRS52421)	Vacated and Remanded.
WATER DAMAGE EXPERTS OF HILLSBOROUGH, LLC v. MILLER No. 22-270	New Hanover (19CVS2724)	Affirmed
WILLIS v. N.C. DEP'T OF STATE TREASURER No. 22-373	Chowan (21CVS1)	Affirmed

CHOCIEJ v. RICHBURG

[287 N.C. App. 615 (2023)]

KATHRYN CHOCIEJ, PLAINTIFF
v.
MARSHALL JERRY RICHBURG, DEFENDANT

No. COA22-548

Filed 21 February 2023

Domestic Violence—finding of assault—issuance of DVPO mandatory—irrelevant considerations

The trial court erred by denying plaintiff's request for a domestic violence protective order (DVPO) after finding that defendant had assaulted her on two occasions. Where plaintiff and defendant had been in a dating relationship and defendant had assaulted plaintiff, issuance of a DVPO was mandatory—regardless of whether the trial court believed that plaintiff was in fear of serious bodily injury or continued harassment.

Appeal by Plaintiff from judgment entered 5 October 2021 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 11 January 2023.

Legal Aid of North Carolina, Inc., by Corey Frost, Dietrich D. McMillan, Larissa Mañón Mervin, TeAndra H. Miller, Celia Pistolis, and James Battle Morgan, Jr., for Plaintiff-Appellant.

No brief filed on behalf of Defendant-Appellee.

CARPENTER, Judge.

Kathryn Chociej ("Plaintiff") appeals from the trial court's dismissal of her Complaint and Motion for Domestic Violence Protective Order ("Complaint") filed against Marshall Jerry Richburg ("Defendant") and the trial court's denial of her subsequent Rule 59 Motion to Amend the Judgment or for New Trial ("Rule 59 Motion"). On appeal, Plaintiff asserts the trial court erred by granting Defendant's Motion to Dismiss the Complaint despite finding Defendant assaulted Plaintiff on two occasions. After careful review, we agree with Plaintiff. Accordingly, we reverse and remand for entry of a Domestic Violence Protective Order ("DVPO").

I. Factual and Procedural Background

In 2021, Plaintiff and Defendant resided together in a dating relationship. On 31 May 2021, an altercation broke out between the couple, and Defendant assaulted Plaintiff with his fists and forehead, breaking her nose. Defendant also threw a vodka bottle and a peanut butter jar against the wall, leaving holes, and destroyed Plaintiff's television. Afterwards, Defendant apologized and promised to seek mental health treatment. On 16 June 2021, another fight broke out in the parties' bedroom. This time, Defendant assaulted Plaintiff with a belt, household objects, including a drawer and a lamp, and his forehead and fists, causing a black eye and bruises to Plaintiff's hands. When the police arrived, Defendant had already fled, but he was arrested in early July and charged with assault on a female.

After his arrest, Defendant called Plaintiff's employer to report she had wrongfully disclosed his confidential medical information to a third party. After being suspended on 16 July 2021, Plaintiff was terminated by her employer on 20 July 2021. Also on 20 July 2021—the same date as the adverse employment action—Plaintiff filed the Complaint against Defendant.

During the hearing on 5 October 2021, Plaintiff testified that Defendant assaulted her on multiple occasions, and she introduced photographs of her injuries, which the court admitted into evidence. Defendant presented no evidence. In open court, the trial court considered the duration of time between the assaults and Plaintiff seeking DVPO relief. The trial court also noted the timing between the adverse employment action and Plaintiff's initiation of the case. Ultimately, the trial court concluded Plaintiff "failed to prove grounds for [the] issuance of a [DVPO]" and dismissed her Complaint. To support its conclusion, the court made the following findings of fact:

> Although this court believes Defendant assaulted Plaintiff on two different occasions. Court does not believe that Plaintiff would have taken out [the DVPO] if she had not been in trouble at her job for releasing to Defendant's friend his medical information. Her fear of defendant appears to have developed after she was suspended from her job due to defendant's 'harassment and vindictiveness' per Plaintiff's testimony by Defendant's calling her boss to report Plaintiff's violation of releasing his private information.

Plaintiff timely filed the Rule 59 Motion. After a hearing on 6 December 2021, the trial court denied Plaintiff's Rule 59 Motion by written order filed on 19 January 2022. Plaintiff timely appealed from both orders.

II. Jurisdiction

This Court has jurisdiction over an appeal from both orders pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

The issues on appeal are whether the trial court erred by: (1) dismissing Plaintiff's Complaint due to insufficient fear of serious bodily injury or continued harassment after finding Defendant had assaulted Plaintiff on two occasions; and (2) denying Plaintiff's Rule 59 Motion.

IV. Analysis

On appeal, Plaintiff first argues the trial court erred by dismissing the Complaint where uncontroverted evidence showed Defendant assaulted Plaintiff on two occasions, and by denying relief absent a showing of fear of imminent serious bodily injury or continued harassment. After careful review, we agree with both arguments.

"When the trial court sits without a jury [on a DVPO], the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Forehand v. Forehand*, 238 N.C. App. 270, 273, 767 S.E.2d 125, 127 (2014) (quoting *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009)). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Ward v. Ward*, 252 N.C. App. 253, 256, 797 S.E.2d 525, 528 (2017) (internal quotations omitted), *appeal dismissed and disc. review denied*, 369 N.C. 753, 800 S.E.2d 65 (2017).

A trial judge sitting without a jury must specifically find facts and state separately its conclusions of law. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 52(a)(1) (2021). "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. . . . [E]ach link in the chain of reasoning must appear in the order itself." *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

"Domestic violence" has been defined by our Legislature as:

> 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. Gen. Stat. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in [N.C. Gen. Stat. §§] 14-27.21 through . . . 14-27.33.

N.C. Gen. Stat. § 50B-1(a) (2021). Each subsection of the statute—separated by the disjunctive conjunction, "or"—independently and sufficiently constitutes an act of domestic violence under North Carolina law. *See Rudder v. Rudder*, 234 N.C. App. 173, 180, 759 S.E.2d 321, 326 (2014) ("The statute thus specifies several alternative ways in which one may commit an act of domestic violence."). A showing of "fear of imminent serious bodily injury or continued harassment" is not required where a defendant intentionally causes bodily injury or attempts to cause bodily injury upon the aggrieved party. *See* N.C. Gen. Stat. § 50B-1(a).

Upon a finding that "one or more" acts of domestic violence have occurred between individuals with a sufficient past or present "personal relationship[,]" N.C. Gen. Stat. § 50B-1, "the court *shall* grant a protective order . . . ." N.C. Gen. Stat. § 50B-3(a) (emphasis added). When subsections (a) and (b) of N.C. Gen. Stat. § 50B-1 are satisfied, the issuance of a DVPO is mandatory, not discretionary. *See D.C. v. D.C.*, 279 N.C. App. 371, 373 n.2, 865 S.E.2d 889, 890 n.2 (2021) ("[I]f a trial court determines that an act qualifying as domestic violence occurred, the trial court is required to issue a DVPO.").

Here, the parties were in a cohabitating dating relationship at the time of the incidents, which constitutes a "personal relationship" within the meaning of the statute. *See* N.C. Gen. Stat. § 50B-1(b)(6) ("persons . . . who are in a dating relationship or have been in a dating relationship."). In the 5 October 2021 order dismissing the Complaint, the trial court explicitly found, based upon competent and uncontroverted evidence, that "Defendant assaulted Plaintiff on two different occasions." The finding that Defendant committed two separate assaults against Plaintiff is irreconcilable with the trial court's conclusion that Plaintiff "failed to prove grounds for issuance of a [DVPO]." *See Forehand*, 238 N.C. App. at 273, 767 S.E.2d at 127. At minimum, the trial court's finding

of two separate assaults based upon the evidence presented necessitates the conclusion that Defendant "[a]ttempt[ed] to cause bodily injury" to Plaintiff. *See* N.C. Gen. Stat. § 50B-1(a)(1). Accordingly, we reverse and remand for entry of a DVPO, inclusive of any relief set forth in N.C. Gen. Stat. § 50B-3(a) that the trial court deems appropriate under the facts of this case.

Having concluded the trial court reversibly erred by dismissing Plaintiff's request for a DVPO, we do not reach the issue of whether the trial court abused its discretion in denying Plaintiff's Rule 59 Motion, wherein Plaintiff sought the same relief under a more exacting standard.

V. Conclusion

In sum, because the trial court found that one or more acts of domestic violence occurred between two individuals with a sufficient personal relationship, the trial court lacked discretion to deny Plaintiff's request for a DVPO. *See D.C.*, 279 N.C. App. at 373, 865 S.E.2d at 890. Accordingly, we reverse the trial court's dismissal of the Complaint and remand for entry of a DVPO. On remand, the trial court should consider all potential relief set forth in N.C. Gen. Stat. § 50B-3(a) and grant any such relief the trial court deems appropriate under the facts of this case.

REVERSED AND REMANDED.

Judges MURPHY and GRIFFIN concur.

FIRST RECOVERY, LLC, AND DYLAN BROOKS, PLAINTIFFS
v.
UNLIMITED REC-REP, LLC, F/K/A UNLIMITED RECOVERY REPOSSESSION DIVISION, LLC, KEITH SANDERS, INDIVIDUALLY, AND RITCHIE, INC. D/B/A SUNBELT OF RALEIGH, DEFENDANTS

No. COA22-495

Filed 21 February 2023

Judgments—vacated—null and void—collateral estoppel

In a dispute arising from the sale of a business to plaintiffs, where the trial court dismissed plaintiffs' claims for fraud and misrepresentation against one defendant on the basis of collateral estoppel because a bankruptcy court had issued an order concluding that plaintiffs had failed to present sufficient evidence to establish a prima facie case of fraud or misrepresentation against another defendant in the same dispute, the bankruptcy court's order became null and void when it was vacated by a federal district court during the pendency of this appeal; therefore, the bankruptcy court's order lost any preclusive effect on the issues in this case and defendant was not entitled to summary judgment on the basis of collateral estoppel.

Appeal by Plaintiffs from Order entered 1 February 2022 by Judge A. Graham Shirley, II in Wake County Superior Court. Heard in the Court of Appeals 24 January 2023.

Austin Law Firm, PLLC, by John S. Austin, for Plaintiff-Appellants.

Cozen O'Connor, by Alycen Moss and Travis Ray Joyce, for Defendant-Appellee Richie Inc. d/b/a Sunbelt of Raleigh.[1]

HAMPSON, Judge.

First Recovery, LLC and Dylan Brooks (Plaintiffs) appeal from an Order granting Summary Judgment to Richie, Inc. d/b/a Sunbelt of

1. Denise L. Besselieu appeared on briefs for Defendant-Appellee. By Order entered 21 November 2022, this Court permitted Denise L. Besselieu to withdraw and Alycen Moss to be substituted as counsel. Travis Ray Joyce subsequently entered a Notice of Appearance in this Court indicating that appearance was in substitution of Alycen Moss. However, this Court was not asked to allow Alycen Moss to withdraw as counsel.

Raleigh[2] (Richie) on the basis Plaintiffs are collaterally estopped from pursuing their claims against Richie following a decision by a bankruptcy court dismissing Plaintiffs' Adversary Proceeding against co-Defendant Keith Sanders (Sanders). However, during the pendency of this appeal, the bankruptcy court's decision was vacated by a United States District Court and the Adversary Proceeding remanded for a new trial. As such, for the following reasons, we vacate the trial court's Order granting Summary Judgment in favor of Richie in this case and remand this matter to the trial court to conduct further proceedings. Relevant to this appeal, the Record before us tends to reflect the following:

Factual and Procedural Background

Plaintiffs commenced this action on 2 February 2016 by filing a Complaint against Unlimited Rec-Rep, LLC, f/k/a Unlimited Recovery Repossession Division, LLC (URR) and Sanders alleging claims of breach of contract, breach of warranty, fraud, and unfair and/or deceptive trade practices arising from the sale of URR to Plaintiffs from Sanders. On 8 August 2016, Plaintiffs filed an Amended Complaint adding Richie, the broker in the sale of the business, as a defendant. In the Amended Complaint, in addition to the claims against URR and Sanders, Plaintiffs alleged claims of fraud, negligent misrepresentation, and unfair and/or deceptive trade practices against Richie.

On 21 September 2017, URR filed a Chapter 7 bankruptcy proceeding in the United States Bankruptcy Court for the Eastern District of North Carolina. The case was subsequently placed on inactive status. On 27 March 2019, URR's bankruptcy case was resolved. On 9 August 2019, Sanders filed his own Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of North Carolina. On 13 January 2020, Plaintiffs filed an Adversary Proceeding against Sanders in the United States Bankruptcy Court for the Eastern District of North Carolina seeking to have the alleged debt owed to Plaintiffs arising from the sale of URR deemed non-dischargeable on the basis of fraud and/or misrepresentation under 11 U.S.C. § 523(a)(2).

On 19 March 2020, Plaintiffs and Richie entered into a Consent Order removing the matter from inactive status to allow the litigation as between them to proceed, while the matter remained inactive as to Sanders. On 16 December 2020, Richie filed a Motion for Summary

2. It appears the case caption in the case as filed below misspelled Richie as Ritchie. While we keep the caption as-is to maintain consistency, we will endeavor to use the correct spelling utilized by the parties in their briefing to this Court in the body of our opinion.

Judgment. This Motion was heard on 17 February 2021 before the Honorable G. Bryan Collins in Wake County Superior Court. On 9 April 2021, Judge Collins rendered his decision denying Richie's Motion for Summary Judgment via email to the parties. Plaintiffs did not submit a proposed Order to Judge Collins until 25 January 2022.

On 17 December 2021, following evidentiary hearings, the Bankruptcy Court issued an Order concluding Plaintiffs in that action had failed to present sufficient evidence of either justifiable or reasonable reliance to establish a prima facie case of fraud or misrepresentation under 11 U.S.C. § 523(a)(2) for non-dischargeability. The Bankruptcy Court, thus, entered judgment for Sanders and dismissed the Adversary Proceeding.

On 29 December 2021, Richie filed a second Motion for Summary Judgment, this time contending the Bankruptcy Court's ruling collaterally estopped Plaintiffs from asserting claims of fraud and misrepresentation against Richie. On 27 January 2022, Richie's second Motion for Summary Judgment was heard before the Honorable A. Graham Shirley, II in Wake County Superior Court. On 1 February 2022, Judge Shirley entered his Order granting Richie's Motion for Summary Judgment and dismissing Plaintiffs' claims against Richie. Later that day, Judge Collins entered his Order denying Richie's first Motion for Summary Judgment. Plaintiffs filed Notice of Appeal to this Court from Judge Shirley's Order on 9 February 2022.

During the pendency of this appeal, Plaintiffs appealed the Bankruptcy Court's Order in the Adversary Proceeding to the United States District Court for the Eastern District of North Carolina. On 9 January 2023, the District Court vacated the Bankruptcy Court's Order and remanded the case for a new trial.[3] *See First Recovery, LLC v. Sanders*, No. 5:21-CV-530-FL (E.D.N.C. Jan. 9, 2023).

Analysis

Judge Shirley's Order granted Richie's Motion for Summary Judgment which alleged Plaintiffs were collaterally estopped from re-litigating issues of fraud and misrepresentation by the Bankruptcy Court's Order. On appeal to this Court, Plaintiffs contend the trial court erred in granting Summary Judgment because the Bankruptcy

3. Plaintiffs have filed a Motion to Amend the Record to include the District Court's Order and Judgment as part of the Record. Richie did not file any response to this Motion. Both parties have included portions of the Adversary Proceeding filings in the Record and relied on those filings in their arguments to this Court. As such, we allow the Motion to Amend the Record.

Court's Order should not be deemed to collaterally estop their claims in this action.

"The companion doctrines of *res judicata* and collateral estoppel have been developed by the courts of our legal system during their march down the corridors of time to serve the present-day dual purpose of protecting litigants from the burden of relitigating previously decided matters and of promoting judicial economy by preventing needless litigation." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986). In particular, collateral estoppel " 'is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally.' " *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (quoting *Comm'r v. Sunnen*, 333 U.S. 591, 599, (1948)). " ' [W]hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.' " *Id.* at 355, 200 S.E.2d at 804 (quoting *Masters v. Dunstan*, 256 N.C. 520, 523-24, 124 S.E.2d 574, 576 (1962)); *see also State v. Summers*, 351 N.C. 620, 622, 528 S.E.2d 17, 20 (2000) (citing this principle specific to collateral estoppel). "[U]nder the doctrine of collateral estoppel, when an issue has been fully litigated and decided, it cannot be contested again between the same parties, even if the first adjudication is conducted in federal court and the second in state court." *McCallum v. N.C. Co-op. Extension Serv.*, 142 N.C. App. 48, 52, 542 S.E.2d 227, 231 (2001) (citing *King*, 284 N.C. at 359, 200 S.E.2d at 807)).

However, the District Court's Order and Judgment vacating the Bankruptcy Court's Order and remanding for a new trial alters the posture of this case. "A vacated order is null and void, and has no legal force or effect on the parties or the matter in question." *Brown v. Brown*, 181 N.C. App. 333, 336, 638 S.E.2d 622, 624 (2007). Federal case law agrees: "A vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case." *No E.-W. Highway Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985). Put another way, the Bankruptcy Court's Order no longer stands unreversed. *See King*, 284 N.C. at 355, 200 S.E.2d at 804.

Thus, in this case, the Bankruptcy Court's Order no longer retains any preclusive effect it may have had on the issues in this case between Plaintiffs and Richie. Therefore, collateral estoppel arising from the vacated Bankruptcy Court Order does not bar Plaintiffs' claims against Richie. Consequently, Richie is not entitled to Summary Judgment on this basis.

Conclusion

Accordingly, we vacate the trial court's 1 February 2022 Order Granting Summary Judgment and remand this matter for further proceedings.[4]

VACATED AND REMANDED.

Judges ZACHARY and GRIFFIN concur.

GLORIA GILLIAM AND REX MAURICE CONNELLY, PARENTS OF MAURICE CONNELLY, DECEASED EMPLOYEE, PLAINTIFFS
v.
FOOTHILLS TEMPORARY EMPLOYMENT, EMPLOYER, SYNERGY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA22-560

Filed 21 February 2023

1. Appeal and Error—preservation of issues—workers' compensation case—failure to state issue with particularity

In a workers' compensation case, defendants failed to preserve an evidentiary issue where they made only a generalized assignment of error when they appealed the Deputy Commissioner's opinion and award to the Full Commission and where there was no indication in the record that the evidentiary issue was raised before the Full Commission at all.

2. Workers' Compensation—calculation of average weekly wage—fifth method—date when decedent would have ended employment

In a workers' compensation case in which decedent died while working a summer job at a bakery, the Industrial Commission did not err by applying the fifth method of calculating average weekly wage (N.C.G.S. § 97-2(5)), rather than the third method, where the Commission's findings supported its conclusion that the third method would be unfair to defendants because decedent was working for the summer until his next school semester began in August,

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4. The subsequent Order denying Summary Judgment entered by Judge Collins is not before us. As such, we express no opinion as to whether that Order was properly entered or decided.

such that his earnings from May to August would have constituted his total earnings for that year. However, the Commission erred in its calculation of decedent's average weekly wage by using his start date until his date of death (in July), rather than his start date until the date he would have ended his employment had he not died (in August).

Appeal by Defendants and cross appeal by Plaintiffs from Opinion and Award entered 19 April 2022 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 January 2023.

Sellers, Ayers, Dortch & Lyons, PA, by Christian R. Ayers, John F. Ayers, III, and I. Matthew Hobbs, for Plaintiffs-Appellees.

Goldberg Segalla LLP, by Gregory S. Horner and Allegra A. Sinclair, for Defendants-Appellants.

COLLINS, Judge.

Defendants Foothills Temporary Employment and Synergy Insurance Company appeal from an Opinion and Award entered by the North Carolina Industrial Commission awarding Plaintiffs Gloria Gilliam and Rex Maurice Connelly, parents of Decedent Maurice Connelly, death benefits at a rate of $64.37 per week for 500 weeks. Defendants contend that the Commission erroneously admitted expert testimony under Rule 702 of the North Carolina Rules of Evidence, and that, absent such testimony, the Commission's findings of facts and conclusions of law are unsupported. Plaintiffs cross appeal, contending that the Commission erroneously calculated Decedent's average weekly wage under N.C. Gen. Stat. § 97-2(5). Defendants failed to preserve their argument regarding the admission of expert testimony under Rule 702. Although the Commission did not err by using the fifth method of calculating average weekly wage under N.C. Gen. Stat. § 97-2(5), the Commission erred in its calculation of Decedent's average weekly wage. We dismiss Defendant's appeal, and we vacate and remand the Opinion and Award with instructions.

