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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

COURTNEY RENEE AMAN, PLAINTIFF
v.
ERIC A. NICHOLSON, DEFENDANT

No. COA22-15

Filed 7 March 2023

1. Appeal and Error—record on appeal—Rule 11(c) supplement—categories of evidence permitted

In a child custody action, where the trial court had excluded the father's three expert witnesses and their reports from evidence at trial, the court erred by excluding from the record on appeal the experts' CVs and reports, which the father had submitted in an Appellate Rule 11(c) supplement. The expert witness materials fell under two of the five disjunctive categories of evidence that Rule 11(c) allows to be included in a record on appeal—specifically, the father had "served" the materials on the mother, with one of the reports having been served over a year before trial; and the father had "submitted for consideration" all of the materials to the court at trial.

2. Discovery—Rule 26—required disclosure of expert witnesses—timeliness—prejudice

In a child custody action, the trial court did not abuse its discretion in excluding evidence from two of the father's proposed expert witnesses on grounds that, by waiting until the first day of trial to disclose the experts, the father failed to disclose them sufficiently in advance of trial as required under Civil Procedure Rule 26(b). The court did err under Rule 26(b) in excluding testimony and a report from the father's third expert, who had performed a psychological

evaluation of the father pursuant to a prior court order, where the mother had received a copy of the report (including the psychological evaluation) over a year before trial; however, the court's error did not prejudice the father because, based on the court's own factual findings and statements at trial, the primary issues addressed in the expert's report had no bearing on the court's decision to grant primary custody to the mother.

3. Child Custody and Support—division of legal custody—both parents "fit and proper" to co-parent—primary custody and final decision-making authority to mother

In a child custody action, the trial court did not abuse its discretion by awarding the mother primary physical and legal custody of the parties' son or by giving the mother final decision-making authority should the parties disagree when making significant life decisions for the child. The court's unchallenged findings of fact established that the mother was the child's primary caregiver, had made great efforts to maintain a stable and healthy life for the child, had greater work flexibility allowing her to devote more time to childcare, and had several family members who lived locally and could provide additional caregiving support. Further, although the court found that both parties were "fit and proper" persons to co-parent their son and that the father had taken good care of the child, it properly determined that the mother was in a better position to understand the child's medical, educational, and social needs.

Judge CARPENTER concurring in result only as to Part III-B.

Appeal by defendant from orders entered 12 August 2021 by Judge William C. Farris in District Court, Halifax County. Heard in the Court of Appeals 10 May 2022.

Lloyd C. Smith, Jr. and Lloyd C. Smith, III, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

STROUD, Chief Judge.

Defendant-Appellant ("Father") appeals from the trial court's Order on Child Custody and Child Support ("Custody Order") and Order Excluding Expert Testimony and Expert Reports ("Expert Witness Order"). Father argues the trial court erred in the Expert Witness Order

under North Carolina Rule of Civil Procedure 26(b). Father also argues the trial court erred in the Custody Order by awarding Plaintiff-Appellee ("Mother") primary legal custody of the parties' child. As to the Expert Witness Order, Father identified three proposed expert witnesses on the first day of trial. Although the trial court did not abuse its discretion in sustaining Mother's objection to two of Father's proposed expert witnesses who had not been previously disclosed to Mother, the trial court erred by excluding a report and testimony from an expert who did an evaluation as directed by a court order which was provided to Mother more than a year before trial. But based upon the trial court's findings of fact and statements regarding the primary issue addressed in that report, Father has failed to demonstrate prejudice from the exclusion of the report and witness. As to the Custody Order, Father has not challenged the trial court's findings of fact, and these findings support the trial court's conclusions of law, so we affirm.

I. Background

Mother and Father were married 6 June 2015. After both parties secured advanced degrees, they moved to Roanoke Rapids, North Carolina, where Mother had grown up and where she "has extensive community and family support locally." In April 2019, the parties' son, Charlie,[1] was born to the parties. Shortly after Charlie's birth, the parties separated in September 2019.

On 21 October 2019, Mother filed a complaint seeking child custody. The same day, the trial court entered a consent order for temporary child custody ("Consent Order") granting the parties temporary joint legal custody, with Mother to have temporary primary physical custody. Father was granted temporary visitation privileges which were set out in detail. The Consent Order required "[e]ach party [to] obtain a psychological evaluation with the results of said evaluation being immediately provided to the other party[.]" In addition, both parties were required "to continue to actively participate in individual and joint counseling at a frequency determined by the psychologist for a period of one (1) year from the date of the entry of this Order."

Approximately 10 months later, Mother filed a Motion to Modify Consent Order, alleging that the Consent Order had provided for the parties to re-evaluate the schedule one year after entry of the Consent Order, and if they were unable to agree to a modification of the terms and conditions of the Order, either party would have the right to file

---

1. We continue to use the pseudonym for the parties' child as used in the proceeding below.

a motion to modify. Mother requested that the trial court modify the Consent Order by granting her primary physical and legal custody, and if she was awarded only primary physical custody, that the trial court "define[ ] what is meant by joint legal custody." After "each Judge in the Sixth Judicial District had recused himself or herself" from hearing this case, on 18 February 2021 the case was scheduled by special commission before a judge from another district for hearing on the 28th, 29th, and 30th of April 2021.[2]

On 28 April 2021, the first day of trial, Father's counsel provided Mother's counsel a list of three potential expert witnesses he may call to testify, along with the CVs of each witness and written reports from two of the experts. Father had noted he was not sure if he would need to present testimony from the proposed witnesses, depending upon Mother's evidence. Mother presented her evidence on April 28 and 29, and when Father began presentation of his evidence, Mother's counsel raised an objection based upon North Carolina Rule of Civil Procedure 26(b)(4)(a)(1) to Father's expert witnesses.

Two of Father's three proposed expert witnesses, Dr. Avram H. Mack and Dr. Roger B. Moore, Jr. had prepared reports. The third expert, Dr. Evans E. Harrell, had been counseling Father, as required by the Consent Order, from about October 2019 up to the date of trial. Father's counsel had also provided a report from Dr. Varley to Mother's counsel, but Father did not intend to call Dr. Varley to testify. Dr. Moore had conducted Father's psychological evaluation, as directed by the Consent Order, in December 2019, and Mother received a copy of his report at that time. Father's counsel noted that Dr. Harrell is "an ongoing treater" and "really more of a fact witness but he's an expert in the sense that he's a Ph.D."

The trial court and counsel for both parties then engaged in an extensive colloquy regarding Mother's objection. Although Mother objected to evidence from Dr. Mack and Dr. Harrell, it is not entirely clear Mother was objecting to Dr. Moore's report or testimony. Mother's counsel acknowledged she had received a copy of Dr. Moore's report in December of 2019, arguing, based upon *Myers v. Myers*, 269 N.C. App. 237, 837 S.E.2d 443 (2020), "from a selfish perspective, my response would be . . . we'd like it stricken *except for the one that's been disclosed to us, and we obviously have no problem with that*," (emphasis added),

---

2. The reason why every judge in the Sixth Judicial District was recused from this case is not clearly stated in the Record. The only reference to this mass-recusal is the single finding from the Expert Witness Order.

referring to Dr. Moore's report. Mother's counsel then noted that "we would offer a second position[,]" arguing that since Father's income was far higher than Mother's income, "he ought to pay for us to be able to depose these witnesses," especially since one of the expert witnesses, Dr. Varley, "criticizes one of these other experts and says he's wrong." Mother argued that she could not have a fair hearing "if we don't have a chance to at least depose Dr. Mack and Dr. Varley, who is the only person that talked to Dr. Harrell, and all three of the other reports that were given, and Dr. Harrell, psychologist." Dr. Harrell "was actually giving family therapy to these two people[.]" Mother's counsel noted that Father was "conveniently not calling" Dr. Varley because he was the only psychologist who "says [Father's] got a problem." The trial court then rendered its ruling allowing Mother's motion to exclude all Father's expert witnesses, including Dr. Moore, and Father began presenting his evidence.

On or about 10 August 2021, the trial court entered the written Expert Witness Order addressing Mother's objection to Father's proposed expert witnesses. The trial court found that Dr. Moore's report had been provided to Mother's attorney on 5 December 2019, in accord with the Consent Order, and Father produced this same report for use at the trial. The trial court also found "[t]his was the first time that [Father] disclosed his intent to call any expert witness for trial or to attempt to introduce any expert witness report." Father never gave [Mother] "any indication by any means that he intended to introduce any psychological evaluations at the trial[.]" The trial court then, "as a Mixed Findings of Fact and Conclusions of Law determines that it has discretion under N.C.G.S. Section 1A-1, Rule 26(b)(4)(a)(1) to impose sanctions for failure of a party to voluntarily disclose the existence of expert witnesses and expert witnesses reports that he or she intends to introduce at trial[,]" and that Father's delay in disclosing his experts and their reports gave him "an unfair tactical advantage" under Rule 26 of Civil Procedure.

Then, the trial court excluded all three expert witnesses and their reports after concluding:

> 1. N.C.G.S. Section lA-1, Rule 26(b)(4)(a)(l) does require advanced disclosure and notice of expert witnesses who will testify at trial and their reports even without a discovery request, discovery plan, or court order.
>
> 2. The Court has the inherent authority to impose sanctions for failure to disclose sufficiently in advance of trial the identity of expert witnesses and the proposed use of their reports.

> 3. The Court also in its discretion can allow or exclude said evidence or impose other sanctions for failure to disclose.
>
> 4. The Court has exercised its discretion in this matter and determined that the testimony and reports should be excluded as failure to do so would further delay this action and the [ ] Father offered no justification acceptable to the court for his failure to give sufficient advance notice of the proposed expert witnesses and documentation.
>
> 5. As a Mixed Findings of Fact and Conclusions of Law, the late disclosure of said experts and their reports gave the [ ] Father "an unfair tactical advantage".

The trial proceeded and the Custody Order was entered on or about 4 August 2021.

Father filed notice of appeal from both the Custody Order and Expert Witness Order to this Court 2 September 2021. While settling the Record on Appeal, Mother "served objections to the proposed Record on Appeal to the [Father] on the 13th day of December, 2021 and served a copy of said objection on the undersigned Judge on the 15th day of December, 2021." The trial court held a judicial settlement conference and excluded Father's proposed expert witness reports–including Dr. Moore's report–from the Record on Appeal. The trial court concluded Father's proposed record evidence "[was] never submitted for consideration to the undersigned Judge, [was] never admitted into evidence or attempted to be admitted into evidence nor was there any offer of proof tendered regarding said" evidence. Father filed a petition for writ of certiorari in this Court, 18 January 2022, to preserve his challenge to the trial court's settlement of the Record on Appeal.

II. Appellant-Father's Petition for Writ of Certiorari

[1] We first address Father's Petition for Writ of Certiorari ("PWC"). Father argues the trial court erred when settling the Record on Appeal. Father argues the order settling the Record "does not follow the requirements of Rule 11(c) of the North Carolina Rules of Appellate Procedure by improperly excluding documents that are properly included in the Record." We first note there are two orders on appeal: the Custody Order and the Expert Witness Order. Most of Father's arguments on appeal address the Expert Witness Order. Father's notice of appeal does not address the trial court's order settling the Record. We grant Father's PWC because the trial court incorrectly applied Rule 11(c) of Appellate Procedure.

After the trial and after filing notice of appeal, Father's counsel included the CVs from all three proposed experts and the reports from two of the experts in "a proposed record and exhibit supplement[.]" Mother objected, and the trial court held a judicial settlement conference. After this conference, the trial court entered an order on or about 22 December 2021 and found the following:

> 2. The Appellant properly served the Appellee a proposed Record on Appeal on the 15th Day of November, 2021.
>
> 3. The Appellee properly served objections to the proposed Record on Appeal to the Appellant on the 13th day of December, 2021 and served a copy of said objection on the undersigned Judge on the 15th day of December, 2021.
>
> 4. The undersigned Judge gave notice of this hearing to which the parties consented . . . .
>
> 5. The Appellee is now requesting that the Court settle the Record on Appeal, specifically as it refers to Appellee's objection to the inclusion of certain documents, more specifically described in the Appellant's Rule 9(d)(2) document Exhibit Supplemental to the Printed Record on Appeal, specifically as identified as [Father]'s Experts Materials Excluded by the Trial Court.
>
> 6. At the trial of this action, the undersigned Judge entered an Order excluding expert testimony and expert reports.
>
> . . . .
>
> 8. In said Order, the undersigned Judge determined that the Appellant, through his counsel at trial on the morning of the first day of trial, April 28, 2021, delivered to the attorney for the Appellee, a list entitled "Possible Expert Trial Witnesses Disclosure" disclosing the identity of three potential expert witnesses with their expert reports that might be introduced and the curriculum vitae of the three expert witnesses.
>
> 9. The Appellee, through counsel, objected to the introduction of said expert reports or the testimony of said witnesses and the court after hearing arguments in his

discretion excluded said expert reports and sustained the objection to said experts testifying.

10. *At no time during the trial were the* [Father]'*s Expert Materials submitted for consideration to the undersigned Judge.*

11. *At no time during the trial were the* [Father]'*s Expert Materials admitted into evidence or attempted to be admitted into evidence.*

12. *At no time during the trial was an offer of proof tendered regarding said* [Father]'*s Expert Materials.*

13. The Appellee argues that Rule 11(c) of the North Carolina Rules of Appellate Procedure that states "[ ] provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included" controls and that said documents should be excluded from the Record on Appeal.

(Emphasis added.)

The trial court then concluded "as a matter of law that:"

1. The [Father]'s Documentary Exhibits entitled "[Father]'s Expert Materials Excluded by the Trial Court" were never submitted for consideration to the undersigned Judge, were never admitted into evidence or attempted to be admitted into evidence nor was there any offer of proof tendered regarding said [Father]'s Expert Materials excluded by the trial court.

2. Under Rule 11(c) as said documents were not submitted for consideration or admitted into evidence or no offer of proof was tendered, they should not be included in the Record on Appeal.

Father and Mother argue about how to interpret Rule 11 of Appellate Procedure as it applies to Father's "Expert Materials Excluded by the Trial Court." At the time the trial court judicially settled the Record on Appeal and denied Father the inclusion of the proposed expert reports, Rule 11(c) stated:

> Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall

> specify any item(s) for which an objection is based on the contention that the item was not *filed*, *served*, *submitted for consideration*, *admitted*, ***or*** *made the subject of an offer of proof*, or that the content of a statement or narration is factually inaccurate. . . .
>
> . . . If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," . . . provided that *any item not filed*, *served*, *submitted for consideration*, ***or*** *admitted*, ***or*** *for which no offer of proof was tendered*, shall not be included. . . .
>
> . . . .
>
> The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects *material filed*, *served*, *submitted for consideration*, *admitted*, ***or*** *made the subject of an offer of proof*, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

N.C. R. App. P. 11(c) (emphasis added).

Again, we first note that Father has appealed from the Expert Witness Order, and it is abundantly clear from the transcript that Father submitted the information regarding the proposed expert witnesses and their reports to Mother's counsel and to the trial court. The arguments of counsel for both parties addressed details regarding each proposed witness and why each should or should not be allowed to testify. This is not a case involving materials which were never addressed at the trial court level, and one of the orders on appeal is directed specifically to the exclusion of those witnesses. And for purposes of the Record on Appeal, at this point we are considering only whether the materials regarding the experts should be included in the Rule 11(c) supplement, not whether the trial court erred by sustaining Mother's objection to use of the evidence at trial based upon North Carolina Rule of Civil Procedure 26(b).

Father argues Rule 11(c) defines five disjunctive categories and should evidence "fit[ ] within any of these categories, then it must be included in the record on appeal submitted to the appellate court." Mother argues this language is broken into three parts, and the first three categories are in fact one. Under Father's reading of the Rule, if evidence is (1) filed, (2) served, (3) submitted for consideration, (4) admitted, *or* (5) made the subject of an offer of proof, then it must be included in the record. Mother argues the additional "or" in the second recitation of categories in Rule 11(c) results in three categories of evidence: (1) evidence filed, served, and submitted for consideration, (2) evidence admitted, or (3) evidence made the subject of an offer of proof. Under Mother's reading of Rule 11(c), evidence must be filed, served, *and* submitted for consideration to meet the first category of material for inclusion in the record.

This issue presents an issue of statutory construction, and we review this type of issue *de novo*:

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

Myers v. Myers, 269 N.C. App. 237, 241, 837 S.E.2d 443, 448 (2020).

> "When the language of a statute is clear and without ambiguity, 'there is no room for judicial construction,' and the statute must be given effect in accordance with its plain and definite meaning." *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). However, if a literal reading of the statutory language "yields absurd results . . . or contravenes clearly expressed legislative intent, 'the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.' " *Id.* (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)); *see also Kaminsky v. Sebile*, 140 N.C. App. 71, 76, 535 S.E.2d 109, 112–13 (2000).

Griffith v. North Carolina Dept. of Correction, 210 N.C. App. 544, 559, 709 S.E.2d 412, 423 (2011). Based upon the plain language of Rule 11(c) and applying basic rules of grammar and punctuation, Father's

interpretation is correct. Rule 11(c) repeatedly refers to materials that were or were not "filed, served, submitted for consideration, admitted, *or* made the subject of an offer of proof." (Emphasis added.) "[T]he disjunctive [conjunction] 'or' is used to indicate a clear alternative. The second alternative is not a part of the first, and its provisions cannot be read into the first." *In re Duckett's Claim*, 271 N.C. 430, 437, 156 S.E.2d 838, 844 (1967); *see also Smith v. Bumgarner*, 115 N.C. App. 149, 152, 443 S.E.2d 744, 745-46 (1994) ("Those persons who may bring a proceeding pursuant to G.S. § 49-14, *et seq.*, are specifically enumerated in G.S. § 49-16, separated by commas and the disjunctive 'or.' The provision is not ambiguous and its natural and ordinary meaning indicates that either of the listed persons may bring an action pursuant to G.S. § 49-14."). Once, Rule 11(c) uses the phrase: "any item not filed, served, submitted for consideration, *or* admitted, *or* for which no offer of proof was tendered, shall not be included[.]" (Emphasis added.) The additional "or" in this phrase does not change the meaning; the second "or" maintains the parallel structure of the list. The first four verbs on the list are introduced by the word "not," addressing any item not filed, not served, not submitted for consideration, or not admitted. But "not" cannot correctly introduce the last item "for which no offer of proof was tendered." The additional "or" maintains the grammatical structure of the sentence: "or for which no offer of proof was tendered." Mother's interpretation of Rule 11(c) focuses on the phrase with the additional "or," and Mother asserts this additional "or" results in three categories of evidence. But we must consider the entire statute in context. In three other phrases within the same subsection, five categories of material are described and those phrases do not include the additional "or." The phrase with the additional "or" has the same meaning as the other three phrases.

Mother's reading of Rule 11(c) is not supported by the plain language of Rule 11. Thus, if Father's proposed "Expert Materials Excluded by the Trial Court" fall within any of the five categories, they should have been included in a Rule 11(c) Supplement by the trial court. This interpretation is also consistent with prior cases from this Court. *See Morris v. Southeastern Orthopedics Sports Medicine and Shoulder Center, P.A.*, 199 N.C. App. 425, 432, 681 S.E.2d 840, 845 (2009) ("*The PEWD was served on defendants*, bringing it within the scope of documents allowed to be included in a Rule 11(c) Supplement to the Record on Appeal. N.C. R. App. P. 11(c) ('[A]ny item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included.'). Accordingly, we grant plaintiff's petition for writ of certiorari as to the PEWD and will consider it as part of our review." (emphasis added)).

In settling the Record on Appeal, the trial court erred by considering only the latter three categories of information, as indicated by the finding that Father did not make an offer of proof of the expert testimony and reports, and not including in the Rule 11(c) Supplement information that had been "served" upon Mother. "[S]ervice may be made as follows: . . . [u]pon a party's attorney of record . . . [b]y delivering a copy to the attorney. Delivery of a copy . . . means handing it to the attorney[.]" N.C. Gen. Stat. § 1A-1, Rule 5(b)(1) (2021). It is apparent from the transcript all materials were "served" upon Mother's counsel, and one portion of the evidence, Dr. Moore's report, had been served upon Mother over a year earlier in compliance with the Consent Order. In addition, Father "submitted for consideration" the materials regarding the expert witnesses, including their CVs and reports, and presented oral summaries of the testimony each witness would offer. The trial court sustained Mother's objection and did not consider the materials, but Father did "submit" them for consideration. Father argued Dr. Harrell would constitute "more of a fact witness" and "he will be speaking to his ongoing counseling with [Father]." Dr. Mack "did an evaluation of Dr. Nicholson with his son and read reports[,] and . . . he's going to offer an opinion . . . about [Father's] parenting skills and his ability to take care of [Charlie]"; and as to Dr. Moore's report, as we have already noted, the report was based upon a court-ordered evaluation and was served on Mother 17 months earlier. Father's counsel additionally argued that these expert witnesses and reports would be used to rebut Mother's case because Father "didn't know that [Mother] [was] going to, as it turns out, attack [Father]'s ability to take care of [Charlie.]"

Father "served" the materials regarding proposed expert witnesses and their reports upon Mother at trial; the issue for purposes of North Carolina Rule of Appellate Procedure 11(c) is not whether this service was timely for purposes of North Carolina Rule of Civil Procedure 26(b), but only whether it was served. Counsel for both parties presented arguments and the trial court conducted an extensive colloquy regarding the information each expert witness would address. In addition, Father appealed from the Expert Witness Order, and on appeal we must consider the parties' arguments regarding that Order, not just the Custody Order. Because the trial court erred in settling the Record by excluding Father's proposed expert materials which were served on Mother at the trial as directed by North Carolina Rule of Appellate Procedure 11(c), we grant Father's PWC, reverse the trial court's order settling the Record on appeal, and thus include the expert witness materials attached to his PWC as a Rule 11(c) supplement to the Record on Appeal.

III. Expert Witness Order

Father appeals from both the Expert Witness Order and the Custody Order. We begin with the Expert Witness Order.

A. Standard of Review

Father first argues the trial court erroneously excluded all his expert testimony and reports under North Carolina Rule of Civil Procedure 26(b). This Court has recently addressed a similar issue in *Myers v. Myers*:

> [Father]'s first issue arises from the trial court's exclusion of testimony of [his] expert witness based upon [his] failure to disclose the identity of the witness[es] sufficiently in advance of trial. As a general rule, we review the trial court's rulings regarding discovery for abuse of discretion. *See Miller v. Forsyth Mem'l Hosp., Inc.*, 174 N.C. App. 619, 620, 625 S.E.2d 115, 116 (2005) ("It is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion. In addition, the appellant must show not only that the trial court erred, but that prejudice resulted from that error. This Court will not presume prejudice." (citations and quotation marks omitted)). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

Myers, 269 N.C. App. at 240, 837 S.E.2d at 447-48. Father argues "the trial court erred [both] as a matter of law and otherwise abused its discretion under North Carolina Rule of Civil Procedure 26 in precluding Father from presenting any evidence or testimony from his expert witnesses." (Capitalization altered.)

B. Analysis

[2] Father's arguments address the trial court's application of North Carolina Rule of Civil Procedure 26. *See* N.C. Gen. Stat. § 1A-1, Rule 26 (2021). Father argues "[t]he trial court erred as a matter of law in excluding" his experts and their reports due to the fact the trial was scheduled with less than 120 days' notice, and under Rule 26 "[t]here was no 'unfair tactical advantage' in the provision of Dr. Moore's report when Mother had had possession of that report for over a year prior to the trial date." Mother argues Father failed to preserve this issue for appellate review

because he failed to comply with North Carolina Rule of Civil Procedure 43 by failing to make a specific offer of proof as to the significance of the evidence. *See* N.C. Gen. Stat. § 1A-1, Rule 43 (2021) ("[I]f an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given. . . . In action tried without a jury the same procedure may be followed[.]"); *Currence v. Hardin*, 296 N.C. 95, 99-100, 249 S.E.2d 387, 390 (1978) (In order to preserve the exclusion of evidence for appellate review, "[u]nless the significance of the evidence is obvious from the record, counsel offering the evidence must make a specific offer of what he expects to prove by the answer of his witness."). She also argues, even had Father complied with Rule 43, "the trial court did not abuse its discretion in excluding [Father's] expert testimony and expert reports" because Father's "argument is premised upon an improper application of" North Carolina Rule of Civil Procedure 26. (Capitalization altered.)

In the Expert Witness Order, the trial court based its exclusion of Father's expert evidence upon Rule 26(b)(4)(a)(1). Father argues Rule 26(f) establishes "an important exception to the timing requirements for disclosure of written reports" under Rule 26(b)(4)(a)(1).[3] Rule 26(b)(4) states in relevant part:

> (4) Trial Preparation; Discovery of Experts.--Discovery of facts known and opinions held by experts, that are otherwise discoverable under the provisions of subdivision (1) of this subsection and acquired or developed in anticipation of litigation or for trial, may be obtained only as provided by this subdivision:
>
> a. 1. In general.–In order to provide openness and avoid unfair tactical advantage in the presentation of a case at trial, a party must disclose to the other parties in accordance with this subdivision the identity of any witness it may use at trial to present evidence . . . .

3. Father argues "reports are to be served '[a]t least 90 days before the date set for trial or the case to be ready for trial[.]' N.C. R. Civ. P. 26(f)(1)[,]" and " '[t]he time requirements of this sub-subsection shall not apply **if all parties had less than 120-days notice of the trial date**.' N.C. R. Civ. P. 26(f)(2) (emphasis added)." We note that this precise language is found in Rule 26(b)(4)(f). Rule 26(f) addresses discovery meetings following the filing of a complaint. Considering Rule 26's lack of clarity, we do not fault Father for incorrectly citing the Rule, for as the trial judge in *Myers* noted, "I think . . . [R]ule [26] is clear as mud." *Myers*, 269 N.C. App. at 247, 837 S.E.2d at 451-52. This poorly worded section of the Rule actually refers back to "sub-sub-subdivision 2. of sub-subdivision a. of this subdivision." *See* N.C. R. Civ. P. 26(b)(4)(f).

> 2. Witnesses providing a written report.--The parties shall have the option, in connection with the disclosures required by this subdivision, of accompanying the disclosure with a written report prepared and signed by the witness if the witness is one retained or specifically employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. . . .
>
> . . . .
>
> f. Time to disclose expert witness testimony.--Parties agreeing to the submission of written reports pursuant to sub-sub-subdivision 2. of sub-subdivision a. of this subdivision or parties otherwise seeking to obtain disclosure as set forth herein by interrogatory shall, unless otherwise stipulated, set by scheduling order or otherwise ordered by the court, serve such written report or in the case of no agreement on the submission of written reports, interrogatory:
>
> 1. At least 90 days before the date set for trial or the case to be ready for trial; or
>
> 2. If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under sub-subdivision a. of this subdivision, within 30 days after the other party's disclosure. If a party fails to provide timely disclosure under this rule, the court may, upon motion, take such action as it deems just, including ordering that the party may not present at trial the expert witness for whom disclosure was not timely made.
>
> The time requirements of this sub-subdivision shall not apply if all parties had less than 120-days' notice of the trial date.

N.C. Gen. Stat. § 1A-1, Rule 26.

Father cites our decision in *Myers* for the proposition that "[t]his Court has already held that Rule 26 has no explicit time frame by which a party must give advance notice of a party's expert witnesses." That much is true, and this lack of an explicit time frame is the source of the problem. We note the Federal Rules of Civil Procedure, upon which

North Carolina's rules were originally based, upon adoption in 1967, have since been amended to clarify this and other issues under Rule 26, but North Carolina's Rule 26 no longer mirrors Federal Rule 26. *See Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 164 (1970) ("The North Carolina Rules of Civil Procedure are modeled after the federal rules. 48 N.C.L.Rev. 636 (1970). In most instances they are verbatim copies with the same enumerations. Sizemore, 5 Wake Forest Intra.L.Rev. 1 (1969)."); *Wickes Corp. v. Hodge*, 7 N.C. App. 529, 530, 172 S.E.2d 890, 891 (1970) ("The 1967 General Assembly . . . enacted a new code of civil procedure . . . the effective date of the act [was] 1 January 1970[.]"). We addressed the changes to Rule 26 in detail in *Myers*:

> The General Assembly has amended the rule of procedure in civil cases for discovery of information about another party's expert witness. North [Carolina] Rule of Civil Procedure 26(b)(4) has largely been unchanged since 1975. With the amendments made by House Bill 376, S.L. 2015-153, the rule updates the methods of disclosing and deposing experts and implements some explicit work-product-type protections. The Rule now looks more like the corresponding provisions in Federal Rule of Civil Procedure 26 (after that Rule's own significant round of changes in 2010).

Myers, 269 N.C. App. at 243, 837 S.E.2d at 449 (quoting Ann Anderson, *North Carolina's Expert Witness Discovery Rule – Changes and Clarifications*, On the Civil Side: A UNC School of Government Blog (4 Sept. 2015, 5:00 AM), https://civil.sog.unc.edu/north-carolinas-expert-witness-discovery-rule-changes-and-clarifications/).

> As Professor Anderson's blog post correctly noted, subsection (b)(4)(a)(1) which requires disclosure is now more similar to Federal Rule of Civil Procedure 26. In addition, other amendments to Rule 26 adopted at the same time also made North Carolina's Rule 26 more similar to its federal counterpart. But since North Carolina has not adopted many of the other related provisions of the Federal Rules, the similarity is somewhat superficial. Regarding the 2015 amendments to Rule 26, Shuford's North Carolina Civil Practice and Procedure notes hat North Carolina Rule 26 and Federal Rule 26 both deal "with substantive aspects of discovery," but they are
>
> > fundamentally different in their respective approaches. Since 1993, when Federal Rule 26

> > was substantively rewritten, the discovery procedures were substantially changed to establish what amounts, through mandatory discovery requirements, to standing interrogatories and requests for disclosure and production. The matter must be produced no later than 14 days before a scheduled conference to formulate a joint written discovery plan. While the North Carolina Rule now lays out the framework for a discovery plan and conference to be crea[t]ed, it is not mandatory unless one of the parties requests to have a discovery meeting.
>
> Alan D. Woodlief, Jr., *Shuford North Carolina Civil Practice and Procedure* § 26:28 (2018).
>
> Because the 2015 Amendments to Rule 26 incorporated the concept of required disclosure of expert witnesses but set no procedure or timing for the disclosure, Rule 26(b[)](4)(a)(1) is ambiguous. The trial court appreciated this ambiguity, noting, "I think the rule is clear as mud." We must therefore review the trial court's interpretation of the 2015 Amendment to Rule 26 *de novo*. *See Moore v. Proper*, 366 N.C. at 30, 726 S.E.2d at 817.

Id. at 247, 837 S.E.2d at 451-52.

Ultimately, we concluded in *Myers* that while Rule 26 sets no time frame for the disclosure of expert witnesses: "Upon *de novo* review of Rule 26(b)(4)(a)(1), we hold the Rule *does require advance disclosure of expert witnesses* who will testify at trial, even without a discovery request, discovery plan, or court order."[4] *Id.* at 256, 837 S.E.2d at 456-57 (emphasis added). Additionally, "[t]he trial court [has] inherent authority to impose a sanction for failure to disclose sufficiently in advance of trial. The trial court *has discretion to allow or to exclude* [an expert]'s evidence or to impose another sanction for the failure to disclose[.]" *Id.* at 256, 837 S.E.2d at 457 (emphasis added).

Our discussion in *Myers* also concluded, after a comparison with the Federal Rules of Civil Procedure:

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4. Our holding the rule applies even absent discovery requests is important in the case at bar, as the trial court found "[n]either party has served any written discovery on the opposing party and neither party had, by written discovery, requested the identity of any expert witnesses."

> Since North Carolina General Statute § 1A-1, Rule 26(b)(4)(a)(1) does not include a timeframe for voluntary disclosure and the North Carolina Rules of Civil Procedure do not include the other related rule provisions which give Federal Rule 26(a)(2)(D) clear time requirements and the Federal Rule 37 provisions which give it "teeth," North Carolina's Rule 26(b)(4)(a)(1) leaves the matter of a party's compliance and any sanction or remedy for noncompliance within the trial court's inherent authority and discretion. The guiding purpose of disclosure in Rule 26(b)(4)(a)(1) is "to provide openness and avoid unfair tactical advantage in the presentation of a case at trial[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(1). Thus, the trial court must make a discretionary determination of *whether* [Father]*'s failure to disclose the expert sufficiently in advance of the trial gave* [*him*] *an "unfair tactical advantage" at trial or defeated the purpose of "providing openness" as contemplated by Rule 26(b).*

Id. at 255, 837 S.E.2d at 456 (emphasis added). In exercising its discretion, the trial court is not *required* to exclude evidence should a party fail to disclose sufficiently in advance experts that may testify at trial, but it may do so. *See id.* at 254-56, 837 S.E.2d at 456-57.

As to the "important exception" carved out of Rule 26(b)(4)(a)(1) by subdivision 26(b)(4)(f), "Rule 26(b)(4)(f) sets a time for disclosure of testifying expert witnesses *if* the parties have agreed to 'submission of written reports pursuant to sub-sub-subdivision 2. of sub-subdivision a. of this subdivision' *or* by interrogatories. The time for disclosure may also be set by stipulation, discovery plan, or court order." *Myers*, 269 N.C. App. at 249 n.7, 837 S.E.2d at 452 n.7 (emphasis in original) (citations omitted). Rule 26(b)(4)(f) therefore has no application "unless the parties have agreed to exchange reports from expert witnesses, have stipulated to a schedule or there is a discovery plan or order setting times for disclosure," and as a result "Rule 26(b)(4)(a)(1) puts the parties in the difficult position of being bound by a vague requirement to disclose expert witnesses without any particular time or method set for making that disclosure." *Id.* at 249, 837 S.E.2d at 453. In this case there was no agreement, stipulation, discovery plan, or order setting disclosure timelines, so Rule 26(b)(4)(f) is inapplicable here. *See id.*

The trial court was therefore vested with discretion to (1) exclude Father's expert testimony and reports and (2) impose any appropriate sanctions for failure to comply with Rule 26. When making its

"discretionary determination of whether [Father] fail[ed] to disclose the expert[s] sufficiently in advance of the trial[,]" the court was required to determine whether Father's delay "gave [him] an 'unfair tactical advantage' at trial or defeated the purpose of 'providing openness' as contemplated by Rule 26(b)." *Id.* at 255, 837 S.E.2d at 456.

1. Exclusion of Dr. Mack's Report and Testimony and Dr. Harrell's Testimony

Dr. Mack's potential testimony and report and Dr. Harrell's potential testimony were both first disclosed by Father on the first day of trial. The trial court did not abuse its discretion in excluding this evidence.

The trial court made the following relevant findings of fact:

> 8. This was the first time that the [ ] Father disclosed his intent to call *any expert witnesses* for trial or to attempt to introduce *any expert witness report*.
>
> . . . .
>
> 10. The [ ] Father never gave the [ ] Mother or [her] attorney notice of his intent to introduce *any* psychological evaluation . . . .
>
> 11. The attorney for the [ ] Mother objected to the testimony of these potential expert witnesses and to the introduction of any psychological evaluation or other reports prepared by said experts stating that *the same had not been supplied to him within a reasonable time*.
>
> 12. The [ ] Father, through counsel, admitted that *he had not previously produced the list of expert witnesses* . . . other than the one that was required by the Temporary Custody Order stated above. . . .
>
> 13. The [ ] Father *had never given the* [ ] *Mother any indication by any means that he intended to introduce any psychological evaluations* at the trial [of] this action.
>
> 14. The attorney for the [ ] Mother requested that the Court consider sanctions in this matter by continuing this trial . . . or that the Court exclude said testimony and reports.
>
> . . . .
>
> 16. The Court, as a Mixed Findings of Fact and Conclusions of Law determines that it has discretion

> under N.C.G.S. Section 1A-1, Rule 26(b)(4)(a)(1) to impose sanctions for failure of a party to voluntarily disclose the existence of expert witnesses and expert witnesses reports that he or she intends to introduce at trial.
>
> 17. The [ ] Father's failure to disclose the expert witnesses' identities and reports sufficiently in advance of the trial *gave the* [ ] *Father "an unfair tactical advantage" at trial or at least defeated the purpose of "providing openness" as contemplated by N.C.G.S. Section 1A-1, Rule 26(b).*
>
> 18. . . . the Court must either continue this matter . . . or . . . exclude the proposed witnesses and their reports.
>
> 19. Given that the child custody portion of this case has been pending since the 21st day of October 2019 and that this matter has been scheduled for trial before the undersigned Judge since the 18th day of February 2021, the Court cannot find any justification for not excluding said expert testimony and documentation in its discretion as allowed under N.C.G.S. Section 1A-1, Rule 26(a) as the [ ] Mother has been placed in an "unfair tactical position" by not having the opportunity to depose said expert witnesses and review their reports. Moreover, this case primarily involves custody and visitation issues which need to be resolved.

(Emphasis added.) Then, based upon these findings the trial court concluded:

> 1. N.C.G.S. Section 1A-1, Rule 26(b)(4)(a)(1) does require advanced disclosure of expert witnesses who will testify at trial and their reports even without a discovery request, discovery plan, or court order.
>
> 2. The Court has the inherent authority to impose sanctions for failure to disclose sufficiently in advance of trial the identity of expert witnesses and the proposed use of their reports.
>
> 3. The Court also in its discretion can allow or exclude said evidence or impose other sanctions for failure to disclose.
>
> 4. The Court has exercised its discretion in this matter and determined that the testimony and reports

> should be excluded *as failure to do so would further delay this action and the* [ ] *Father offered no justification acceptable to the court for his failure to give sufficient advance notice of the proposed expert witnesses and documentation.*
>
> 5. As a Mixed Findings of Fact and Conclusions of Law, the late disclosure of said experts and their reports *gave the* [ ] *Father "an unfair tactical advantage.*"

(Emphasis added.) The trial court then ordered "[t]he expert witnesses identified . . . the first day of trial in this hearing and the expert reports which were for the first time disclosed as being proposed as exhibits . . . are excluded."

The trial court's decision to exclude Drs. Mack and Harrell's testimony and Dr. Mack's report was not an abuse of discretion. Instead, the trial court came to "a decision manifestly [ ]supported by reason" and the order had to "have been the result of a reasoned decision." *See Myers*, 269 N.C. App. at 240, 837 S.E.2d at 447-48 (quoting *Briley*, 348 N.C. at 547, 501 S.E.2d at 656). The trial court found that Father had waited until the last possible moment, the first day of trial, to disclose potential expert witnesses to Mother. Even though Father was aware that the trial court was concerned with his behavior, and had even ordered a psychological evaluation as part of the Consent Order, Father had never given any indication up until trial that he would be calling any expert witness or providing any expert report regarding the psychological evaluation. By waiting until the eleventh hour Father placed himself in an unfairly advantageous position at trial. And, although Rule 26 does not set forth an explicit time frame for the disclosure of expert witnesses, it "does require advance disclosure of expert witnesses who will testify at trial, even without a discovery request, discovery plan, or court order[,]" as were the circumstances in the present case. *Id.* at 256, 837 S.E.2d at 456-57.

We also note, as to these expert reports, it appears Father had multiple psychological evaluations completed during November and December 2019, yet appears to only have intended to call the experts who offered favorable reports. On the first day of trial, Mother's attorney was also provided the name of a "Dr. Varley, who is the only person that talked to Dr. Harrell," and who apparently disagreed with at least one of Father's other proposed experts. Father's counsel, however, did not indicate he planned to call Dr. Varley. Father's counsel instead referred to "three expert witnesses," and included Drs. Mack, Harrell, and Moore. The trial court also considered the fact that this case had been pending

for nearly 18 months, and that visitation and custody issues would be delayed should the court continue the trial rather than exclude Father's proposed expert witnesses. The trial court did not arbitrarily decide to exclude Father's proposed experts. The decision whether to exclude Father's expert witnesses and reports was within the trial court's discretion and the circumstances of this case support exclusion of the expert witnesses and reports provided to Mother's attorney the first day of trial. *See Myers*, 269 N.C. App. at 240, 837 S.E.2d at 447-48 (citing *Miller*, 174 N.C. App. at 620, 625 S.E.2d at 116).

The trial court's decision to exclude Dr. Mack and Dr. Harrell's expert testimony and Dr. Mack's report was not an abuse of discretion. The portion of the trial court's Expert Witness Order excluding these experts is affirmed.

2. Exclusion of Dr. Moore's Report and Testimony

We address Dr. Moore's report and testimony separately because the facts as to his report and evaluation are quite different from those of the other proposed experts. We first note that Dr. Moore's report was prepared based upon the Consent Order and served upon Mother over a year prior to trial. Father's argument regarding Dr. Moore's report and testimony is thus much stronger than as to the other proposed expert witnesses who were just identified immediately prior to trial. There is no question that Mother had ample notice of Dr. Moore's report and opinions, and as noted above, it is not entirely clear that Mother objected to this evidence.[5]

As to Dr. Moore's report, the court found:

> 9. The parties were required to secure a psychological evaluation as to custodial fitness by the Temporary Custody Order entered herein by Consent in the case having Halifax File Number 19-CVD-901. [ ] Father secured such a psychological evaluation from Dr. Roger B. Moore, Jr. which psychological evaluation was provided to [ ] Mother's attorney on December 5, 2019, and which was the same report disclosed to [ ] Mother's attorney on April 28, 2021.

Addressing all three proposed expert witnesses, the court ultimately concluded "the late disclosure of said experts and their reports gave the [ ] Father 'an unfair tactical advantage.' "

5. Her counsel stated before the trial court: "[M]y response would be . . . we'd like it stricken except for the one that's been disclosed to us, and we obviously have no problem about that," referring to Dr. Moore's report.

When ruling on Mother's motion to exclude Father's proposed expert witness, the trial court stated:

> Regardless of the rule, basic fairness requires that a party tell the other party in advance that they intend to call expert witnesses so that the other side can be prepared, they can get their own expert witnesses to talk about it or they can interview or depose, as we say, your expert witness to find out what they might have an opinion about and what it's based upon.
>
> . . . .
>
> On reading the pleadings and listening to the evidence so far, it seems to me that nothing in the mother's case should have been a surprise to the father. She obtained a domestic violence protective order in September of 2019 alleging domestic violence. And I think any experts to dispute his -- or to dispute that characterization of his tendency to violence could have been planned prior to trial with notice to her so she could have a chance to depose that witness or gather other witnesses in the field.
>
> I'm not inclined to delay this trial. It's been two years almost -- well, a year and a half, since they separated. We've got a two-year-old child here at stake. I think the parties and [Charlie] need a resolution of this matter.

The trial court also recognized shortly before denying the motion: "Well now, the first one [, Dr. Moore's report,] you mentioned that they've had for several months, I believe that was required by the consent order that they signed in October. So -- and *so I know what that's all about*."[6] (Emphasis added.) In addition, Finding of Fact No. 9 in the Expert Witness Order also recognized that Dr. Moore's report was produced based upon the prior court order and had been provided to Mother long before trial. While the court noted that "nothing in the [M]other's case should have been a surprise to the [F]ather[,]" the trial court's Expert Witness Order did not distinguish between Dr. Moore's report and the other expert witnesses who were disclosed just before trial. Mother was served with the report long before trial and she had a full opportunity

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6. The trial court's statements in rendering the custody order also tend to indicate it was aware of the contents of Dr. Moore's report. Although various witnesses testified about the "events of September 20th," these events were the impetus to Mother's request for a protective order and the entry of the Consent Order, and Dr. Moore identified these events in his report.

to depose Dr. Moore, if she had wished to do so. Based upon the trial court's own findings, Father's use of Dr. Moore's report or his testimony at trial would not have resulted in any surprise to Mother or unfair tactical advantage to Father.

But even if we assume *arguendo* that the trial court erred by excluding Dr. Moore's evidence, Father has not demonstrated any prejudice from exclusion of this expert witness. *See Myers*, 269 N.C. App. at 240, 837 S.E.2d at 447 (citing *Miller v. Forsyth Mem'l Hosp., Inc.*, 174 N.C. App. 619, 620, 625 S.E.2d 115, 116 (2005) ("It is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion. In addition, the appellant must show not only that the trial court erred, but that prejudice resulted from that error[.]" (citations and quotation marks omitted))). Father argues he was prejudiced by the exclusion of his expert witnesses' evidence, including Dr. Moore's report and testimony, because the trial court granted primary custody and full final decision-making authority to Mother. The trial court decreed:

> 2. In exercising primary physical and legal custody of [Charlie], the Mother shall consult with the Father about any significant decisions in the life of said child such as major healthcare procedures, educational decisions, or extracurricular activities. However, if the parties cannot agree after a reasonable period of consultation (defined as meaning no more than 72 hours) *then the decision of the Mother as the primary physical and legal custodian will control the decision.*

(Emphasis added.) Father contends the trial court granting Mother total and final decision-making authority should the parties disagree, for any reason, as to "any significant decision[ ] in the life of said child" effectively deprives him of his right to co-parent his child.

Mother contends that even if the trial court should have allowed Father to present his proposed expert testimony and reports, he has failed to identify any specific findings he contends are unsupported by the evidence, nor has he demonstrated that the trial court abused its discretion by granting her primary custody and final decision-making authority, so he was not prejudiced by the exclusion. Father contends he was prejudiced because he was deprived of any right to make decisions as to raising his child and the trial court may have ruled differently if he had been allowed to present the expert evidence. We only address the potential prejudice to Father from the exclusion of Dr. Moore's report because, as stated above, even assuming *arguendo* the trial court erred

in excluding Dr. Moore's report, Father has not shown any prejudice resulting from the exclusion of Dr. Moore's report.

When evidence is improperly excluded and not considered by the trial court, the issue is not whether the findings of fact the trial court made were supported by the evidence; the issue is we normally do not know what findings the trial court might have made if it had considered the excluded evidence. We have reviewed Dr. Moore's report, and it is not apparent this evidence might have led the trial court to rule differently upon Father's decision-making authority or visitation schedule. And here, the trial court's rendition of the order and the findings of fact indicate Father was not prejudiced from the exclusion of Dr. Moore's report and testimony.

Dr. Moore's report notes that he prepared a "forensic psychological evaluation" and noted as the "reason for referral" that Father had "presented for a forensic psychological evaluation as agreed to in a consent order detailing temporary custody in the aftermath of events that occurred in the family home in September of 2019." Based upon the trial court's findings of fact and rendition of the rationale for the order in open court, Father has not demonstrated prejudice from the exclusion of Dr. Moore's report or testimony. The trial court did not find that Father suffered from any psychological disorder or that he presented any risk of harm to the child. To the contrary, the trial court found that Father "has a healthy and nurturing relationship with [Charlie,]" that he "has also been attentive and appropriate in his care of [Charlie] but has been less involved in the daily care of [Charlie] than the Mother because of the terms of the temporary custody order and because he has worked more hours than the Mother to provide financially for the family." The trial court concluded that Father is a "fit and proper person to have physical and legal custody of [Charlie.]" The trial court specifically noted when rendering the ruling that "[i]n making findings of fact that support this order, *I do not find the events of September 20th to be significant to the determination of custody or visitation and they really had little bearing on my judgment*. The arguments that day do not reflect the parties' care and concern for [Charlie]." (Emphasis added.) Therefore, even if we were to assume *arguendo* the trial court should have allowed Father to present evidence from Dr. Moore, based upon the trial court's findings of fact regarding Father and its determination that the events of September 20th did not have any real bearing upon its ruling, Father has failed to show the exclusion of Dr. Moore's evidence created any prejudice.

Because Father did not make a requisite showing of prejudice resulting from exclusion of Dr. Moore's evidence, *see Myers*, 269 N.C. App. at

240, 837 S.E.2d at 447-48 (citing *Miller*, 174 N.C. App. at 620, 625 S.E.2d at 116), we affirm the trial court's Expert Witness Order as to Dr. Moore.