I. Procedural History and Factual Background

Decedent was an employee of Foothills Temporary Employment, a temporary employment agency that places individuals with various employers. On 15 July 2018, Decedent was assigned to work at Bimbo Bakeries, a large-scale bread-making facility, in a "general utility"

position for $11.50 per hour. Bimbo Bakeries had been training Decedent in multiple areas, but on 29 July 2018 he was working on the lid line. The lid line is approximately 4 feet wide by 60 feet long and runs along a conveyor belt. Lid line workers "are generally responsible for observing that the lids are being produced efficiently, for ensuring that the type of lid being produced is consistent with the product currently being baked, and for stacking the lids to the side of the conveyor belt in racks as appropriate during changeover periods."

On 29 July 2018, Decedent's shift began "around 4:00 or 5:00 p.m." On that day, Decedent was working on the lid line with Larry Brooks, a Bimbo Bakeries employee, and "monitoring the lids." Decedent gave Brooks a 20-minute break in the break room while he continued to work on the lid line. Leon Weaver, an oven operator for Bimbo Bakeries, spoke with Decedent a few minutes prior to his collapse: "I looked at him and I asked him, I was like, 'Are you – are you okay? You good? You need water or anything?' He said he was fine and then I just walked back down to the oven." When Brooks came back from his break, he found Decedent lying face down on the lid line platform.

Burke County EMS arrived at the scene where Decedent was "unresponsive to all stimuli," his "pupils were fixed and dilated," and he was "placed on the cardiac monitor via defibrillation pads . . . [and] found to be in Vfib." Lieutenant Nicole Carswell, a paramedic with Burke County, noted that "we defibrillated quite a few times and there was no significant change in that until we were arriving at the hospital. He stayed in defib the entire time." Decedent was pronounced dead at the hospital, and an autopsy revealed that

> [t]he cause of death is probable dysrhythmia due to cardiomegaly. Major findings at autopsy were an enlarged heart with increased concentric left ventricle thickness. An enlarged heart impairs proper coordinated electrical conduction and predisposes to a fatal arrythmia. In addition to the increased muscle mass, there was an increased fibrosis seen microscopically.

Plaintiffs filed a workers' compensation claim, alleging that Decedent "collapsed and died while working in high heat inside bakery." Defendants denied Plaintiffs' workers' compensation claim on the basis that Decedent "died from natural causes as ruled by OSHA and Medical Examiner." After a hearing, Deputy Commissioner Tiffany M. Smith entered an Opinion and Award, concluding that Decedent's death was compensable and ordering Defendants to pay death benefits calculated pursuant to the third statutory method of calculating average weekly

wage under N.C. Gen. Stat. § 97-2(5). Defendants appealed the Opinion and Award, and the Full Commission affirmed the compensability of Decedent's death but recalculated the average weekly wage pursuant to the fifth statutory method. Defendants appealed the Commission's Opinion and Award, and Plaintiffs cross-appealed.

II. Discussion

A. Expert Witness Testimony

[1] Defendants contend that the Commission erred under Rule of Evidence 702 by admitting Dr. Owens' testimony and thus the Commission's findings of fact and conclusions of law concerning compensability are unsupported. Plaintiffs contend this issue is not preserved for our review.

Pursuant to North Carolina Industrial Commission Rule 701, an application for review of a Deputy Commissioner's opinion and award must be made within 15 days from the date notice of the opinion and award was given. Workers' Comp. R. N.C. Indus. Comm'n 701(a), 2021 Ann. R. N.C. 635-36.[1] The Commission must acknowledge the request for review by letter and within 30 days, must prepare and provide the parties involved with the official transcript and exhibits, if any, along with a Form 44 Application for Review. *Id.* Rule 701(c).

> The appellant shall submit a Form 44 Application for Review stating with particularity all assignments of error and grounds for review, including, where applicable, the pages in the transcript or the record on which the alleged errors shall be recorded. Grounds for review and assignments of error not set forth in the Form 44 Application for Review are deemed abandoned, and argument thereon shall not be heard before the Full Commission.

Id. Rule 701(d).

"[T]he portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission." *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005). The penalty for non-compliance with the particularity requirement on appeal to the Full Commission is waiver of the grounds. *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 249, 652 S.E.2d 713,

1. The Rules of the North Carolina Industrial Commission are codified as 11 N.C. Admin. Code 23A.0701 (2021).

715 (2007) (citations omitted). Grounds waived on appeal to the Full Commission are not preserved for this Court's review. *See Bentley v. Jonathan Piner Constr.*, 254 N.C. App. 362, 368, 802 S.E.2d 161, 165 (2017).

Defendants argue that the following assignment of error[2] in its Form 44 was sufficient to preserve its argument that the Commission erred under Rule 702 by admitting Dr. Owens' testimony: "Defendants allege error in Findings of Fact 1-2, 7-9, 21, 23-27, 34-49 as these findings are either unsupported by competent evidence, conflict with the evidence of record and/or are against the weight of the evidence taken as a whole."

However, that assignment of error is only a generalized assignment of error regarding the Commission's findings of facts that fails to state with particularity as grounds for review the admissibility of Dr. Owens' testimony under Rule of Evidence 702. *See Reed v. Carolina Holdings*, 251 N.C. App. 782, 787-88, 796 S.E.2d 102, 106 (2017) (holding that Defendants failed to preserve an issue where there was "no indication in the record that [the] issue was raised at all before the Commission prior to the Opinion and Award" and that "Defendants pleaded only a generalized assignment of error . . . ."). Furthermore, the record on appeal before this Court does not contain Defendants' brief or other document filed with the Full Commission stating with particularity as grounds for review the admissibility of Dr. Owens' testimony under Rule 702. *Cf. Cooper v. BHT Enters.*, 195 N.C. App. 363, 369, 672 S.E.2d 748, 753-54 (2009) ("Since both this Court and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the filing requirement of an appellant's Form 44 where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission, we overrule these assignments of error."). *See also Reed*, 251 N.C. App. at 789-90, 796 S.E.2d at 107-08 ("Although Defendants contend in response to the Motion to Dismiss that they stated their challenge to the Commission's authority to award attorney's fees in their brief to the Commission on appeal from the Deputy Commissioner's decision, they did not include the referenced brief in the record."). Finally, the Commission did not

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2. Although our Rules of Appellate Procedure no longer limit the scope of appellate review to those issues presented by assignments of error set out in the record on appeal, North Carolina Industrial Commission Rule 701(d) requires a party appealing a Deputy Commissioner's opinion and award to the Full Commission "to submit a Form 44 Application for Review stating with particularity all assignments of error and grounds for review . . . ." Workers' Comp. R. N.C. Indus. Comm'n 701(d).

explicitly address in its Opinion and Award the admission of Dr. Owens' testimony under Rule 702; thus, it is not apparent that the Commission considered that ground for review. *See Adcox v. Clarkson Bros. Constr. Co.*, 241 N.C. App. 178, 186, 773 S.E.2d 511, 517 (2015). Accordingly, there is no indication in the record that the admission of Dr. Owens' testimony under Rule 702 was raised before the Commission prior to the filing of the Opinion and Award from which this appeal arises. Accordingly, that ground was abandoned before the Commission and Defendants have failed to preserve it for our review.

B. Average Weekly Wage

[2] Plaintiffs contend that the Commission erred by concluding that the fifth method of calculating average weekly wage under N.C. Gen. Stat. § 97-2(5) should be applied instead of the third method. Plaintiffs further contend that even if the fifth method is used, the Commission erroneously calculated Decedent's average weekly wage by using the earnings he accrued from 17 May 2018 to his death on 29 July 2018 rather than the earnings he would have accrued from 17 May 2018 to when he would have ceased working for Defendant-Employer in August 2018.

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted). "The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, even though there is evidence that would support findings to the contrary." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (brackets, quotation marks, and citation omitted). The Commission's conclusions of law are reviewed de novo. *Pickett v. Advance Auto Parts*, 245 N.C. App. 246, 249, 782 S.E.2d 66, 69 (2016).

1. Application of the Fifth Method

Plaintiffs contend that the Commission's decision to apply the fifth method of calculating average weekly wage was erroneous.

Whether the Commission selected the correct method of calculating average weekly wage under N.C. Gen. Stat. § 97-2(5) is a question of law that we review de novo. *Nay v. Cornerstone Staffing Sols.*, 380 N.C. 66, 85, 867 S.E.2d 646, 659 (2022). Whether a particular method of calculating average weekly wage produces "fair and just" results is a question of fact subject to the "any competent evidence" standard. *Id.*

The calculation of average weekly wage is governed by N.C. Gen. Stat. § 97-2(5). "Subsection 97-2(5) sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed and establishes an order of preference for the calculation method to be used . . . ." *Id.* at 77, 867 S.E.2d at 654. (citation and quotation marks omitted).

The third method of calculating average weekly wage states: "Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained." N.C. Gen. Stat. § 97-2(5) (2021). Results fair and just, within the meaning of N.C. Gen. Stat. § 97-2(5), "consist of such average weekly wages as will most nearly approximate the amount which the injured employee would be earning were it not for the injury, in the employment in which he was working at the time of his injury." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956) (emphasis and quotation marks omitted).

The fifth method of calculating average weekly wage states: "But where for exceptional reasons the foregoing [methods of calculating average weekly wages] would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5). The fifth method may not be used unless there has been a finding that unjust results would occur by using one of the first four methods. *McAninch v. Buncombe Cnty. Sch.*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997).

Here, the Commission found, in relevant part, as follows:

> 6. Although Decedent's employment with Defendant-Employer was at-will and had no specified end date, the preponderance of the evidence demonstrates that Decedent would have ended his employment with Defendant-Employer and returned to school in August 2018. The medical record from the 11 July 2018 "Well Male Check" reflects that Decedent was "currently in grad school for sports communication at Mississippi college." Furthermore, an 18 July 2018 Facebook post authored by Decedent expressed his plan to return to school: "I'm so glad school starts in August so I don't have much longer in the bakery lol." Decedent's sister testified that Decedent

was "in school" at the time of his death. Moreover, ceasing his employment to return to school in August 2018 would have followed the pattern of Decedent's work history in recent years. The Work Experience portion of Decedent's 14 May 2018 employment application with Defendant-Employer reflects that he worked for two different employers during the previous two summers before departing each August. The document reflects that Decedent worked from 8 June 2017 until 7 August 2017 and from 31 May 2016 until 1 August 2016, and on this form he indicated that he discontinued his work in those positions due to "school."

7. According to the Form 22 *Statement of Days Worked and Earnings of Injured Employee* stipulated into evidence, Decedent worked for Defendant-Employer for 64 days over a 73-day period starting 17 May 2018 and ending with his death on 29 July 2018. Defendant-Employer's payroll records reflect that Plaintiff earned $5,021.13 during this period.

. . . .

33. Based upon the preponderance of the evidence in view of the entire record, exceptional reasons, including the limited duration of Decedent's work for Defendant-Employer and the fact that Decedent would have terminated the employment within a few weeks but for his death, the first four methods of calculating average weekly wage under N.C. Gen. Stat. § 97-2(5) are inappropriate. Given the nature of Decedent's employment with Defendant-Employer, the Full Commission finds that dividing Decedent's total earnings by 52 yields an average weekly wage which most nearly approximates what Decedent would be earning were it not for the injury.

Decedent's medical records, Facebook post, employment application, and Form 22 are competent evidence to support the Commission's findings of fact, including "that Decedent would have ended his employment with Defendant-Employer and returned to school in August 2018" and that "Decedent would have terminated the employment within a few weeks but for his death . . . ." Because Decedent began working for Defendant-Employer on 17 May 2018 and would have ceased working for Defendant-Employer in August 2018, within a few weeks of his death, Decedent's earnings from May to August would have constituted

his total earnings in 2018. If Decedent's total earnings are divided by the number of weeks and parts thereof that he would have worked, this would yield an average weekly wage reflecting that Decedent would have worked for the entire year rather than just three months.

Accordingly, the Commission's findings of fact support its conclusion of law that applying "a third method [of] calculation would be unfair to Defendants in this case in that it would overestimate the wages Decedent would have earned but for the compensable accident. The third method is therefore inappropriate in this case as it would not produce results 'fair and just to both parties.' " *See Joyner v. A. J. Carey Oil Co.*, 266 N.C. 519, 521-22, 146 S.E.2d 447, 448-49 (1966) (holding that dividing plaintiff's earnings by the number of weeks in his brief period of employment during peak season would not be fair and just where plaintiff's employment was "inherently part-time and intermittent" and did not "provide work in each of the 52 weeks of the year; some weeks the job is non-existent").

Furthermore, the Commission's findings of fact support its conclusion that the fifth method should be used:[3]

> Given the highly unusual situation presented by the facts of this case, "exceptional reasons" exist and "such other method of computing average weekly wages" "as will most nearly approximate the amount" Decedent "would be earning were it not for the injury" must be used. N.C. Gen. Stat. § 97-2(5). The fifth method of calculation under N.C. Gen. Stat. § 97-2(5) is therefore appropriate. *See Pope v. Johns Manville*, 207 N.C. App. 157, 700 S.E.2d 22 (2010).

2. Calculating Average Weekly Wage under the Fifth Method

Plaintiffs further contend that, even if the fifth method is used, the Commission erroneously calculated Decedent's average weekly wage by using his date of death to calculate his total earnings when there was no competent evidence that Decedent would have ceased working for Defendant-Employer on that date.

Findings of fact 6, 7, and 33, as recited above, including that "Decedent would have ended his employment with Defendant-Employer and returned to school in August 2018[,]" that "Decedent would have

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3. The Commission's conclusion of law 4 also details why the first, second, and fourth methods of calculating Decedent's average weekly wage should not be used. Plaintiffs do not argue that this portion of the Commission's conclusion was erroneous.

terminated the employment within a few weeks but for his death," and that "dividing Decedent's total earnings by 52 yields an average weekly wage which most nearly approximates what Decedent would be earning were it not for [his death]" are supported by competent evidence. However, these findings do not support the Commission's conclusion of law calculating Decedent's average weekly wage as follows:

> 5. . . . In the case at bar, the evidence shows that Decedent earned $5,021.13 during his summer employment with Defendant-Employer. This figure divided by 52 yields an average weekly wage of $96.56. This average weekly wage most nearly approximates the amount Decedent would be earning were it not for the injury. This average weekly wage yields a corresponding weekly workers' compensation rate of $64.37. N.C. Gen. Stat. §§ 97-2(5); 97-38 (2021).

Because there is no evidence that Decedent would have ceased working for Defendant-Employer on 29 July 2018 but for his death, using the $5,021.13 Decedent earned from 17 May 2018 to 29 July 2018 as his "total earnings" to calculate his average weekly wage underestimates the wages Decedent would have earned but for the compensable accident. Instead, using the amount Decedent would have earned from 17 May 2018 to the date he would have ceased working for Defendant-Employer in August 2018 as his "total earnings," and dividing that figure by 52, yields an average weekly wage that most nearly approximates the amount Decedent would be earning were it not for his death.

Accordingly, the Commission erroneously calculated Decedent's average weekly wage under the fifth method by using the "total earnings" he accrued from 17 May 2018 to 29 July 2018 rather than the "total earnings" he would have accrued had he worked from 17 May 2018 to August 2018, within a few weeks of his death.

III. Conclusion

Defendants did not properly preserve their argument that Dr. Owens' testimony was inadmissible, and we therefore dismiss Defendants' appeal. The Commission did not err by concluding that the third method of calculating Decedent's average weekly wage under N.C. Gen. Stat. § 97-2(5) would not produce results "fair and just to both parties" in that it would overestimate the wages Decedent would have earned but for the compensable accident. As such, the Commission did not err by concluding that the fifth method of calculation under N.C. Gen. Stat. § 97-2(5) is appropriate.

However, the Commission erred under the fifth method in calculating Decedent's average weekly wage by using his "total earnings" from 17 May 2018 to 29 July 2018 instead of the "total earnings" he would have accrued had he worked until August 2018. Accordingly, we vacate the Commission's Opinion and Award and remand with the following instructions: find, based on competent evidence, the date Decedent would have ended his employment with Defendant-Employer, had he not died; determine Decedent's "total earnings" based on his start date of 17 May 2018 and the date Decedent would have ended his employment with Defendant-Employer; calculate Decedent's average weekly wage by dividing Decedent's "total earnings" by 52; enter a new opinion and award consistent with these findings and conclusions.

DISMISSED IN PART; VACATED AND REMANDED WITH INSTRUCTIONS IN PART.

Chief Judge STROUD and Judge ZACHARY concur.

JESSE GUERRA, PLAINTIFF
v.
HARBOR FREIGHT TOOLS, DEFENDANT

No. COA22-351

Filed 21 February 2023

1. Appeal and Error—preservation of issues—constitutional right to jury trial—waiver

In an action for damages against a tool retailer (defendant) for injuries plaintiff sustained while visiting one of defendant's stores, plaintiff failed to preserve for appellate review his argument that the trial court erred in proceeding with a bench trial after he had requested a jury trial. When the case was called for trial, plaintiff appeared pro se, participated in the trial, and neither sought a continuance nor raised an objection to having a bench trial; therefore, plaintiff waived any resulting constitutional error.

2. Appeal and Error—preservation of issues—exclusion of evidence—offer of proof at trial

In an action for damages against a tool retailer (defendant) for injuries plaintiff sustained while visiting one of defendant's stores, where plaintiff—appearing pro se at trial—sought to introduce

evidence of email communications from defendant's claim specialist regarding plaintiff's claim against defendant, plaintiff failed to preserve for appellate review his argument that the trial court erred in excluding the email communications. Plaintiff did not make a specific offer of proof as to what the emails would have shown, and the significance of those emails was not obvious from the record.

3. Appeal and Error—preservation of issues—motion for discovery—no ruling obtained

In an action for damages against a tool retailer (defendant) for injuries plaintiff sustained while visiting one of defendant's stores, plaintiff—acting pro se—failed to preserve for appellate review any arguments regarding his pretrial motion for discovery where, although he brought the motion to the trial court's attention at trial, he did not obtain a ruling from the court on that motion as required under Appellate Rule 10(a)(1).

Appeal by Plaintiff from judgment entered 23 November 2021 by Judge Larry Archie in Guilford County District Court. Heard in the Court of Appeals 2 November 2022.

Jesse Guerra, Plaintiff-Appellant pro se.

Lincoln Derr PLLC, by R. Jeremy Sugg, for the Defendant-Appellee.

WOOD, Judge.

Jesse Guerra ("Plaintiff") appeals from the 23 November 2021 judgment of the district court dismissing his appeal and reinstating the judgment of the magistrate. Because Plaintiff has failed to properly preserve the issues raised in his brief for appellate review in violation of our North Carolina Rules of Appellate Procedure, we dismiss the appeal.

I. Factual and Procedural Background

On 28 September 2019, Plaintiff visited one of Harbor Freight Tools' ("Defendant") establishments with the intent of buying a crowbar for various household repairs. When Plaintiff reached for the crowbar located on a shelf system, the overhead metal span of the shelving system fell on top of Plaintiff. Plaintiff suffered injuries to his face and left hand. On 22 September 2021, Plaintiff filed a complaint for money owed against Defendant in small claims court. Plaintiff's complaint alleged that he was owed $10,000 as a result of "[d]amage to the Plaintiff's [p]roperty or caused injury to the Plaintiff."

Pursuant to a judgment entered on 14 October 2021, a magistrate determined that Plaintiff had "failed to prove the case by the greater weight of the evidence" and ordered that the "action be dismissed with prejudice." On 20 October 2021, Plaintiff filed a notice of appeal to district court and requested trial before a jury. On 5 November 2021, the trial court coordinator filed a calendar request for a bench trial of Plaintiff's appeal and issued a notice of hearing for 23 November 2021. Defendant filed an answer on 19 November 2021 denying all allegations in Plaintiff's complaint and asserted contributory negligence as an affirmative defense. On the day of trial, Plaintiff, acting *pro se*, served Defendant with a "Motion for Discovery" via hand delivery. Plaintiff's motion listed nine categories of items, the "release" of which Plaintiff requested including Defendant's insurance agreements, photos taken by Defendant's employees of Plaintiff's injuries, and any video recordings from Defendant's store's cameras capturing the incident in question. When the case was called for trial, Plaintiff appeared *pro se*. He did not ask for a continuance, nor raise an objection to proceeding with a bench trial instead of his previously requested jury trial.

During Plaintiff's case-in-chief, he referenced his motion for discovery. However, Plaintiff did not request a ruling on the motion, and the trial court did not render one. Plaintiff further stated to the trial court that he wanted "to get discovery" of a surveillance video of the incident in question.

In response, the trial court informed Plaintiff that if the discovery he sought had not already been produced, it was not going to be produced during trial. Plaintiff also attempted to introduce email "communication[s] from [Defendant's] claim specialist, addressing that there was a claim and then that [Defendant] denied it." Defense counsel objected to these email communications based on hearsay and as a statement made to compromise a claim pursuant to Rule 408 of the North Carolina Rules of Evidence. The trial court sustained Defendant's objection. In response to the trial court's ruling, Plaintiff explained to the court, "this was the denial of the claim, so I'm -- I was hoping that this would not fall under some sort of [exception]." The trial court then looked at the physical copies of the communications from Plaintiff to determine whether the documents were in fact admissible, but did not change or modify its ruling on Defendant's objection.

At the close of the evidence, the trial court determined Plaintiff had not proven his case by the greater weight of the evidence. Thus, the trial court dismissed Plaintiff's appeal and reinstated the judgment of the

magistrate. Plaintiff filed a written notice of appeal on 20 December 2021 but did not specify in his notice the court to which he was appealing.

II. Appellate Jurisdiction

Defendant filed a motion to dismiss Plaintiff's appeal due to several violations of the North Carolina Rules of Appellate Procedure. Defendant argues Plaintiff: (1) failed to designate in his written notice of appeal the court to which appeal was taken, a violation of Rule 3(d); (2) violated Rule 7 (b)(3) and (4) by failing to complete or serve an Appellate Division Transcript Documentation form upon Defendant; (3) violated Rule 9(a)(1), by failing to include in the Record on Appeal a copy of any Appellate Division Transcript Documentation form; and, (4) failed to identify an applicable standard of review for any of his arguments, thereby violating Rule 28(b)(6).

Even if we were able to get beyond the jurisdictional defect under Rule 3(d) and the other appellate rules violations in Plaintiff's appeal, we are, nonetheless, unable to reach the merits of Plaintiff's arguments as he failed to properly preserve for appellate review any of the issues raised in his brief. Thus, we dismiss the appeal. *See Lake Colony Constr., Inc. v. Boyd*, 212 N.C. App. 300, 312, 711 S.E.2d 742, 750 (2011); *Lake Toxaway Cmty. Ass'n v. RYF Enters., LLC*, 226 N.C. App. 483, 493, 742 S.E.2d 555, 562 (2013).

III. Analysis

"[R]ules of procedure are necessary in order to enable the courts properly to discharge their duty of resolving disputes." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008) (citation and internal quotation marks omitted). "It necessarily follows that failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice." *Id.* Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states, "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). The preservation of an issue for appellate review also requires "the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.*

"The requirement expressed in Rule 10[(a)] that litigants raise an issue in the trial court before presenting it on appeal goes 'to the heart

of the common law tradition and [our] adversary system.' " *Don't Do It Empire, LLC v. Tenntex*, 246 N.C. App. 46, 54, 782 S.E.2d 903, 908 (2016) (citation omitted). Rule 10(a)(1) "is not simply a technical rule of procedure but shelters the trial judge from an undue if not impossible burden." *Id.* (cleaned up). Thus, due to the "practical considerations promoted by the waiver rule, a party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co., LLC*, 362 N.C. at 195-96, 657 S.E.2d at 364 (citations omitted).

A. Plaintiff's demand for a jury trial.

[1] First, Plaintiff contends the trial court "erred in proceeding with a bench trial" as his appeal to the district court included a written demand for a jury trial. We disagree.

While "[t]he right to a jury trial is a substantial right of great significance[,]" this right may be waived by a party. *Mathias v. Brumsey*, 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975). Although Plaintiff's appeal explicitly requested a jury trial, the record reveals that Plaintiff appeared at the trial, participated in the bench trial, and did not raise this objection before the trial court.

We agree with Defendant that "[w]hen the appellant fails to raise an argument at the trial court level, the appellant 'may not . . . await the outcome of the [trial court's] decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the [trial court's] attention.' " *Global Textile All., Inc. v. TDI Worldwide, LLC*, 375 N.C. 72, 79, 847 S.E.2d 30, 35 (2020) (citation omitted). As it is "well settled that an error, even one of constitutional magnitude, that [a party] does not bring to the trial court's attention is waived and will not be considered on appeal[,]" we dismiss Plaintiff's argument because it has not been properly preserved for review. *State v. James*, 226 N.C. App. 120, 127, 738 S.E.2d 420, 426 (2013) (citation omitted).

B. Trial court's ruling on evidence as settlement communications.

[2] Next, Plaintiff argues that the trial court "erred in its application of privileged settlement communication and in its sustaining defense counsel's objection to [Plaintiff's] introduction of email communication." In response, Defendant contends that Plaintiff also has not preserved this particular issue for appeal as "he made no offer of proof as to what the . . . [c]ommunication would have shown, or otherwise shown that a different result would have been reached" if the communication was admitted. We agree with Defendant.

"[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) (citation omitted). If a party fails to provide an adequate offer of proof, the appellate court "can only speculate" as to what the excluded evidence would have shown. *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861-62 (2010) (citation omitted).

Here, the settlement communication does not appear in the record before us, and Plaintiff does not attempt to explain the significance of the excluded evidence by any document within the record. According to the transcript, the communication in question was from Defendant's claims specialist, who allegedly addressed that "there was a claim and then that they denied it." Because Plaintiff made no offer of proof as to what the communication would have shown, we can only speculate as to the significance of the evidence. Therefore, we must conclude Plaintiff has failed to preserve this issue for appellate review. This argument is dismissed.

C. Plaintiff's request for discovery.

[3] Finally, Plaintiff challenges the trial court's "ruling on discovery material from [Defendant]" and argues that he "motioned the court to step in and the court permitted other parties to be decision makers." In turn, Defendant argues "there was no ruling on [Plaintiff's] [m]otion for [d]iscovery," such that "there is nothing for this Court to review."

Although Plaintiff filed a motion for discovery before the court hearing and brought this motion to the trial court's attention during the trial, the transcript shows there was neither a hearing on this motion nor a ruling on it. Rule 10 of the North Carolina Rules of Appellate Procedure requires an appellant to obtain a ruling upon a motion for an issue to be preserved for appeal. N.C. R. App. P. 10(a)(1). Because Plaintiff "did not request a ruling on this issue at the hearing, this issue was not properly preserved for appellate review." *Smith v. Axelbank*, 222 N.C. App. 555, 561, 730 S.E.2d 840, 844 (2012). Thus, Plaintiff's argument is dismissed.

IV. Conclusion

Although we recognize the difficult challenges a *pro se* litigant and appellant encounters when navigating the rules and procedures of our legal system, our Rules of Appellate Procedure equally "apply to everyone—whether acting *pro se* or being represented by all of the five largest

firms in the state." *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999). Because of Plaintiff's failure to properly preserve and present any of his arguments for appellate review, we dismiss his appeal.

DISMISSED.

Judges TYSON and MURPHY concur.

HEATHER O'NEAL AND FLETCHER O'NEAL, PLAINTIFFS
v.
ARLEEN BURLEY, AND DEVIL SHOAL OYSTER & CLAM CO., LLP, DEFENDANTS

No. COA22-624

Filed 21 February 2023

1. Partnerships—judicial dissolution—partnership classification—limited versus general

In the judicial dissolution of a shellfish business, the trial court erred in classifying the company as a limited partnership rather than as a general partnership governed by the Uniform Partnership Act. Although the parties formed the company under a "Limited Partnership Agreement," the agreement was evidence of the parties' intent to form a general partnership where it identified the parties as general partners but did not name any limited partners, and where there was no evidence that a certificate of limited partnership was filed with the Secretary of State on the company's behalf.

2. Partnerships—judicial dissolution—date of dissolution—unsupported by findings of fact

In a legal dispute between two partners of a shellfish business (a general partnership), the trial court's order judicially dissolving the business was reversed and remanded where the court erroneously identified the date of dissolution. The court's conclusion of law—that, as of 1 January 2018, it was not reasonably practicable for the partners to carry on the partnership's business—was inconsistent with its findings of fact stating that the partners had acted on the partnership's behalf when applying for disaster relief and receiving proceeds from the partnership's insurance policy for losses that the partnership had incurred after January 2018 (specifically, a hurricane had destroyed the partnership's shellfish crops in 2019).

3. Partnerships—judicial dissolution—partnership property—classification of insurance proceeds—allocation between partners

In a legal dispute between two partners of a shellfish business (a general partnership) where, after a hurricane destroyed much of the partnership's shellfish crops, disaster relief funds were paid to the partnership from an insurance policy covering its losses, the trial court's order judicially dissolving the business was reversed and remanded where the court improperly allocated seventy-five percent of the insurance proceeds to one partner and twenty-five percent to the other. The disaster relief funds met the statutory definition of "partnership property," and the express terms of the partnership agreement showed that the partners intended to share partnership profits equally.

4. Partnerships—judicial dissolution—valuation, classification, and allocation of assets—partners' contributions

In a legal dispute between two partners of a shellfish business (a general partnership), the trial court's order judicially dissolving the business was reversed and remanded where the court erred in distributing the partnership's property before first determining its assets and liabilities and their respective values. In particular, the trial court made findings of fact about two shellfish bottom leases—one that the partnership had acquired and another that one of the partners had contributed to the partnership—but failed to assign a value to each lease for the purpose of repaying each partner's respective contributions and then failed to allocate the value of the partnership's remaining assets in accordance with the express terms of the partnership agreement, which stated that the partners were to share equally in all partnership profits.

Appeal by defendant from judgment entered 29 April 2022 by Judge Wayland J. Sermons, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 11 January 2023.

Sharp, Graham, Baker & Varnell, LLP, by Casey C. Varnell, for Plaintiffs-Appellees.

Rodman, Holscher, Peck, Edwards & Hill, P.A., by Chad H. Stoop, for Defendant-Appellant Arleen Burley.

CARPENTER, Judge.

Arleen Burley ("Defendant") appeals from the "Amended Judgment" entered by the trial court. In her prior appeal in this matter, Defendant challenged the trial court's original judgment, which judicially dissolved and wound up Devil Shoal Oyster & Clam Co., LLP ("Devil Shoal")[1]; the appeal was dismissed as interlocutory. *O'Neal v. Burley*, 2022-NCCOA-238 (unpublished) ("*O'Neal I*").

In the instant appeal, Defendant raises the same challenges to the trial court's Amended Judgment: that the trial court erred in concluding Devil Shoal is a limited partnership, and in classifying, allocating, and distributing the partnership's assets—including insurance proceeds—and liabilities. After careful review, we agree with Defendant that Devil Shoal is a general partnership and that the trial court erred in its wind up of Devil Shoal. Accordingly, we reverse and remand the Amended Judgment for the trial court to: determine Devil Shoal's date of dissolution; classify and value Devil Shoal's assets and liabilities; satisfy any liabilities, including the partners' contributions; and allocate to the partners any remaining property of Devil Shoal.

I. Factual & Procedural Background

In *O'Neal I*, we summarized the pertinent factual history of the case:

> This case arises from a dispute between two general partners of a partnership over the classification and distribution of partnership assets. On 1 October 2015, Plaintiff Heather O'Neal and Defendant (collectively, the "Partners") executed the "Limited Partnership Agreement" (the "Agreement"), memorializing the terms and conditions of the partnership. The conditions of the partnership included: (1) Defendant would provide the partnership use of a shellfish bottom lease ("Lease 9802") and related water column amendment, granted by the North Carolina Division of Marine Fisheries to Defendant in her individual name; (2) Plaintiff Heather O'Neal would provide the partnership a boat and crew to set up, maintain, and harvest shellfish on Lease 9802; (3) the Partners would share equally the costs of gear and seed; and (4) the Partners would share equally the net profit of the business. The Agreement also provided that the partnership term would "continue until mutually agreed dissolution or transfer."

1. Devil Shoal is not a party to this appeal.

> On 9 January of 2018, Devil Shoal obtained its own 4.84-acre shellfish bottom lease ("Lease 9787") and a corresponding amendment to add the superjacent water column. The Partners agreed through an addendum to the Agreement that Devil Shoal would "fully own and operate" Lease 9787 and its respective water column.
>
> In July of 2018, the Partners had discussions concerning Plaintiff Heather O'Neal buying out Defendant's share of Devil Shoal. After unsuccessful negotiations, Plaintiff Heather O'Neal informed Defendant by email on 1 August 2018 that she would be seeking a separate lease but would continue to utilize Lease 9787 with her own gear and seed until Plaintiff Heather O'Neal obtained a new lease. On 2 August 2018, Defendant responded to Plaintiff Heather O'Neal's email, advising "[a]ny seed or gear purchased by you needs to be placed on your own lease" and "[s]eed and equipment placed on the partnership leases becomes the property of Devil Shoal Oyster & Clam Co."

O'Neal, 2022-NCCOA-238, ¶¶ 2–4.

Between 2015 and 2017, the Partners obtained three loans for Devil Shoal: (1) a Small Business Administration ("SBA") loan for $8,900.00 to purchase a refrigerated truck; (2) "Golden Leaf Loan 1" for $15,000.00, which was used to purchase gear; and (3) "Golden Leaf Loan 2" for $15,000.00, which was used to establish Lease 9787 and purchase its equipment.

> On 17 December 2019, Plaintiff Heather O'Neal and her spouse, Fletcher O'Neal (collectively, the "Plaintiffs"), commenced the instant action by filing a verified complaint and issuing a summons for Defendant. In their complaint, Plaintiffs sought a judicial decree dissolving the Devil Shoal partnership and a declaratory judgment against Defendant, holding she committed a violation of N.C. Gen. Stat. § 75-1.1 for unfair and deceptive trade practices by "willfully and intentionally misappropriat[ing] insurance proceeds that were paid to the Partnership . . . ." As an alternative cause of action to the Chapter 75 violation, Plaintiffs alleged a cause of action for constructive fraud related to the allocation of insurance proceeds. On 21 January 2020, Defendant filed an answer *pro se*. On 20 February 2020, Defendant filed, through counsel, an amended answer.

> On 6 April 2021, a bench trial was held before the Honorable Wayland J. Sermons, Jr., judge presiding. Testimony from the parties revealed the following: Plaintiff Fletcher O'Neal performed services for Devil Shoal as the farm manager, in which he purchased seed, performed marketing tasks, sold product, and obtained the necessary permits. He was not paid by Devil Shoal for his services.
>
> No new crops had been planted on behalf of Devil Shoal since 2017. Plaintiffs planted and harvested oyster crops on Lease 9787 in 2018 and 2019, using seed and gear they purchased individually. Defendant began planting clams again at Lease 9802 in June of 2019, which were separate from the partnership. In 2019, Hurricane Dorian destroyed "about half of [the oyster] crop" planted by Plaintiffs and some of the clam crop planted by Defendant. During this period, Devil Shoal's crops on Lease 9802 and Lease 9787 were protected under the Noninsured Crop Disaster Assistance Program ("NAP"). Plaintiffs and Defendant applied for NAP financial assistance under the partnership name because Devil Shoal was the named lessee of the Lease 9787 and "the [insurance] policy was under the partnership [name]." Based on a calculation worksheet prepared by the Farm Service Agency of the United States Department of Agriculture ("USDA"), Devil Shoal was entitled to a NAP payment of $63,328.00, minus a $ 3,157.00 insurance premium. In December of 2019, NAP proceeds totaling $59,596.00 were deposited into the Devil Shoal bank account. Using these funds, Defendant paid off two remaining partnership loans and took $34,059.95 as her share.
>
> In addition to NAP, Defendant and Plaintiffs applied for assistance under the Wildfires and Hurricanes Indemnity Program ("WHIP") for the damaged 2018 and 2019 crops, listing Devil Shoal as the producer. The gross WHIP payments were calculated to be $541.00 for clam crops in 2018, and $22,538.00 for oyster crops in 2019.

O'Neal, 2022-NCCOA-238, ¶¶ 5–8. Using the NAP funds, Defendant paid off the $8,009.12 SBA loan balance and the $7,982.07 Golden Leaf Loan 1 balance. Using a corporation she formed, Defendant assumed the remaining $8,900.12 Golden Leaf Loan 2 balance.

On 6 May 2021, the trial court entered its original judgment, in which it, *inter alia*, judicially dissolved Devil Shoal and wound up its affairs. The trial court ordered the NAP funds be allocated "75% to Plaintiff [Heather] O'Neal and 25% to Defendant Burley." The trial court dismissed Plaintiffs' unfair and deceptive trade practice claim but did not decide their constructive fraud claim. Defendant appealed to this Court, and the matter was heard on 5 April 2022. This Court dismissed the appeal as interlocutory due to the unresolved constructive fraud claim. *O'Neal*, 2022-NCCOA-238, ¶ 15.

On 29 April 2022, the trial court entered the Amended Judgment, in which it, *inter alia*: distributed Lease 9802 to Defendant and Lease 9787 to Plaintiff Heather O'Neal; distributed 75% of NAP funds to Plaintiff Heather O'Neal and 25% of NAP funds to Defendant; distributed the partnership's refrigerated truck to Plaintiff Heather O'Neal; awarded a monetary judgment to Plaintiff Heather O'Neal for $11,572.69; and dismissed Plaintiffs' constructive fraud claim against Defendants. On 20 May 2021, Defendant gave timely written notice of appeal to this Court.

II. Jurisdiction

This Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

The issues before this Court are whether the trial court erred by: (1) concluding that Devil Shoal is a limited partnership; and (2) classifying, allocating, and distributing Devil Shoal's assets and liabilities in winding up the affairs of the business.

IV. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation omitted), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). Findings of fact not challenged on appeal "are deemed to be supported by competent evidence and are binding on appeal[.]" *In re K.D.L.*, 207 N.C. App. 453, 456, 700 S.E.2d 766, 769 (2010), *disc. rev. denied*, 365 N.C. 90, 706 S.E.2d 478 (2011). We review the trial court's conclusions of law *de novo*. *Dept. of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. 101, 106, 804 S.E.2d 486, 492 (2017).

V. Analysis

A. Nature of Partnership

[1] In her first argument, Defendant contends "the trial court erred in concluding that Devil Shoal is a limited partnership." Defendant and Plaintiff Heather O'Neal agree the trial court's determination that Devil Shoal is a limited partnership does not impact the dissolution and winding up of Devil Shoal. After examination of the record, we conclude Devil Shoal is a general partnership, and the North Carolina Uniform Partnership Act (the "Uniform Partnership Act") governs its dissolution and wind up.

Under North Carolina law, a limited partnership is defined as "a partnership formed by two or more persons under the laws of [North Carolina] and having one or more general partners and one or more limited partners[.]" N.C. Gen. Stat. § 59-102(8) (2021). "In order to form a limited partnership, a certificate of limited partnership must be executed and filed in the office of the Secretary of State . . . ." N.C. Gen. Stat. § 59-201(a) (2021). Generally, the "failure to file a certificate of limited partnership is a failure of 'substantial compliance' such that any assertion of limited partnership is negated." *Blow v. Shaughnessy*, 68 N.C. App. 1, 19, 313 S.E.2d 868, 878 (1984), *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 127 (1984). "[W]here a limited partnership is found not to exist, it is the intent of the parties and not the operation of law . . . that determines whether or not a general partnership results." *Id.* at 21, 313 S.E.2d at 879; *see also* N.C. Gen. Stat. § 59-36(a) (2021) (defining a general partnership as "an association of two or more persons to carry on as co-owners a business for profit").

Here, the Agreement was formed by two persons, Defendant and Plaintiff Heather O'Neal, who are identified in the Agreement as general partners. The Agreement did not name any limited partners. *See* N.C. Gen. Stat. § 59-102(8). Additionally, there is no evidence that a certificate of limited partnership was filed with the Secretary of State on behalf of Devil Shoal. *See* N.C. Gen. Stat. § 59-201(a). The Agreement is evidence of the Partners' intent to form a general partnership and share equally in the partnership's profits. *See Blow*, 68 N.C. App. at 21, 313 S.E.2d at 879; *see also* N.C. Gen. Stat. § 59-36(a). Therefore, we conclude Devil Shoal is a general partnership governed by the Uniform Partnership Act. *See* N.C. Gen. Stat. §§ 59-31 *et seq*.

B. Classification, Allocation, and Distribution of Devil Shoal's Assets and Liabilities

In her second argument, Defendant asserts the trial court erred in classifying, allocating, and distributing the assets and liabilities of the partnership, including the proceeds received from the NAP and WHIP disaster financial assistance programs as well as Lease 9787. Specifically, Defendant contends the trial court erred in ordering the NAP and WHIP payouts to be split 75% to Plaintiff Heather O'Neal and 25% to Defendant and in distributing Lease 9787 to Plaintiff Heather O'Neal without first assigning a value to the lease.

1. Date of Dissolution

[2] We first consider the date of dissolution for Devil Shoal. Defendant argues the trial court erred in concluding "that the partnership should be treated as dissolved as of 1 January 2018" because this conclusion of law "is not supported by the facts of this case or the applicable law." We agree.