IV. Custody Order

[3] "Visitation privileges are but a lesser degree of custody." *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978). Because both parents were found to be "fit and proper persons to have physical and legal custody of [Charlie]," and because Mother was granted primary legal custody and Father was granted visitation, we therefore "review a trial court's deviation from pure joint legal custody for abuse of discretion, [and] '[the] trial court's findings of fact must support the court's exercise of this discretion.' " *Eddington v. Lamb*, 260 N.C. App. 526, 535, 818 S.E.2d 350, 357 (2018) (quoting *Peters v. Pennington*, 210 N.C. App. 1, 17, 707 S.E.2d 724, 736 (2011); citing *Diehl v. Diehl*, 177 N.C. App. 642, 647, 630 S.E.2d 25, 28 (2006)). We must determine "whether, based on the findings of fact below, the trial court made specific findings of fact to warrant a division of joint legal authority." *Id.* (quoting *Hall v. Hall*, 188 N.C. App. 527, 535, 655 S.E.2d 901, 906 (2008)). However, as to the trial court's division of legal custody, we note "[o]ur trial courts have wide latitude in distributing decision-making authority between the parties based on the specifics of a case." *Id.* at 535, 818 S.E.2d at 357 (quoting *Peters*, 210 N.C. App. at 17, 707 S.E.2d at 736 (in turn citing *Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28)).

We first note Father does not specifically challenge any findings of fact in the Custody Order. He also does not argue the trial court abused its discretion in awarding Mother primary physical and legal custody. Father's arguments are instead limited to non-specific and general references to the trial court's findings and that these findings do not support its conclusions. Father argues there are "literally **no** findings to support an abrogation of Father's right to exercise joint legal custody over Charlie as a fit and proper parent of Charlie." (Emphasis in original.) Father argues the trial court erred by giving " 'primary' legal custody of Charlie" to Mother after finding both parents "fit and proper persons to have physical and legal custody of Charlie" because "primary legal custody gives Mother final decision[-]making authority over all significant decisions concerning Charlie[,]" and "[t]he trial court's order improperly denies Father his ability as a fit and proper parent to co-parent Charlie." Mother notes Father's failure to make any specific challenges to the trial court's Findings of Fact, and argues Father misunderstands the current law in North Carolina and "improperly asks this Court to overturn the award of primary legal custody to [Mother] and order [pure] joint legal custody[.]" The trial court did not abuse its discretion in awarding

Mother primary legal custody, and the trial court's findings of fact support its conclusions of law.

The trial court awarded Mother primary legal custody and final decision-making authority should the parties be unable to reconcile their positions as to "any significant decisions in the life of [Charlie] such as major healthcare procedures, educational decisions, or extra-curricular activities." The award of primary physical custody was made after the trial court concluded:

> 3. The Mother and Father are fit and proper persons to have physical and legal custody of [Charlie].
>
> 4. As a Mixed Findings of Fact and Conclusions of Law, the undersigned Judge determined that, at this time, it is in the best interest of the minor child, [Charlie], for the Mother to have primary physical and legal custody of [Charlie] with the Father having the visitation privileges as hereinafter set forth.

To support this conclusion of law, the trial court also made "specific findings of fact to warrant a division of joint legal authority." *Eddington*, 260 N.C. at 535, 818 S.E.2d at 357 (quotation marks omitted). In the Custody Order, the trial court found "Mother has extensive community and family support locally" and "Father is not from the Roanoke Rapids area" where the family lived. The trial court found "[t]he parties agreed after the birth of [Charlie]" that Mother's mother and cousin "would be caregivers of [Charlie], whenever either of the parties worked." The trial court also found Father returned to work full time, while Mother was able to structure her professional obligations so that she can spend significantly more time caring for Charlie. This includes having her mother and cousin care for Charlie while Mother is at work. Additionally, Mother has taken additional steps to ensure a healthy and balanced life for Charlie, including making "certain [Charlie] did not eat store-bought baby food or other such foods" by making "baby food from scratch as soon as he began eating solid food[,]" by making "him nutritious dishes which has resulted in [Charlie] having an extraordinary exposure to a number of healthy foods[,]" by clothing him and making all healthcare appointments, by "expos[ing] [Charlie] to a number of new friends in outdoor settings and places as reasonably possible given the COVID-19 pandemic and her valid concerns for [Charlie]'s safety," and by "limiting her income and work schedule so that she could spend time with [Charlie]." The trial court summarized its findings well when rendering the judgment in open court:

> It is clear to me that the mother has been the primary caregiver of [Charlie] since birth. She has been an extraordinary caregiver, absolutely devoted to [Charlie]'s care and development. She drastically limited her work schedule and her income.
>
> But I also find that the father has been attentive and appropriate in his care of [Charlie], just much less involved than the mother.

Although the trial court also found Father spent significant time with Charlie, fed and clothed him, and developed "a healthy and nurturing relationship with [Charlie] . . . by reading to him; exposing him to music, and involving [Charlie] in indoor structured play and outdoor play and activities when weather allows[,]" the trial court's decision to grant mother primary legal and physical custody was not an abuse of discretion. "Our trial courts have wide latitude in distributing decision-making authority between the parties based on the specifics of a case." *Eddington*, 260 N.C. App. at 535, 818 S.E.2d at 357 (quotations marks omitted). The trial court here granted Mother primary legal and physical custody after finding that Mother had made great efforts to ensure a stable, balanced, and healthy lifestyle for Charlie, and that Mother was "the primary caregiver" of Charlie. Mother was able to provide a greater degree of flexibility and support in her caretaking of Charlie and was able to leverage her local family for additional support. The trial court recognized Father had also taken good care of Charlie but determined Mother was in a better position to understand Charlie's medical, educational, and social needs. And, ultimately, when two parties are unable to effectively communicate or resolve a decision, there necessarily must be a way to defeat any stalemate as to "any significant decision[ ]" in Charlie's life. As the trial court stated, "one parent has to be in charge when you can't agree, and this is the only way it works."

The trial court did not abuse its discretion in awarding Mother primary physical and legal custody of Charlie, including final decision-making authority should Mother and Father be unable to agree as to important decisions regarding Charlie's health, wellbeing, and education. The trial court's findings of fact also support its conclusions of law. The trial court's Custody Order is affirmed.

V. Conclusion

The trial court's conclusion excluding Dr. Moore's report and testimony based upon failure to timely disclose this expert under Rule 26(b) of Civil Procedure was not supported by its findings of fact since the report had been disclosed over a year prior to trial. However, Father has

not demonstrated any prejudice from the exclusion of Dr. Moore's report or testimony. The trial court did not abuse its discretion in excluding Father's other expert witnesses, who were identified for the first time on the first day of trial.

We also conclude the trial court did not abuse its discretion by awarding Mother primary physical and legal custody, with final decision-making authority when Mother and Father are unable to agree as to important decisions regarding Charlie's health, wellbeing, and education. The Custody Order and Expert Witness Order are affirmed.

AFFIRMED.

Judge COLLINS concurs.

Judge CARPENTER concurs in Parts II, III-A, and IV and concurs in result only in Part III-B.

RANDALL LIMERICK, Plaintiff
v.
CLAUDIA ROJO-LIMERICK, Defendant

No. COA22-568

Filed 7 March 2023

Child Custody and Support—child support action—attorney fees —statutory findings

In an action that, by the time of trial, was solely an action for child support, the trial court erred by awarding attorney fees in favor of plaintiff—the party ordered to pay child support—where the court failed to make the statutorily required finding that "the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding" (N.C.G.S. § 50-13.6) and where the trial court did not find (and would not have found, on the facts of this case) that plaintiff as the supporting party initiated a frivolous action or proceeding.

Appeal by Defendant from Order entered 9 December 2021 by Judge Tracy Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 16 November 2022.

Randall Limerick, plaintiff-appellee, pro se.

Fleet Law, PLLC, by Jennifer L. Fleet, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Claudia Rojo-Limerick (Defendant) appeals from the trial court's Order for Permanent Child Support and Attorney's Fees. Specifically, Defendant only challenges the award of $5,189.00 in attorney's fees to Randall Limerick (Plaintiff). We, therefore, limit our analysis to the attorney's fees issue and affirm the portion of the trial court's Order relating to the award of child support. However, our prior case law compels to us to conclude that, at the time of trial, this matter was solely an action for child support, and the trial court did not make the statutorily required findings under N.C. Gen. Stat. § 50-13.6 to support an award of attorney's fees when an action is solely for child support. Indeed, under the plain language of Section 50-13.6, because the action was one solely for child support and Plaintiff was the party ordered to pay support, the trial court could not award attorney's fees to Plaintiff, notwithstanding findings of fact that: (I) Plaintiff was a party acting in good faith and does not have sufficient means to pursue the action; (II) Plaintiff has paid reasonable child support since separation; and (III) Defendant unnecessarily increased Plaintiff's attorney's fees by her actions. As such, we are constrained by our precedent to reverse the trial court's award of attorney's fees to Plaintiff in this case.

Relevant to this appeal, the Record reflects the following:

On 17 August 2020, Plaintiff filed a Complaint for divorce from bed and board, child custody, child support, and attorney's fees in Mecklenburg County District Court. Defendant filed a Motion to Dismiss and Answer on 12 November 2020. Defendant further asserted counterclaims seeking custody of the parties' minor children, child support, equitable distribution of marital property, alimony, and attorney's fees. On 12 January 2021, Plaintiff filed a Reply to Defendant's counterclaims, including a Motion for Interim Distribution.

On 25 January 2021, Defendant filed a Notice of Voluntary Dismissal "without prejudice of [Defendant's] counterclaims for equitable distribution, post separation support, alimony, and attorney['s] fees in this case as to [Plaintiff]." This voluntary dismissal expressly provided Defendant's counterclaims for child custody and child support remained

open. Subsequently, on 27 January 2021, Plaintiff also filed a Notice of Voluntary Dismissal "without prejudice, of his claim[s] for Divorce from Bed and Board, Equitable Distribution, Motion for Interim Distribution, and Attorney Fee's [sic] due to the parties entering into a Separation Agreement that resolves those issues." Plaintiff's Notice of Voluntary Dismissal also expressly provided claims for child custody and child support remained open. On 15 February 2021, the trial court entered a Consent Order for Permanent Child Custody, Temporary Child Support, and Attorney's Fees.

The case came on for hearing in the Mecklenburg County District Court on 1 November 2021 on the parties' sole remaining claims for child support. On 9 December 2021, the trial court entered its Order. In relevant part, the trial court found:

> 24. Defendant's Motion for attorney's fees is denied.
>
> 25. Plaintiff's Motion for Attorney's Fees is granted because he has paid reasonable child support since separation and Defendant unnecessarily increased Plaintiff's attorney[']s fees by her actions.
>
> 26. Plaintiff is an interested party, acting in good faith who does not have sufficient means to pursue this action.
>
> 27. Defendant has received $20,000 from her parents, which was not shown to be loans.
>
> 28. In addition, Defendant received $4,200.00 for COVID Relief whereas Plaintiff only receiv[e]d $200.00.
>
> 29. Therefore, Defendant has the means to defray her attorney's fees costs and pay $5,189.00 of Plaintiff's attorney fees.

Based on these Findings of Fact, the trial court made, in part, the following Conclusion of Law: "Defendant's Motion for Attorney's Fees is denied and Plaintiff's Motion for Attorney's Fees is granted." The trial court ordered Defendant to pay Plaintiff $5,189.00 in Attorney's Fees. The trial court also ordered Plaintiff to pay $1,260.70 per month in child support to Defendant and $651.00 for the child's before and after school care costs. On 7 January 2022, Defendant timely filed written Notice of Appeal.

Issue

The dispositive issue on appeal is whether the trial court erred in awarding Plaintiff Attorney's Fees related to the child support claim

without making findings of fact required by N.C. Gen. Stat. § 50-13.6 governing awards of attorney's fees in child support actions.

Analysis

"The recovery of attorney's fees is a right created by statute. A party can recover attorney's fees only if such a recovery is expressly authorized by statute." *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citation and quotation marks omitted). The question of whether statutory requirements have been met for an award of attorney's fees is a question of law reviewable de novo. *Hudson v. Hudson*, 299 N.C. 465, 472-73, 263 S.E.2d 719, 724 (1980). The trial court in this case did not specify the statutory basis upon which it was awarding fees. However, the only request for fees by Plaintiff relied on N.C. Gen. Stat. § 50-13.6. It is also apparent from the nature of the trial court's findings that it intended to draw from this statutory authority for its award of fees.

N.C. Gen. Stat. § 50-13.6 governs the award of counsel fees in both child custody and child support actions. The statute provides:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, 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. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6 (2021).

Our Courts have interpreted N.C. Gen. Stat. § 50-13.6 as differentiating an action or proceeding for child custody or custody and support from an action that is *solely* one for child support. Specifically, when an action is one for child custody or custody *and* support, a trial court need only find the party awarded fees be an interested party acting in good faith who has insufficient means to defray the expense of the suit.

Hudson, 299 N.C. at 472, 263 S.E.2d at 723. On the other hand, when the action is one *solely* for child support, prior to making an award of fees, a trial court is required to make the additional finding: "the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding." *Id.* at 472-73, 263 S.E.2d at 724 (citations and quotation marks omitted).

Our Courts have concluded the determination of whether an action is one for custody and support or one solely for support is based on what issues were pending before the trial court when the case was called for trial. *See*, *e.g.*, *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996) ("The instant action is properly characterized as one for 'custody and support' because both the custody and support actions were before the trial court [at] the times the case was called for trial."). This is so even if the action or proceeding as originally filed included contested claims for both custody and support. *See Gibson v. Gibson*, 68 N.C. App. 566, 574, 316 S.E.2d 99, 104-05 (1984).

Indeed, an action is one solely for support in instances where the issue of custody was settled or resolved by consent prior to the matter being called for trial. *Id.* Thus, for example, in *Hudson*, our Supreme Court—in reversing this Court—concluded an action was one solely for support by the time the case was tried when "[t]he issue of custody was initially raised in this suit but was disposed of in a consent order and was not raised again." *Hudson*, 299 N.C. at 470, 263 S.E.2d at 722 (emphasis omitted). Similarly, this Court in *Gibson* determined a matter was one solely for child support where "the issue of custody, though uncontested, was settled by the judgment of the court some five months prior to the entry of the child support judgment." *Gibson*, 68 N.C. App. at 574, 316 S.E.2d at 105.

On the other hand, an action retains its character as one for custody and support where both of those issues are pending at trial—even if the parties quickly resolve the custody issue prior to judgment. *See Spicer v. Spicer*, 168 N.C. App. 283, 297, 607 S.E.2d 678, 687-88 (2005) ("In this case, the record shows that the custody issue had not yet been resolved when the support hearing began. The case was, therefore, one for both custody and support."). For example, this Court in *Forbes v. Forbes* determined that the action in that case was one for both custody and support and expressly distinguished its decision from both *Hudson* and *Gibson* observing: "In both those cases a spouse had asked for custody and support. In each case the custody was determined prior to the decision as to support and was not at issue when the matter of

support was contested." 72 N.C. App. 684, 685, 325 S.E.2d 272, 273 (1985); *see also Taylor*, 343 N.C. at 54, 468 S.E.2d at 35 ("The instant action is properly characterized as one for 'custody and support' because both the custody and support actions were before the trial court [at] the times the case was called for trial. This is so despite the fact that the parties 'quickly settled' the issue of custody." (citations and quotation marks omitted)); *Lawrence v. Tise*, 107 N.C. App. 140, 153, 419 S.E.2d 176, 184 (1992) ("The instant action is properly characterized as one for 'custody and support' because both the custody and support actions were before the trial court [at] the time the case was called for trial. This is so despite the fact that the parties 'quickly settled' the issue of custody." (citation omitted)); *Theokas v. Theokas*, 97 N.C. App. 626, 630, 389 S.E.2d 278, 280 (1990) ("Even though the custody issue may have been 'resolved in basically 15 minutes' at trial, as defendant's counsel stated during the hearing on attorney's fees, it nevertheless was an issue and the proceeding is therefore one which addressed both custody and support."); *cf. Loosvelt v. Brown*, 235 N.C. App. 88, 109, 760 S.E.2d 351, 364 (2014) ("Although plaintiff and defendant may have believed and acted as though they had resolved the custody claims before entry of the order, custody was still at issue when the case was called for hearing and was not addressed by the trial court until its final order which also addresses child support.").

In this case, the Record reflects the parties resolved the issue of child custody by Consent Order entered 15 February 2021 prior to the support trial. The child support trial began on 1 November 2021, and the trial court entered its Order on 9 December 2021. Thus, at the time of trial, this matter was solely a child support action.

As such, the trial court was required to make the additional finding "the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding[.]" *See* N.C. Gen. Stat. § 50-13.6 (2021). Here, the trial court did not make this finding. Indeed, the trial court expressly found Plaintiff—the party ordered to furnish support—"has paid reasonable child support since separation[.]" Moreover, the trial court did not—and on the facts of this case, clearly would not—find Plaintiff as the supporting party "initiated a frivolous action or proceeding" which would otherwise justify an award of fees to an interested party under the language of the statute. *See id.*

Thus, the trial court did not make the findings required by N.C. Gen. Stat. § 50-13.6 to award attorney's fees when—by the time of trial—this was solely an action for child support. Therefore, the trial court did not have statutory authority to make an award of attorney's fees in this case.

Consequently, the trial court erred in awarding Plaintiff attorney's fees. In so concluding, we acknowledge the potential for gamesmanship our case law creates. Here, the trial court's Order reflects it was Defendant's intransigence on the issue of child support that prolonged this litigation and resulted in this matter converting to one that was solely an action for support in which Plaintiff was functionally precluded from recovering his attorney's fees. On the other hand, there would appear to be at least some disincentive (really on the part of any party) to settle child custody issues until the matter is called for trial in hopes of an easier path—or in the case of a supporting party, any path at all—to recouping attorney's fees. We simply note the statute's other requirement that the party awarded fees be one who is "acting in good faith." N.C. Gen. Stat. § 50-13.6 (2021).

Conclusion

Accordingly, for the foregoing reasons, we reverse the trial court's 9 December 2021 Order to the extent it awarded Plaintiff attorney's fees in the amount of $5,189.00. As no party challenges any other portion of the Order, we affirm it in all other respects.

AFFIRMED IN PART; REVERSED IN PART.

Judges ZACHARY and GRIFFIN concur.

RYAN AND AMANDA POPE, Petitioners
v.
DAVIDSON COUNTY, Respondent

No. COA22-466

Filed 7 March 2023

1. Zoning—special use permit—application tabled by county board—improper procedure found by trial court—invited error

In an appeal from the trial court's order directing a county board of adjustment to issue a special use permit, where—after the board had denied petitioner-appellees' permit application based on a misreading of the county's zoning ordinance—the board tabled the matter until the next board meeting and then denied the application again, intervenor-appellants could not challenge the trial court's conclusion that the board acted improperly under the procedures

set forth in Robert's Rules of Order by tabling the permit application. Intervenor-appellants invited the alleged error by presenting the trial court with a copy of Robert's Rules of Order after the county's attorney argued that the board's own procedural rules were partially based on Robert's Rules of Order. Furthermore, the board's decision to table the application was irrelevant to the main issue on appeal: whether the board erred in denying the application the first time around.

2. Zoning—special use permit—denied by county board—statutory right to appeal—no waiver

In a zoning case, where a county board of adjustment denied petitioners' application for a special use permit to operate a motocross center despite receiving enough passing votes to issue the permit (the board misapplied the county's zoning ordinance, believing that a super-majority vote was required when, in fact, the ordinance required only a simple majority vote), and where the board subsequently reopened the application and denied it again at a second hearing, petitioners were entitled to appeal the board's second vote by petitioning for certiorari to the superior court pursuant to N.C.G.S. § 160D-1402(b). Specifically, where petitioners argued that the board erred in holding the second hearing instead of issuing the permit at the first hearing, petitioners' participation in the second hearing did not constitute a waiver of their statutory right under section 160D-1402(b) to challenge the results of that second hearing.

3. Appeal and Error—preservation of issues—constitutional argument—waiver—zoning case

At a hearing on a petition for a writ of certiorari seeking judicial review in superior court of a county board of adjustment's denial of an application for a special use permit (to build and operate a motocross center), intervenors were not denied their due process right to a meaningful opportunity to be heard at the hearing where their counsel was present but did not participate at the hearing, and the record did not show any indication that intervenors' counsel sought to participate but was prevented from doing so. Intervenors' failure to raise their constitutional argument before the trial court barred appellate review of the alleged constitutional error.

4. Zoning—special use permit—denied by county board—legal error—misapplication of zoning ordinance

In a zoning case, where a county board of adjustment denied petitioners' application for a special use permit to operate a motocross center despite receiving enough passing votes to issue the

permit, and where the board subsequently reopened the application and denied it again at a second hearing, the trial court—having granted certiorari review of the board's decision pursuant to N.C.G.S. § 160D-1402—did not err in ordering the board to issue the permit. The record showed that the board's decision to deny the application at the first hearing and to table the matter until the second hearing resulted from a legal error (the board misapplied the county's zoning ordinance, believing that a super-majority vote was required to issue the permit when, in fact, the ordinance required only a simple majority vote), and that, but for the board's error, petitioners' application would have been granted.

Appeal by intervenors from order entered 20 January 2022 by Judge Susan E. Bray in Davidson County Superior Court. Heard in the Court of Appeals 25 January 2023.

Bondurant Law, PLLC, by Joel M. Bondurant, Jr., for Petitioner-Appellees.

Office of the Davidson County Attorney, by Assistant County Attorney James Andrew Howe, for Respondent.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for Intervenors-Appellants.

ARROWOOD, Judge.

Timothy Miller and Lyle Loflin (collectively, "intervenors"), appeal from the trial court's order granting Ryan and Amanda Pope (collectively, "petitioners") the issuance of a special use permit for the construction of a motocross training center. For the reasons stated herein, we affirm the trial court's order.

I. Background

On 19 April 2021, petitioners applied for a special use permit from the Davidson County Board of Adjustment (the "Board") requesting authorization to use their 143.46-acre parcel of property to operate a "Recreational Facility, Commercial Outdoor, in a RA-2 Rural Agricultural District." Petitioners planned on using the land to operate a motocross training center.

Prior to considering the application, the Board conducted a "quasi-judicial public evidentiary hearing in accordance with the

procedures" set forth in Article VII of the Davidson County Zoning Ordinance ("the ordinance"). The hearing was held on 20 May 2021.

The ordinance states that in order for a special use permit to be granted, four standards must be established with respect to the proposed use:

> 1) The use will maintain the public health, safety and general welfare, if located where proposed and developed and operated according to the plan as submitted;
>
> 2) The use is listed as a Special Use in the district in which it is proposed to be located, and complies with the regulations and standards of this Ordinance including the Dimensional regulations (Article IV), as well as those contained in the individual standards for that special use;
>
> 3) The use will maintain or enhance the value of contiguous property, or that the use is a public necessity;
>
> 4) The use is in compliance with the general plans for the physical development of the county as embodied in these regulations.

Prior to the hearing, the Board was misinformed as to the correct voting threshold required in order to issue a special use permit. The Board believed that in order to grant a special use permit a super-majority vote (4/5) on each standard was required. However, a change in the ordinance, which came into effect in January 2021, allowed for a special use permit to be awarded after a simple majority vote on each standard.

Individuals present at the May hearing included Senior Assistant County Attorney Mike Newby ("Mr. Newby"), county zoning officials and administrators, intervenors, and other members of the community. Due to the rural nature of the area in question, intervenors were concerned about "the noise, lighting, and dust" operating a motocross facility would create. Timothy Miller stated that because the facility would operate in a valley, he was concerned about the noise funneling toward his property. Lyle Loflin stated that he was concerned with barriers and individuals using the facility trespassing onto his property.