Initially, we note the Uniform Partnership Act provides gap-filling default rules to "govern[ ] the relations among partners and between partners and the partnership" where an agreement between the partners cannot or does not resolve the issue. 59A Am. Jur. 2d *Partnership* § 93 (2023); *see also* N.C. Gen. Stat. § 59-34(e) (2021) (explaining the Uniform Partnership Act should "not be construed so as to impair the obligations of any contract").

"The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on [of the business] as distinguished from the winding up of the business." N.C. Gen. Stat. § 59-59 (2021). Dissolution is caused:

> (1) Without violation of the agreement between the partners,
>
> a. By the termination of the definite term or particular undertaking specified in the agreement,
>
> b. By the express will of any partner when no definite term or particular undertaking is specified,
>
> c. By the express will of all partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specific term or particular undertaking,

d. By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner, unless the partnership agreement provides otherwise;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under [N.C. Gen. Stat. §] 59-62.

N.C. Gen. Stat. § 59-61 (2021).

"[D]issolution terminates all authority of any partner to act for the partnership." N.C. Gen. Stat. § 59-63 (2021). On the date of dissolution, the right to an account of a partnership interest accrues, unless there exists an agreement to the contrary. N.C. Gen. Stat. § 59-73 (2021). Nonetheless, the partnership itself is not terminated "until the winding up of partnership affairs is completed." N.C. Gen. Stat. § 59-60 (2021). "Winding up generally involves the settling of accounts among partners and between the partnership and its creditors." *Simmons v. Quick-Stop Food Mart, Inc.*, 307 N.C. 33, 40, 296 S.E.2d 275, 280 (1982).

Here, Defendant maintains "the Partnership was dissolved by the express will of . . . Defendant after the filing of the Complaint but before Defendant was served with the Complaint." As support for this contention, Defendant relies on a "Notice of Dissolution" she prepared pursuant to N.C. Gen. Stat. § 59-59 and sent via certified mail to Plaintiffs' attorney. Because the Agreement expressly required *mutual agreement* for the Partners to dissolve Devil Shoal, we reject Defendant's assertion that her notice was sufficient to dissolve the partnership.

In its Amended Judgment, the trial court did not expressly find Devil Shoal's date of dissolution but nevertheless concluded "that a Decree of Dissolution of the limited partnership should issue as a result of the actions of each partner, making it not reasonably practicable to carry on the business in conformity with the [Agreement], as of January 1, 2018." The trial court then ordered Devil Shoal was "[there]by [j]udicially

dissolved." Yet, the trial court also found and concluded as a matter of law that the Partners applied for, were entitled to, and ultimately received NAP and WHIP payments, including in 2019. The conclusion of law that it was not reasonably practicable for the Partners to carry on the business of Devil Shoal as of 1 January 2018, is wholly inconsistent with the findings that the Partners acted on behalf of Devil Shoal to apply for and receive proceeds from Devil Shoal's insurance policy for losses incurred by the partnership *after* January 2018. Therefore, we conclude that conclusion of law 6 is not supported by the trial court's findings of fact. *See Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176. Accordingly, we reverse and remand the Amended Judgment to the trial court for its determination of Devil Shoal's date of dissolution, not inconsistent with the other findings of fact.

2. Classifying and Valuing Devil Shoal's Assets & Liabilities

[3] In the context of non-jury trials, our Court has stated: "Where findings of fact are challenged on appeal, each contested finding of fact must be separately [challenged], and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding." *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000). Notwithstanding this rule,

> an appeal constitutes an exception to the judgment and presents the question whether the facts found support the judgment. [I]t follows that an exception to a conclusion of law upon which the judgment is predicated presents the question whether the facts found support the conclusion of law.

Halsey v. Choate, 27 N.C. App. 49, 51, 217 S.E.2d 740, 742 (1975), *disc. rev. denied*, 288 N.C. 730, 220 S.E.2d 350 (1975).

In this case, Defendant has not challenged any specific finding of fact; thus, all findings of fact—that the trial court has correctly designated as findings of fact—"are deemed to be supported by competent evidence and are binding on appeal[.]" *In re K.D.L.*, 207 N.C. App. at 456, 700 S.E.2d at 769.

We note finding of fact 25, where the trial court apportioned insurance proceeds to the Partners based on the respective leases they were using, is a conclusion of law, and we review it as such. *See In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) ("If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*."). Finding

of fact 25 states: "[T]he Court finds . . . 75% to Plaintiff O'Neal and 25% to Defendant Burley is a proper division of all net NAP and WHIP payments already received for the 2019 year, given the relative size and scope of each lease contributed to the Partnership by each partner." Conclusion of law 5 reiterates this conclusion.

Partnership property means "[a]ll property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership[.]" N.C. Gen. Stat. § 59-38(a) (2021). "Unless [a] contrary intention appears, property acquired with partnership funds is partnership property." N.C. Gen. Stat. § 59-38(b). Property belonging to one partner, "which is agreed to be used for partnership purposes, may be deemed partnership property." *Jones v. Shoji*, 110 N.C. App. 48, 53–54, 428 S.E.2d 865, 868 (1993), *aff'd*, 334 N.C. 163, 432 S.E.2d 361 (1994).

The assets of a partnership include partnership property and "[t]he contributions of the partners necessary for the payment of all the liabilities" owed by the partnership under N.C. Gen. Stat. § 59-70(2) (2021). N.C. Gen. Stat. § 59-70(1) (2021). On the other hand, "[t]he liabilities of the partnership rank in order of payment" and are to be satisfied in the following order:

a. Those owing to creditors other than partners.

b. Those owing to partners other than for capital and profits.

c. Those owing to partners in respect of capital.

d. Those owing to partners in respect of profits.

N.C. Gen. Stat. § 59-70(2). "Until the liabilities [and assets] of the partnership have been determined[,] *there can be no distribution to the partners*." *Brewer v. Elks*, 260 N.C. 470, 474, 133 S.E.2d 159, 163 (1963) (citations omitted and emphasis added); *see* N.C. Gen. Stat. § 59-70.

In the instant case, the record and transcript reveal the NAP and WHIP funds were paid out to named insured Devil Shoal from an insurance policy, which covered losses incurred by Devil Shoal for shellfish crops cultivated in its leased premises. Hence, the NAP and WHIP funds were property "subsequently acquired" through Devil Shoal's insurance proceeds and are thus "partnership property." *See* N.C. Gen. Stat. § 59-38(a); *see also Jones v. Shoji*, 336 N.C. 581, 585, 444 S.E.2d 203, 205–06 (1994) (concluding the settlement proceeds from a joint venture's vehicular liability insurance policy constituted joint venture property).

The conclusion of law contained in finding of fact 25 relating to a 75/25 allocation of insurance proceeds between the Partners is not supported by the findings or the evidence of record. On the contrary, the express terms of the Agreement show the parties intended to share partnership profits equally. Finally, there is no finding to support the conclusion regarding the sizes and scopes, and thus values, of the leases. Therefore, finding of fact 25, a conclusion of law labeled as a finding of fact, and its counterpart conclusion of law 5, are not supported by the findings. *See Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176.

On remand, the trial court—after determining Devil Shoal's date of dissolution—should classify and assign values to Devil Shoal's assets and liabilities and satisfy any liabilities owed to creditors other than the Partners. *See* N.C. Gen. Stat. § 59-70. Next, the trial court should satisfy all liabilities owed to the Partners other than for capital and profits, including reimbursement to Defendant for assuming Golden Leaf Loan 2. *See id.*

3. Repayment of Partners' Contributions & Allocation of Remaining Capital

[4] Finally, Defendant challenges the trial court's classification and allocation of Lease 9787 and its distribution of the remaining partnership property. Under decretal 2, the trial court found "that each partner shall receive the lease they contributed to the partnership." Accordingly, the trial court concluded "Plaintiff O'Neal shall receive and be the sole holder of Lease No. 9787" and "Defendant Burley shall receive and be the sole holder of Lease No. 9807 [sic]." Defendant contends "the trial court failed to assign a value to Lease 9787 and allocate one-half that value to Defendant since Plaintiff was awarded the lease." As discussed above, the trial court erred in distributing Devil Shoal's property before first determining its assets and liabilities and their respective values. *See Brewer*, 260 N.C. at 474, 133 S.E.2d at 163.

Under N.C. Gen. Stat. § 59-48(1), "*[e]ach partner shall be repaid his contributions*, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits." N.C. Gen. Stat. § 59-48(1) (2021) (emphasis added).

Here, the trial court found in finding of fact 4 that Defendant contributed Lease 9802 to the partnership, and Plaintiff Heather O'Neal contributed "labor, boats, and harvesting." In finding of fact 5, the trial

court found the partnership acquired a second lease, Lease 9787, in 2018. Lastly, it ordered "each partner [to] receive the lease they contributed to the partnership."

Because there is no provision in the Agreement to the contrary, the distribution rules set out in N.C. Gen. Stat. § 59-70 are applicable to the wind up of Devil Shoal. The trial court should find each Partner's interest in Devil Shoal is 50% because the Agreement expressly stated the Partners were to share equally in all profits. The trial court should then repay the Partners for their respective contributions. *See* N.C. Gen. Stat. § 59-48(1). Finally, the trial court should allocate Devil Shoal's remaining assets pursuant to N.C. Gen. Stat. § 59-70. *See* N.C. Gen. Stat. § 59-70 (establishing the rules for distribution to satisfy a partnership's liabilities, including monies owed to partners for capital and profits).

Accordingly, we instruct the trial court on remand to make appropriate findings regarding the value of the Partners' contributions, the repayment of the Partners' contributions, and the distribution of remaining Devil Shoal property. *See Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176; *see also* N.C. Gen. Stat. § 59-48(1); N.C. Gen. Stat. § 59-70. Additionally, the trial court should enter judgment, which is supported by the findings of fact and conclusions of law. *See id.* at 699, 567 S.E.2d at 176.

VI. Conclusion

We conclude Devil Shoal is a general partnership within the meaning of the Uniform Partnership Act. We also conclude the trial court erred in its classification, valuation, and distribution of partnership assets and liabilities in connection with its wind up of Devil Shoal. Accordingly, we reverse and remand the matter to the trial court for its dissolution and wind up of Devil Shoal, pursuant to the Uniform Partnership Act and not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges MURPHY and GRIFFIN concur.

STATE v. BLACK

[287 N.C. App. 653 (2023)]

STATE OF NORTH CAROLINA
v.
ELEANOR BLACK

No. COA22-426

Filed 21 February 2023

1. Appeal and Error—record on appeal—incomplete—judicial notice of record in previous appeal—request improperly made

In defendant's second appeal from her criminal convictions, the Court of Appeals denied the parties' requests that it take judicial notice of the record in defendant's first appeal, where: the record in the second appeal was incomplete, each party had made their request for judicial notice in their appellate briefs instead of filing a motion pursuant to Appellate Rule 37, and no apparent effort was made to include the missing documents. Further, it was improper for defendant to attach the transcript of her plea in an appendix to her brief where doing so was not permitted under Appellate Rule 28(d) and where the transcript was not included in the record on appeal.

2. Damages and Remedies—restitution—criminal case—amount—stipulation—ability to pay

In a prosecution for attempted identity theft and possession of a stolen motor vehicle, the trial court did not abuse its discretion in ordering defendant to pay $11,000 in restitution where defendant had stipulated to this amount at her sentencing hearing and had not presented any evidence showing that she lacked the ability to pay that amount.

Appeal by Defendant from Judgment entered 8 September 2021 by Judge Marvin P. Pope, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 11 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jessica V. Sutton, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

[1] Eleanor Black (Defendant) appeals from Judgment entered 8 September 2021 upon her convictions for Possession of a Stolen Motor Vehicle and Attempted Identity Theft. The Record before us, however, fails to include any record of Defendant's initial sentencing hearing or transcript of Defendant's plea. The Record also fails to include any record of Defendant's first appeal to this Court. Instead, both parties request in their briefs that this Court take judicial notice of the record in Defendant's first appeal, *State v. Black*, 276 N.C. App. 15, 854 S.E.2d 448 (2021). We decline to do so.

Motions to an appellate court may not be made in a brief but must be made in accordance with N.C. R. App. P. 37. *Horton v. New S. Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858, *cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996) (citing *Morris v. Morris*, 92 N.C. App. 359, 361, 374 S.E.2d 441, 442 (1988)). "Even if a motion were properly made, we will not take judicial notice of a document outside the record when no effort has been made to include it." *Id.* at 268, 468 S.E.2d at 858. Further, in her brief to our Court, Defendant included the transcript of her plea as an appendix. While our Rules of Appellate Procedure permit an appendix, "it [is] improper for [a party] to attach a document not in the record and not permitted under N.C. R. App. P. 28(d) in an appendix to its brief." *Id.* (citing N.C. R. App. P. 9(a); 28(b)).

The Record before us, including our opinion in Defendant's prior appeal to this Court, tends to reflect the following:

On 17 May 2019, Defendant pled guilty to Attempted Identity Theft and Possession of a Stolen Motor Vehicle. Her plea agreement provided the two Class H felony charges "will be consolidated into [one] judgment for supervised probation[.]" The Restitution Worksheet dated 17 May 2019 provided the amount of restitution owed was $11,000. There is no evidence Defendant challenged this amount in the Record before us. Indeed, Defendant's briefing to this Court reflects Defendant stipulated to this amount of restitution during the original hearing.

In Defendant's first appeal to this Court, she argued: (I) the trial court erred in calculating her prior record level by improperly counting out-of-state misdemeanor convictions without considering whether each conviction was substantially similar to any North Carolina Class A1 or Class 1 misdemeanor; and (II) the trial court erred in entering a civil judgment for attorney's fees because the trial court did not allow Defendant to be heard on the issue. *Black*, 276 N.C. App. at 17, 845 S.E.2d at 451. This Court held that the trial court erred in concluding

Defendant's out-of-state offenses were substantially similar to certain North Carolina crimes for sentencing purposes absent comparison of the elements of each statute, and it also erred by imposing attorney's fees without providing Defendant the opportunity to be heard. *Id.* at 21, 845 S.E.2d at 453. As such, the case was remanded for resentencing and the civil judgment of attorney's fees was vacated. *Id.*

The matter came back before the trial court on remand on 9 September 2021. At the hearing, the following colloquy occurred:

> [DEFENSE COUNSEL]: Could we request, Your Honor, that if she financially complies with her probation, she can be transferred to unsupervised probation?
>
> THE COURT: What does the State have to say? Are you talking about paying the attorney fees?
>
> [DEFENSE COUNSEL]: Well, the restitution. I would just ask that given – here would be my argument, Your Honor. She's – Your Honor just gave her a nine-month sentence, which she's already served almost half of. You put her on probation for 36 months. She's already kind of done half of her sentence, which nobody is expecting her to do any more of. We're just trying to set the situation where if she's successful on probation, she can be transferred to unsupervised probation before the 36 months is up.
>
> THE COURT: That's fine with me as long as the probation officer is agreeable to it. She complies with all other conditions of probation.
>
> [DEFENSE COUNSEL]: Thank you.
>
> THE COURT: I found page 2 out of place . . . Here's the restitution sheet. Okay. $11,000 restitution. Yes, she's got to repay that to [Victim].
>
> THE DEFENDANT: Can I say something?
>
> [DEFENSE COUNSEL]: Hold on a second.

The hearing concluded following this exchange. Defendant was subsequently sentenced to a suspended sentence of 9 to 20 months, with a 36-month period of supervised probation. Defendant was also ordered to pay $11,000 in restitution, consistent with the stipulated amount in the 17 May 2019 Restitution Worksheet. Defendant timely filed written Notice of Appeal on 8 September 2021.

Issue

[2] The dispositive issue on appeal is whether the trial court erred in ordering Defendant to pay restitution in the amount of $11,000.

Analysis

Defendant contends the trial court erred in failing "to hear from Defendant[1] or consider her ability to pay before assessing her $11,000 in restitution." We disagree.

> In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record[.]

N.C. Gen. Stat. § 15A-1340.36(a) (2021). "Whether the trial court properly considered a defendant's ability to pay when awarding restitution is reviewed by this Court for abuse of discretion." *State v. Hillard*, 258 N.C. App. 94, 98, 811 S.E.2d 702, 705 (2018) (citation omitted). The defendant bears the burden of demonstrating an inability to pay restitution. *See State v. Riley*, 167 N.C. App. 346, 349, 605 S.E.2d 212, 215 (2004) ("Because [defendant] failed to present evidence showing that she would not be able to make the required restitution payments, we find no error.").

The Record before us contains no indication the trial court erred or abused its discretion in ordering Defendant to pay $11,000 in restitution. There is nothing in the Record to suggest Defendant presented any evidence of inability to make the required restitution payments. Moreover, Defendant concedes she previously stipulated to the $11,000 restitution amount set out in the May 2019 Restitution Worksheet. Thus, on the

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1. Defendant argues the trial court erred in failing to "hear from defendant", contending N.C. Gen. Stat. § 15A-1340.36(a) requires a trial court to "invite [a] [d]efendant to be heard on her financial ability to pay restitution." As expressly stated in the statute, the trial court is required to "take into consideration" numerous factors when determining the amount of restitution to be made. N.C. Gen. Stat. § 15A-1340.36(a) (2021). However, the statute is silent as to how the court is to obtain knowledge about a defendant's resources, and we decline to adopt Defendant's position.

Record before us, Defendant has not met her burden of demonstrating any inability to comply with the restitution order. Therefore, the trial court did not err in ordering Defendant to pay her stipulated $11,000 in restitution. Consequently, we affirm the trial court's 8 September 2021 Judgment.

Conclusion

Accordingly, for the foregoing reasons, the trial court did not err or abuse its discretion in ordering Defendant to pay her stipulated $11,000 in restitution, and we affirm the trial court's Judgment.

AFFIRMED.

Judges DILLON and TYSON concur.

STATE OF NORTH CAROLINA
v.
LEWIS RODNEY LYTLE, JR., DEFENDANT

No. COA22-675

Filed 21 February 2023

Probation and Parole—revocation—after probation expired—finding of good cause required

A judgment revoking a criminal defendant's probation was vacated where the trial court had failed to enter a factual finding—as required under N.C.G.S. § 15A-1344(f)—that good cause existed to revoke defendant's probation 700 days after it had expired. Because the record did not provide any persuasive evidence that the court had made reasonable attempts to hold defendant's probation revocation hearing before the probationary term had expired, the judgment was vacated without remand.

Appeal by defendant from judgment entered 6 January 2022 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 10 January 2023.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Cheryl L. Kaminski, for the State-appellee.

GORE, Judge.

On 6 August 2018, defendant Lewis Rodney Lytle, Jr., pled guilty to possession of a firearm by a felon and possession of a stolen firearm. The two charges were combined into one judgment with defendant receiving a sentence of 17 to 30 months in prison. This sentence was suspended for 18 months of supervised probation. Defendant's probation expired on 6 February 2020.

Defendant presents three issues on appeal: (i) whether the trial court failed to make a finding of good cause to revoke his probation in violation of N.C. Gen. Stat. § 15A-1344(f); (ii) whether his waiver of counsel was knowing and voluntary under N.C. Gen. Stat. § 15A-1242; and (iii) whether the trial court erred in failing to address all filed violations of probation individually in its judgment. Upon review, we vacate without remand.

Defendant filed written notice of appeal from a final judgment revoking probation entered against him in Buncombe County Superior Court. This Court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1347.

Defendant contends, and the State concedes, that the trial court failed to find good cause to revoke probation after the expiration of the probation period as required by N.C. Gen. Stat. § 15A-1344(f)(3). We agree. This issue is preserved for appellate review without objection entered upon the ruling because § 15A-1344(f)(3) is a statutory mandate that requires the trial judge to make a specific finding before revoking probation after expiration of the probationary period. *State v. Morgan*, 372 N.C. 609, 617, 831 S.E.2d 254, 259 (2019); *see also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("[W]hen 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.").

"Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721, (internal citation omitted), *rev. denied*, 365 N.C. 193, 707 S.E.2d 246 (2011).

The statute provides:

> The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C. Gen. Stat. § 15A-1344(f)(1)-(3) (2022).

Under subsection (f)(3), the trial court is "required . . . to make an *additional* finding of 'good cause shown and stated' to justify the revocation of probation even though the defendant's probationary term has expired." *Morgan*, 372 N.C. at 617, 831 S.E.2d at 259 (emphasis added). "In the absence of statutorily mandated factual findings, the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved." *State v. Bryant*, 361 N.C. 100, 103, 637 S.E.2d 532, 534 (2006). Our review of the transcript and record does not show that the trial court made any findings, oral or written, that good cause existed to revoke defendant's probation after expiration of his probationary term.

"Ordinarily, when the trial court fails to make a material finding of fact, the case must be remanded so that proper findings can be made." *State v. Sasek*, 271 N.C. App. 568, 575, 844 S.E.2d 328, 334, (citation omitted), *rev. denied*, 376 N.C. 543, 851 S.E.2d 49 (2020). However, when the trial court fails to make a finding of good cause under § 15A-1344(f)(3), this Court "may only remand where the record contain[s] sufficient evidence to permit the necessary finding of 'reasonable efforts' by the State to have conducted the probation revocation hearing earlier." *Id.* (alteration in original) (quotation marks and citation omitted).

Defendant argues, and the State concedes, that the appropriate remedy under these facts is to vacate without remand.

Here, defendant's probation expired 700 days prior to the revocation hearing. The record on appeal provides no persuasive evidence that the

trial court made reasonable attempts to hold the probation revocation hearing prior to the expiration of defendant's probation. We, therefore, "vacate the trial court's judgments revoking [d]efendant's probation without remand." *Id.* at 576, 844 S.E.2d at 335 (citing *Bryant*, 361 N.C. at 101, 637 S.E.2d at 534). In light of our resolution of this matter above, it is unnecessary to reach defendant's remaining arguments.

VACATED.

Judges ARROWOOD and WOOD concur.

STATE OF NORTH CAROLINA
v.
DEREK JVON MILLER

No. COA22-561

Filed 21 February 2023

1. Constitutional Law—right to a public trial—*Waller* test—findings of fact—remand

In defendant's trial for attempted first-degree murder and related charges, the trial court violated defendant's Sixth Amendment right to a public trial by closing the courtroom without first conducting the four-part test in *Waller v. Georgia*, 467 U.S. 39 (1984), and making the requisite findings of fact. Given the limited closure and the fact that the trial court failed to conduct the *Waller* test, the matter was remanded for the trial court to conduct the *Waller* test and make appropriate findings of fact.

2. Firearms and Other Weapons—discharging a weapon within city limits—charging documents—caption of ordinance—proof of ordinance at trial

The trial court erred by denying defendant's motion to dismiss the charge of discharging a weapon within city limits where the charging documents did not include the caption of the ordinance, pursuant to N.C.G.S. § 160A-79(a), and the State failed to prove the ordinance at trial, pursuant to N.C.G.S. § 8-5.

Appeal by Defendant from judgment entered 10 December 2021 by Judge Jonathan Wade Perry in Union County Superior Court. Heard in the Court of Appeals 25 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for Defendant-Appellant.

COLLINS, Judge.

Defendant Derek Jvon Miller appeals from judgment entered upon a jury verdict of guilty of attempted first degree murder, going armed to the terror of the people, possession of a handgun by a minor, and discharge of a firearm within city limits in violation of a city ordinance. Defendant contends that the trial court erred by failing to make sufficient findings of fact to justify closing the courtroom and by denying Defendant's motion to dismiss the charge of discharging a weapon within city limits. We hold that the trial court erred by closing the courtroom without making the requisite findings of fact and by denying Defendant's motion to dismiss the charge of discharging a weapon within city limits, in violation of Monroe's ordinance.

I. Factual Background and Procedural History

The evidence at trial tended to show the following: On 19 August 2018, Neqayvius McLendon, his brother Nyhiem Kendall, and his friend Oaklen Starnes were walking to a neighborhood basketball court when a car with four occupants drove up beside them. All of the occupants were armed, and Defendant was seated in the front passenger seat. The car drove down the block a little bit, and McLendon, Kendall, and Starnes began walking away. As the car began to drive away, Defendant leaned out of the passenger window and began shooting. One of the bullets hit McLendon in the back, striking his liver before exiting through the center of his chest.

Defendant was indicted for attempted first degree murder, going armed to the terror of the people, attempted robbery with a dangerous weapon, possession of a handgun by a minor, and discharge of a firearm within city limits in violation of a city ordinance. Defendant moved to dismiss all charges at the close of the State's evidence, and the trial court granted the motion as to the attempted robbery charge. The jury found Defendant guilty of the remaining charges. The trial court consolidated Defendant's convictions and sentenced him within the presumptive range to 144 to 185 months' imprisonment. Defendant timely appealed.

II. Discussion

A. Motion to Close the Courtroom

[1] Defendant contends that his constitutional right to a public trial was violated because the trial court closed the courtroom without engaging in the four-part test set forth in *Waller v. Georgia*, 467 U.S. 39 (1984).

"We review alleged violations of constitutional rights *de novo*." *State v. Gettys*, 243 N.C. App. 590, 593, 777 S.E.2d 351, 354 (2015) (citation omitted).

The Sixth Amendment of the United States Constitution and Article I, Section 18, of the North Carolina Constitution guarantee a criminal defendant the right to a public trial. "The violation of the constitutional right to a public trial is a structural error, not subject to harmless error analysis." *State v. Rollins*, 221 N.C. App. 572, 576, 729 S.E.2d 73, 77 (2012) (citations and quotation marks omitted). "Although there is a strong presumption in favor of openness, the right to an open trial is not absolute . . . ." *State v. Comeaux*, 224 N.C. App. 595, 599, 741 S.E.2d 346, 349 (2012) (citation and quotation marks omitted). "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Id.* (quoting *Waller*, 467 U.S. at 45).

Accordingly, within the bounds of these constitutional principles, a trial court "may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present." N.C. Gen. Stat. § 15A-1034(a) (2021). Additionally, the trial court may order that all persons in the courtroom "be searched for weapons or devices that could be used to disrupt or impede the proceedings[,]" but such order "must be entered on the record." *Id.* § 15A-1034(b) (2021).

Before closing the courtroom, "the trial court must determine if the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure." *State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625 (1994) (citing *Waller*, 467 U.S. at 48). "[W]hile the trial court need not make exhaustive findings of fact, it must make findings sufficient for this Court to review the propriety of the trial court's decision to close the proceedings." *Rollins*, 221 N.C. App. at 579, 729 S.E.2d at 79 (citation omitted).

Here, the State made a pre-trial motion to close the courtroom during McLendon and Kendall's testimony, stating the following rationale for closure:

> Number one, determine whether the party seeking closure has advanced an overriding interest that is likely to be prejudiced. We would state that we have in that the interests of our witnesses being safe outside of the courtroom as well as being -- us being able to go forward with this case without there being any type of intimidation of them while they are possibly on the stand is the prejudice that we are trying to overcome or want to overcome.
>
> An order of closure -- second, order of closure no broader than necessary to protect that interest. We're not asking that the entire courtroom be closed for the entire trial. Just be closed when those two young men take the stand.
>
> Also consider -- and then consider reasonable alternative[s] to closing the proceeding and make findings which support the closure. I don't know of any other reasonable alternative. We can, of course, take phones and things like that. I think in my motion we ask that that be done as well of Mr. Miller, the Court hold the phone until or at least after those two young men testify, if he has his phone with him, to make sure there's no recordings or anything like that . . . .

Defendant objected, asserting that closing the courtroom would violate his Sixth Amendment right to a public trial. The trial court held the ruling open at that time to review exhibits from a prior hearing to increase Defendant's bond for potential witness intimidation. A bench conference was held at the end of the day, and the trial court stated the following synopsis on the record:

> [M]y resolution at this point, unless circumstances change, is for direct relatives of Mr. Miller to stay in the courtroom during those two witnesses. Anybody not directly related to him will be outside the courtroom. And deputies, after my admonition for no cell phone use, will keep an eye on anybody in the courtroom and their use of cell phones. And that will be true for any State witnesses as well, Mr. Collins, or speculators. So anybody who's not a direct relative of Mr. Miller or Mr. Purser, they will be asked to step outside during those two witnesses' examinations.

The trial court's written order entered on 30 November 2021 states:

> STATE'S MOTION TO CLOSE COURTROOM TO PUBLIC FOR THE TESTIMONY OF NEQUAVIUS (sic) MCLENDON AND NYHIEM KENDALL, OBJECTION BY DEFENDANT ~ GRANTED, RELATIVES OF THE DEFENDANT AND LEAD INVESTIGATOR KYLE PURSER MAY STAY IN THE COURTROOM. ALL CELLPHONES EXCEPT FOR COURT PERSONNEL ARE NOT ALLOWED IN THE COURTROOM OR MAY BE PUT ON FRONT COUNTER.

Because the trial court closed the courtroom to the public, it was required to utilize the four-part *Waller* test to determine whether closure was appropriate and to "make findings sufficient for this Court to review the propriety of the trial court's decision to close the proceedings." *Rollins*, 221 N.C. App. at 579, 729 S.E.2d at 79 (citation omitted). The trial court's written order does not include any findings of fact, and the only oral finding of fact the trial court made was that "the [c]ourt is concerned because of the documents I've reviewed with there being some social media posts and things like that . . . ." The trial court did not utilize the four-part W*aller* test before closing the courtroom, and its finding of fact is inadequate to support closure. *Cf. Comeaux*, 224 N.C. App. at 603, 741 S.E.2d at 351 ("We believe these findings of fact show that the State advanced an overriding interest that was likely to be prejudiced; that the closure of the courtroom was no broader than necessary to protect the overriding interest; that the trial court considered reasonable alternatives to closing the courtroom; and that the trial court made findings adequate to support the closure.").

"Given the limited closure in the present case and the fact that the trial court did not utilize the *Waller* four-part test, . . . the proper remedy is to remand this case for a hearing on the propriety of the closure" during McLendon and Kendall's testimony. *Rollins*, 221 N.C. App. at 580, 729 S.E.2d at 79. On remand, the trial court must engage in the four-part *Waller* test and make the appropriate findings of fact in an order regarding the necessity of the closure. *Id.* If the trial court determines that the closure was not justified, then Defendant is entitled to a new trial. *Id.* If the trial court determines that the closure was justified, then Defendant may seek review of the trial court's order by means of an appeal from the judgment that the trial court will enter on remand following the resentencing hearing as set out in the next section of this opinion. *Id.*

B. Discharging a Firearm within City Limits

[2] Defendant next contends that the charge of discharging a weapon within Monroe city limits should have been dismissed because neither the arrest warrant nor the indictment contained the caption of the ordinance and the State failed to prove the ordinance at trial. We agree.

"We review a trial court's denial of a motion to dismiss *de novo*." *State v. Thomas*, 268 N.C. App. 121, 131, 834 S.E.2d 654, 662 (2019) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Hicks*, 243 N.C. App. 628, 639, 777 S.E.2d 341, 348 (2015) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Ingram*, 283 N.C. App. 85, 88, 872 S.E.2d 148, 150 (2022) (citation and quotation marks omitted). "In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (citation omitted).

N.C. Gen. Stat. § 160A-79(a) provides that "[i]n all civil and criminal cases a city ordinance that has been codified in a code of ordinances adopted and issued in compliance with G.S. 160A-77 must be pleaded by both section number and caption." N.C. Gen. Stat. § 160A-79(a) (2018). Furthermore, N.C. Gen. Stat. § 8-5 states that "[i]n a trial in which the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, proven as provided in G.S. 160A-79, shall be prima facie evidence of the existence of such ordinance." N.C. Gen. Stat. § 8-5 (2021). It is well-established that a court "cannot take judicial notice of the provisions of municipal ordinances." *Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775, 796 S.E.2d 120, 123 (2017) (citation and quotation marks omitted).

Section 130.02(a) of the Monroe Code of Ordinances is captioned "Firearms and other weapons" and states, "Subject to divisions (B), (C), and (D) of this section, no person may fire, discharge or shoot within the city any rifle, shotgun, handgun or other firearm, bow and arrow, or similar contrivance." Monroe, N.C., Code of Ordinances § 130.02(a) (2018).

Here, the arrest warrant for discharging a firearm within city limits stated that there was probable cause to believe that Defendant "unlawfully and willfully did FIRE, DISCHARGE, OR SHOOT WITHIN THE CITY A HANDGUN.MONROE CITY ORDINANCE 130.02[.]" Furthermore, the indictment charged that Defendant "unlawfully and willfully did fire, discharge or shoot within the city a handgun, a Monroe City Ordinance 130.02." The indictment and arrest warrant did not contain the caption of the city ordinance, as required by N.C. Gen. Stat. § 160A-79(a). The State likewise did not prove the ordinance at trial. *See In re Jacobs*, 33 N.C. App. 195, 197, 234 S.E.2d 639, 641 (1977) ("The ordinance was clearly not proven at trial and the record does not contain a caption. Respondent's motion to quash the petition based on violating 'City Code 15-2' should have been allowed.").

Accordingly, the trial court erred by denying Defendant's motion to dismiss the charge of discharging a weapon within city limits in violation of Monroe's ordinance.

III. Conclusion

Because the trial court failed to utilize the *Waller* four-part test and make adequate findings of fact in an order to support closing the courtroom to the public, we remand for a hearing on the propriety of the closure. If the trial court determines that the closure was not justified, then Defendant is entitled to a new trial. If the trial court determines that the closure was justified, then Defendant may seek review of the trial court's order by means of an appeal from the judgment that the trial court will enter on remand following resentencing.

Furthermore, the trial court erred by denying Defendant's motion to dismiss the charge of discharging a weapon within Monroe city limits because the charging documents did not include the caption of the ordinance and the State failed to prove the ordinance at trial. Accordingly, we vacate Defendant's conviction of this charge and remand for resentencing.

REMANDED IN PART; VACATED AND REMANDED IN PART.

Judges ARROWOOD and WOOD concur.

STATE OF NORTH CAROLINA
v.
JAIRO PALACIO PALACIO

No. COA22-231

Filed 21 February 2023

1. Appeal and Error—record on appeal—portion of transcript missing—adequate alternative—meaningful appellate review

In a prosecution for multiple sex offenses, defendant was not deprived of meaningful appellate review of his criminal judgment—and therefore was not entitled to a new trial—on the basis that a portion of the jury selection was missing from the transcript. His appellate attorney made sufficient efforts to reconstruct the missing portion by contacting the trial judge, attorneys, and court personnel, and produced an adequate alternative to a verbatim transcript that allowed defendant to identify potentially meritorious issues for appeal.

2. Sexual Offenses—incest—elements—definition of "niece"—blood relation

In a prosecution for multiple sex offenses, defendant's motion to dismiss the charge of incest should have been granted where his relationship with the victim was one of affinity, not consanguinity, because she was the daughter of his wife's sister and, therefore, the victim did not meet the definition of "niece" for purposes of the criminal offense of incest (N.C.G.S. § 14-178(a)).

3. Confessions and Incriminating Statements—statements following arrest—voluntariness—findings of fact

In a prosecution for multiple sex offenses, defendant was not entitled to the suppression of inculpatory statements he made to law enforcement after his arrest. The trial court was not required to make findings about all of the evidence at the motion hearing, and the unchallenged findings it did make were supported by substantial evidence. More specifically, the findings supported the trial court's conclusion that defendant's confession was voluntary based on defendant's verbal acknowledgment of the constitutional rights that were read to him, his statement that he was familiar with those rights from his own law enforcement work, his completion of a written waiver form, and the lack of any evidence that defendant was under the influence of alcohol or drugs during his interrogation.

4. Judgments—criminal—clerical error—dismissed charge mistakenly included

Where defendant's criminal judgment for multiple sex offenses, which were consolidated for sentencing, mistakenly included a charge that the trial court had orally dismissed after the jury verdict, the matter was remanded for correction of a clerical error.

Appeal by Defendant from judgment entered 1 April 2021 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for Defendant-Appellant.

COLLINS, Judge.

Defendant Jairo Palacio[1] appeals from judgment entered upon a jury verdict of guilty of statutory rape of a child 15 years or younger, sexual activity by a substitute parent, incest, and two counts of indecent liberties with a child. Defendant contends that (1) he is entitled to a new trial because the transcript for one day of the proceedings is missing; (2) the trial court erred by denying his motion to dismiss the incest charge; (3) the trial court erred by denying his motion to suppress; and (4) the case must be remanded to the trial court to correct a clerical error in the trial court's judgment. We conclude that Defendant is not entitled to a new trial and that the trial court did not err by denying his motion to suppress. However, we vacate Defendant's incest conviction and remand for resentencing, and remand for correction of a clerical error on the written judgment.

I. Procedural History and Factual Background

Mary,[2] a Columbian citizen, moved to Jacksonville, North Carolina, in April 2018 with her mother, father, and sister. Mary and her family lived with Defendant and his wife. Defendant's wife is Mary's mother's

1. The trial court allowed the State's motion to amend the indictment to read Jairo Palacio, but the judgment, appellate entries, and amended appellate entries identify Defendant as Jairo Palacio Palacio.

2. Mary is a pseudonym used to protect the identity of the child victim.

sister, making Defendant's wife Mary's aunt by blood and Defendant Mary's uncle by marriage. Because Mary's parents did not initially plan to stay permanently in the United States, Defendant began the process of legally adopting Mary.

One Tuesday in the summer of 2018, when Mary was 15 years old and Defendant was 42 years old, Mary, her mother, her sister, and Defendant were by the pool in the backyard. Mary went inside the house to get drinks; Defendant followed her into the kitchen and kissed her on the lips. The next day, Mary and her family were again at the pool; Mary went inside the house to use the bathroom. Defendant, who was already inside, pushed her through the doorway. Defendant touched her on the vagina over her swimsuit, made her touch him on his penis over his swimsuit, and pulled her hand inside his swimsuit. Defendant stopped after Mary began to cry and said, "No" loudly.

On 16 July 2018, Mary and her younger sister were home alone with Defendant. Mary was doing laundry in the garage when Defendant came in and grabbed her buttocks. When Mary turned around, Defendant grabbed her arms and tried to kiss her. Defendant pushed her to the ground and continued to try to kiss her. Defendant took off his pants and underwear and then took off Mary's pants and underwear. Defendant grabbed a condom and engaged in vaginal intercourse with Mary. After Defendant finished, Mary grabbed her little sister, went into her bedroom, and locked the door until Defendant left the house. Defendant left that same day to visit his family in Colombia. Mary did not immediately tell her family about these encounters out of fear that it would destroy her family's future. About two weeks after Defendant had left for Columbia, Mary told her father what happened, and he called the police.

As part of the subsequent investigation, the Child Advocacy Center conducted a forensic interview with Mary through an interpreter during which Mary detailed the encounters with Defendant. During the medical evaluation, Mary told the nurse practitioner that she was worried that she might be pregnant by Defendant. The nurse practitioner conducted a genital exam of Mary and determined that, although there was no evidence of injury to Mary's hymen, Mary's symptoms and characteristics were consistent with the profiles of children who had been sexually abused.

Defendant was indicted for statutory rape of a child who was 15 years or younger, sexual activity by a substitute parent, three counts of indecent liberties with a child, incest, and obstruction of justice.

Prior to trial, Defendant moved to suppress his inculpatory statements made at the Onslow County Sheriff's Office following his arrest. After an evidentiary hearing, the trial court orally denied the motion and subsequently entered a written denial order.

The case came on for trial on 1 March 2021. After all the evidence was presented, and prior to submitting the case to the jury, the trial court dismissed one count of indecent liberties with a child and the single count of obstruction of justice. The jury found Defendant guilty of the remaining charges. Prior to sentencing, the trial court dismissed the charge of sexual activity by a substitute parent. The trial court consolidated the remaining convictions into a single Class B1 felony. The trial court sentenced Defendant within the presumptive range to 192 to 291 months' imprisonment, ordered that Defendant register as a sex offender for a period of 30 years upon his release, and entered a permanent no contact order prohibiting Defendant from contacting Mary. Defendant timely appealed.

II. Discussion

A. Missing Transcript

[1] Defendant first contends that he is entitled to a new trial because the transcript for 2 March 2021 is missing, depriving him of meaningful appellate review.

"[W]hen an indigent defendant ha[s] entered notice of appeal, he is entitled to receive a copy of the trial transcript at State expense." *State v. Hobbs*, 190 N.C. App. 183, 185, 660 S.E.2d 168, 170 (2008) (citing N.C. Gen. Stat. § 7A-452(e)). However, "due process does not require a verbatim transcript of the entire proceedings[.]" *Id.* (quotation marks, citation, and brackets omitted). Generally, a defendant is entitled to "a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution." *Id.* (quoting *Hardy v. United States*, 375 U.S. 277, 282 (1964)).

Here, Defendant's case was tried from 1 to 5 March 2021 and the transcript consists of four volumes. Volume I transcribes the COVID-19 safety protocols and initial jury impanelment proceedings that took place on 1 March 2021. At the end of volume I, the transcript states, "The jury impanelment proceedings recessed at 4:21 p.m. on Monday, March 1, 2021, continued through Tuesday, March 2, 2021, and resumed 9:00 a.m. Wednesday, March 3, 2021." Volume II starts by noting, "The following proceedings with the defendant present and outside the presence of

the jurors at 9:02 a.m." The transcript indicates that the trial court then stated, "The defendant is present with counsel. The State is here represented by counsel. The jury has been selected, not impaneled."