At the conclusion of the hearing, the Board voted 4-1 with respect to standards one and two. Standard three received a 3-2 vote, and standard four was satisfied by a 5-0 vote. The chairman of the Board, referring to standard three, then declared "that one of the standards failed and it is

the Board's obligation to deny the request." Thereafter, members of the Board motioned to "table the application" and reconsider the standards and additional evidence at the next Board meeting held on 17 June 2021.

At the beginning of the Board meeting held in June, Mr. Newby noted that the May hearing was "conduct[ed] . . . under a false premise." "Based on inaccurate information, the Board voted under the assumption that the votes should be 4/5 majority votes." The Board then voted, 5-0, to rescind the prior votes and reopen the hearing on the application. All evidence from the previous hearing was still applicable and witnesses did not need to provide new testimony unless they had new or additional evidence to present.

At the conclusion of the July hearing, the Board voted and found that three standards failed. Thus, the special use permit was denied.

Pursuant to N.C. Gen. Stat. § 160D-1402, petitioners filed a petition for *writ of certiorari* ("PWC") on 6 August 2021 seeking judicial review of the Board's decision to deny their special use permit. Petitioners alleged that "the decision to deny the application in May and table [p]etitioners' application until June was the result of a legal error[,]" and thus petitioners' application for a special use permit should have been granted at the May hearing. A hearing on the PWC was held on 10 January 2022, Judge Bray presiding.

At the beginning of the hearing, Mr. Newby conceded that the Board incorrectly concluded that one of the standards didn't pass at the May hearing. Joel Bondurant, Jr. ("Mr. Bondurant"), attorney for petitioners, argued "[t]here's no process in the statutes for a board, once having taken all the evidence and vot[ing] in favor of a special use permit, to then reopen the proceedings and take more evidence and then deny the permit." Thus, the crux of petitioners' argument was that once the vote was conducted in May and each standard received a passing vote, the Board no longer had the authority to reopen the application and conduct an additional vote at the June hearing.

However, it was the county's position that petitioners were not entitled to relief as "no final action was taken [at the May hearing], and every deliberative body can change its mind prior to making its decision formally." Mr. Newby argued that "the county has the right to establish rules of procedure for its Board of Adjustment." Mr. Newby stated the county's rules of procedure stem from "two sources; one is the Roberts' [sic] Rules of Order[]" and a presentation entitled "Suggested Rules of Procedure for Small Local Government Boards[,]" from the UNC School of Government.

Judge Bray was given a copy of Robert's Rules of Order by E. Drew Nelson ("Mr. Nelson"), intervenors' counsel, and declared that the Board's decision to table the application until the June meeting was improper procedure. Judge Bray found that based on Robert's Rules of Order, "a lay-on-the-table motion" cannot be used "to kill the motion or to put it off until the next meeting[,]" which is what the Board did at the conclusion of the May hearing. After receiving testimony with respect to the Board's requirement to issue the special use permit once the standards set forth in the ordinance were satisfied, Judge Bray granted petitioners' PWC directing the Board to issue the special use permit.

Judge Bray's order was entered on 20 January 2022. Judge Bray concluded that "the denial of the application and the manner in which it was handled was based upon a plain and acknowledged error of law." Intervenors appealed the trial court's order on 21 February 2022.

II. Discussion

On appeal, intervenors contend the trial court erred by: (1) concluding that the Board used an improper procedure by voting to table the special use application until the following June Board meeting; (2) not concluding that petitioners waived their right to contest the decision of the June Board due to their own participation in the hearing; and (3) denying intervenors the opportunity to be heard at the hearing on the PWC. We address each argument in turn.

A. Improper Board Procedure

[1] As to the first issue, intervenors assert it was error for the trial court to conclude the Board acted improperly pursuant to the procedures set forth in Robert's Rules of Order. They argue, "the trial court made an assumption, against all evidence, that Robert's Rules of Order governed the proceedings." As illustrated above, this is not an accurate depiction of what occurred at the PWC hearing. It was Mr. Newby who argued that the procedural rules of the Board were established using Robert's Rules of Order. It was only after Judge Bray read and analyzed the copy of Robert's Rules of Order given to her by Mr. Nelson that she found the motion to table the application until the June hearing was error. Counsel " 'may not base an appeal on an alleged error that she invited.' " *Dillingham v. Ramsey*, 267 N.C. App. 378, 380, 837 S.E.2d 129, 132 (2019) (citation omitted). Moreover, the trial court's finding that the Board's decision to table the application until the following Board meeting was improper procedure is not the core issue before this Court. Instead, it is the fact that the Board held a vote on the special use permit at the May hearing which should have resulted in the permit being

granted, eradicating the necessity for a second Board meeting. To be clear, Robert's Rules of Order have no connection to the central issue on appeal, which is the fact that the Board acted pursuant to a misapplication of their own zoning ordinance in denying petitioners' application at the May hearing. Intervenors' first argument is overruled.

B. Waiver and Consent to Board Process

[2] Intervenors' second argument is likewise without merit. Despite the statutory scheme provided by our General Statutes, intervenors contend that petitioners "waived their right" to file for a PWC by "consenting to the process used by [the Board][.]" Intervenors assert that petitioners are "presumptively charged with knowledge of [the ordinance] and the requirements to obtain a special use permit[,]" thus, by being unaware of the correct voting standards and participating in the June Board meeting, they waived their right to challenge the Board's June decision to deny the special use permit. Intervenors concede that there is no case law to support their assertion and attempt to draw parallels to criminal law and contract disputes to bolster their argument that petitioners waived a statutory right. We reject this argument that is unsupported by any applicable legal authority.

C. Opportunity to be Heard

[3] With respect to the third argument on appeal, intervenors allege they were denied their "due process right to a meaningful opportunity to be heard at a meaningful time and in a meaningful manner[,]" despite the fact that their counsel was present at the PWC hearing. Intervenors concede that they "did not otherwise object to this failure at the time of the hearing[,]" but assert their issue is preserved for appellate review due to the trial court's failure "to protect the intervenors' due process rights[.]" We disagree.

Our review of the record does not support any determination that intervenors' counsel sought to participate in the PWC hearing but was prevented from doing so. Thus, we find no support for this contention in the record. Because intervenors did not seek to participate in the trial court, appellate review of this issue is barred. N.C. R. App. P. 10(a)(1) (2022); *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) ("The failure to raise a constitutional issue before the trial court bars appellate review."); *See also State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002) ("It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal."), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003).

D N.C. Gen. Stat. § 160D-1402

[4] The dispositive issue on appeal is whether it was error for the trial court to grant petitioners' PWC directing the Board to issue a special use permit. We conclude that it was not.

A special use permit "is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist." *PHG Asheville, LLC v. City of Asheville*, 374 N.C. 133, 148, 839 S.E.2d 755, 765 (2020) (internal quotation marks omitted) (quoting *Humble Oil & Refin. Co. v. Bd. of Aldermen*, 284 N.C. 458, 467, 202 S.E.2d 129, 135).

"According to well-established North Carolina law, the local governing board 'must follow a two-step decision-making process in granting or denying an application for a [special] use permit.' " *PHG Asheville, LLC*, 374 N.C. at 149, 839 S.E.2d at 765 (citation omitted). Preliminarily, the local board "must determine whether 'an applicant has produced competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of a [special] use permit.' " *Id.* at 149, 839 S.E.2d at 765-66 (emphasis in original) (citation omitted). Where an applicant has satisfied this initial burden, then *prima facie* he is entitled to the issuance of the requested permit. *Id.* at 149, 839 S.E.2d at 766 (quotation marks and citation omitted). Accordingly, "an applicant for a special use permit who has met its burden of *production* automatically wins if no contrary evidence is offered." *Dismas Charities, Inc. v. City of Fayetteville*, 282 N.C. App. 29, 31, 870 S.E.2d 144, 146 (2022) (emphasis in original).

The trial court, when reviewing a decision of a county board of adjustment, is responsible for:

> (1) Reviewing the record for errors of law,
>
> (2) [E]nsuring that procedures specified by law in both statutes and ordinances are followed,
>
> (3) [E]nsuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) [E]nsuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) [E]nsuring that decisions are not arbitrary or capricious.

JWL Invs., Inc. v. Guilford Cnty. Bd. of Adjustment, 133 N.C. App. 426, 428-29, 515 S.E.2d 715, 717 (citations omitted), *disc. rev. denied*, 351 N.C. 357, 540 S.E.2d 349 (1999). "If a petitioner contends the Board's decision was based on an error of law, 'de novo' review is proper." *Id.* at 429, 515 S.E.2d at 717 (citation omitted).

On appeal, it is this Court's role "to review the trial court's order for errors of law." *Id.* at 429, 515 S.E.2d 717-18 (citation omitted). " 'Th[is] process has been described as a two-fold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Id.* at 429, 515 S.E.2d at 718 (citations omitted).

In pertinent part, N.C. Gen. Stat. § 160D-1402(b) (2022) states "[a]n appeal in the nature of certiorari shall be initiated by filing a petition for writ of certiorari with the superior court." The statute further provides, "[f]ollowing its review of the decision-making board . . . the [superior] court may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." N.C. Gen. Stat. § 160D-1402(k). "If the court concludes that a permit was wrongfully denied . . . based on an error of law, the court *shall* remand with instructions that the permit be issued[.]" *Id.* § 160D-1402(k)(3)(a) (emphasis added).

The record before us reflects that the trial court properly concluded:

> the decision to deny the application in May and table [p]etitioners' application until June was the result of a legal error. But for the Board's legal error in interpreting and applying its zoning ordinance, the [p]etitioners' application would have been granted as a result of the May 20 hearing, as each standard obtained a majority vote at that time.

Thus, upon reading the record from the May meeting and interpreting the ordinance, the trial court found the denial of the special use permit was an error of law. The county conceded this error at the PWC hearing and the trial court entered its order appropriately.

Accordingly, the trial court acted properly pursuant to its authority under N.C. Gen. Stat. § 160D-1402 to order the Board to issue the special use permit as petitioners had previously received a passing vote on their application at the May hearing. *Dismas Charities, Inc.*, 282 N.C. App. at 35, 870 S.E.2d at 148 (directing the city council to issue the special use permit upon petitioners meeting their "burden of production"); *See also MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169

N.C. App. 809, 811, 610 S.E.2d 794, 796 (citation omitted) ("[W]hen an applicant produces evidence which demonstrates it has complied with the ordinance, the petitioner is entitled to have the permit issued unless substantial competent evidence is introduced to support its denial."), *disc. rev. denied and appeal dismissed*, 359 N.C. 634, 616 S.E.2d 540 (2005). The arguments to the contrary are overruled.

III. Conclusion

The trial court properly determined the issues before it, therefore the judgment appealed from must be affirmed.

AFFIRMED.

Judges COLLINS and WOOD concur.

STATE OF NORTH CAROLINA
v.
MICHAEL BUCHANAN, DEFENDANT

No. COA22-663

Filed 7 March 2023

Evidence—prior bad acts—Rule 403—inappropriate discipline of children

In defendant's prosecution for charges stemming from the death of a twenty-two-month-old who died after suffering blunt force trauma to his head while in defendant's care, where the State sought to introduce Rule 404(b) evidence of defendant's recent prior inappropriate discipline of the decedent's siblings—punching a four-year-old in the chest, beating a child with a belt, and snatching a video game system out of the wall in anger—the trial court did not abuse its discretion in determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

Appeal by Defendant from judgment entered 3 December 2021 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 24 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State-Appellee.

Dysart Willis, P.L.L.C., by Drew Nelson, for Defendant-Appellant.

STADING, Judge.

Michael Buchanan ("Defendant") appeals from a judgment entered upon a jury verdict finding him guilty of one count of involuntary manslaughter. For the reasons set forth below, we hold no error.

I. Procedural History

Defendant was indicted on one count of first-degree murder on 11 March 2019. Initially, Defendant was tried during the 12 April 2021 Criminal Session of Wake County Superior Court. Defendant filed a pretrial motion *in limine* "to prevent the State from introducing . . . any evidence of other crimes, wrongs, or acts allegedly committed by Defendant." The trial court denied Defendant's motion.

On the fifth day of the initial trial, evidence extracted from a cell phone was located and produced by the State. The trial court determined the late production of evidence was not due to misconduct by the State but nonetheless would prejudice Defendant's ongoing trial. Accordingly, the judge declared a mistrial. A retrial was held during the 29 November 2021 Criminal Session of Wake County Superior Court. The same trial court judge, prosecutor, and defense counsel were present for Defendant's retrial. Defendant renewed his objections made pursuant to the pretrial motion argued at the 12 April 2021 Criminal Session of Wake County Superior Court. Consistent with the ruling made prior to the initial trial, the judge once again denied Defendant's motion. On 3 December 2021, a jury found Defendant guilty of involuntary manslaughter. The trial court entered judgment sentencing Defendant to 16 to 29 months imprisonment. Defendant entered notice of appeal.

II. Factual Background

At trial, relevant evidence tended to show Defendant began dating Marquise McCall ("McCall") in Maryland in early 2018. On 2 February 2019, Defendant moved into McCall's residence in Raleigh, North Carolina. McCall had five children, all under the age of twelve years old. McCall's youngest child, T.A.,[1] was twenty-two months old. Defendant and McCall had a verbal disagreement over discipline which ended their relationship on 13 February 2019. This dispute led to a decision that

1. We use pseudonyms to protect the identity of the minor child in this case. *See* N.C. R. App. P. 42(b).

Defendant would leave McCall's residence in North Carolina and return to Maryland at the end of the week.

Just before Defendant was to leave, McCall had a job interview on 14 February 2019. She left her three youngest children in the exclusive care of Defendant. When McCall left, T.A. did not have any visible injuries on his body. At the conclusion of the job interview, McCall turned on her phone and received a text message from Defendant requesting she contact him. McCall called Defendant who stated T.A. had "a bad diaper rash" after soiling his diaper but otherwise did not indicate anything was out of the ordinary. Just moments later, McCall received a FaceTime call from Defendant yelling that she needed to "[g]et home now." Defendant informed McCall that T.A. was "not breathing," and she could see on her phone that his eyes "weren't open, but they weren't closed and his mouth was open."

Immediately thereafter, McCall ended the FaceTime call, contacted 911, rushed home, and arrived contemporaneously with the paramedics. T.A. looked "like a doll, totally not moving, flaccid." Defendant stated to the paramedics that T.A. had "choked on a waffle." However, contrary to Defendant's claim, the paramedics found nothing blocking the child's airway.

Intubation was not effective as would be expected had T.A. choked on something. Therefore, the treating physician ordered a computerized tomography ("CT") scan to see if there was another reason he was not breathing. The CT scan results showed T.A. sustained a skull fracture and subdural hematomas on both sides of his brain. In the opinion of T.A.'s treating physician, these injuries were "inflicted on him" and indicative of "non-accidental trauma or child abuse." He was declared brain dead on 16 February 2019, and died thereafter. The medical examiner opined that the cause of death was "blunt force injury of the head" and the manner of death was "homicide." Hospital staff informed law enforcement of their findings.

III. The Trial Court's Ruling on Defendant's Motion

Prior to the initial trial, the State filed a notice of intent to introduce 404(b) evidence against Defendant at trial. More specifically, the State gave notice of intent to use "incidents of prior acts of child abuse against Ms. McCall's minor children." In response, Defendant moved the trial court to "prevent the State from introducing, at trial, any evidence of other crimes, wrongs, or acts allegedly committed by Defendant" pursuant to Rules of Evidence 403 and 404.

During the presentation of evidence for the motion, McCall first testified to an incident from November 2018 in which she learned from two sources that Defendant punched her then four-year-old son in the chest. Next, McCall recounted that she personally heard Defendant "beat" her daughter with a belt a day or two before T.A. was fatally injured. Not long thereafter, another incident occurred in McCall's presence whereby Defendant "snatched" a videogame system out of the wall after he became angry with one of the children. Defendant lived with McCall and her minor children in North Carolina for a total of two weeks when the last two instances of conduct occurred, as well as the fatal injury sustained by T.A.

At the conclusion of the motion, including sworn testimony elicited from McCall followed by arguments of counsel, the trial court found there was "substantial evidence" Defendant committed the three acts of discipline. Additionally, the judge determined these instances of discipline were "substantially similar" to the acts alleged that resulted in injury and the untimely death of T.A. With respect to temporal proximity, the trial court noted that the conduct occurred within a maximum timeline of "three or four months." Moreover, the judge concluded that the instances of conduct were "probative of the intent of the [D]efendant, the motive of the [D]efendant, the absence of mistake or accident, and malice of the [D]efendant." Therefore, the trial court found the three disciplinary acts admissible under Rule 404(b).

Next, the trial court weighed the probative value of the evidence relative to the prejudicial effect pursuant to Rule 403 and found the evidence was "not unduly prejudicial." Accordingly, the judge found "each of these instances" were admissible. Nevertheless, a limiting instruction was provided to the jury that these three incidents were to be considered only for the purpose of showing that Defendant "had the intent which is a necessary element of the crime charged in this case," or "had the malice . . . ; the absence of mistake; and the absence of accident."

IV. Analysis

Defendant argues that the trial court erred in failing to exclude the evidence of prior acts of discipline under Rule 403. In the alternative, Defendant requests the trial court's determinations be reviewed for plain error in the event the issue appealed was not properly preserved at trial. However, this alternative inquiry is not necessary as the issue was properly preserved for appeal pursuant to Rule 10 of the North Carolina Rules of Appellate Procedure. Defendant does not dispute the trial court's findings of fact or conclusions of law pursuant to Rule 404(b).

The appropriate standard of review concerning a trial court's balancing of probative value and unfair prejudice under Rule 403 is abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008). "Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341, 114 S. Ct. 392 (1993). Reversal is appropriate only if the trial judge's ruling was "outside the bounds of reason." *State v. Peterson*, 361 N.C. 587, 603, 652 S.E.2d 216, 227 (2007).

Defendant argues that the three instances of conduct offered little probative value to the State's theory that T.A.'s death was not accidental. Here, a review of the record reveals that the trial court heard evidence from a witness outside of the presence of the jury and decided that two of the prior acts involved "striking" and the third was "indicative of a temper." The judge went on to note that this behavior was consistent with Defendant's statement to McCall that if she would discipline the children, then he "wouldn't have to." The trial court further considered the temporal proximity of all relevant acts. Specifically, the judge found the conduct was "probative of the intent . . . , the motive . . . , the absence of mistake or accident, and malice of . . . [D]efendant."

Defendant maintains that admission of the specific instances of conduct was "highly prejudicial" and the "verbs chosen by the witness" illustrate the "prejudicial nature of this testimony." Pursuant to Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2019). "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree." *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986). It is well settled that "[w]hile all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial." *State v. Rainey*, 198 N.C. App. 427, 433, 680 S.E.2d 760, 766 (2009) (citations omitted). Rather, "[t]he meaning of 'unfair prejudice' in the context of Rule 403 is an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Id.* (quotation marks and citation omitted). "[T]o be excluded under Rule 403, the probative value of the evidence must not only be outweighed by the danger of unfair prejudice, it must be *substantially* outweighed." *State v. Lyons*, 340 N.C. 646, 669, 459 S.E.2d 770, 783 (1995).

According to Defendant, "highly prejudicial testimony—that [Defendant] 'punched' and 'beat' other minor children—substantially outweighed the probative value of the evidence." Despite Defendant's disapproval of the "verbs chosen by the witness," McCall is merely recounting her personal observations and knowledge of Defendant's forceful actions toward her minor children. In the present case, a review of the record reveals that the trial court heard evidence of the acts of discipline outside the presence of the jury and then heard arguments from the attorneys. Thereafter, the judge conducted the proper balancing test required by Rule 403 to determine admissibility. Moreover, the trial court was aware of the potential danger of unfair prejudice to Defendant and exercised due diligence by instructing the jury of the limited purpose for which the evidence could be considered before hearing testimony on each instance of conduct. Additionally, when charging the jury, the judge gave a proper limiting instruction that the evidence of those instances of conduct could be considered "only for the limited purpose for which it has been received" and "not . . . for any other purpose."

V. Conclusion

In light of the support for the trial court's findings in the record, coupled with the deliberate and careful handling of the process, we conclude that it was not an abuse of discretion for the judge to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Therefore, the trial court's decision to overrule Defendant's objection and allow evidence of the prior acts of discipline was a proper exercise of the trial court's discretion and did not prejudice Defendant in the outcome of his case. We find that the trial court appropriately applied the balancing test and accordingly, we hold no error.

NO ERROR.

Judges GORE and RIGGS concur.

STATE OF NORTH CAROLINA
v.
JAMES THOMAS CHRISTIAN, III

No. COA22-299

Filed 7 March 2023

Drugs—trafficking by possession and by transportation—acting in concert—constructive presence—distance between vehicles

The State presented substantial evidence to support defendant's convictions for trafficking methamphetamine by possession and by transportation on the theory of acting in concert where defendant initiated a plan with another person, who was a police informant, to buy drugs in another state and transport them into North Carolina; the informant told law enforcement about the plan beforehand and kept in communication with them as the plan unfolded; the two men drove to another state and obtained the drugs; on their return to North Carolina, defendant rode in one vehicle while the informant rode in a separate vehicle with the drugs; and both cars were traveling on the same highway on the way to defendant's residence when they were stopped by law enforcement after crossing over the state line. Although there were no drugs in defendant's vehicle and his car was a few miles apart from the informant's vehicle in which the drugs were being transported, the cars were in sufficiently close proximity to each other to establish that defendant was constructively present for the purpose of proving each offense.

Appeal by Defendant from judgments entered 7 October 2021 by Judge Gary M. Gavenus in Cleveland County Superior Court. Heard in the Court of Appeals 19 October 2022.

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

Mark L. Hayes, for Defendant.

WOOD, Judge.

Defendant appeals the trial court's denial of his motion to dismiss two charges of trafficking methamphetamine, one charge for possession of more than 400 grams and the other charge for transportation of more than 400 grams. Defendant argues that, because Defendant was

not physically present when law enforcement stopped a travel companion who was in possession of the contraband, Defendant cannot be tried for the possession of or the transportation of the methamphetamine. For the reasons outlined below, we affirm the trial court's denial of Defendant's motion to dismiss.

I. Background

In February 2020, Chris Gibson ("Gibson") was arrested and charged with possession of drugs, and, in exchange for leniency with his own case, Gibson agreed to assist police with their investigation of Defendant. Gibson and Defendant knew each other through drug transactions. At this time, Defendant had asked Gibson to travel with and assist him in transporting drugs from Georgia to North Carolina. Subsequently, the police developed a plan wherein Gibson would drive with Defendant to Georgia where they would pick up drugs to sell in North Carolina. As the pair re-entered this state, police would pull over their vehicle and arrest Defendant for drug trafficking.

Because Gibson did not own a car, police rented a red sedan for his and Defendant's use and hid a GPS tracking device on the vehicle. On 13 February 2020, Gibson informed police that he and Defendant were driving to Georgia, and police tracked the vehicle all the way to Atlanta. While in Atlanta, Defendant briefly dropped Gibson off at a Walmart before returning with a one-kilogram package of methamphetamine. Gibson updated police through text messaging the entire time. After securing the drugs, the two began their journey back to Defendant's residence in North Carolina.

However, as Gibson and Defendant approached the North Carolina border, the weariness of travel overtook them. Defendant suggested they park at a nearby gas station and summon help to assist them with the remainder of their journey. Gibson agreed, and the two stopped at a nearby gas station where Defendant called a female friend in North Carolina and requested that she and another friend drive to South Carolina to meet them and drive the vehicles back to North Carolina. The two women arrived in a white vehicle. Gibson remained in the red sedan but switched from the driver's seat to the passenger's seat, and Defendant got into the white vehicle. The women then drove the vehicles, in close proximity to each other, toward the North Carolina border.

Both vehicles were stopped separately after they crossed into North Carolina. Officer Perkins first stopped the white car and searched the Defendant and the car but did not find drugs. Deputy Tinoco then stopped the red sedan which was behind the white car by a few miles.