Although the proceedings on 2 March 2021 are not transcribed, it is evident from volumes I and II of the transcript that the trial court conducted jury selection on that day. As the jury was not impaneled and no evidence was presented on 2 March, Defendant was not entitled to a verbatim transcript of those proceedings. *See Hobbs*, 190 N.C. App. at 185, 660 S.E.2d at 170. Accordingly, that there is no verbatim transcript of the jury selection on 2 March 2021 does not deprive Defendant of meaningful appellate review.

Even assuming arguendo that the missing portion of transcript could possibly contain information necessary for a meaningful appeal, Defendant has failed to demonstrate he is prejudiced by its absence.

"[T]he unavailability of a verbatim transcript does not *automatically* constitute reversible error in every case." *In re Shackleford*, 248 N.C. App. 357, 361, 789 S.E.2d 15, 18 (2016). "To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006) (citation omitted). "General allegations of prejudice are insufficient to show reversible error." *Id.* (citations omitted).

We conduct a three-step inquiry to determine whether the right to a meaningful appeal has been lost due to the unavailability of a verbatim transcript. S*tate v. Yates*, 262 N.C. App. 139, 142, 821 S.E.2d 650, 653 (2018).

> First, we must determine whether defendant has "made sufficient efforts to reconstruct the [proceedings] in the absence of a transcript." Second, we must determine whether those "reconstruction efforts produced an adequate alternative to a verbatim transcript—that is, one that would fulfill the same functions as a transcript . . . ." Third, "we must determine whether the lack of an adequate alternative to a verbatim transcript of the [proceedings] served to deny [defendant] meaningful appellate review such that a new [trial] is required."

Id. (quoting *Shackleford*, 248 N.C. App. at 361-64, 789 S.E.2d at 18-20).

Here, Defendant's appellate counsel made sufficient efforts to reconstruct the record from 2 March 2021 by contacting the trial judge, Defendant's trial attorney, the district attorney who prosecuted the case,

the court reporting manager and court reporter who transcribed the proceedings on 1 March 2021 and 3 March 2021, and the deputy clerk of superior court.

Based on his efforts, Defendant determined that on 1 March 2021, the trial court reviewed the COVID-19 safety protocols and began the process of jury impanelment. At the end of the day, Defendant offered several objections to the COVID-19 protocols, and the trial court suggested that Defendant make a list of his objections to consider after impanelment.

Regarding the 2 March 2021 proceedings, Defendant's trial attorney stated:

> In an attempt to reconstruct March 2 and upon review of the materials, I do not recall anything particularly unusual or remarkable about the jury selection. There were no outbursts, no overt comments about race, religion, sexuality or politics by any juror or the State, or any juror acting in a way that I felt was otherwise concerning or objectionable . . . .
>
> The materials indicate that the judge denied approximately five (5) of my motions to strike jurors for cause, (3 on March 1, 2 on March 2). Three of the show cause motions were because the respective jurors were either the direct victim of a sexual offense or knew someone close to them who was. One motion was due to the juror's prior professional relationship with Onslow County Sheriff deputies. The fifth was a juror who worked for a property management company I had been adverse to in prior, unrelated civil litigation. As a result of the denials, we elected to use peremptory challenges on all five jurors. The notes from March 2 indicate we used the 6th peremptory challenge that day.

Volume II of the transcript, which covers the proceedings on 3 March 2021, begins with the trial court noting that the jury had been selected but not yet impaneled. The transcript continues:

> THE COURT: So I believe we left this time open to hear from [Defendant] with regards to some motions that he has raised earlier, and I gave him permission to expand on those motions this morning outside the presence of the jury before the case actually -- the evidence is actually received.

Defendant then detailed specific objections to the COVID-19 protocols, including the physical layout of the courtroom, the size of the jury pool, the possible bias of jurors "for having to be here during COVID," and the length of time the proceedings would take with the newly-implemented protocols. After Defendant's objections were addressed, the trial court impaneled the jury. Defendant's efforts produced an adequate alternative to a verbatim transcript in that Defendant can "identify all potential meritorious issues, particularly as they relate to the procedures and manner in which his trial was conducted." *Yates*, 262 N.C. App. at 142, 821 S.E.2d at 653.

Accordingly, because Defendant made sufficient reconstruction efforts that produced an adequate alternative to a verbatim transcript, he was not deprived of meaningful appellate review. *Shackleford*, 248 N.C. App. at 362, 789 S.E.2d at 19. Defendant's argument that he is entitled to a new trial is thus without merit.

B. Incest

[2] Defendant next contends that the trial court erred by denying his motion to dismiss the incest charge. Defendant specifically contends that the term "niece" in N.C. Gen. Stat. § 14-178 does not include a niece-in-law for the purposes of incest as criminalized by that statute. We agree.

"This Court reviews a trial court's denial of a motion to dismiss *de novo*[.]" *State v. Moore*, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015) (citation omitted). Moreover, "[i]ssues of statutory construction are questions of law which we review *de novo* on appeal[.]" *State v. Hayes*, 248 N.C. App. 414, 415, 788 S.E.2d 651, 652 (2016). Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

Upon a defendant's motion to dismiss, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Worley*, 198 N.C. App 329, 333, 679 S.E.2d 857, 861 (2009) (quotation marks and citations omitted). "[T]he trial court must consider the record evidence in the light most favorable to the State . . . ." *Id.* (citation omitted).

"The primary endeavor of courts in construing a statute is to give effect to legislative intent." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d

274, 276-77 (2005) (citations omitted). "Generally, the intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act[,] and what the act seeks to accomplish." *State v. Huckelba*, 240 N.C. App. 544, 559, 771 S.E.2d 809, 821 (2015) (quotation marks, brackets, and citation omitted), *rev'd per curiam on other grounds*, 368 N.C. 569, 780 S.E.2d 750 (2015). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277 (citation omitted). "When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Id.* (quotation marks and citation omitted). Moreover, "criminal statutes are to be strictly construed against the State." *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 489 (1987) (quotation marks and citation omitted).

The offense of incest is governed by section 14-178(a) of our General Statutes, which provides:

> A person commits the offense of incest if the person engages in carnal intercourse with the person's (i) grandparent or grandchild, (ii) parent or child or stepchild or legally adopted child, (iii) brother or sister of the half or whole blood, or (iv) uncle, aunt, nephew, or niece.

N.C. Gen. Stat. § 14-178(a) (2018).

In its primary sense, "niece" is defined as "[t]he daughter of a person's brother or sister[,]" *Niece*, *Black's Law Dictionary* (11th ed. 2019), and is understood to be a relationship of consanguinity. *See Consanguinity*, *Black's Law Dictionary* (11th ed. 2019) (defining "consanguinity" as "[t]he relationship of persons of the same blood or origin"). In a secondary sense, "niece" is only "*sometimes* understood to include the daughter of a person's brother-in-law or sister-in-law[,]" *Niece*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added), and is only sometimes understood to be a relationship of affinity. *See Affinity*, *Black's Law Dictionary* (11th ed. 2019) (defining "affinity" as "[a]ny familial relation resulting from a marriage"). The plain language of the term "niece" in its primary sense indicates the legislature's intent to criminalize carnal intercourse with "[t]he daughter of a person's brother or sister[,]" a relationship of consanguinity. However, the scope of the term "niece" could be subject to debate, depending on which dictionary definition is used, and thus could be considered ambiguous. *See State v. Sherrod*, 191 N.C. App. 776, 778, 663 S.E.2d 470, 472 (2008) (The language of a statute is ambiguous when it is "fairly susceptible of two or more meanings.");

State Auto. Mut. Ins. Co. v. Hoyle, 106 N.C. App. 199, 201, 415 S.E.2d 764, 765 (1992) ("A word is ambiguous when it is reasonably capable of more than one meaning.").

Even so, the text of the relevant statutory provision further supports the legislature's intent that a "niece" must be a consanguineous relationship to constitute the crime of incest. *See State v. Conley*, 374 N.C. 209, 215, 839 S.E.2d 805, 809 (2020) ("[A] statute must be considered as a whole[.]" (quotation marks omitted)). The relationships detailed in section 14-178 are all those of consanguinity, except the relationships of child by marriage or legal adoption. In the application of criminal law, it would be an unwarranted extension and presumption to assume that, by specifying the relationship of child by marriage or legal adoption, the legislature intended to include other nonconsanguineous relationships. *See State v. McCants*, 275 N.C. App. 801, 824, 854 S.E.2d 415, 432 (2020) ("Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.").

Furthermore, the legislative history, the spirit of the incest statute, and what the statute seeks to accomplish all confirm the legislative intent that a "niece" must be a consanguineous relationship for the purpose of criminalizing incest.

In January 1878, the North Carolina Supreme Court issued *State v. Keesler*, 78 N.C. 469 (1878), dismissing an indictment against the defendant for incest for his having had improper intercourse with his daughter. The Court explained, "This offence was not indictable at common law, and as we have no statute in this State declaring it to be a criminal offence, this indictment cannot be maintained." *Id.* at 469. Noting that "[i]n most of the States of the Union incest is made an indictable offence by statute[,]" the Court opined that "[p]erhaps its rare occurrence in this State has caused the revolting crime to pass unnoticed by the Legislature." *Id.* at 469-70.

Immediately following *Keesler*, the General Assembly criminalized incest in 1879 by sections 1060 and 1061 of the North Carolina Code. Section 1060 provided:

> In all cases of carnal intercourse between grand parent and grand child, parent and child, and brother and sister, of the half or whole blood, the parties shall be guilty of felony, and punished for every such offence by imprisonment in the county jail or penitentiary for a term not exceeding five years, in the discretion of the court.

1 N.C. Code of 1883, § 1060. Section 1061 provided:

> In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and punished by fine or imprisonment, in the discretion of the court.

Id. § 1061.

In *State v. Laurence*, 95 N.C. 659 (1886), our Supreme Court held that section 1060 applies to both legitimate and illegitimate children. The Court stated that "[i]t is obvious that the legitimacy of birth in one of the offending parties is not, and ought not to be, an essential ingredient in the crime" because the statute prohibits intercourse between those who are "related in those degrees by consanguinity[.]" *Id.* at 660.

In 1905, the General Assembly recodified sections 1060 and 1061 as sections 3351 and 3352, respectively. *See* 1 N.C. Revisal of 1905, §§ 3351, 3352.[3] Section 3351 continued to criminalize as felony incest "carnal intercourse between grandparent and grandchild, parent and child, and brother and sister, of the half or whole blood," punishable by imprisonment for a term not exceeding five years, but changed the location of imprisonment from the "county jail or penitentiary" to the "state's prison[.]" *Id.* § 3351. Section 3352 continued to criminalize as misdemeanor incest "carnal intercourse between uncle and niece, and nephew and aunt," punishable by fine or imprisonment. *Id.* § 3352.

In *State v. Harris*, 149 N.C. 513, 62 S.E. 1090 (1908), our Supreme Court upheld the defendant's conviction for incest where the sole question before the Court was whether the daughter of the defendant's half-sister came within the language of section 3352. The Court explained:

> For obvious reasons, nothing is said [in section 3352] of the half or whole blood. The relation of uncle and niece must of necessity be of the half blood, as in all other relations of consanguinity, other than those defined in [section 3351]. As here, the daughter of defendant's sister is of course related to him only by the half blood. The fact that

3. Section 3351 provided that "In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister, of the half or whole blood, the parties shall be guilty of a felony, and punished for every such offense by imprisonment in the state's prison for a term not exceeding five years, in the discretion of the court." 1 N.C. Revisal of 1905, § 3351. Section 3352 provided that: "In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and punished by fine or imprisonment, in the discretion of the court." *Id.* § 3352.

> the mother of the girl is only half sister of defendant cannot affect the case . . . .

Id. at 514, 62 S.E. at 1090-91. Accordingly, the Court concluded the "defendant and his niece, the daughter of the half sister, are clearly within the statute." *Id.* at 514, 62 S.E. at 1091.

In 1919, the General Assembly recodified sections 3351 and 3352 as sections 4337 and 4338, respectively, of the Consolidated Statutes.[4] course between grandparent and grandchild, parent and child, and brother and sister, of the half or whole blood," punishable by a term of imprisonment in the state's prison, but increased the allowable term of imprisonment from "not exceeding five years" to "not exceeding fifteen years[.]" 1 N.C. Consol. Stat. of 1919, § 4337. Section 4338 continued to criminalize as misdemeanor incest "carnal intercourse between uncle and niece, and nephew and aunt," punishable by fine or imprisonment. *Id.* § 4338. In 1943, sections 4337 and 4338 were recodified as sections 14-178 and 14-179, respectively, of the North Carolina General Statutes. The recodified sections were identical to their predecessors.

In *State v. Rogers*, 260 N.C. 406, 133 S.E.2d 1 (1963), our Supreme Court reversed the defendant's conviction for incest where the defendant had sexual relations with his adopted daughter. At that time, section 14-178 read:

> In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood, the parties shall be guilty of a felony, and shall be punished for every such offense by imprisonment in the State's prison for a term not exceeding fifteen years, in the discretion of the court.

Id. at 407-08, 133 S.E.2d at 2 (quoting N.C. Gen. Stat. § 14-178). The Court explained, "The crime of incest is purely statutory, and our statute is based on consanguinity and, therefore, excludes affinity. Our statute . . . would not include the relationship between a stepfather and his stepdaughter, since their relationship would not be one of consanguinity."

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4. Section 4337 provided that: "In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood, the parties shall be guilty of a felony, and shall be punished for every such offense by imprisonment in the state's prison for a term not exceeding fifteen years, in the discretion of the court." 1 N.C. Consol. Stat. of 1919, § 4337. Section 4338 provided that "In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, in the discretion of the court." *Id.* § 4338.

Id. at 409, 133 S.E.2d at 3 (citation omitted). Noting that "[t]he word 'daughter' means, and is generally understood to mean, 'an immediate female descendant,' and not an adopted daughter, a stepdaughter, or a daughter-in-law[,]" the Court concluded that while "[t]he defendant's conduct . . . in having sexual relations with his adopted daughter[] is indeed detestable, [i]t rests, however, within the power of the Legislature to make such conduct incestuous." *Id.* (quotation marks and citation omitted).

Immediately following *Rogers*, the General Assembly amended section 14-178 in 1965 to include the affinity relationship of "stepchild" and the legal relationship of "legally adopted child," as follows:

> The parties shall be guilty of a felony in all cases of carnal intercourse between (i) grandparent and grandchild, (ii) parent and child or stepchild or legally adopted child, or (iii) brother and sister of the half or whole blood. Punishment for every such offense shall be imprisonment in the State prison for a term of not more than fifteen years, in the discretion of the court.

N.C. Gen. Stat. § 14-178 (1969).[5] Section 14-179 remained unchanged. *See* N.C. Gen. Stat. § 14-179 (1969).

In 2002, the General Assembly enacted "An Act to Close the Legal Loophole that Exists Under the State's Incest Laws by Equalizing Punishments for Crimes Committed Against Children Without Regard to Familial Status[.]" *See* 2002 N.C. Sess. Laws 280 (capitalization altered). The Act consolidated portions of sections 14-178 and 14-179, repealed section 14-179, and enacted a new section 14-178, labeled "Incest," which reads as follows:

> (a) Offense. – A person commits the offense of incest if the person engages in carnal intercourse with the person's (i) grandparent or grandchild, (ii) parent or child or stepchild or legally adopted child, (iii) brother or sister of the half or whole blood, or (iv) uncle, aunt, nephew, or niece.
>
> (b) Punishment and Sentencing. –
>
> > (1) A person is guilty of a Class B1 felony if either of the following occurs:

5. Section 14-178 was amended by 1965 N.C. Sess. Laws 190, but the amended statute did not appear in the North Carolina General Statutes until the 1969 volume.

> a. The person commits incest against a child under the age of 13 and the person is at least 12 years old and is at least four years older than the child when the incest occurred.
>
> b. The person commits incest against a child who is 13, 14, or 15 years old and the person is at least six years older than the child when the incest occurred.
>
> (2) A person is guilty of a Class C felony if the person commits incest against a child who is 13, 14, or 15 and the person is more than four but less than six years older than the child when the incest occurred.
>
> (3) In all other cases of incest, the parties are guilty of a Class F felony.
>
> (c) No Liability for Children Under 16. — No child under the age of 16 is liable under this section if the other person is at least four years older when the incest occurred.

2002 N.C. Sess. Laws 281.

The relationships specified remained unchanged, but the Act increased the punishment and sentencing for individuals convicted of incest to equalize punishments for crimes committed against children, without regard to whether the perpetrators are related to their victims. *Id*. Notably, the Act increased the punishment for incest based on carnal intercourse with an aunt, uncle, nephew, or niece from a misdemeanor to a felony. *Id*. The Act also created different punishment classes based on certain age requirements. *Id*. Finally, the Act excused any child under the age of 16 from liability for incest if the other person was at least four years older when the incest occurred. *Id*. The version of N.C. Gen. Stat. § 14-178 adopted in 2002 remains in effect today.

By tracing the legislative history and judicial treatment of incest from 1878 to the present, the following is apparent: Our legislature has actively criminalized incest since 1879, presumably in response to our Supreme Court dismissing an incest indictment because North Carolina had no incest statute. *See Keesler*, 78 N.C. at 469. The first incest statutes criminalized carnal intercourse between an uncle and a niece, and the punishment was later increased from a misdemeanor to a felony. Our courts have repeatedly stated that our incest statutes are based on consanguinity, not affinity, except where the legislature has specified otherwise. *See Laurence*, 95 N.C. at 660 (holding that the incest

statute prohibits intercourse between individuals who are "related in those degrees by consanguinity"); *Harris*, 149 N.C. at 514, 62 S.E. at 1091 ("The relation of uncle and niece must of necessity be of the half blood, as in all other relations of consanguinity, other than those defined in [section 3351]."); *Rogers*, 260 N.C. at 409, 133 S.E.2d at 3 ("The crime of incest is purely statutory, and our statute is based on consanguinity and, therefore, excludes affinity. Our statute . . . would not include the relationship between a stepfather and his stepdaughter, since their relationship would not be one of consanguinity."). The legislature acted swiftly in 1965, presumably in response to *Rogers*, to amend the statute to include the affinity relationship of "stepchild" and the legal relationship of "legally adopted child."

The legislature has the authority, and has had the opportunity, to expand the definition of incest to include familial relationships by affinity or other means, as it did in 1965 with stepchildren and legally adopted children. However, even in 2002 when it consolidated sections 14-178 and 14-179 and significantly overhauled the punishment and sentencing for incest, the legislature did not expand the definition of incest to include familial relationships by affinity or other means. Had the legislative intent been to include what, in this case, would commonly be called a relationship of niece-in-law and uncle-in-law, it would have done so.

Furthermore, judicially expanding the definition of incest to include familial relationships by affinity or other means "could lead to absurd results." *Beck*, 359 N.C. at 615, 614 S.E.2d at 277. Incest is defined as "sexual intercourse between persons so closely related that marriage is illegal[.]" *The Merriam-Webster Dictionary* 251 (2019). *See also Incest*, *Black's Law Dictionary* (11th ed. 2019) (defining "incest" as "[s]exual relations between family members or close relatives, including children related by adoption"). In North Carolina, "marriages between any two persons nearer of kin than first cousins, or between double first cousins" are void. N.C. Gen. Stat. § 51-3 (2018). In ascertaining whether persons are nearer of kin than first cousins, "the half-blood shall be counted as the whole-blood . . . ." N.C. Gen. Stat. § 51-4 (2018). Expanding the scope of section 14-178 to include a niece-in-law would mean that, while an individual could marry their niece-in-law where certain age restrictions do not prohibit otherwise, that individual would be guilty of incest if the marriage were consummated.

We thus conclude that the term "niece" in N.C. Gen. Stat. § 14-178 does not encompass a niece by affinity for the purposes of incest as criminalized by that statute. Our construction is consistent with a majority of other jurisdictions with similar statutes that have addressed

whether sexual intercourse between an uncle and niece, related only by affinity, is incestuous within the meaning of their statutes. *See State v. Tucker*, 93 N.E. 3, 4 (Ind. 1910) ("[T]o constitute the crime of incest by uncle and niece under the provisions of the act under consideration they must be such kindred by the ties of consanguinity."); *State v. Moore*, 262 A.2d 166, 169 (Conn. 1969) ("Had the legislative intent been to include what, in this case, would commonly be called a relationship of niece-in-law and uncle-in-law, it would have been a simple matter to say so.[6]"); *State v. Anderson*, 484 N.E.2d 640, 641 (Ind. Ct. App. 1985) ("Although the statute[7] does not contain a requirement for consanguinity in the case of incest between an uncle and a niece, this precise question was addressed by our Supreme Court in *State v. Tucker* . . . . Thus, the trial court's judgment dismissing the charges is affirmed."); *Hull v. State*, 686 So. 2d 676, 677 n.2 (Fla. Dist. Ct. App. 1996) ("The relationship of uncle-in-law and niece-in-law is clearly not alone sufficient to . . . implicate the incest statute, section 826.04, Florida Statutes (1995)[.8]"); *State v. Dodd*, 871 S.W.2d 496, 497 (Tenn. Crim. App. 1993) (reversing the conviction of a defendant who had sexual relations with the daughter of his wife's half-sister where the applicable incest statute "include[d] all relationships of consanguinity and only a *limited number* of those by affinity[.]" (emphasis added)).