The lead investigator estimated the distance between the two vehicles to be between three and five miles. The deputy searched the red sedan and found a large amount of methamphetamine in the trunk and the dash of the vehicle, along with three firearms. The officers arrested Defendant and the two women and pretended to arrest Gibson. Defendant was later indicted for possession of a firearm by a felon and two counts of trafficking in methamphetamine on 9 March 2020.

Defendant was tried before a jury in superior court at the 7 October 2021 session. At trial, Defendant's counsel moved to dismiss all charges at the close of the State's evidence and again at the close of all evidence. The trial court denied both motions. The jury found Defendant guilty of possession of a firearm by a felon, trafficking in methamphetamine by possessing 400 grams or more of methamphetamine, and trafficking in methamphetamine by transporting 400 grams or more of methamphetamine. The trial court sentenced Defendant to 225 – 282 months for each of the two counts of trafficking in methamphetamine, to run consecutively, and 19 – 32 months for possession of a firearm by a felon to commence at the end of his sentences for the trafficking convictions. Defendant, through counsel, gave oral notice of appeal.

II. Standard of Review

A trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016). "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).

When presented with a motion to dismiss, the trial court must determine if "there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Evidence is 'substantial' if a reasonable person would consider it sufficient to support the conclusion that the essential element exists." *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

III. Jurisdiction

At the outset, we note that an individual may be charged with a crime in this state though a part of the crime was committed in another state

so long as the person "has not been placed in jeopardy for the identical offense in another state." N.C. Gen. Stat. § 15A-134 (2022). If any part of the offense occurred in North Carolina, this state has jurisdiction to try the offender. *State v. First Resort Props.*, 81 N.C. App. 499, 501, 344 S.E.2d 354, 356 (1986). However, such part of the offense must constitute at least one "of the essential acts forming the crime." *State v. Vines*, 317 N.C. 242, 251, 345 S.E.2d 169, 174 (1986). Thus, the fact that most of Defendant's drug trafficking activities occurred in other states is not dispositive when he was not charged with an identical crime in Georgia or South Carolina. We must now determine whether Defendant's actions in this state were sufficient to constitute any part of the "essential acts forming the crime" alleged when, as the State concedes, Defendant did not physically possess the drugs at issue as he crossed the border into North Carolina.

IV. Discussion

Defendant argues that the trial court erred when it denied Defendant's motion to dismiss the charges of trafficking in methamphetamine because the State failed to present any evidence that Defendant possessed or transported methamphetamine within North Carolina. Defendant contends that while he may have possessed and transported the drugs in Georgia and South Carolina, he never actually or constructively possessed or transported the drugs as he entered North Carolina. Therefore, he contends he could not be charged in this state with trafficking in methamphetamine by possession or transportation, and the State could not have presented substantial evidence of the necessary elements of trafficking by possession or transportation.

A person may be charged with trafficking in methamphetamine when that person "sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or any mixture containing such substance." N.C. Gen. Stat. § 90-95(h)(3b) (2022). Here, the State charged Defendant with two separate counts of trafficking methamphetamine by possession and trafficking methamphetamine by transportation. We therefore look to each charge in turn.

A. Trafficking by Possession

To proceed upon the possession charge, the State must present substantial evidence that Defendant "(1) knowingly possessed . . . methamphetamine, and (2) that the amount possessed was greater than 28 grams." *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 93 (2003). "The 'knowing possession' element of the offense of trafficking by possession may be established by a showing that (1) the defendant

had actual possession, (2) the defendant had constructive possession, or (3) the defendant acted in concert with another to commit the crime." *State v. Reid*, 151 N.C. App. 420, 428, 566 S.E.2d 186, 192 (2002); *see State v. Ambriz*, 286 N.C. App. 273, 278, 880 S.E.2d 449, 458 (2022) (applying this standard to trafficking in methamphetamine by possession). The State concedes that Defendant did not have actual possession of the drugs when he entered this state but argues that he nevertheless had constructive possession through Gibson as his agent. For reasons unknown, the State did not brief this Court on the third relevant theory of acting in concert.[1]

Addressing the acting in concert theory, a defendant is said to have acted in concert with another if he acted "together, in harmony or in conjunction . . . with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979). "The principle of concerted action need not be overlaid with technicalities." *Id.*

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)). In short, "there must be evidence of a common plan or purpose shared by the accused with one other person." *State v. Holloway*, 250 N.C. App. 674, 685, 793 S.E.2d 766, 774 (2016).

In addition to acting in conjunction with another, the accused must generally be "present while a trafficking offense occurred" to be guilty of possession. *Reid*, 151 N.C. App. at 429, 566 S.E.2d at 192. "A defendant's presence at the scene may be either actual or constructive." *State v. Gaines*, 345 N.C. 647, 675 483 S.E.2d 396, 413 (1997). "A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." *Id.* at 675-76, 483 S.E.2d at 413 (citing *State v. Willis*, 332 N.C. 151, 175, 420 S.E.2d 158, 169 (1992)). "This is true even where

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1. The trial court instructed the jury on the principle of acting in concert by stating "For a defendant to be guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit trafficking in methamphetamine by transportation, each of them, if actually or constructively present, is guilty of the crime."

'the other person does all the acts necessary to commit the crime.' " *State v. Abraham*, 338 N.C. 315, 329, 451 S.E.2d 131, 137 (1994) (quoting *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993)). The "actual distance [between a defendant and companion] is not determinative," *State v. Barnes*, 91 N.C. App. 484, 487, 372 S.E.2d 352, 354 (1988), but it may be relevant depending on the totality of the circumstances.

The State presented substantial evidence that Defendant and Gibson acted in concert for the common purpose to possess methamphetamine. The evidence tended to show that Defendant initiated the plan with Gibson to buy drugs from Georgia and that both were traveling back to Defendant's residence, in close proximity to each other, with the drugs when their vehicles were stopped in North Carolina. The evidence showed that the vehicle transporting Defendant and the vehicle transporting Gibson and the drugs traveled together on a highway toward Defendant's residence. The vehicles were estimated to be approximately three miles apart when they entered this state and when stopped by police. Defendant argues, however, that he cannot be tried for trafficking under an acting in concert theory because he could not have been constructively present while the trafficking offense occurred. He claims this distance is too great for Defendant to be "close enough to provide assistance if needed and to encourage the actual execution of the crime." *Gaines*, 345 N.C. at 676, 483 S.E.2d at 413.

Defendant attempts to analogize this case with *State v. Bradsher*. There, upon a theory of concerted action, the State attempted to show that a district attorney obtained property by false pretenses when he allowed a subordinate to fraudulently log working hours while working from a remote office. *State v. Bradsher*, 275 N.C. App. 715, 736, 852 S.E.2d 716, 730 (2020), *rev'd on other grounds*, 382 N.C. 656 (2022). The defendant "was not even in the same county" as the wrongdoer and was not in communication with her during the commission of her fraud. *Id.* at 737, 852 S.E.2d at 731. Thus, this Court held that the evidence was insufficient to support a showing of constructive presence when the defendant was not positioned to assist or encourage the wrongdoer during the commission of the crime. *Id.* To hold otherwise "would sever the 'presence' requirement from the theory of acting in concert." *Id.*

In another example of the outer limits of constructive presence, "one cannot be actually or constructively present for purposes of proving acting in concert simply by being available by telephone." *State v. Hardison*, 243 N.C. App. 723, 727, 779 S.E.2d 505, 508 (2015) (citing *State v. Zamora-Ramos*, 190 N.C. App. 420, 425-26, 660 S.E.2d 151, 155 (2008)). Nor can one be constructively present when "in a house ten to

fifteen blocks away" from a robbery and without the means to provide "any advice, counsel, aid, encouragement or comfort, if needed" though "the actual distance of a person from the place where a crime is perpetrated is not always material." *State v. Wiggins*, 16 N.C. App. 527, 530-31, 192 S.E.2d 680, 682-83 (1972). We do not find Defendant's arguments compelling in light of other precedent of this Court more analogous to the case before us.

In *State v. Pryor*, this Court held that "[a] guard who has been posted to give warning or the driver of a 'get-away' car, may be constructively present at the scene of a crime although stationed a convenient distance away." 59 N.C. App. 1, 9, 295 S.E.2d 610, 616 (1982). The distance between the defendant and another actor is not dispositive. For example, in *State v. Gregory*, a defendant argued that he could not have been constructively present during a robbery when he waited in his vehicle at an intersection while two colleagues robbed a nearby theatre. 37 N.C. App. 693, 695, 247 S.E.2d 19, 21 (1978). The defendant made plans with the colleagues to rob the theatre, but he never entered the theatre with them. *Id.* at 694, 247 S.E.2d at 20. Instead, the "[d]efendant had driven around the shopping center and was waiting in his car at a nearby intersection." *Id.* at 694, 247 S.E.2d at 21. This Court nonetheless held that the defendant in that case was constructively present at the scene of the robbery though he was some distance away from the events. *Id.* at 695, 247 S.E.2d at 21. "Actual distance from the scene is not always determinative of constructive presence; however, defendant must be close enough to be able to render assistance if needed and to encourage the crime's actual perpetration." *Id.* (citing *State v. Buie*, 26 N.C. App. 151, 215 S.E.2d 401 (1975)).

Further, a defendant who waits in his home while his mother murders his father in a nearby home may also be constructively present during the crime. This was the case in *State v. Gilmore* where the defendant and his mother planned to overdose the defendant's father with insulin. 330 N.C. 167, 171, 409 S.E.2d 888, 890 (1991). "The back of the defendant's home faced the back of his father's home." *Id.* at 169, 409 S.E.2d at 889. Though certain evidence might have established the defendant's actual presence in his father's home, "[t]he evidence would also permit an inference that when the defendant was in his own home he was in close proximity to the place where the injections were administered ready to aid his mother. This made him constructively present." *Id.* at 171, 409 S.E.2d at 890; *see also State v. Tirado*, 358 N.C. 551, 583, 599 S.E.2d 515, 537 (2004).

Though the parties in the present case were a few miles away from each other, they were not so far away that Defendant could not render

aid or encouragement to Gibson. We are cognizant of the function of highways in allowing vehicles to travel great distances in a short period of time and take that into account here. Though, as Defendant points out, a supporting vehicle may ordinarily travel behind the target vehicle, Defendant was in a position to provide support as the lead vehicle. Defendant could have relayed road updates, looked out for police, and turned the vehicle around to help Gibson should he have needed it.

Therefore, when viewed in the light most favorable to the State, the evidence shows that Defendant was constructively present with Gibson and acted in concert with him to possess methamphetamine while in this state. Because we hold that the State presented substantial evidence under the doctrine of concerted action to overcome Defendant's motion to dismiss, we need not address the parties' other arguments. *State v. Diaz*, 317 N.C. 545, 552, 346 S.E.2d 488, 493 (1986).

B. Trafficking by Transportation

Similar to its burden with the possession charge, the State may proceed upon a charge of trafficking in methamphetamine by transportation if it presents substantial evidence that Defendant "(1) knowingly . . . transported methamphetamine, and (2) that the amount possessed was greater than 28 grams." *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 93 (2003). Transportation in this context, unlike mere possession, requires "substantial movement" of contraband, eliciting "considerations as to the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved." *State v. Greenidge*, 102 N.C. App. 447, 451, 402 S.E.2d 639, 641 (1991). It may be defined as "any real carrying about or [movement] from one place to another." *State v. Outlaw*, 96 N.C. App. 192, 197, 385 S.E.2d 165, 168 (1989) (quoting *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122, 43 S. Ct. 504, 506, 67 L. Ed. 894, 901 (1923)). Evidence tending to show that Defendant moved methamphetamine across this state in a vehicle for the purposes of later distribution would more than satisfy the State's evidentiary burden related to transportation and overcome Defendant's motion to dismiss. *Id.* As with trafficking by possession, "trafficking by transport can be proved by an acting in concert theory." *State v. Ambriz*, 286 N.C. App. 273, 280, 880 S.E.2d 449, 459 (2022).

Defendant's arguments that the trial court erred in denying his motion to dismiss the trafficking by transportation charge mirror those advanced in his arguments regarding the motion to dismiss the trafficking by possession charge. The evidence showed that the vehicle transporting Defendant and the vehicle transporting Gibson and the drugs traveled together on a highway toward Defendant's residence, in

close proximity to each other. The police stopped the vehicles in North Carolina, and the State presented substantial evidence that Defendant and Gibson acted in concert for the common purpose to transport methamphetamine. For the same reasons we hold that Defendant's motion to dismiss the trafficking by possession charge was properly denied, we also hold that the motion to dismiss the trafficking by transportation charge was properly denied. *See id.*

V. Conclusion

When viewed in the light most favorable to the State, the evidence presented at trial showed Defendant acted in concert with Gibson to commit the offenses of trafficking in methamphetamine by both possession and transportation and was constructively present with Gibson when the two were stopped in separate vehicles a few miles apart. Therefore, the State presented sufficient evidence to support the charges of trafficking in methamphetamine by both possession and transportation, and we affirm the trial court's denial of Defendant's motions to dismiss and conclude that Defendant received a fair trial, free from reversible error.

AFFIRMED.

Judges DILLON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
BOEVINO ANTWANE HAMMOND, DEFENDANT

No. COA22-715

Filed 7 March 2023

Drugs—identity of substance—guilty knowledge—jury instructions

In defendant's trial for trafficking opium or heroin, the trial court did not err by denying defendant's request for an instruction that the jury must find that he "knew that what he possessed was fentanyl" in order to convict him, where no evidence in the record suggested that defendant lacked guilty knowledge—including the testimony of the police officer who stated that the officers at first had believed that the substance was cocaine, which had no bearing on whether defendant believed that the fentanyl was cocaine.

Appeal by Defendant from Judgment entered 16 March 2022 by Judge William H. Coward in Henderson County Superior Court. Heard in the Court of Appeals 24 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John A. Payne, for the State.

Mary McCullers Reece for Defendant-Appellant.

RIGGS, Judge.

Defendant Boevino Antwane Hammond appeals from a judgment entered after a jury found him guilty on one count of trafficking opium or heroin, *i.e.*, fentanyl. At trial, Mr. Hammond requested—but was denied—an instruction that the jury must find he "knew that what [he] possessed was fentanyl" in order to convict him of the crime charged. Mr. Hammond renews this argument by direct appeal and petition for writ of *certiorari*, contending the trial court prejudicially erred in declining to give the requested instruction. After careful review, we grant *certiorari* review in our discretion and hold that that Mr. Hammond has failed to show error on the merits of his appeal.

I. FACTUAL AND PROCEDURAL HISTORY

On 15 March 2018, the Henderson County Sheriff's Office SWAT team executed a search warrant at a home near Fletcher, North Carolina, in an attempt to locate and arrest Mr. Hammond on several outstanding arrest warrants. Officers immediately located Mr. Hammond upon entry into the home and placed him under arrest without incident. Mr. Hammond did not speak to police in exercise of his Fifth Amendment rights.

One of the arresting officers, James Hurn, smelled marijuana and heard a toilet running somewhere in the house. Officer Hurn informed his supervisor of his findings, who in turn pursued and obtained a warrant to search the home for drugs later that day.

Following issuance of the new search warrant, Officer Hurn began looking through the primary bedroom for contraband. He started his search by looking through a laundry hamper, which contained a black plastic bag with a solid white substance inside. Believing the substance to be cocaine, Officer Hurn had the substance photographed, catalogued, and field tested. That test returned a positive result for suspected cocaine. Officer Hurn then found suspected drug paraphernalia elsewhere in the bedroom, including a Magic Bullet blender, inositol, and scales.

Officer Hurn also searched the home's bathroom, locating a powdered substance caked around the toilet bowl. This, too, tested positive for suspected cocaine on a field test. Another officer, Michael Gehring, then collected the substance for testing at the State Crime Lab.

The homeowner returned to the property later that afternoon while the search was still underway. Police placed her under arrest for possession of trafficking amounts of cocaine based on the belief that the substance found in her home was cocaine. Subsequent but pre-indictment testing at the State Crime Lab in late 2018 revealed that the white powder from the hamper and toilet bowl was actually fentanyl.

A grand jury indicted Mr. Hammond on 7 January 2019 for trafficking opium or heroin by possession. Trial began on 14 March 2022, with Officer Hurn, Officer Gehring, and other members of law enforcement testifying consistent with the above recitation of the facts. On cross-examination, Officer Gehring explained why police charged the homeowner with possession of cocaine and not fentanyl:

> [OFFICER GEHRING]: There's a lot of different reasons why we decided to charge with possession of cocaine instead of fentanyl. . . . I've come across cocaine multiple times, whether it be user amounts or large quantities—amounts up in Asheville, as well as Henderson County itself. . . . [O]nce I came back down to Henderson County, the white powder that we ever really came across was cocaine. And that was based upon State Lab results, as well as actual individuals telling us, yes, that's cocaine. . . .
>
> . . . .
>
> And like I stated yesterday, we actually came into contact with an individual who was in the process of trying to dye his cocaine red because people were so scared of fentanyl at that time in Henderson County.
>
> . . . .
>
> So all of that combined with now I have a white powder substance in large quantities, like I've seen multiple times before. I've not seen or heard of fentanyl in Henderson County. None of our informants have talked about fentanyl in Henderson County whatever. Have talked about cocaine multiple times in Henderson County, white powder, white powder. What's more prevalent in the area? What have we seen? What have we heard from informants? Based upon

> all that information, I have to go based off of what I feel is cocaine at that time.
>
> [DEFENDANT'S COUNSEL]: And it tested positive for cocaine?
>
> [OFFICER GEHRING]: It did. Yes, sir.
>
> [DEFENDANT'S COUNSEL]: Okay. And so on the date of offence, March 15, 2018, at the end of that day everyone thinks it's cocaine?
>
> [OFFICER GEHRING]: Yes, sir. Very good reasonable belief. Yes, sir.

Following the close of the State's evidence, Mr. Hammond informed the trial court that he did not intend to testify and rested without presenting any evidence. The trial court then held the charge conference, during which Mr. Hammond's counsel made the following request:

> [I]n foot note number 2, that is in 260.10, Possession, it says: If the defendant contends that the defendant did not know the true identity of what the defendant possessed, add this language to the first sentence, . . . ["]and the defendant knew that what the defendant possessed was . . . fentanyl.["]
>
> I certainly think there is evidence in this case from every witness that has taken the stand that the identity of the substance is in question, since it was field tested and believed to be cocaine and charged as cocaine at the beginning. And so we are requesting as part of the possession instruction to inform the jury that they have to find that [Mr. Hammond] knew that he possessed fentanyl.

The trial court denied the requested instruction, reasoning that law enforcement's initial misapprehension of the substance's identity had no bearing on Mr. Hammond's knowledge, and "[t]here was no evidence in this case that the defendant did not know [the substance was fentanyl]. He didn't testify."

Closing arguments were given but not transcribed and, after instruction and deliberation, the jury returned a guilty verdict. The trial court proceeded to sentence Mr. Hammond to 225 to 282 months imprisonment. A written judgment was entered on 16 March 2022, which states that Mr. Hammond gave notice of appeal from the judgment even though no such notice appears in the trial transcript.

Mr. Hammond filed a *pro se* written notice of appeal on 21 March 2022. Though timely, the notice does not identify the judgment appealed or the court to which the appeal is taken as required by N.C. R. App. P. 4(b) (2022). Nor does the notice indicate service on the State as required by N.C. R. App. P. 4(a)(2) (2022). The trial court nonetheless entered appellate entries on 25 March 2022, and Mr. Hammond's counsel filed a petition for writ of *certiorari* with this Court on 27 September 2022.

II. ANALYSIS

A. Appellate Jurisdiction and Petition for Writ of *Certiorari*

Mr. Hammond concedes that his written notice of appeal does not comply with the requirements of N.C. R. App. P. 4(a)(2) and (b). He also argues, however, that these defects do not divest this Court of jurisdiction; indeed, this Court has noted that failure to serve the State and identify the court to which the appeal is taken "are not the sorts of defects requiring dismissal of an appeal on a jurisdictional basis." *State v. Baungartner*, 273 N.C. App. 580, 583, 850 S.E.2d 549, 551 (2020) (citation omitted). We have also granted *certiorari* review in similar circumstances where, as here, the State lodges no substantive argument against such review. *Id.*; *see also State v. Thorne*, 279 N.C. App. 655, 659, 865 S.E.2d 768, 771 (2021) (granting *certiorari* review when the defendant's *pro se* written notice of appeal was not served on the State and failed to designate the court to which the appeal was taken). Assuming, *arguendo*, that Mr. Hammond's *pro se* notice of appeal raises jurisdictional concerns, we allow his petition for writ of *certiorari* in our discretion to reach the merits of his appeal.

B. Standard of Review

We review a preserved challenge to jury instructions *de novo*. *State v. Richardson*, 270 N.C. App. 149, 152, 838 S.E.2d 470, 473 (2020). A trial court must give the requested instruction if it is supported by the evidence when taken in the light most favorable to the defendant. *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020). To prevail on appeal, a defendant must demonstrate both error and a "reasonable possibility" that the jury would have reached a different result had the requested instruction been given. *State v. Brewington*, 343 N.C. 448, 454, 471 S.E.2d 398, 402 (1996).

C. The Trial Court Did Not Err

Mr. Hammond's requested instruction is appropriately given only "when the defendant denies having knowledge of the controlled substance that he has been charged with possessing or transporting, [as]

the existence of the requisite guilty knowledge becomes 'a determinative issue of fact' about which the trial court must instruct the jury." *State v. Galaviz-Torres*, 368 N.C. 44, 49, 772 S.E.2d 434, 437 (2015). Stated differently, "when the defendant introduces evidence of lack of guilty knowledge the court must charge on it." *State v. Nobles*, 329 N.C. 239, 244, 404 S.E.2d 668, 671 (1991). *See also State v. Elliott*, 232 N.C. 377, 379, 61 S.E.2d 93, 95 (1950) (holding a guilty knowledge instruction is required when a defendant "specifically pleas want of knowledge . . . and offer[s] evidence in support of that plea.").

Mr. Hammond argues that the arresting and investigating officers' misapprehension of the substance found in the home amounts to evidence that Mr. Hammond did not know he was in possession of fentanyl. Specifically, he seizes on the following exchange in arguing the requested instruction should have been given:

> [DEFENDANT'S COUNSEL]: Okay. And so on the date of offence, March 15, 2018, at the end of that day *everyone* thinks it's cocaine?
>
> [OFFICER GEHRING]: Yes, sir. Very good reasonable belief. Yes, sir.

(Emphasis added). Mr. Hammond posits that because Officer Gehring did not expressly limit his testimony that "everyone" believes the substance was cocaine to the arresting and investigating officers, the jury should have been given the opportunity to resolve whether Mr. Hammond lacked knowledge of the substance's true identity upon proper instruction.

Mr. Hammond's argument fails for the simple reason that there is no ambiguity in Officer Gehring's testimony suggesting that Mr. Hammond believed the fentanyl to be cocaine. Read in context, it is apparent that Officer Gehring was referring to the knowledge of the officers who initially arrested Mr. Hammond and the homeowner for possession of cocaine, as the excerpted testimony immediately follows a lengthy discussion of their rationale for doing so. Nothing else in the record supports a reading to the contrary; Mr. Hammond did not testify, and the officers who did—including Officer Gehring—were clear that Mr. Hammond refused to speak with them consistent with his right to remain silent. No written statements to police or physical evidence otherwise suggests that Mr. Hammond lacked the requisite guilty knowledge in this case; to the contrary, officers testified that the inositol recovered at the scene is "a commonly used cutting agent for fentanyl." Without testimony or other evidence suggesting that Officer Gehring had any indication as to Mr. Hammond's knowledge, Mr. Hammond's preferred reading of Officer Gehring's testimony lacks any support in the record.

This absence of any evidence as to Mr. Hammond's lack of knowledge of the substance's identity renders it meaningfully distinct from the central case on which Mr. Hammond relies. In that decision, *State v. Coleman*, we held that a defendant was erroneously denied the requested guilty knowledge instruction, but only because there was "substantive evidence" admitted at trial demonstrating he "did not know the true identity of what he possessed." 227 N.C. App. 354, 359, 742 S.E.2d 346, 350 (2013). As previously explained, no such evidence was admitted in this case.