In this case, because Mary is not Defendant's niece by consanguinity, Mary is not Defendant's niece as contemplated by N.C. Gen. Stat. § 14-178 and the trial court erred by denying Defendant's motion to dismiss the incest charge. We therefore vacate Defendant's incest conviction and remand for resentencing.

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6. "Every man and woman who marry or carnally know each other, being within any of the degrees of kindred specified in section 46-1, shall be imprisoned in the State Prison not more than ten years." Conn. Gen. Stat. § 53-223 (1969). "No man shall marry his mother, grandmother, daughter, granddaughter, sister, aunt, niece, stepmother or stepdaughter, and no woman shall marry her father, grandfather, son, grandson, brother, uncle, nephew, stepfather or stepson . . . ." Conn. Gen. Stat. § 46-1 (1969).

7. "A person eighteen (18) years of age or older who engages in sexual intercourse or deviate sexual conduct with another person, when he knows that the other person is his parent, stepparent, child, stepchild, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew, commits incest, a Class D felony." IND. CODE § 35-46-1-3 (1977).

8. "Whoever knowingly marries or has sexual intercourse with a person to whom he is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece, commits incest[.]" Fla. Stat. § 826.04 (1995).

C. Defendant's Statements at the Sheriff's Office

[3] Defendant contends that the trial court erred by denying his motion to suppress his inculpatory statements made at the Onslow County Sheriff's Office following his arrest. Defendant specifically contends that the trial court's findings of fact are incomplete and that the evidence does not support the conclusion that his statements were made voluntarily.

"The standard of review for a motion to suppress evidence is whether the trial court's findings of fact are supported by competent evidence and whether the findings support the court's conclusions of law." *State v. Boyd*, 207 N.C. App. 632, 636, 701 S.E.2d 255, 258 (2010) (quotation marks and citation omitted). "Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal." *State v. Davis*, 237 N.C. App. 22, 27-28, 763 S.E.2d 585, 589 (2014) (citation omitted). "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The trial court made the following relevant findings of fact in its written order denying Defendant's motion to suppress:

> 6. Accompanied by local law enforcement, the detectives arrested the defendant once he arrived back at Raleigh-Durham Airport on August 7, 2018 at approximately 11:00 a.m. after a flight from Colombia.
>
> 7. The defendant was transported to Onslow County by the detectives in an Onslow County Sheriff's Department motor vehicle. The defendant, at the time of the arrest, was 42 and was an active duty marine stationed in the provost marshal office aboard Camp Lejeune, N.C.
>
> 8. The defendant was handcuffed in front of his body and sat in the front passenger seat while Detective Pete Johnston drove, and Detective Charles Parrish was seated in the rear seat behind the defendant. They arrived at the Onslow County Sheriff's Office at shortly after 1:30 p.m. An audio recording of the conversation in the car during the trip was captured through a Go-Pro device in the car, and portions were played for the jury.
>
> 9. Shortly after they left RDU on the trip back to Onslow County, the defendant initiated questioning about his case. The detectives stopped him, and Johnston told him that

"as long as you are in custody, you know as well as we do, that we cannot really talk." He was told that if he wanted to talk, they would have to go over the rights form. The defendant asked what they thought he ought to do, and Johnston told him it was "what he thought." He advised the officers that he wanted to ask them "what is coming" and "what he is facing." In response the officers told him that whether he talked about the case was "totally up to him." He was told that after they went over the form, he could then make a decision as to what he wanted to do. After his rights were read to him, the defendant appeared to decide that he would not sign the waiver and talk then but wait until he got back. Discussion about the case ceased at that point.

10. They basically advised him that it was his choice as to whether he wanted to talk about the case. In the car Detective Parrish at 11:28 a.m. read him his Miranda rights . . . . The language of the waiver was also read to the defendant by Detective Parrish, but he chose not to execute the waiver at that time.

11. In the car after each right was read to him, the defendant orally answered "Yes, Sir." After being handed the printed Interrogation-Advisement of Rights form on a clipboard, the defendant initialed each right in the space provided after each right. He advised that from his work in the Provost Marshal's office, he jokingly stated that he had read those rights "a few times himself" in his law enforcement work. He chose not to sign under the waiver of rights paragraph at that time, and returned the clipboard containing the rights form back to Detective Parrish.

. . . .

14. Once the defendant got seated next to the table, he was provided the same rights waiver form, which he had previously been read from in the car and on which he had initialed next to each right during the trip from the airport.

15. Once he joined the defendant and Deputy Parrish already seated in the room, Detective Johnston told him that now they had to be a "little more candid than they were in the car." The defendant was told not to say anything but just to listen, and they will go over "some stuff."

The defendant was told "Nothing you say here is going to change the things that happened. You are fully charged with the offense."

16. This was said to the defendant by Detective Johnston because the warrant for arrest for statutory rape had already been issued, and because of that, nothing that was going to be discussed during the interrogation was going to change the status of the case.

. . . .

18. The defendant was advised that they work in the Special Victims Unit, and they know there are always "two sides to every story, and they are never going to arrest anyone without giving them an opportunity to tell them what's going on." In order to give the defendant that opportunity, they had to "finish signing and going over that [rights] form" which the defendant had in front of him. "That is up to you. Before we address that and ask you what you want to do with that, keep in mind, again, that nothing you say in here is going to hurt you or change the situation as it stands. It will give us some insight. Right now we have a little girl that "we kind to (sic) have more questions than we have answers for. Now we are hoping that you can shed some light on what is going on with her." Parrish advised him that part of their job was the consideration of the welfare of the victims.

19. . . . After which, the defendant signed the waiver form at 2:02 p.m . . . .

. . . .

24. After the defendant continued to deny any misconduct, Detective Johnston eventually told the defendant that based on other sources that the defendant did not know about, "stuff" was not adding up and he could not explain it. He intimated that defendant was not telling the truth.

25. About thirty minutes into the interrogation the defendant stated that "I fucked up. I screwed up." He stated that he and the victim got close and kissed. On the day he left for Colombia while the victim's parents were at work, he had gotten the victim to put coconut butter on his back after he had been sunbathing. They talked about

> the victim's boyfriend in Spain and went into the garage and had intercourse. He told law enforcement that he did not force her.
>
> 26. When it appeared to Detective Johnston that the defendant was close to making an inculpatory statement, he reached over and touched the defendant on his knee with an open palm. Johnston explained that this was a technique to show empathy and humanity to the defendant . . . .
>
> 27. The defendant never requested counsel, never asked that the questioning stop and never invoked his right to remain silent.

1. Findings of Fact

Defendant does not challenge any findings of fact; they are thus binding on appeal. *See State v. Hoque*, 269 N.C. App. 347, 361, 837 S.E.2d 464, 475 (2020). Defendant instead argues that the trial court's findings of fact are incomplete because the trial court failed to "make [a] finding of fact as to how many times and when Johnston touched [Defendant]." However, the findings of fact need not summarize *all* the evidence presented at voir dire. *State v. Dunlap*, 298 N.C. 725, 730, 259 S.E.2d 893, 896 (1979). Indeed, if there is no conflicting testimony about the facts alleged, it is permissible for the trial court to admit evidence a defendant seeks to suppress without making specific findings of fact at all, although it is better practice to make them. *Id.* In light of this rule, it is enough that the findings are supported by substantial and uncontradicted evidence, as they are here, and Defendant's argument is overruled.

2. Voluntariness

"The determination of whether a defendant's statements are voluntary and admissible is a question of law and is fully reviewable on appeal." *State v. Maniego*, 163 N.C. App. 676, 682, 594 S.E.2d 242, 245-46 (2004) (quotation marks and citation omitted). We look at the totality of the circumstances to determine whether the confession was voluntary. *State v. Cortes-Serrano*, 195 N.C. App. 644, 655, 673 S.E.2d 756, 763 (2009).

> The requisite factors in the totality of the circumstances inquiry include: 1) whether the defendant was in custody at the time of the interrogation; 2) whether the defendant's *Miranda* rights were honored; 3) whether the interrogating officer made misrepresentations or deceived the

> defendant; 4) the interrogation's length; 5) whether the officer made promises to the defendant to induce the confession; 6) whether the defendant was held incommunicado; 7) the presence of physical threats or violence; 8) the defendant's familiarity with the criminal justice system; and 9) the mental condition of the defendant.

State v. Martin, 228 N.C. App. 687, 690, 746 S.E.2d 307, 310 (2013) (citation omitted). "The presence or absence of one or more of these factors is not determinative." *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992) (citation omitted).

Here, Defendant was advised of his *Miranda* rights, and, after each right was read to him, he orally answered "Yes, Sir." After Defendant was handed the Interrogation-Advisement of Rights form, he initialed in the space provided after each right. At the time of his arrest, Defendant was an active duty marine stationed in the provost marshal office in Camp Lejeune and "he jokingly stated that he had read those rights 'a few times himself' in his law enforcement work." Upon arrival at the Onslow County Sheriff's Office, Defendant was placed into an interrogation room where he waited for approximately fifteen minutes for the officers to return. Thereafter, he was permitted to use the restroom before returning to the interrogation room. Defendant was again advised of his *Miranda* rights, and he signed the rights waiver form. The interrogation proceeded for approximately thirty minutes before Defendant made inculpatory statements. Defendant did not appear to be under the influence of any alcohol or drugs, did not display any ill effects from his trip from Colombia, and conversed in fluent English.

The findings of fact support the trial court's conclusion that "[f]rom the totality of the circumstances, the defendant was aware of his constitutional rights at the time of his interrogation[,]" and that "the defendant was fully and completely advised of his *Miranda* warnings, and his waiver of his *Miranda* rights was executed freely, knowingly, voluntarily and intelligently." The findings of fact also support the trial court's conclusion of law that "the defendant's inculpatory statements were made voluntarily and understandingly." Thus, Defendant's argument lacks merit.

D. Clerical Error

[4] Defendant contends, and the State essentially concedes, that the case must be remanded to the trial court to correct a clerical error in the trial court's judgment. We agree.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (quotation marks and citation omitted).

Here, the jury convicted Defendant of sexual activity by a substitute parent. Prior to sentencing, however, the trial court orally dismissed Defendant's conviction of sexual activity by substitute parent:

> [DEFENDANT]: I would make further motions to dismiss all charges. The arguments previously set forth for the record, if the Court could just take judicial notice of the content of those. They were voluminous. That would be the bases for any further motions.
>
> THE COURT: Okay.
>
> [DEFENDANT]: I'm happy to expound upon anything you want, Judge, but –
>
> THE COURT: Okay.
>
> [DEFENDANT]: – they've been argued several times.
>
> THE COURT: The Court is going to allow the motion to dismiss as to the sexual activity by substitute parent.
>
> [DEFENDANT]: Thank you, Judge.

Thereafter, the trial court consolidated the remaining convictions for sentencing. However, the judgment and subsequent modified judgment indicate that Defendant was convicted of sexual activity by a substitute parent. Accordingly, we remand for correction of the clerical error.

III. Conclusion

Defendant's incest conviction is vacated and remanded for resentencing and for correction of a clerical error on the written judgment.

NO ERROR IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING AND FOR CORRECTION OF JUDGMENT.

Judges DILLON and WOOD concur.

YVES v. TOLENTINO

[287 N.C. App. 688 (2023)]

MUGABO YVES, PLAINTIFF
v.
NOE MARTINEZ TOLENTINO A/K/A TOLENTINO NOE MARTINEZ, DEFENDANT

No. COA22-730

Filed 21 February 2023

Process and Service—sufficiency of service of process—attempted delivery—incorrect address—dismissal proper

The trial court properly dismissed plaintiff's negligence complaint for insufficient service pursuant to Civil Procedure Rule 4 where defendant presented two affidavits demonstrating that he had not been personally served with the summons and complaint because, even though the private shipping service used by plaintiff provided a proof of delivery receipt at the address listed by plaintiff, defendant was not living at that address when service was attempted. Further, dismissal of the complaint with prejudice was appropriate where plaintiff did not seek judgment by default and the relevant statute of limitations had expired.

Appeal by defendant from judgment entered 13 January 2022 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 February 2023.

The Layton Law Firm, PLLC, by Christopher D. Layton, for the plaintiff-appellant.

Law Office of Zach R. Snyder, PLLC, by Zach Snyder, for the defendant-appellee.

TYSON, Judge.

Mugabo Yves ("Plaintiff") sought damages for injuries which occurred as a result of Noe Martinez-Tolentino's ("Defendant") purported negligence. Defendant moved to dismiss Plaintiff's Summons and Complaint for improper service. The trial court allowed the motion and dismissed Plaintiff's complaint with prejudice. Plaintiff appeals. We affirm.

I. Background

Defendant drove his car through an intersection and ran into Plaintiff on 5 March 2018. Plaintiff was riding a bicycle and alleged he

had sustained serious injuries. Plaintiff and Defendant unsuccessfully attempted to settle the matter outside of court. Plaintiff filed his complaint a few days before the statute of limitations expired, seeking compensatory damages for Defendant's purported negligence on 2 March 2021.

Plaintiff used the United Parcel Service ("UPS") to attempt to serve Defendant on 13 April 2021. UPS had temporarily adjusted its delivery guidelines for packages requiring a signature to a no-contact policy because of restrictions from the COVID-19 pandemic. According to the UPS website, UPS drivers were still required "to make contact with the consignee," and the consignee was required to "acknowledge that UPS is making a delivery and, if applicable, show government issued photo ID."

The UPS "Proof of Delivery" receipt provides the package was delivered on 19 April 2021 and received by "MARTINAZ." The driver signed "COVID-19" in the space designated for a consignee's signature to indicate compliance with the COVID-19 no-contact signature protocols. Plaintiff's lawyer signed an Affidavit of Service on 22 April 2021, which provided that a certified a copy of the Affidavit of Service was mailed to the same address using the United States Postal Service ("USPS").

Defendant moved to dismiss pursuant to Rule 4 and Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure on 20 July 2021. Defendant's motion to dismiss included two affidavits: (1) one by Defendant stating he had moved and had not been personally served with a copy of the Summons or Complaint; and, (2) one from the person currently living at Defendant's former address, who stated he resided at the address on the day the Summons and Complaint were sent. Defendant also attached paystubs and a change of address from his bank demonstrating he was being paid at a different address at the time he was served. Plaintiff filed a response to Defendant's motion to dismiss on 27 August 2021.

Defendant's motion was heard on 14 December 2021. The trial court found the Summons "did not contain the Defendant's correct address" and "the Defendant ha[d] not been personally served with this lawsuit, pursuant to Rule 4 of the North Carolina Rules of Civil Procedure." The trial court granted Defendant's motion to dismiss with prejudice on 13 January 2022, as any subsequent issuance of any Alias and Pluries would be time-barred as occurring after the statute of limitations had expired. Plaintiff filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Proof of Service

Plaintiff argues the trial court erred in dismissing his complaint because Defendant was properly served according to Rule 4(j)(1)(d) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 4 (2021). He asserts the trial court failed to find and apply a presumption of valid service, because Defendant's purported signature was contained on the UPS "Proof of Delivery" receipt.

Plaintiff also asserts Rule 4(j2)(2) prevents Defendant from pleading the statute of limitation as a defense, because the action was commenced before the period of limitation expired. *Id.*

A. Standard of Review

"We review *de novo* questions of law implicated by . . . a motion to dismiss for insufficiency of service of process." *New Hanover Cty. Child Support Enf't ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012).

B. Analysis

"The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him." *Stinchcomb v. Presbyterian Med. Care Corp.*, 211 N.C. App. 556, 562, 710 S.E.2d 320, 325 (2011) (citation and quotation marks omitted).

"In order for a summons to serve as proper notification, it must be issued and served in the manner [as is] prescribed by statute." *Id.* (citation and quotation marks omitted); *Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998) ("[I]t is well established that a court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods.") (citation omitted).

A plaintiff's failure to comply with the statutory requirements for service and process will not cure procedural defects, including a defendant's actual notice of a lawsuit. *Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604 (1996) ("It is well-settled that process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid, even though a defendant had actual notice of the lawsuit.") (citations omitted).

Long ago, this Court stated, "a person relying on the service of a notice by mail must show strict compliance with the requirements of the statute." *In re Appeal of Harris*, 273 N.C. 20, 24, 159 S.E.2d 539, 543 (1968) (citation and internal quotation marks omitted); *Fulton v. Mickle*, 134 N.C. App. 620, 623, 518 S.E.2d 518, 521 (1999).

Our statutes provide several options for the acceptable manner of service of process. One option for serving a "natural person" is to: "deposit [ ] with a designated delivery service . . . a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(d). A delivery receipt "includes an electronic or facsimile receipt." *Id.*

1. Presumption of Valid Service

If the record demonstrates compliance with the statutory requirements for service of process, such compliance raises a rebuttable presumption the service was valid. *Patton v. Vogel*, 267 N.C. App. 254, 258, 833 S.E.2d 198, 202 (2019) (quoting *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 491, 586 S.E.2d 791, 796 (2003) (citations omitted)); *see also Taylor v. Brinkman*, 108 N.C. App. 767, 771, 425 S.E.2d 429, 432 (1993) ("The filing of an affidavit consistent with N.C. [Gen. Stat.] § 1–75.10(4) raises a rebuttable presumption of valid service consistent with N.C. [Gen. Stat.] § 1A–1, Rule 4(j)(1)(c)") (citation omitted).

In *Patton*, the plaintiff first mailed a copy of the complaint and summons *via* FedEx to an address listed on the accident report. *Id.* at 255, 833 S.E.2d at 200. The attempted service was returned to plaintiff and indicated the delivery address was vacant. *Id.* When plaintiff mailed another copy to an address discovered by a private investigator, plaintiff received a signed receipt of delivery from someone named "R. Price." *Id.* The defendant in *Patton* filed an affidavit with her motion to dismiss for improper service, averring: (1) she lived at the address listed on the accident report "on and after the day of the accident[;]" (2) had "neither lived nor worked" at the address supposedly discovered by the private investigator; (3) "had not authorized 'R. Price' or anyone else to accept legal papers for her[;]" and, (4) "had never been served with a copy of the summons, complaint, or amended complaint." *Id.* at 255-56, 833 S.E.2d at 200-01.

On appeal, the plaintiff in *Patton* argued the defendant's "single affidavit averring she did not reside" at the address discovered by the private investigator did not "overcome the presumption" she lived there. *Id.* at 258, 833 S.E.2d at 202. This Court held defendant had overcome

the presumption because the plaintiff had "produced no evidence other than the 'R. Price' receipt from FedEx to support the presumption of effective service." *Id.*

The facts before us are very similar to those in *Patton*. Defendant produced two sworn affidavits: (1) one averring he did not live at the address at the time the complaint and summons were delivered and attached paystubs indicating his current address; and, (2) another from the current occupant averring Defendant did not live at the address listed on the UPS delivery receipt on the date the summons and complaint were delivered. Those two affidavits, taken together, provided sufficient evidence for the trial court to find and conclude Defendant was not timely served according to the statute. *Id.* Plaintiff's argument is overruled.

2. Statute of Limitation Defense Pursuant to N.C. R. Civ. Pro. 4(j2)(2)

Plaintiff's argument asserting Rule 4(j2)(2) prevents Defendant from pleading the statute of limitation as a defense is similarly without merit. The application of Rule 4(j2)(2) is explained in *Taylor*:

> If the plaintiff, in seeking judgment by default, presents an affidavit giving rise to the presumption of valid service and this presumption is later rebutted, "the statute of limitation may not be pleaded as a defense if the action was initially commenced within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid."
>
> Because Taylor was not seeking the imposition of a *judgment by default*, *the sixty-day saving provision of Rule 4(j2)(2) was not applicable.*

Taylor, 108 N.C. App. at 771, 425 S.E.2d at 432 (emphasis supplied) (citations omitted).

Here, Plaintiff was not seeking judgment by default, as Defendant had timely moved to dismiss the complaint for improper service. Rule 4(j2)(2) is not applicable, and the expiration of the statute of limitation bars Plaintiff from bringing the claim again. *Id.*; *see also United States v. Locke*, 471 U.S. 84, 101, 85 L.Ed.2d 64, 80 (1985) ("[S]tatutes of limitations [ ] necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a [statute of limitations] is to have any content, the deadline must be enforced."). Plaintiff's argument is overruled.

IV. Conclusion

The trial court properly concluded Plaintiff had failed to timely perfect service upon Defendant. The two affidavits Defendant submitted with his motion to dismiss sufficiently rebutted any presumption the service was valid. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(d); *Patton*, 267 N.C. App. at 258, 833 S.E.2d at 202.