Without evidence of Mr. Hammond's lack of knowledge, the trial court was not required to give the requested instruction because "[a] presumption that the defendant has the required guilty knowledge exists in the event that the State makes a prima facie showing that the defendant has committed a crime, such as trafficking by possession, . . . that lacks a specific intent element." *Galaviz-Torres*, 368 N.C. at 48, 772 S.E.2d at 437. *See also State v. Parker*, 277 N.C. App. 531, 860 S.E.2d 21, 36 (2021) (holding a defendant was not entitled to receive a guilty knowledge instruction because it was not supported by the evidence); *State v. Bagley*, 183 N.C. App. 514, 524, 644 S.E.2d 615, 622 (2007) ("Jury instructions must be supported by the evidence. Conversely, all essential issues arising from the evidence require jury instruction." (citations omitted)). We therefore hold Mr. Hammond has failed to demonstrate error under this argument.

III. CONCLUSION

Mr. Hammond's argument rests on the assertion that Officer Gehring's testimony created an issue of fact as to Mr. Hammond's guilty knowledge. But Mr. Hammond's reading of that testimony is not supported by the record, and no other evidence demonstrates a lack of guilty knowledge on Mr. Hammond's part. Under such a circumstance, the trial court was not required to give a specific instruction on guilty knowledge. Thus, while we allow Mr. Hammond's petition for writ of *certiorari* to reach his appeal on the merits, we ultimately hold that he has failed to demonstrate error below.

NO ERROR.

Judges GORE and STADING concur.

STATE OF NORTH CAROLINA
v.
ADRON MORRIS, JR., Defendant

No. COA22-3

Filed 7 March 2023

1. Identification of Defendants—out-of-court identification—pretrial show-up—impermissibly suggestive—no likelihood of misidentification

The trial court properly denied defendant's motion to suppress an undercover informant's pretrial identification of defendant—from a single photograph—as the person she bought drugs from, where the court's findings of fact were supported by competent evidence. Further, the identification did not violate defendant's due process rights, even though the single-photograph show-up was impermissibly suggestive, because there was no substantial likelihood of misidentifying defendant as the perpetrator based on a balancing of multiple factors, including that the informant had ample opportunity to observe defendant up close on more than one occasion during daytime hours, the informant was a trained professional who paid a high degree of attention to defendant during their interactions, and the informant accurately described defendant and was certain in her identification.

2. Identification of Defendants—pretrial show-up—Eyewitness Identification Reform Act—applicability

In defendant's prosecution for multiple drug offenses, the pretrial identification of defendant as the person who sold drugs to an undercover informant was not subject to the Eyewitness Identification Reform Act because the identification was done by showing the informant a single photograph; therefore, it did not constitute either a lineup (which would involve an array of photographs) or a show-up (which would involve a live person).

3. Evidence—jury examination of photograph—illustrative purposes—no plain error

In a prosecution of multiple drug offenses, the trial court did not commit plain error, even assuming error occurred, by allowing the jury to examine a photograph of defendant from the Department of Motor Vehicles, since the photograph was admitted for illustrative purposes only, and the jury had other, substantive evidence from which to conclude that defendant was the person who had

sold drugs to an undercover informant—including video recordings of the drug transactions, still photos from those recordings, and the informant's own identification of defendant as the perpetrator.

4. Sentencing—sale and delivery of cocaine—based on single transfer of drugs—judgment entered on both offenses improper

The trial court erred by entering judgment and sentencing defendant for both selling and delivering cocaine based on a single transfer of drugs, since a defendant may be convicted of only one of those offenses for a single transaction. Since the court improperly entered judgment for both sale and delivery in each of two cases and then consolidated the multiple convictions into a single judgment for sentencing, the matter was remanded for resentencing.

Appeal by defendant from judgments entered on or about 28 May 2021 by Judge Henry L. Stevens in Superior Court, Duplin County. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Sage A. Boyd, for the State.

Shelly Bibb DeAdder, for defendant-appellant.

STROUD, Chief Judge.

Defendant Adron Morris, Jr. appeals from an order denying his motion to suppress eyewitness identification evidence and from two judgments for one count per judgment of (1) sale and (2) delivery of cocaine.[1] As to the motion to suppress, because there was not a substantial likelihood of irreparable misidentification, the identification did not violate due process. Because the Eyewitness Identification Reform Act ("EIRA") did not apply, the identification did not violate it either. As a result, we affirm the trial court's denial of Defendant's motion to suppress. As to Defendant's trial, because the EIRA did not apply, the

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1. As explained below, the trial court incorrectly entered judgment for two counts of sale *and* two counts of delivery of cocaine. Instead, the trial court should have entered judgment for two total counts of sale or delivery of cocaine. Because the trial court's error in the judgment related back to both the indictment and the jury's verdicts, we mention separate charges for (1) sale of cocaine and (2) delivery of cocaine throughout the "Background" section. The discussion of why the trial court erred in treating sale and delivery as separate charges occurs in the "Sentencing Issue" section.

trial court did not err in denying Defendant's motion *in limine* based on the EIRA. Because there was overwhelming evidence of Defendant's guilt, the trial court did not plainly err by allowing the jurors to treat illustrative evidence as substantive evidence. Finally, because the trial court erred by giving weight to both the sale and the delivery of cocaine charges when sentencing Defendant, we remand for Defendant to be resentenced on a single count of sale or delivery for each involved transaction.

I. Background

Because the main factual disputes in this appeal concern Defendant's motion to suppress, we start by discussing what the State's evidence tended to show at the suppression hearing. That evidence tended to show, on 12 and 13 December 2017, Detective Cody Boyette of the Duplin County Sheriff's Office had two informants, Kenyatta Polk and "Ms. Eve,"[2] conduct undercover drug buys at a trailer park in Wallace, North Carolina. On both days, the informants bought crack cocaine from someone Eve knew as "Head[.]" Polk later identified Defendant as Head at the suppression hearing.

Each day the informants went to the vacant trailer around mid-day. The weather and visibility were good, and Polk had a clear, unobstructed view of Head from "[a]bout three to five feet" away during their interactions, which lasted "[p]robably a minute" or two. As the "lead" or "primary" informant, Polk recorded the interactions, with both audio and video means, using equipment supplied by Detective Boyette.

After the interactions, the informants returned to Detective Boyette with the drugs they had purchased from Head. At that time, law enforcement officers "debriefed" Polk, and she provided a written account of the interactions, identifying the person she had purchased drugs from as Head. As part of this debrief, Polk described Head as a "black male with a scruffy beard, 5'7 or 5'8, with a brush cut[,]" and weighing 150 pounds. Detective Boyette also watched the recording of the transactions shortly after recording them and created a case file for the transactions with the suspect initially listed only as Head.

About two weeks after the undercover drug buys, Detective Boyette connected the name Head to Defendant by using information from confidential informants and police databases, as well as other "police

2. At various points in the transcript, Ms. Eve is also referred to as Evelyn. We refer to her as Eve throughout for consistency.

work." As part of this process, Detective Boyette looked up identifying information for Defendant and noted Defendant was listed as five feet, seven inches tall and 150 pounds, as Polk had described. Once Detective Boyette had Defendant's name, he looked up a DMV photo of Defendant and compared it to the footage of Head from the recordings of the drug buys, as well as still photos taken from the footage, to confirm Defendant was Head. Detective Boyette did not ask Polk to identify Defendant as Head at that time.

After a delay to allow the informants to continue working without revealing their identities, the Duplin County Sheriff's Office arrested Defendant on or about 19 September 2019. Then, on or about 17 December 2019, Defendant was indicted on two counts each—one for each of the days of the controlled buys—of the following three charges: possession with intent to manufacture, sell, and/or deliver a Schedule II controlled substance, *i.e.* the cocaine ("possession"); sale of a Schedule II controlled substance ("sale"); and delivery of a Schedule II controlled substance ("delivery").

Then, on 9 October 2020, the State held a trial preparation meeting with one of the informants, Polk,[3] and Detective Boyette. While reviewing the case file at this meeting, Polk saw a DMV picture of Defendant with Defendant's name written on it. After Polk picked up the photo, the prosecutor and Detective Boyette asked her, "Is this the person you purchased from?" Polk responded, "Yes." The prosecutor and Detective Boyette did not show Polk any other pictures at the trial preparation meeting.

Partially as a result of this meeting, on 23 October 2020, Defendant's attorney filed a motion to suppress "eyewitness testimony and prevent[] certain witnesses from rendering in-court identifications" based on the federal and state Constitutions and EIRA. Specifically, Defendant contended law enforcement never had either of the two informants who conducted the drug buys identify Defendant as Head, the person from whom they had bought the cocaine. Defendant argued allowing an identification for the first time in court "would amount to an impermissible 'show up,' in clear violation of Defendant's due process and statutory rights." As a result, Defendant asked the trial court to suppress "any eyewitness identifications, including potential in-court identifications[.]"

3. The other informant, Eve, did not testify at either the suppression hearing or Defendant's trial. Our record does not contain any information about her beyond her involvement in the initial undercover drug buys as discussed above.

On 29 October 2020, the trial court held a hearing on Defendant's motion to suppress. At the hearing both Polk and Detective Boyette testified about the undercover drug buys and Polk's subsequent trial preparation meeting as discussed above. Polk also identified Defendant as Head, the person from whom she bought drugs, with "[a] hundred percent" certainty. The State further admitted into evidence: the recordings of both undercover drug buys; still photographs of Head taken from those recordings; Polk's written debriefs; and the information from police databases Detective Boyette used to identify Defendant as Head. The State finally played the relevant portions of the recordings during Polk's testimony. After hearing arguments from counsel, the trial court orally denied Defendant's motion to suppress.

The trial court subsequently entered a written order denying Defendant's motion to suppress that aligned with its oral order. First, the trial court found both Polk and Detective Boyette "to be credible." The trial court then found on both 12 and 13 December 2017 Polk bought "a controlled substance" from Head and "[d]uring the transaction it was light out, there was nothing obstructing the person known as Head's face, [and] Ms. Polk had an unobstructed view of Head's face for approximately 1 minute from a distance of 3 to 5 feet." On both days, Polk recorded the interactions, and "[a]n unobstructed view of Head's person, including his face, were clearly depicted in the recordings." The trial court also found "[i]mmediately after" the 12 December transaction, Polk described Head "as being a young black male standing approximately 5'7" and weighing approximately 150 pounds." After recounting how Polk had identified Defendant as the person from whom she bought drugs with one hundred percent certainty, the trial court made another finding about the circumstances surrounding the identification that largely summarized the prior findings. In its final two findings, the trial court determined "[t]here was not a substantial likelihood of misidentification by the witness[,]" and "[t]here was a reasonable possibility of observation sufficient to permit subsequent identification."

Based on those findings of fact, the trial court concluded "[t]he identification procedure was not so impermissibly suggestive as to create a substantial likelihood of misidentification[,]" again noting Polk "unequivocally identified . . . Defendant as the person from whom she bought controlled substances." The trial court also noted it took into account the EIRA. As a result, the trial court denied Defendant's motion to suppress.

Following the suppression hearing, Defendant's attorney filed two motions *in limine* on 15 November 2020. In the first motion *in limine*,

Defendant sought to exclude any testimony by Detective Boyette identifying Defendant as Head on the grounds it was impermissible lay opinion testimony because Detective Boyette only made an identification by comparing the still photos from the recordings of the transactions to pictures of Defendant in "law enforcement databases" rather than by having any personal interaction with Defendant or Head. In the second motion, Defendant asked for the court to deem admissible "evidence of the State's failure to comply with the" EIRA.

The case came for trial starting on 24 May 2021. Before the start of trial and outside the presence of the jury, the parties discussed the motions *in limine*. The parties told the court they had reached a "tentative agreement" on the motion *in limine* about Detective Boyette's identification of Defendant as Head. The trial court heard arguments on the other motion *in limine* about the EIRA. During these arguments, the State asserted, in part, the EIRA did not apply to Polk's identification. The trial court agreed with the State that the EIRA did not apply, so it did not allow Defendant's attorney to "bring[] up" that law enforcement was "required to do certain things under the" EIRA. But the trial court clarified questions about the identification, the timeframe, "and all that kind of stuff are obviously permissible."

At trial, the State's only witnesses were Polk and Detective Boyette. Polk testified about the controlled drug purchases of crack cocaine consistent with her testimony at the suppression hearing. As part of Polk's testimony, the jurors watched her recordings of the transactions on both days, and the State introduced still photos of Head taken from the recordings. After the trial court overruled the renewed objection of Defendant's counsel, Polk identified Defendant as the person from whom she purchased drugs both days with "[a] hundred percent" certainty. Detective Boyette also testified consistently with his testimony at the suppression hearing. In addition to testimony on the topics he discussed at the suppression hearing, Detective Boyette explained to the jury how the undercover drug buys took place in an area "[a]pproximately a football field or less" from an address associated with Defendant.

Defendant did not present evidence at trial, so the case went to the jury. During jury deliberations, the jurors sent a note to the court saying, "DMV photo, still shots, all photos." Neither party objected to the jurors receiving these items, but, at the State's request, the jurors reviewed them in the courtroom.

Following the deliberations, the jury found Defendant guilty of two counts each, one for each day, of: possession; sale; and delivery. The trial

court arrested judgment on both the possession charges. On or about 28 May 2021, the trial court entered judgment on both the sell and deliver charges; it sentenced Defendant to 15 to 27 months for the 12 December counts and 15 to 27 months for the 13 December counts. Defendant gave oral notice of appeal in open court.

II. Analysis

Defendant contends the trial court erred in four ways. First, he argues "the trial court erred by denying [his] motion to suppress" the informant Polk's "eyewitness identification because the identification procedure . . . violated his due process rights." (Capitalization altered.) Second, Defendant asserts "the identification procedure did not comply with the" EIRA, so the trial court erred in denying his motion to suppress on that ground as well and "erred by denying [his] motion *in limine* to introduce evidence that the State failed to comply with the EIRA." (Capitalization altered.) Third, Defendant contends the trial court plainly erred "by allowing the jury to examine" his DMV photo during deliberations and to "treat it as substantive evidence" because it was introduced for illustrative purposes only. (Capitalization altered.) Finally, Defendant argues "the trial court erred by entering judgment for both selling and delivering cocaine." (Capitalization altered.) We address each of the issues in turn.

A. Eyewitness Identification and Due Process

[1] Defendant first argues the trial court erred in denying his motion to suppress because Polk's identification "violated his due process rights." The due process inquiry in the context of eyewitness identification "asks 'whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification.' " *State v. Rouse*, 284 N.C. App. 473, 480, 876 S.E.2d 107, 114 (2022) (quoting *State v. Malone*, 373 N.C. 134, 146, 833 S.E.2d 779, 787 (2019)), *disc. rev. denied*, 383 N.C. 686, 881 S.E.2d 308 (2022). That inquiry has two steps:

> first assessing "whether the identification procedures were impermissibly suggestive." [*Malone*, 373 N.C. at 146, 833 S.E.2d at 787] (citations and quotations omitted). "If this question is answered negatively, our inquiry is at an end." *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978). If the answer is affirmative, courts then determine "whether the procedures create a substantial likelihood of irreparable misidentification." *Malone*, 373 N.C. at 146, 833 S.E.2d at 787 (citations and quotations omitted). At this second step, "[t]he central question is whether

> under the totality of the circumstances the identification was reliable even if the confrontation procedure was suggestive." [*State v.*] *Reaves-Smith*, 271 N.C. App. [337,] 345, 844 S.E.2d [19,] 25 [(2020)] (citing *State v. Oliver*, 302 N.C. 28, 45-46, 274 S.E.2d 183, 195 (1981))[.]

Id. at 480, 876 S.E.2d at 114-15 (bracket for "[t]he" in original) (brackets with citation information added). To aid in the second step's totality of the circumstances analysis, courts use five factors:

> [(1)] the opportunity of the witness to view the accused at the time of the crime, [(2)] the witness' degree of attention at the time, [(3)] the accuracy of his prior description of the accused, [(4)] the witness' level of certainty in identifying the accused at the time of the confrontation, and [(5)] the time between the crime and the confrontation.

Id. at 481-82, 876 S.E.2d at 115 (brackets in original) (quoting *Malone*, 373 N.C. at 147, 833 S.E.2d at 787).

Having reviewed that framework, we turn to Defendant's specific arguments on the due process issue. First, Defendant challenges certain findings of fact within the trial court's order denying his motion to suppress. Defendant then argues the "the trial court's Findings of Fact do not support the Conclusions of Law" that "the 'identification procedure was not so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification' and that '[t]here was a reasonable possibility of observation sufficient to permit subsequent identification[,]' " which both support the trial court's ultimate conclusion, the identification did not violate Defendant's due process rights. (First brackets in original.) After addressing the standard of review, we assess Defendant's challenges to the findings and then to the trial court's conclusion his due process rights were not violated.

1. Standard of Review

This Court recently summarized the standard of review for the denial of a motion to suppress in an eyewitness identification case:

> On appeal, "review of the denial of a motion to suppress is limited to determining whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 779, 786 (2019) (quotations and citations omitted). "Unchallenged findings are deemed supported by competent evidence and

> are binding on appeal." *State v. Fields*, 268 N.C. App. 561, 566-67, 836 S.E.2d 886, 890 (2019) (citing *State v. Biber*, 365 N.C. 162, 167, 712 S.E.2d 874, 878 (2011)). Challenged findings "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Malone*, 373 N.C. at 145, 833 S.E.2d at 786 (quotations and citations omitted). "However, the trial court's conclusions of law are fully reviewable on appeal." *Id.* (citation omitted); *see also Fields*, 268 N.C. App. at 567, 836 S.E.2d at 890 ("Conclusions of law are reviewed de novo.").

Id. at 479, 876 S.E.2d at 114.

2. Challenged Findings of Fact

Applying that standard of review, Defendant first contends findings of fact 2, 3, 4, 7, 8, and 9 "are not supported by competent evidence." (Capitalization altered.) Defendant groups his challenges to the findings, and we review his contentions in those groups.

First, Defendant challenges findings 2, 3, and 7. Findings 2 and 3 concern the informant Polk's drug purchases:

> 2. On or about December 12, 2017, Ms. Polk bought a controlled substance from someone she referred to as "Head." During the transaction it was light out, there was nothing obstructing the person known as Head's face, Ms. Polk had an unobstructed view of Head's face for approximately 1 minute from a distance of 3 to 5 feet.
>
> 3. On or about December 13, 2017, Ms. Polk bought a controlled substance from someone she referred to as "Head." During the transaction it was light out, there was nothing obstructing the person known as Head's face, Ms. Polk had an unobstructed view of Head's face for approximately 1 minute from a distance of 3 to 5 feet.

Finding 7 summarizes previous findings and lists them in alignment with the five factors relevant for the second step of the due process analysis:

> 7. Although it has been nearly 3 years since the crime occurred, Polk had ample opportunity to view the perpetrator of this crime in person at a distance of 3 to 5 feet with two separate daylight observations lasting approximately 1 minute each. Polk is a professional informant and exhibited a high degree of attention as evidenced by her care in recording the perpetrator and his face. Polk's

> description of the perpetrator was extremely accurate as evidenced by her estimation of his height and weight matching his recorded height and weight. Polk also demonstrated a high level of certainty, stating that she was "100% certain" that Defendant was the man from whom she bought controlled substances on December 12, 2017 and December 13, 2017.

See id. at 481, 876 S.E.2d at 115 (listing factors).

As to each of these three findings, Defendant specifically challenges the sentences on Polk's "clear and unobstructed view of Head for approximately one minute[.]" Defendant admits Polk "testified that one to two minutes passed from the time she arrived to purchase the drugs to the time the drugs were in her hands" and the testimony "is accurate according to the videos[.]" But Defendant contends "the relevant timeframe is her direct interaction with Head[,]" which lasted only 35 seconds on 12 December and 26 seconds on 13 December, and that time period "is half of what the trial court sets forth."

As Defendant indicates, Polk testified the time between her arrival to obtaining the drugs was "[o]ne to two minutes" for each of the two days. After reviewing the videos which were shown during the suppression hearing, Defendant is correct the interactions were closer to 30 to 40 seconds each day rather than a full minute. But Polk also testified she interacted with Head for a minute on each day:

> Q. So the entirety of your interaction with Head was basically a minute on December 12, 2017 and another minute on December 13, 2017, is that right?
>
> A. Yes, sir.

Notably, that testimony came on cross-examination by Defendant's own attorney. Since Polk testified each interaction was "basically a minute," the trial court had competent evidence to support the Findings, even if the video presented conflicting evidence. *See id.* at 479, 876 S.E.2d at 114 ("Challenged findings 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " (quoting *Malone*, 373 N.C. at 145, 833 S.E.2d at 786)). Therefore, we reject Defendant's challenge to findings 2, 3, and 7 on the ground that the timeframe of the informant Polk's interaction with Head was shorter than the trial court found.

Defendant also challenges finding 4 together with another part of finding 7. Finding 4 states:

> 4. Ms. Polk captured both the December 12 and December 13 transactions on an audio/visual recording device. An unobstructed view of Head's person, including his face, were clearly depicted in the recordings.

As to finding 4, Defendant argues "[t]he recordings in this case are not clear[,]" and the trial court erroneously stated, "Head is distinctly visible throughout the interactions." Defendant also challenges finding 7's statement Polk "exhibited a high degree of attention as evidenced by her care in recording the perpetrator and his face."

We reject Defendant's challenges to finding 4 and that part of finding 7 because the trial court had competent evidence to support those findings. As to finding 4, Defendant misstates the finding. Finding 4 never says the recording is clear or Head "is distinctly visible throughout the interactions." The trial court only found there was a clear, unobstructed view of "Head's person, including his face," in the recordings during at least one point. Reviewing the videos shown at the suppression hearing, they clearly depict the person identified as Head, including both his body and his face. Similarly, finding 7 only stated Polk ensured the recordings captured "the perpetrator and his face[,]" and those same portions of the video show she did. As a result, the trial court had competent evidence to support findings 4 and 7.

Finally, Defendant argues findings 8 and 9 are actually conclusions of law. We agree. Findings 8 and 9 state:

> 8. There was not a substantial likelihood of misidentification by the witness.
>
> 9. There was a reasonable possibility of observation sufficient to permit subsequent identification.

Both findings relate to the second step of the due process analysis discussed above. Finding 8's language on the lack of "a substantial likelihood of misidentification" mirrors the language for the second part of the analysis. *See id.* at 480, 876 S.E.2d at 114 (phrasing the second step as "a substantial likelihood of irreparable misidentification" (citations and quotation marks omitted)). And finding 9's focus on a previous "observation sufficient to permit subsequent identification" resembles the first factor of the five factors used when conducting the second step inquiry because the first factor focuses on "the opportunity of the witness to view the accused at the time of the crime." *Id.* at 481, 876 S.E.2d at 115. Because these findings are actually conclusions of law, we will treat them as conclusions. *See State v. Hopper*, 205 N.C. App. 175, 179, 695 S.E.2d 801, 805 (2010) ("A trial court's mislabeling a determination

. . . is inconsequential as the appellate court may simply re-classify the determination and apply the appropriate standard of review." (citations and quotation marks omitted)). As a result, we will review the findings with Defendant's argument the trial court erred in concluding the identification did not violate his due process rights, to which we now turn.

3. Conclusions of Law on Due Process

Defendant argues the trial court erred in concluding "the identification procedure was not so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification" and that there "was a reasonable possibility of observation sufficient to permit subsequent identification" and therefore erred in determining no due process violation occurred. Specifically, Defendant, aligning with the two prongs of the due process test, *see Rouse*, 284 N.C. App. at 480, 876 S.E.2d at 114-15, argues "the identification procedure in this case was impermissibly suggestive" and "there was a substantial likelihood of misidentification." (Capitalization altered.) We review the trial court's conclusion that the identification procedure did not violate due process *de novo*. *See id.* at 479, 876 S.E.2d at 114.