The trial court also properly dismissed Plaintiff's claim with prejudice, because Plaintiff was not seeking a default judgment and Rule 4(j2)(2) of the North Carolina Rules of Civil Procedure does not apply. N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2); *Taylor*, 108 N.C. App. at 771, 425 S.E.2d at 432. The statute of limitation bars Plaintiff from renewing his claims. *Id.*; *Locke*, 471 U.S. at 101, 85 L.Ed.2d at 80. The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges ZACHARY and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 FEBRUARY 2023)

DUNCAN v. TRANSEAU No. 22-375	Guilford (19CVD7868)	Reversed and Remanded.
ELLER v. AUTEN No. 22-577	Rowan (20CVS1518)	Affirmed
GRIFFING v. GRAY, LAYTON, KERSH, SOLOMON, FURR & SMITH, P.A. No. 22-576	Gaston (21CVS4249)	Vacated and Remanded.
IN RE A.A.C.D. No. 22-202	Mecklenburg (19JT143)	Affirmed.
IN RE C.M.S. No. 22-512	Iredell (16JT227)	Affirmed
IN RE E.P. No. 22-352	New Hanover (16JT358) (16JT359) (20JT96)	Affirmed
IN RE FORECLOSURE OF LIEN BY EXEC. OFF. PARK OF DURHAM ASS'N, INC. v. ROCK No. 20-405-2	Durham (18SP1035)	Vacated and Remanded
IN RE L.G.M.W. No. 22-419	Mitchell (20JT1)	Affirmed.
IN RE M.G.B. No. 22-389	Alamance (20JA155) (20JA156) (20JA46)	Affirmed
STATE v. CASS No. 22-187	Yadkin (18CRS50638) (18CRS50640) (18CRS50894-95) (18CRS50916) (18CRS50918-21) (18CRS50923)	No Error
STATE v. DAVIS No. 22-645	Cumberland (20CRS55737)	No Error

STATE v. JONES No. 22-716	Guilford (21CRS74073) (21CRS80277)	Affirmed.
STATE v. ORE No. 21-693-2	Davidson (20CRS50976) (21CRS681)	Dismissed
STATE v. PHAIR No. 22-445	Lee (20CRS63)	Affirmed
STATE v. SPEAKS No. 22-499	Surry (18CRS52806) (19CRS461)	No Error
STATE v. TEAL No. 22-336	Scotland (18CRS52094) (18CRS52115) (19CRS181) (19CRS69)	Affirmed In Part; Remanded For Resentencing.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

plaintiffs abandoned the issue of whether sovereign immunity was a valid ground for dismissal of their unjust enrichment claims because plaintiffs did not argue this issue on appeal. Even if plaintiffs had raised the issue, the appellate court noted that contracts implied in law—which allow recovery based on quantum meruit, an equitable remedy, to prevent unjust enrichment—do not waive sovereign immunity. **Dieckhaus v. Bd. of Governors of Univ. of N.C., 396.**

Appellate rule violations—gross and substantial—dismissal warranted— Respondent's numerous appellate rule violations, both jurisdictional and nonjurisdictional—particularly her counsel's failure to include the order appealed from in the record on appeal and to timely serve the proposed record—constituted gross and substantial violations warranting dismissal of her appeal from an order of foreclosure. Other violations that impaired appellate review included the failure to file the transcript and all the evidence presented to the trial court, failure to serve and/or provide proof of service on several filings, and failure to include necessary sections of the appellate brief. **In re Foreclosure of Moretz, 117.**

Criminal judgment—oral notice of appeal in open court—sufficient to confer jurisdiction—Where defendant properly gave oral notice of appeal in open court immediately upon entry of the final judgment in his criminal prosecution but did not file a written notice of appeal, defendant's petition for writ of certiorari (in the event that his oral notice of appeal was deemed inadequate) was unnecessary and therefore dismissed. Appellate Procedure Rule 4 allows parties to take appeal by giving oral notice of appeal at trial. **State v. Graham, 477.**

Final judgment—remaining claim voluntarily dismissed—appeal not interlocutory—Although the trial court's order granting defendant's motion to dismiss as to two of plaintiff's claims was not a final judgment at the time it was entered because one claim was left still pending, plaintiff's subsequent voluntary dismissal of the remaining claim rendered the trial court's order a final judgment. When plaintiff thereafter filed his notice of appeal from the order, the appeal was not interlocutory and it was properly before the Court of Appeals. **Bassiri v. Pilling, 538.**

Interlocutory order—no Rule 54(b) certification—no petition for certiorari—failure to argue substantial right in main brief—In a breach of contract action arising from the sale of a luxury car, defendants' appeal from an order dismissing their third-party claims was dismissed where: (1) the order was interlocutory, since it left all other claims in the action unresolved; (2) the trial court had declined to certify the order as a final judgment under Civil Procedure Rule 54(b); (3) defendants did not petition the appellate court for a writ of certiorari; and (4) in their main appellate brief, defendants failed to include any facts or argument in their statement of grounds for appellate review asserting that the challenged order affected a substantial right. Although defendants did argue in a reply brief that the order deprived them of a substantial right to avoid inconsistent verdicts on the dismissed and remaining claims, they failed to show that separate proceedings on these claims would involve the same factual issues. **SR Auto Transp., Inc. v. Adam's Auto Grp., Inc., 449.**

Interlocutory order—substantial right—denial of motion to compel arbitration—no valid arbitration agreement—In a business contract dispute, where the trial court correctly concluded that defendant (a company that acted as an intermediary negotiator of cost savings) failed to demonstrate the existence of a valid arbitration agreement with plaintiff (an irrigation equipment company), defendant's appeal from the trial court's order denying its motion to compel arbitration was

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

CONSTITUTIONAL LAW—Continued

was not violated because the prosecutor did not ask the officer to comment on defendant's silence, did not rely on the officer's testimony to establish defendant's guilt or any element of the charged crime, and only mentioned defendant's noncooperation in order to contextualize law enforcement's decision not to immediately arrest him. **State v. Taylor, 333.**

Right to a public trial—*Waller* test—findings of fact—remand—In defendant's trial for attempted first-degree murder and related charges, the trial court violated defendant's Sixth Amendment right to a public trial by closing the courtroom without first conducting the four-part test in *Waller v. Georgia*, 467 U.S. 39 (1984), and making the requisite findings of fact. Given the limited closure and the fact that the trial court failed to conduct the *Waller* test, the matter was remanded for the trial court to conduct the *Waller* test and make appropriate findings of fact. **State v. Miller, 660.**

CONTRACTS

Breach—husband sponsoring immigrant wife—failure to provide financial support under Form I-864—subject matter jurisdiction—In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife), where the husband had signed a United States Citizenship and Immigration Services Form I-864 "Affidavit of Support" promising to sponsor and financially support the wife when she immigrated to the U.S., the trial court had subject matter jurisdiction to hear the wife's breach of contract claim alleging that the husband failed to continue paying support under the Form I-864 for years after they separated. Although the support obligation under a Form I-864 is calculated on an annual basis, the wife was not required to renew her breach of contract claim every year after the date of separation where her complaint prayed for all monetary damages resulting from the alleged breach; therefore, the husband's argument—that the only year the court possessed jurisdiction over the wife's claim was the year that the parties separated—was meritless. **Pelc v. Pham, 427.**

CONVERSION

Corporate assets—contracts, orders, payments—not tangible—In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) converted corporate assets when they left the existing corporation to form a new business entity and diverted contracts, orders, and payments to the new business, as well as contacting existing customers about moving over to the new business, the trial court properly granted summary judgment to defendants because the property listed by plaintiff consisted of business opportunities, expectancy interests, and contract rights that were not subject to a conversion claim. To the extent plaintiff's allegations about payments and billing could be considered to involve tangible assets, plaintiff failed to identify specific sums in order to support his claim. **Duffy v. Camp, 46.**

CORPORATIONS

Breach of fiduciary duty—by chief executive officer—evidence of resignation—genuine issue of material fact—In a business dispute in which plaintiff (one of three shareholders of a corporation), asserted that defendant (one of the other shareholders who also served as the corporation's chief executive officer) had breached his fiduciary duties of loyalty and due care to the corporation, the trial court improperly granted summary judgment to defendant. There were genuine

CORPORATIONS—Continued

issues of material fact regarding the timing and nature of defendant's severance from the corporation, which would determine when his fiduciary duties as an officer ceased and thus whether his activities in contacting existing clients about moving to a newly formed business constituted a breach of those duties. **Duffy v. Camp, 46.**

Breach of fiduciary duty—by majority shareholders—no domination and control over minority shareholder—no fiduciary relationship—In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that he was a minority shareholder and that defendants (the other two shareholders) owed him a fiduciary duty based on their majority shareholder status but that they breached that duty by forming a new business entity similarly named to the old one and signing new contracts with existing clients, the trial court properly granted summary judgment to defendants because plaintiff failed to demonstrate that defendants were controlling shareholders who exerted domination and influence over him. **Duffy v. Camp, 46.**

Claims asserted by shareholder and officer—direct versus derivative claims—In a business dispute in which plaintiff, who was one of three shareholders in a corporation and who also served as an officer, filed a complaint against the other two shareholders asserting multiple claims both as an individual and derivatively—including breach of fiduciary duty, common-law trademark infringement and conversion—plaintiff was not entitled to assert his claims in his individual name because shareholders in general may not bring individual actions unless either of two exceptions apply, neither one of which applied in this case. Where the appellate court determined that the trial court should not have granted summary judgment to defendants on all claims, the trial court was directed on remand to consider plaintiff's surviving claims as a derivative suit. **Duffy v. Camp, 46.**

Common-law trademark infringement—new business—similar name—likelihood of confusion—In a business dispute in which plaintiff (one of three shareholders of a corporation) asserted that defendants (the other two shareholders) committed common law trademark infringement by leaving the corporation, named CampSight Strategic Communications, Inc., and forming a new entity with the name CampSight Strategies, LLC, the trial court properly granted summary judgment in favor of defendants where plaintiff presented no evidence that defendants' actions likely produced actual confusion among customers. **Duffy v. Camp, 46.**

CRIMINAL LAW

Prosecutor's closing argument—defendant's character—insinuation that defendant planned a mass shooting—In closing arguments at a trial for solicitation to commit first-degree murder, the trial court did not err in failing to intervene during the prosecutor's closing argument where none of the statements were so grossly improper as to constitute reversible error. The prosecutor's characterization of the evidence and comment on defendant's apparent lack of remorse, while unfavorable to defendant regarding his intent to commit the offense, were supported by a reasonable interpretation of the evidence, and the prosecutor's summary of the relevant law on solicitation was accurate. The prosecutor's statements invoking mass shootings and suggesting that defendant intended to kill his victims with a similar type of action, while improper, when considered in context were not prejudicial or so grossly improper as to merit reversal. **State v. Norris, 302.**

Prosecutor's opening statement—forecast of evidence not introduced—not grossly improper—In a trial for taking indecent liberties with a child, the trial court

CRIMINAL LAW—Continued

was not required to intervene ex mero motu during the State's opening statement (to which defendant did not object) or to instruct the jury to disregard that opening statement, in which the State forecast evidence from a witness who the State said would corroborate location details that had been described by the victim but who did not testify at trial. The prosecutor's statements were not so grossly improper or prejudicial as to warrant a new trial; further, the trial court properly instructed the jury that opening statements did not constitute evidence and the State's failure to introduce forecast evidence could have been addressed by defense counsel at closing. **State v. Owens, 513.**

Recordation—private bench conferences—no request—In a trial for uttering a forged instrument and obtaining property by false pretenses, the trial court did not violate defendant's right to recordation under N.C.G.S. § 15A-1241 by failing to record several private bench conferences between the trial judge and the attorneys where defendant never requested that the subject matter of the bench conference conversations be reconstructed for the record. **State v. Mackey, 1.**

DAMAGES AND REMEDIES

Equitable remedy—breach of quasi-contract—loan to purchase rental home—no credit given for "sweat equity"—In a divorce case where, during the marriage, the wife loaned money to the husband so that he could purchase a rental home in Georgia but he never paid her back, the trial court did not abuse its discretion in awarding equitable relief to the wife—based on a finding that a quasi-contract existed with respect to the loan—without crediting the husband for his "sweat equity" in repairing some of the wife's properties in Australia. The quasi-contract between the parties concerned only the rental home, and therefore the court did not have to consider any of the parties' other properties when fashioning an equitable remedy. Further, the court also declined to credit the wife with the "sweat equity" she purportedly put into repairing the parties' residential property in North Carolina. **Pelc v. Pham, 427.**

Equitable remedy—breach of quasi-contract—loan to purchase rental home—North Carolina Foreign-Money Claims Act—currency for payment of damages—In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife) where, during the marriage, the wife loaned money to the husband so that he could purchase a rental home in Georgia but he never paid her back, and where the trial court awarded equitable relief to the wife based on a finding that the parties had a quasi-contract with respect to the loan, the court erred by awarding damages in U.S. dollars. Under the North Carolina Foreign-Money Claims Act, relief should have been awarded in Australian dollars (AUD) because: (1) the wife loaned the money in AUD, and the husband regularly made interest payments on the loan in AUD; (2) the parties used AUD "at the time of the transaction"; and (3) the wife's loss was "ultimately felt" in AUD. **Pelc v. Pham, 427.**

Restitution—criminal case—amount—stipulation—ability to pay—In a prosecution for attempted identity theft and possession of a stolen motor vehicle, the trial court did not abuse its discretion in ordering defendant to pay $11,000 in restitution where defendant had stipulated to this amount at her sentencing hearing and had not presented any evidence showing that she lacked the ability to pay that amount. **State v. Black, 653.**

EVIDENCE—Continued

opinion testimony by three officers identifying defendant as the shooter in the surveillance footage of the crime. Given that the officers had had previous encounters with defendant before viewing the footage, that defendant's appearance had changed between the night of the crime and defendant's trial, and that the quality of the surveillance video itself was poor, there was a rational basis for concluding that the officers were more likely than the jury to correctly identify defendant as the individual shown in the footage. **State v. Taylor, 333.**

Prior bad acts—admissibility under Rules 401, 402, 403, and 404(b)—murder and attempted murder—In a prosecution for multiple counts of murder and attempted murder, where defendant set fire to the house where his girlfriend had been staying—believing that his girlfriend was inside the house when, in fact, her friend's family was inside—the trial court properly admitted evidence regarding defendant's prior attempt to burn down his girlfriend's father's car, another incident where he successfully burned down a vehicle belonging to the mother of his former romantic partner, and various acts of violence toward both the girlfriend and former partner. The evidence was relevant under Evidence Rules 401 and 402 because it was probative of defendant's identity, common scheme or plan, motive, knowledge, and *modus operandi*; and it was admissible under Rule 404(b) as evidence tending to show defendant's intent, motive, malice, premeditation, and deliberation. Further, defendant's prior acts were not too temporally remote from the charged crimes to warrant exclusion under Rule 403. **State v. Davis, 456.**

Prior bad acts—text messages—identity of substance as marijuana—In a drug prosecution, the trial court did not err by admitting prior bad act evidence in the form of text messages from defendant's cell phone tending to show defendant's interest in purchasing and possessing marijuana, in order to prove motive, intent, and knowledge. The evidence was relevant because it corroborated the State's contention that the substance in defendant's possession was marijuana and not legal hemp. Furthermore, the trial court's decision to admit the evidence was supported by reason and was not an abuse of discretion. Finally, even assuming that photographic evidence from defendant's cell phone was erroneously admitted, the error was harmless because of the substantial amount of unchallenged evidence of defendant's guilt. **State v. Massey, 501.**

Solicitation to commit murder—drawings and notes of weapons—testimony from people on defendant's "kill list"—more probative than prejudicial—In a trial for solicitation to commit first-degree murder, the trial court did not err by admitting a collection of defendant's drawings and notes depicting the comic book villain the Joker as well as a variety of weapons, or by admitting testimony from eleven of the thirteen people on defendant's "Kill List" and from a relative of a twelfth person on the list. Both types of evidence were admissible under Evidence Rule 403 where, even though they undeniably posed a risk of prejudice to defendant, they were nonetheless more probative than unfairly prejudicial regarding defendant's state of mind and the specificity of defendant's plan to hurt real people. **State v. Norris, 302.**

Solicitation to commit murder—drawings and notes of weapons—testimony from people on defendant's "kill list"—relevance—In a trial for solicitation to commit first-degree murder, the trial court did not err by admitting a collection of defendant's drawings and notes depicting the comic book villain the Joker as well as a variety of weapons, or by admitting testimony from eleven of the thirteen people on defendant's "Kill List" and from a relative of a twelfth person on the list. Both types of evidence were admissible as being relevant under Evidence Rules 401 and

SEARCH AND SEIZURE

Motion to suppress—denial—rationale for ruling—In denying defendant's motion to suppress, the trial court adequately provided a rationale for its ruling where the trial court's statements from the bench during the hearing and during a later session of open court, coupled with the relevant conclusion of law, made clear what the court had concluded: that the officers had probable cause to conduct the warrantless search of defendant's vehicle based on the totality of the circumstances despite the police canine's failure to alert during a sniff search around the vehicle. **State v. Aguilar, 248.**

Motion to suppress—warrantless search of vehicle—failure of canine to alert—totality of circumstances—The trial court's denial of defendant's motion to suppress evidence of contraband found during a warrantless search of his vehicle was affirmed where the totality of the circumstances—including the reliable information from confidential informants, which was confirmed by the observations of experienced narcotics investigators—supported the conclusion that it was objectively reasonable to believe that defendant's vehicle contained narcotics, even though a police canine failed to alert on the vehicle. **State v. Aguilar, 248.**

Probable cause—search incident to arrest—medically canceled driver's license—misdemeanor versus infraction—In a prosecution of drug offenses, the trial court erred by granting defendant's motion to suppress evidence obtained during a search incident to arrest, which defendant was subjected to after law enforcement officers conducted a traffic stop of defendant's car on the basis that they ran a license plate number check and discovered that the driver's license of the registered vehicle's owner had been medically canceled. The officers had probable cause to arrest defendant because, interpreting multiple statutory sections together, the offense of driving with a medically canceled license is comparable to the offense of driving without a license and, absent one of several statutory exceptions that were inapplicable in this case, constituted a misdemeanor (pursuant to N.C.G.S. § 20-35(a)) and not a traffic infraction (for which the officers would not have had authority to make an arrest). **State v. Duncan, 467.**

Search warrant application—affidavit—probable cause—nexus between cellphone and home invasion—The trial court properly denied defendant's motion to suppress evidence found on his cellphone where the warrant application's supporting affidavit established probable cause for the search by demonstrating a nexus between the cellphone and an armed home invasion, based on the following details: the victim described a red and black suitcase that had been stolen from his home; the victim's neighbor described a dark late-model Lexus with chrome rims that was parked near the home at the time of the invasion; the neighbor later positively identified the vehicle; that same vehicle had been used to transport defendant to the hospital later in the night of the home invasion; the registered owner of the Lexus consented to having her car searched, which led to the discovery of the stolen suitcase and defendant's white cellphone; the car's owner explained to law enforcement that she had loaned out her car earlier in the day, that she did not know what the car had been used for, that defendant was her cousin, and that defendant owned a white cellphone that was missing. **State v. Byrd, 276.**

Traffic stop—frisk—reasonable suspicion—possession of a firearm by a felon—In a prosecution for possession of a firearm by a felon, the trial court properly denied defendant's motion to suppress evidence of a pistol that a police officer had seized from defendant's vehicle after frisking both defendant and the vehicle (during a lawful traffic stop). The totality of the circumstances showed that the

WILLS

Caveat proceeding—undue influence—no forecast of evidence—In a caveat proceeding brought by decedent's son in which he alleged that the propounder—a friend of decedent's to whom decedent left his entire estate—obtained the will through undue influence and duress while decedent was physically and mentally weakened, the trial court properly granted summary judgment for the propounder because the caveator failed to set forth specific facts to establish a genuine issue of material fact as to whether the propounder exerted fraudulent influence on decedent to procure the will. **Paxton v. Owen, 167.**

WORKERS' COMPENSATION

Calculation of average weekly wage—fifth method—date when decedent would have ended employment—In a workers' compensation case in which decedent died while working a summer job at a bakery, the Industrial Commission did not err by applying the fifth method of calculating average weekly wage (N.C.G.S. § 97-2(5)), rather than the third method, where the Commission's findings supported its conclusion that the third method would be unfair to defendants because decedent was working for the summer until his next school semester began in August, such that his earnings from May to August would have constituted his total earnings for that year. However, the Commission erred in its calculation of decedent's average weekly wage by using his start date until his date of death (in July), rather than his start date until the date he would have ended his employment had he not died (in August). **Gilliam v. Foothills Temp. Emp., 624.**