The first issue is "whether the identification procedures were impermissibly suggestive." *Id.* at 480, 876 S.E.2d at 114. The trial court did not make any findings on the pre-trial identification procedure in question in this case, but Polk testified about the procedure during the suppression hearing. Specifically, during trial preparation with the prosecutor and Detective Boyette, Polk reviewed "the file" and saw a DMV picture of Defendant with Defendant's name on it. After Polk picked up the photo, "they asked [her] the - 'Is this the person you purchased from[,]' " and she said yes. That photo was the only picture Polk saw or was asked about; she had not been asked to identify any photos prior to the trial preparation meeting and was only asked about that one photo at the meeting.

"Our courts have widely condemned the practice of showing suspects singly to persons for the purpose of identification." *State v. Yancey*, 291 N.C. 656, 661, 231 S.E.2d 637, 640 (1977) (citing, *inter alia*, *Stovall v. Denno*, 388 U.S. 293, 302, 18 L. Ed. 2d 1199, 1206 (1967), *abrogated on other grounds by U.S. v. Johnson*, 457 U.S. 537, 73 L. Ed. 2d 202 (1982)). Furthermore, the Supreme Court of the United States "has held that single-suspect identification procedures 'clearly convey the suggestion to the witness that the one presented is believed guilty by the police.' " *Malone*, 373 N.C. at 148, 833 S.E.2d at 788 (brackets omitted) (quoting *U.S. v. Wade*, 388 U.S. 218, 234, 18 L. Ed. 2d 1149, 1161 (1967)). For example, in *State v. Jones*, this Court held "[t]he showing of

only one picture some seven months after the incident occurred, after the witness had been notified that he would be receiving a photograph of the defendant and with the defendant's name written on the back, was impermissibly suggestive." *State v. Jones*, 98 N.C. App. 342, 347, 391 S.E.2d 52, 56 (1990).

Further, in *Malone*, our Supreme Court found a similar trial preparation identification scenario to be impermissibly suggestive. *See Malone*, 373 N.C. at 148, 833 S.E.2d at 788. There, the prosecutor showed two witnesses a video of one defendant's interview and recent photographs of both defendants. *See id.* The *Malone* Court determined the prosecutor "did more than simply convey a suggestion" and "effectively told" the witnesses "they were viewing pictures of the men police believed were responsible" by showing them the photos "in a meeting two weeks before trial." *Id.* The *Malone* Court also rejected the arguments that the trial preparation setting or the fact that one of the witnesses asked to see the video of the defendant's interview changed the first step of the due process analysis. *See id.* at 148-49, 833 S.E.2d at 788-79. The *Malone* Court held the situation led "inescapably to the legal conclusion that the procedures employed . . . were impermissibly suggestive." *Id.* at 149, 833 S.E.2d at 789.

Here, the identification situation resembles both *Jones* and *Malone*, so it was also impermissibly suggestive. Similar to *Jones*, Polk saw only one photo years after the incident, and the photo had Defendant's name written on it. *See Jones*, 98 N.C. App. at 347, 391 S.E.2d at 56. And similar to *Malone*, the district attorney "effectively told" Polk she was looking at a picture of the person police believed bought the drugs because Defendant's name was on the picture and the picture was included in the police file during a meeting to prepare for Defendant's trial. *See Malone*, 373 N.C. at 148-49, 833 S.E.2d at 788-79. Moreover, it does not make a difference that here Polk picked up the photo out of the file before the prosecutor and Detective Boyette asked if that was the person from whom she purchased the drugs. The *Malone* Court rejected a similar argument when in that case the witness asked to watch one of the videos of a defendant. *See id.* As a result, we determine Polk seeing the photo of Defendant in the file during the trial preparation meeting was impermissibly suggestive, thereby satisfying the first step of the due process inquiry.

The State argues Polk's "out-of-court identification was not impermissibly suggestive" because she: had previously interacted with the person she had bought drugs from "during daylight with clear visibility[;]" was able to record those interactions; and described him afterwards.

But those arguments all relate to the factors used to assess the substantial likelihood of irreparable misidentification rather than to the impermissibly suggestive nature of the identification. *See Rouse*, 284 N.C. App. at 481, 876 S.E.2d at 115. For example, the State's argument Polk had previously interacted with the person she bought drugs from "during daylight with clear visibility" relates to the first factor "the opportunity of the witness to view the accused at the time of the crime[.]" *Id.* Therefore, the State's arguments do not change our determination that the identification was impermissibly suggestive; they are only relevant to the second step.

Turning to that second step, we must determine "whether the procedures create[d] a substantial likelihood of irreparable misidentification." *See id.* at 480, 876 S.E.2d at 114. In order to assess that question, we use five factors:

> [(1)] the opportunity of the witness to view the accused at the time of the crime, [(2)] the witness' degree of attention at the time, [(3)] the accuracy of his prior description of the accused, [(4)] the witness' level of certainty in identifying the accused at the time of the confrontation, and [(5)] the time between the crime and the confrontation.

Id. at 481, 876 S.E.2d at 115 (brackets in original). "Reviewing courts do not need to find all five factors weigh against a substantial likelihood of irreparable misidentification to admit the evidence over due process concerns." *Id.* at 482, 876 S.E.2d at 115. The factors must ultimately be weighed against "the corrupting effect of the suggestive procedure itself." *State v. Pigott*, 320 N.C. 96, 100, 357 S.E.2d 631, 634 (1987) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L.Ed.2d 140, 154 (1977)). We address each factor in turn.

As to the first factor, the trial court found "[d]uring the transaction it was light out, there was nothing obstructing the person known as Head's face," and Polk "had an obstructed view of Head's face for approximately 1 minute from a distance of 3 to 5 feet" both days she bought drugs from Head. Many of the facts for this factor resemble the situation in *Malone* where the first factor counted against a due process violation when one of the witnesses saw a shooter for 75 to 90 seconds from four feet away. *See Malone*, 373 N.C. at 148-50, 833 S.E.2d at 788-79 (stating in terms of supporting an independent origin after saying that independent origin inquiry is "merely the second part of the due process inquiry"). Here, the time frame of approximately two minutes total and distance of 3 to 5 feet is nearly identical. The trial court's additional findings—the transaction occurred when it "was light out" and nothing was obstructing

Head's face—serve only to further strengthen Polk's opportunity to view the accused. Thus, this factor counts against a due process violation.

On the second factor, "the witness's degree of attention[,]" *Rouse*, 284 N.C. App. at 481, 876 S.E.2d at 115, the trial court relevantly found Polk is a "professional" who took "care in recording the perpetrator and his face" given the recordings "clearly depicted" an "unobstructed view of Head's person, including his face[.]" In *State v. Smith*, this Court noted a police officer who participated in an undercover drug purchase testified she had "trained to maintain a high degree of attention when observing suspects," in part through an "informant training and control," and because she knew she would be required to later identify the suspect. *State v. Smith*, 134 N.C. App. 123, 124, 128, 516 S.E.2d 902, 904, 906 (1999). Here, Polk's "professional" status and the care in the recording likewise indicate she knew she would need to pay attention to later be able to identify the person from whom she brought the drugs. Therefore, this factor also counts against finding a due process violation.

Turning to the third factor, we look at the accuracy of Polk's prior description of the accused. *See Rouse*, 284 N.C. App. at 481, 876 S.E.2d at 115. The trial court found, following the first transaction on 12 December 2017, Polk described Head as being a "young black male standing approximately 5'7" and weighing approximately 150 pounds." The trial court also found this description "match[ed]" Defendant's "recorded height and weight."

That match is important, but in the past our courts have found a more detailed description still supported a due process violation. For example, in *State v. Headen*, our Supreme Court found a due process violation in part because the witness "could only give a general description" including the accused's race, height, age range, build, and hair. *State v. Headen*, 295 N.C. 437, 442-43, 245 S.E.2d 706, 710 (1978). This "general description" described the perpetrator as a white man who was 5' 9" tall, "slender or medium build[,]" and who had "dark colored" hair. *Id.* Here, Polk described Head's race, height, age range, and approximated his weight, but the trial court's binding finding, *see Rouse*, 284 N.C. App. at 479, 876 S.E.2d at 114 (indicating findings supported by competent evidence are binding on appeal), does not indicate Polk described his hair. Polk's description also had a similar level of generality to the one in *Headen* in both race and height. *See Headen*, 295 N.C. at 442-43, 245 S.E.2d at 710. While Polk gave an approximate weight in comparison to just the witness's description of build in *Headen*, *see id.*, the lack of description of Head's hair helps offset this greater level of detail. In total, Polk's description here was the same or less informative than the

description in *Headen* that supported finding a due process violation. *See id.* This factor slightly favors finding a due process violation.

For the fourth factor, we examine the witness's "level of certainty" in the identification "at the time of the confrontation[.]" *Rouse*, 284 N.C. App. at 481, 876 S.E.2d at 115. The time of the confrontation means the time of the "impermissibly suggestive events[.]" *See Malone*, 373 N.C. at 151, 833 S.E.2d at 790 (indicating time of confrontation was 29 February 2016 and then when discussing another factor saying that was the date of "the impermissibly suggestive events"). The trial court here only made a finding Polk identified Defendant as the person from whom she purchased drugs with one hundred percent certainty during her testimony. The trial court did not make any finding on Polk's certainty at the time of the confrontation—*i.e.* when she was shown the photo of Defendant during the pre-trial meeting—although Polk testified that when she was asked whether that photo depicted the person from whom she purchased drugs, she said "Yes." Since Polk's testimony about her identification at the time of the confrontation did not demonstrate hesitancy, this factor slightly counts against a due process violation.

Finally, for the fifth factor, we consider "the time between the crime and the confrontation." *Rouse*, 284 N.C. App. at 481, 876 S.E.2d at 115. The trial court noted in its findings that it had been "nearly 3 years since the crime occurred[.]" This gap in time between the crime and confrontation resembles *Malone* where our Supreme Court found the factor favored finding a due process violation when the confrontation occurred three and a half years after the crime for one of the witnesses. *See Malone*, 373 N.C. at 151, 833 S.E.2d at 790. Thus, this factor also favors finding a due process violation.

Weighing all those factors as part of the totality of the circumstances against the corrupting influence of the identification procedure itself, the procedure did not "create a substantial likelihood of irreparable misidentification." *Rouse*, 284 N.C. App. at 480, 876 S.E.2d at 114 (citation and quotation marks omitted). Polk had an excellent chance to observe Head during the transactions, and she gave an accurate, albeit limited, description of Head that matched Defendant. Her professional background and the corresponding degree of attention she paid also mitigates the impact of the gap in time between the confrontation and identification because Polk knew she could be asked to identify the person from whom she bought drugs later and would therefore need to remember him. *See Smith*, 134 N.C. App. at 128, 516 S.E.2d at 906 (finding no due process violation in part because the police officer witness was a professional who "was aware that part of her responsibility

. . . would require that she later identify [the] defendant"). While this fact does not fit cleanly within any one of the five factors, the length in time between the confrontation and identification is also mitigated by the fact Polk reviewed the videos she recorded of the drug purchases shortly before making the identification. Thus, the confrontation was fresher in Polk's mind than the three year gap would otherwise indicate. Finally, Polk did not express hesitancy in her identification. Because there was not a substantial likelihood of irreparable misidentification, the identification did not violate due process. After our *de novo* review, we hold the trial court did not err in reaching that conclusion.

B. EIRA Issues

[2] Beyond his due process argument in relation to Polk's eyewitness identification, Defendant contends the identification also violated the EIRA. Specifically, Defendant argues the "procedure used in this case was either an improper photographic lineup[,]" an "improper show-up[,]" or "some variation that is not permitted by statute." Defendant argues the asserted EIRA violation caused two separate errors in the trial court. First, he contends the eyewitness identification "should have been suppressed" because of the EIRA violation. Second, he argues the trial court erred by denying his "motion *in limine* to introduce evidence that the State failed to comply with the EIRA." (Capitalization altered.) The State responds Polk's "observation of the DMV photo in the case file was not part of a procedure outlined in the EIRA[,]" so the trial court "appropriate[ly]" decided "the EIRA was not applicable under these circumstances[.]"

As an initial matter, we must decide whether the EIRA applies to Polk's identification in this case. Only if the EIRA applies do we need to reach Defendant's arguments about a violation of the EIRA and the trial court's alleged errors in relation to any such violation.

1. Standard of Review

The applicability of the EIRA presents an issue of statutory interpretation. "We review questions of statutory interpretation *de novo*." *State v. Macon*, 236 N.C. App. 182, 185, 762 S.E.2d 378, 380 (2014).

2. Applicability of the EIRA

"As our Supreme Court has emphasized, when construing a statute, 'our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished.' " *State v. Rawls*, 207 N.C. App. 415, 419, 700 S.E.2d 112, 115 (2010) (quoting *Electric Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)).

The first method of statutory construction is to "ascertain[]" the legislative intent "from the plain words of the statute." *Id.* (quoting *Electric Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294). Further, when a statute "contains a definition of a word used therein, that definition controls[.]" *Id.* (quoting, *inter alia*, *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974)). When looking at the language of the statute, "words and phrases . . . may not be interpreted out of context, but individual expressions must be construed as a part of the composite whole[.]" *Id.* at 419, 700 S.E.2d at 115-16 (brackets omitted) (quoting, *inter alia*, *In re Hardy*, 294 N.C. 90, 95-96, 240 S.E.2d 367, 371-72 (1978)). Finally, as relevant here, "the legislature is 'presumed to have acted with full knowledge of prior and existing law and its construction by the courts.' " *See id.* at 421, 700 S.E.2d at 117 (brackets omitted) (quoting *State v. Anthony*, 351 N.C. 611, 618, 528 S.E.2d 321, 324 (2000)).

Turning to the statute at issue here, the main provisions of the EIRA are codified in N.C. Gen. Stat. § 15A-284.52. *See* N.C. Gen. Stat. § 15A-284.52 (2017). The EIRA includes required procedures for both lineups (sub-sections (b) and (c)) and show-ups (sub-section (c1)). *Id.* Both the required procedures sub-sections and the definition sub-section identify two types of lineups, a "[l]ive lineup" and a "[p]hoto lineup." *See id.* (a)(6)-(7) (defining the two types of lineups); *see*, *e.g.*, *id.* (b)(4) (setting requirements for "[i]n a photo lineup") and (b)(8) (setting requirements for "[i]n a live lineup"). By contrast, the same relevant sub-sections for show-ups do not explicitly differentiate between live and photo show-ups. The definition of "[s]how-up" only discusses the use of a live person: "A procedure in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime." *Id.* (a)(8). And one of the requirements for a show-up dictates the procedure "shall only be performed using a live suspect and shall not be conducted with a photograph." *Id.* (c1)(2).

Both of these sub-sections on show-ups indicate a show-up can only permissibly include a live person. *See id.* (a)(8), (c1)(2). Thus, if the identification in this case were a show-up under the EIRA, Defendant has shown an EIRA violation, and we would have to discuss the potential remedies for which he argues. But, we hold the identification procedure in his case was not a show-up covered under the EIRA.

The first issue we must address is how to classify the identification here because that classification determines which portions of the EIRA we must interpret. Defendant argues the procedure was either "an improper photographic lineup[,]" an "improper show-up[,]" or "some

variation that is not permitted by statute." As discussed above, the identification here involved Polk seeing a single photograph of Defendant and being asked if he was the person from whom she bought the drugs. In the past, this Court has described "[t]he use of a single photograph . . . to make an identification" as what "might be called a photographic showup[.]" *Macon*, 236 N.C. App. at 189-90, 762 S.E.2d at 383. In that case, this Court held the EIRA did not cover single-photograph identifications "because they are not lineups" and the version of the EIRA in effect at the time did not ban show-ups. *Id.* The relevant version of the EIRA here creates requirements for at least some types of show-ups, *see* N.C. Gen. Stat. § 15A-284.52(c1) (2017), following an amendment by the General Assembly. *See* 2015 North Carolina Laws S.L. 2015-212, §§ 1, 3 (11 Aug. 2015) (adding show-up provisions to § 15A-284.52(c1) in amendment effective 1 Dec. 2015). As a result, the portion of *Macon*'s reasoning that a photographic show-up is not covered by the EIRA because the EIRA does not ban show-ups has been abrogated by the statutory change. But we still follow *Macon*'s rejection of the idea a single-photo identification can be classified as a lineup. *See Macon*, 236 N.C. App. at 189, 762 S.E.2d at 383. Therefore, we reject Defendant's argument the identification here could be classified as a lineup.

Having concluded the identification here was not a lineup, the only remaining identification type in the EIRA that could cover the identification is a show-up. Thus, we need to determine if the identification procedure here was a show-up within the meaning of the EIRA.

The first method of statutory interpretation, the plain meaning of the statute, does not fully answer the question here. *See Rawls*, 207 N.C. App. at 419, 700 S.E.2d at 115 (indicating the first approach in statutory interpretation is to focus on the plain meaning of the "words of the statute" (citation and quotation marks omitted)). Using the definition of "show-up," which we are bound by, *see id.* (explaining statutory definition "controls" (citation and quotation marks omitted)), an identification using a single photograph, as happened here, would never be covered by the EIRA because the statute only defines a "show-up" as "[a] procedure in which an eyewitness is presented with a single *live* suspect[.]" N.C. Gen. Stat. § 15A-284.52(a)(8) (emphasis added). But reading that definition literally to decide the EIRA does not cover so-called photographic show-ups does not make sense in the context of the statute, which we are required to take into account when interpreting a statute. *See Rawls*, 207 N.C. App. at 419, 700 S.E.2d at 115-16. Specifically, sub-section (c1)'s requirements for show-ups include a ban on photographic show-ups by specifically stating a show-up "shall not

be conducted with a photograph." N.C. Gen. Stat. § 15A-284.52(c1)(2). Thus, the General Assembly contemplated a photographic show-up and rejected it as a permissible procedure.

Still, other aspects of a show-up make clear the identification here is not a banned photographic show-up under the EIRA. First, looking at other show-up requirements, the procedure can:

> only be conducted when a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness.

Id. (c1)(1). This requirement contemplates a show-up taking place only in close proximity to the crime when trying to determine if a suspect is a perpetrator. *See id.* That interpretation aligns the EIRA's statutory requirements for a show-up with our courts' longstanding view on the positive aspects of show-ups:

> A show-up " 'is a much less restrictive means of determining, at the earliest stages of the investigation process, whether a suspect is indeed the perpetrator of a crime,' allowing an innocent person to be 'released with little delay and with minimal involvement with the criminal justice system.' "

See Rouse, 284 N.C. App. at 479, 876 S.E.2d at 114 (quoting *Rawls*, 207 N.C. App. at 422, 700 S.E.2d at 117 (in turn quoting *In re Stallings*, 318 N.C. 565, 570, 350 S.E.2d 327, 329 (1986))). And we presume the General Assembly is fully aware of prior and existing law like this description of show-ups. *See Rawls*, 207 N.C. App. at 421, 700 S.E.2d at 117.

In contrast to our longstanding description of show-ups, the procedure here was not conducted in close proximity to the crime and, critically, it was not conducted to try to determine if a suspect was the perpetrator. The identification here took place during a meeting to prepare for Defendant's "potential trial[.]" As a result, the State, both the police and the prosecution, had already concluded Defendant was the perpetrator. The identification acted to bolster their evidence in support of that conclusion since they would need to convince a jury of the same. Since the identification here did not seek the same purpose as a show-up, it was not a show-up under the EIRA.

Thus, at the end of our statutory construction, we conclude the identification does not fall under the EIRA or any of its categories, either the permissible or impermissible ones. Since the EIRA does not apply to the identification at hand, the trial court did not err in denying Defendant's motion to suppress or his motion *in limine* on the grounds of an EIRA violation.

Defendant's arguments to the contrary do not change our conclusion. First, Defendant argues, based on this Court's opinion in *State v. Malone*, 256 N.C. App. 275, 807 S.E.2d 639 (2017), "*all eyewitness identification procedures* should comply with the requirements of the EIRA." (Quoting *Malone*, 256 N.C. App. at 294, 807 S.E.2d at 652 (emphasis added by Defendant)). But as Defendant states, our Supreme Court reversed in part this Court's opinion, clarified this Court's statement all eyewitness identifications were subject to EIRA was dicta, and declined to address the EIRA further. *See Malone*, 373 N.C. at 153, 833 S.E.2d at 791. Further, this Court has also held since the amendment to the EIRA adding show-ups that not all out-of-court identifications are lineups or show-ups subject to the EIRA. *See State v. Crumitie*, 266 N.C. App. 373, 377, 831 S.E.2d 592, 595 (2019). For example, in *Crumitie*, this Court held "the inadvertent out-of-court identification of [the] defendant, based on a single DMV photograph accessed by an investigating officer" after receiving the name from another witness "for the purposes of issuing a BOLO" was "neither a lineup or show-up under the EIRA, and thus not subject to those statutory procedures." *Id.* at 377-78, 831 S.E.2d at 595. There, as here, the purpose was not to confirm a suspect was the perpetrator, so the EIRA and its provisions on show-ups did not apply. *See id.*

Defendant also asserts the failure to apply the EIRA here "would create a dangerous precedent where law enforcement can wholesale violate the EIRA and then claim that it does not apply because they were not attempting to follow one of the three procedures" covered by the EIRA. But our holding is limited to this case and this situation where the State already had identified, charged, and were preparing to try Defendant and where the identification only happened in the course of preparation for that trial. We do not address a situation where the police present a single photograph to a witness shortly after the crime and ask if that was the person who committed the crime or any other scenario.

Beyond the limited nature of our holding, other means also exist to prevent the dire consequences of which Defendant warns. First, due process protections exist on top of the EIRA's statutory protections. *See Macon*, 236 N.C. App. at 190, 762 S.E.2d at 383 ("Even if the EIRA does

not apply, the normal due process rules still do."). Second, the General Assembly can of course amend the EIRA to add additional protections if its goals are not met within the current statute as interpreted. The General Assembly has already undertaken that course of action with the EIRA when it added show-ups to the statute after this Court ruled in *Rawls* the EIRA did not apply to show-ups. *See Rawls*, 207 N.C. App. at 423, 700 S.E.2d at 118; 2015 North Carolina Laws S.L. 2015-212 (11 Aug. 2015).

After our *de novo* review, the EIRA does not apply to the identification in this case. As a result, the trial court correctly denied Defendant's motion to suppress and motion *in limine* to the extent they were based on the EIRA.

C. Plain Error by Treating Illustrative Evidence as Substantive Evidence

[3] In his third contention on appeal, Defendant argues "the trial court committed plain error by allowing the jury to examine the DMV photograph" of him "and treat it as substantive evidence" because it "was introduced for illustrative purposes only[.]" (Capitalization altered.) Specifically, Defendant contends the jury compared his DMV photograph to still shots of Head from the drug purchases without the trial court giving a "qualifying instruction[.]" He also asserts this error caused prejudice because "the lack of clarity in the videos and the still shots" made it "unlikely that the jury was able to make an identification."

1. Standard of Review

The plain error standard applies to "unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

> In the definitive case on plain error, our Supreme Court explained:
>
> > For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Thomas, 281 N.C. App. 159, 181, 867 S.E.2d 377, 394 (2021) (brackets in original) (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334), *disc. rev. denied*, 382 N.C. 717, 878 S.E.2d 808 (2022).

2. Analysis

Even assuming the trial court erred, the error does not rise to the level of plain error because Defendant has failed to establish a "probable impact on the jury's finding" Defendant "was guilty." *Id.* The jury had "overwhelming" evidence of Defendant's guilt, particularly on the central issue in the case: whether Defendant was Head, the person from whom Polk and the other informant bought drugs. *See Lawrence*, 356 N.C. at 519, 723 S.E.2d at 335 ("In light of the overwhelming and uncontroverted evidence, [the] defendant cannot show that, absent the error, the jury probably would have returned a different verdict."). First, Polk identified Defendant as the person who sold her drugs with "[a] hundred percent" certainty. Polk also read her description of Head from her 12 December debrief for the jury, describing him, in part, as "5'7" and "150 pounds," and Detective Boyette testified the height of Defendant matched. Detective Boyette also testified he matched the name Head to Defendant and explained that the drug buys took place in an area "[a]pproximately a football field or less" from an address associated with Defendant. Finally, the jury watched the recordings of the drug buys, and the State introduced still photos of Head taken from the recordings.

Thus, taking away the DMV photo as a point of comparison, the jury still had many bases to determine Defendant and Head were the same person. The recording and still photos are particularly pertinent. Even if the jury could not compare the recording and still photos to the DMV photo, they could still compare those depictions of Head to Defendant as he appeared before them in court. Because of this overwhelming evidence, Defendant "cannot show that, absent the error, the jury probably would have returned a different verdict." *Id.* Therefore, he cannot demonstrate plain error even assuming an error. *See Thomas*, 281 N.C. App. at 181, 867 S.E.2d at 394 (requiring Defendant to show a "probable impact" on the jury's decision Defendant was guilty for an error to constitute plain error).

D. Sentencing Issue

[4] Finally, Defendant argues "the trial court erred by entering judgment for both selling and delivering cocaine." (Capitalization altered.) He contends sentencing him for "both sale and delivery of a controlled substance" is not allowable based on *State v. Moore*, 327 N.C. 378, 395

S.E.2d 124 (1990). As a result, he "asks this Court to vacate the judgment and remand for reentry of judgment and resentencing."

1. Standard of Review

"We review alleged sentencing errors for whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Fleig*, 232 N.C. App. 647, 650, 754 S.E.2d 461, 463 (2014) (citations, quotation marks, and brackets omitted).

2. Analysis

Defendant is correct. While a defendant can be tried for both the sale and delivery of a controlled substance, he cannot be sentenced for "both the sale *and* the delivery of a controlled substance arising from a single transfer." *See Moore*, 327 N.C. at 382-83, 395 S.E.2d at 127-28 (emphasis in original) (stating in terms of conviction before remanding for resentencing when the convictions for both were consolidated into a single judgment). The *Moore* Court based that ruling on its determination North Carolina General Statute § 90-95(a)(1) makes selling or delivering a controlled substance a single criminal offense. *See id.* at 382, 395 S.E.2d at 127. Here, the trial court violated this rule because it sentenced Defendant for both the sale *and* the delivery of a controlled substance in two consolidated judgments, one for each day. The trial court erred in entering convictions for both sale and delivery in the consolidated judgments because each day there was only one transfer.

"When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing when the appellate courts 'are unable to determine what weight, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant.' " *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015) (ellipses in original) (quoting *Moore*, 327 N.C. at 383, 395 S.E.2d at 127-28). For example in *Moore*, our Supreme Court remanded because it could not determine "what weight, if any, the trial court gave each of the separate convictions for sale and for delivery in calculating the sentences imposed upon the defendant" given they were consolidated for judgment. *Moore*, 327 N.C. at 383, 395 S.E.2d at 127-28.

The only exception to that general rule is where the defendant "has already received the lowest possible sentence" because then it is clear the trial court did not improperly count the second conviction. *See State v. Cromartie*, 257 N.C. App. 790, 797, 810 S.E.2d 766, 772 (2018) (explaining the reason for "typically" remanding is "the premise that multiple offense[s] probably influenced the defendant's sentence"). In

Cromartie, for example, the defendant received "the lowest possible sentence that he could have received in the mitigated range." *Id.*

Here, the general rule requiring remand applies. The judgments themselves indicate the trial court sentenced Defendant in the presumptive range, rather than in the lowest possible part of the mitigated range as in *Cromartie*. *See id.* As a result, we cannot determine "what weight, if any, the trial court gave each of the separate convictions for sale and for delivery in calculating the sentences imposed upon" Defendant, and "[t]his case must thus be remanded for resentencing." *Moore*, 327 N.C. at 383, 395 S.E.2d at 127-28.

The State argues "any error by the trial court entering judgment for sale and delivery of cocaine was harmless error as no prejudice arose from any such error." (Capitalization altered.) Specifically, the State contends "it is clear in the record that the weight in sentencing was focused on the sale" because of statements the trial court made at sentencing. The State also asserts "the existence of the consolidated judgment will not prejudice Defendant in any future prior record level calculation."

We reject the State's harmless error argument. First, this is not a case where Defendant was given the lowest possible sentence. Second, the State cites no binding authority in support of this argument. The only case it cites is an unpublished case, *State v. Moore*, No. COA19-301, 269 N.C. App. 386 (2020) (unpublished). In that case, this Court found no prejudice based on separate convictions for sale or delivery because the trial court "arrested judgment on the delivery convictions" and sentenced based on sale alone. *Id.*, slip op. at 7-8. Here, the trial court did not arrest judgment on either the sale or delivery conviction but rather sentenced on both. Finally, and most importantly, the trial court specifically said it was sentencing Defendant based on both the sale and the delivery for each of the two cases. At one point, the trial court explicitly said: "I'm going to sentence him on the sell of cocaine, which is a Class G [felony], and the delivery of cocaine."

Thus, the trial court apparently gave some weight to both the sale and the delivery, which was an error that requires remand. *See Moore*, 327 N.C. at 383, 395 S.E.2d at 127-28. We therefore remand for Defendant to be resentenced based on a conviction of a "single count for the 'sale or delivery of a controlled substance' " for each transaction. *Id.* at 383, 395 S.E.2d at 128.

III. Conclusion

We affirm and find no error except as to the sentencing issue for which we remand. Specifically, we affirm the trial court's denial of

Defendant's motion to suppress because, given there was not a substantial likelihood of irreparable misidentification, Polk's identification of Defendant as Head did not violate due process. Further, because the EIRA did not apply to that identification, the trial court did not need to take the Act into account when ruling on the motion to suppress. The EIRA's lack of applicability also indicates the trial court did not err in denying Defendant's motion *in limine*. Because the trial court next did not plainly err in allowing the jurors to treat the DMV photo, admitted for illustrative purposes, as substantive evidence given the other overwhelming evidence of Defendant's guilt, the trial court did not err in relation to Defendant's conviction. But the trial court erred in sentencing Defendant on both the sale and delivery counts for each transaction because sale or delivery is a single criminal offense. As a result of that error, we remand for Defendant to be resentenced on a single count of sale or delivery for each transaction.

AFFIRMED IN PART, NO ERROR IN PART, AND REMANDED FOR RESENTENCING.

Judges ARROWOOD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JASON DEON NORMAN

No. COA22-812

Filed 7 March 2023

Sexual Offenses—human trafficking—sexual servitude—prostitution in exchange for drugs and accommodation—sufficiency of evidence

At a trial for multiple charges arising from a prostitution scheme, the State presented sufficient evidence from which the jury could conclude that defendant trafficked and held the victim in sexual servitude (pursuant to N.C.G.S. §§ 14-43.11 and 14-43.13(a), respectively), including evidence that defendant drove the victim to a truck stop after receiving a phone call requesting sexual services, that defendant paid for hotel rooms and rented a house in which several women—including the victim—lived and engaged in hired sexual acts, and that the victim and other women purchased drugs from defendant and paid him for accommodation with money

obtained by providing sexual services to customers. Any contradictions in the evidence were within the jury's province to resolve.

Appeal by defendant from judgment entered 9 February 2022 by Judge D. Thomas Lambeth, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 21 February 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellant Defender Jillian C. Franke, for the defendant-appellant.

TYSON, Judge.

Jason Norman ("Defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of human trafficking and sexual servitude regarding Defendant's ex-wife, Connie. Our review shows no error.

I. Background

Defendant was a truck driver at the time of the alleged offenses. Defendant met Alicia in late 2015, and began dating her shortly thereafter (pseudonym used to protect the identity of the victims). Defendant pursued Alicia, by buying her gifts and taking her on dates.

Prior to meeting Defendant, Alicia had prostituted herself occasionally on the streets. She also used crack cocaine. Alicia began buying crack cocaine and heroin through and from Defendant. She started regularly working as a prostitute from the Red Carpet Inn rooms Defendant had paid for. Alicia engaged in prostitution to secure money to pay Defendant for the rooms and drugs. Defendant did not allow Alicia to buy drugs from anyone else.

Alicia initially only prostituted herself enough to pay back Defendant for the rooms and drugs. As time passed, Alicia felt Defendant pimped her to engage in more prostitution. Alicia would typically give leftover money from prostitution to Defendant after paying Defendant for the rooms and drugs. To find customers for sexual services, Alicia posted advertisements on Backpage.com and Craigslist.com.

Initially, Alicia was the only prostitute working with Defendant. The group eventually grew to include eight to twelve women. The women included, among others, Holly, Connie, Kelly, and Hailey. Alicia

tried to leave Defendant on multiple occasions after he became abusive towards her.

Connie, Defendant's ex-wife, was Defendant's "do girl." Connie would complete whatever tasks Defendant asked of her, including assisting with posting ads seeking johns for the other girls. Connie would also check behind Alicia to ensure Alicia was posting advertisements and prostituting. Connie was served a subpoena, but she failed to appear at trial to testify.

Holly also met Defendant through a dating relationship but she, like Alicia, eventually began prostituting herself to pay Defendant for hotel rooms and drugs. Holly only reimbursed Defendant enough money to pay him for the hotel rooms and drugs.

Kelly met Defendant one evening while she was prostituting on the street. Defendant engaged her sexual services and paid for the room. After their liaison, Kelly only purchased drugs from Defendant.

Hailey also worked with Defendant, prostituting out of hotel rooms Defendant had procured for her and the others to use. Hailey did not develop a romantic relationship with Defendant, but did engage in sexual relations with him. Like Alicia, Hailey posted ads seeking sexual customers on Backpage.com and Craigslist.com, after she learned how to do so from Defendant and the other women. Hailey also discovered a GPS tracker on her phone Defendant had installed to track her location.

Defendant was "in the process with" all the women and provided money for rooms. Defendant would provide drugs for the women before he left for work, and he expected payment for the drugs and hotel rooms when he returned. The women were not allowed to have anyone else inside the rooms other than paying customers.

Defendant kept track of the debts owed to him through a ledger contained on a computer and notepads. Alicia often carried the notepads and otherwise helped Defendant run his illicit businesses through transporting drugs or money. Eventually, all the women and Defendant were banned from staying at the Red Carpet Inn. Defendant rented a house for the women to prostitute. Connie lived at the house with Alicia and some of the other women.

On 24 November 2016, the Burlington Police Department responded to a call at a truck stop near Mebane. The call had alleged a sexual assault. At the scene, the officer came into contact with Defendant, Connie, and Darius King. Defendant told the officer Connie had called Defendant while she was engaging in prostitution. During that phone call, Connie told Defendant she had been raped by King.

On 15 January 2017, the Burlington Police Department responded to a call at the Red Carpet Inn regarding a domestic dispute. When the officer arrived, Connie, Defendant, and Alicia were present. Defendant told the officer Connie was his ex-wife and they had been separated for about three years. Defendant also accused Connie of stealing $250 from him the night before.

On 22 January 2017, the Graham Police Department responded to a call reporting solicitation for prostitution at a truck stop. Upon arrival, the officer met with a truck driver who handed the officer a business card he had received from the woman soliciting. The business card advertised for a purported entity called "Fantasy Island", and it contained a phone number and the email address: jdnorman302.wixsite.com/mysite.

The officer called the number on the card and reached Alicia. The officer pretended to be a truck driver and asked Alicia to provide sexual services at the truck stop. Alicia provided pricing and explored the officer's interests. According to the officer, Alicia's word choices and her descriptions of acts are not used "in anything other than prostitution."

Defendant, Alicia, and Connie arrived in the same vehicle at the truck stop. Defendant was driving the vehicle to drop Connie off for the offered "companionship" services. At that point, the officers approached the vehicle. Defendant, Alicia, and Connie denied engaging in prostitution, and told the officers any services were for "companionship."

No charges were brought arising from this incident, but Alicia was taken into custody for an unrelated warrant for failure to appear. Following the incident, a detective in the Special Victims Unit at the Alamance County Sheriff's Office searched online databases and located the self-described "Fantasy Island" at jdnorman302.wixsite.com/mysite.

On 17 March 2017, Alamance County Narcotics Enforcement team members executed a search warrant at Defendant's home. During the search, officers seized ten notepads found throughout the house. One of the notepads had a page with three columns labeled: "plays, debt, and paid." The officer understood the information on the page to document prostitution encounters. Another notebook included a shopping list of "copy keys, condom, lube, eye liner."

Yet another notebook had a list of times, with "Eric times two" and "QV, Jen" written next to the time stamps. The officer knew from investigating human trafficking and prostitution that "QV" normally stands for "quick visits," meaning fifteen-minute prostitution encounters. One of the notepads contained Connie's name with "1G $20 + $20" beside

her name. Based upon his experience, the officer understood the "1G" to represent one gram of whatever substance the individual was selling.

On 15 December 2017, Burlington Police Department responded to a drug complaint at the Red Carpet Inn. When officers arrived, they spoke with Defendant and Hailey. Officers requested to enter the room. Inside of the room, the officers saw a white powdery substance in plain view on the table beside a razor blade, which they believed was used for narcotics based on their training and experience.

Additionally, the officers noticed a notepad that appeared to be a ledger, and which contained names with money amounts next to them. Hailey told the officers she was not a prostitute, but she was a drug user. Hailey denied buying drugs from Defendant. Rather, Hailey described Defendant as a "father figure" and told the officers he had helped to provide for her. With Hailey's consent, Officers searched Hailey's room, where they encountered two male individuals and another female. The officers found items Hailey admitted belonging to her, including Amazon gift cards and what appeared to be yet another notebook containing a ledger.

Additionally, the officers located a small bag of marijuana inside the bathroom and torn corners of plastic baggies, several unused needles, burnt pieces of Chore Boy scrubbers, and a paper bag containing Chore Boy scrubbers. The officers believed all the items were indicative of drug use, based on their training and experience. Further, the officers found a glass smoking pipe, a metal smoking pipe, a gift card, and several papers with names, monetary amounts, and login information for Gmail, Backpage.com, and Craigslist.com accounts.

The other woman inside the room admitted to engaging in prostitution, but said she worked on her own. She explained Defendant was not her boss or pimp, but he provided the room and drugs. She explained she prostituted herself to pay Defendant back. Both Hailey and the other woman inside her room consented to the officer searching their phones. The officers found text message conversations about prostitution and sexual acts. The officers later discovered an advertisement for prostitution on Craigslist.com for a woman whose advertisement contained an email address, which matched the email contained on papers found inside the room.

On 5 September 2018, the Burlington Police Department Special Victims Unit apprehended Defendant and searched Defendant's car pursuant to a warrant. In the car, the officers found two packages of 40 count lifestyle condoms, one 150 count package of sandwich bags,

one container of KY jelly lubricant, and one large box of syringes. Officers also found two ledger notebooks. Defendant voluntarily sat for a recorded interview with two officers after he was seized.

On 29 April 2019, Defendant was indicted for three counts each of human trafficking an adult victim, sexual servitude of an adult victim, and promoting prostitution between 24 November 2016 through 5 September 2018 in case 18 CRS 54798-00. On 7 July 2021, superseding indictments were issued for the same charges. Additionally, Defendant was charged with promoting prostitution in 18 CRS 54801, as well as human trafficking, sexual servitude, and promoting prostitution in 19 CRS 873. In connection with the investigation, Alicia was also charged with human trafficking, sexual servitude, and promoting prostitution. Alicia pled guilty pursuant to a plea agreement to promoting prostitution and agreed to testify for the State.

A trial was held beginning on 1 February 2022. Prior to deliberations, the court granted Defendant's motion to dismiss one count each of human trafficking and sexual servitude "regarding" or "related to" June, but it denied Defendant's motion to dismiss charges concerning Connie and Holly.

The jury found Defendant guilty of three counts each of human trafficking and sexual servitude, but not guilty of five counts of promoting prostitution. Defendant was sentenced as a prior record level V offender to active terms of incarceration of 130 to 216 months to run consecutively. Defendant entered oral notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2021).

III. Substantial Evidence

Defendant argues the trial court erred by denying his motion to dismiss the charges of human trafficking and sexual servitude regarding Connie, Defendant's ex-wife, for insufficient evidence.

A. Standard of Review

This Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State*

v. Rose, 339 N.C. 172, 192, 451 S.E.2d 211, 222 (1994) (citation omitted). "[A]ll evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Fisher*, 228 N.C. App. 463, 471, 745 S.E.2d 894, 900 (2013) (citation omitted).

"Whether the evidence presented at trial is substantial evidence is a question of law for the court." *Id.* (citation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Id.* "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002) (citation omitted).

"[I]t is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Poole*, 24 N.C. App. 381, 384, 210 S.E.2d 529, 530 (1975) (citation omitted). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Scott*, 356 N.C. at 596, 573 S.E.2d at 869 (citation omitted).

B. Analysis

Defendant argues insufficient evidence shows Defendant recruited, provided, or obtained Connie with the intent of holding her in sexual servitude, or that Defendant subjected or maintained her for sexual servitude. We disagree.

A person is guilty of human trafficking when in "knowingly or in reckless disregard of the consequences of the action [the person] recruits, entices, harbors, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude." N.C. Gen. Stat. § 14-43.11 (2021).

A person is guilty of sexual servitude when they "knowingly or in reckless disregard of the consequences of the action [the person] subjects, maintains, or obtains another for the purposes of sexual servitude." N.C. Gen. Stat. § 14-43.13(a) (2021). "Sexual servitude" includes "[a]ny sexual activity as defined in G.S. 14-190.13 for which anything of value is directly or indirectly given, promised to, or received by any person, which conduct is induced or obtained by coercion or deception." N.C. Gen. Stat. § 14-43.10(a)(5)(a) (2021). "Coercion" includes "providing a controlled substance as defined by G.S. 90-87 to a person" received by any person, which conduct is induced or obtained by coercion or deception." N.C. Gen. Stat. § 14-43.10(a)(1)(d) (2021).

Viewed in the light most favorable to the State, the evidence tends to show, on at least one occasion, Defendant transported Connie to engage in paid sexual services. On 22 January 2017, Alicia answered a call requesting sexual services at a truck stop. Defendant argues no evidence connects Defendant with Connie's actions that day, but Defendant *drove* Connie to the truck stop in response to the call for prostitution. Defendant's name appeared in the URL on the business card the caller had used to solicit Connie.

Substantial evidence supports a reasonable inference to find and conclude Defendant was guilty of human trafficking and of sexual servitude of Connie. A jury could reasonably conclude Defendant oversaw, organized, and transported Connie for sexual servitude on 22 January 2017. Defendant's argument is overruled.

Defendant also argues no evidence tended to show Connie engaged in sexual servitude in exchange for something of value from Defendant. On at least one occasion, Connie purchased drugs from Defendant. Additionally, on a separate occasion, officers responded to a domestic dispute between Defendant and Connie at the Red Carpet Inn, where women associated with Defendant provided hired sexual acts. The dispute revolved around money Connie had allegedly stolen and owed Defendant. Defendant told the responding officers she owed him $250. Further, Connie lived with the other women at the Red Carpet Inn and, later, at the house Defendant rented for the rendition of hired sexual acts.

Although no additional testimony tended to show Connie purchased drugs in connection with sexual servitude, the evidence, taken as a whole, shows Defendant provided and sold the other women drugs and coerced or encouraged them to engage in prostitution to repay Defendant for the drugs and hotel rooms. It was not unreasonable for a jury to find Connie engaged in sexual servitude in exchange for something of value from Defendant when Connie purchased drugs from Defendant on at least one occasion and lived with the other women where Defendant provided accommodations for hired sexual acts. Taken as a whole, a reasonable juror could conclude Defendant coerced Connie into sexual servitude with drugs and accommodations.

Alicia testified and the facts tend to show Connie, like Alicia, was actively involved in Defendant's criminal enterprise of requiring women to trade and engage sexual services to pay for drugs and lodging Defendant provided to keep the women in sexual servitude and making sure the women were posting ads, soliciting, seeking, and getting work to prostitute and performing hired sexual acts. Other evidence, including the various ledgers located during searches tends to show Connie,

even though she was Defendant's current or former wife and his "do girl", was also forced to pay for drugs and housing. Alisha was charged as a principal. Connie was not.

While this decision may indicate selectivity or discretion in prosecution, the jury could reasonably conclude Connie was trafficked and held in sexual servitude by Defendant, despite Alicia's testimony and the arguably contradictory evidence. While the jury could reasonably find Connie willingly contributed to, engaged in and did supervisory work in the prostitution operation, they could also find Connie was forced to do so to support her drug habit and housing needs. "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Scott*, 356 N.C. at 596, 573 S.E.2d at 869 (citation omitted). As the jury is the finder of facts, Defendant's argument is overruled.

IV. Conclusion

The State's evidence, taken as a whole, is sufficient for a reasonable jury to find and conclude Defendant is guilty of sexual servitude and human trafficking of Connie. Connie lived with the other women in the house paid for by Defendant to provide a place and accommodation for prostitution, purchased drugs from Defendant on at least one occasion, and was transported by Defendant to a truck stop to engage in and render hired sexual services.

Defendant's argument regarding sentencing upon remand are moot. 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 judgment entered thereon. *It is so ordered.*

NO ERROR.

Chief Judge STROUD and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
RICHARD CRAIG WILKINSON, Defendant

No. COA22-563

Filed 7 March 2023

Sexual Offenses—soliciting a child by computer—intent to commit unlawful sexual act—sufficiency of evidence

In a prosecution for soliciting a child by computer, the State presented substantial evidence from which a jury could conclude that defendant intended to commit an unlawful sexual act with a child under the age of sixteen when he communicated with the victim via a series of instant messages online, despite defendant's argument that there was no definite plan to meet up with the victim in person prior to her sixteenth birthday. Defendant's messages with the victim—who told him that she was fifteen—included descriptions of physical acts that he wanted to do with her and, on at least four separate occasions, the victim visited defendant at his home where he gave her gifts and money, served her alcohol, asked her to sit on his lap wearing only a bikini, and kissed and groped her.

Appeal by Defendant from judgment entered 3 March 2022 by Judge Joshua W. Wiley, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 11 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State.

Drew Nelson for Defendant.

GRIFFIN, Judge.

Defendant Richard Craig Wilkinson appeals from a judgment entered after a jury found him guilty of soliciting a child by computer. Defendant argues the trial court erred in denying his motion to dismiss because the State presented insufficient evidence to support the charge. We find no error.

I. Factual and Procedural Background

During the summer of 2019, Defendant, who was fifty-nine years old, began communicating with Danielle[1], a fifteen-year-old, online. Defendant, although aware of Danielle's age, began messaging her about engaging in sexual activity. On at least four separate occasions, Danielle went to Defendant's home where he served her alcohol and gave her around $300 in cash along with other gifts. Upon Danielle's first visit to Defendant's home, Defendant asked Danielle to take off her clothing and sit on his lap wearing only a bikini. Danielle complied with Defendant's requests. On other occasions, when Danielle visited Defendant's home, Defendant reached under her dress, groped her, and, on at least one occasion, kissed her.

The Federal Bureau of Investigation received an anonymous tip regarding Defendant's inappropriate relationship with Danielle and began an investigation into the matter. On 29 August 2019, with the FBI and her father present, Danielle began a Snapchat conversation with Defendant. During this conversation, Defendant stated he "thought about [Danielle] every minute [o]f every day and of . . . [h]ow good [her] touch feels" and how he "so want[s] [his] hand right there [f]eeling how smooth." Defendant also messaged Danielle saying: "And to have you one day completely butt nekkid laying across my lap" and "I just want my hands in that hair . . . [p]ulling it back[,] [b]iting that neck[,] [w]atching your back arch." Further, in planning their next in-person encounter, Defendant told Danielle to come see him whenever she could get out of the house and even offered to get her a ride stating, "let me know if ya need a uber ;) [.]" Danielle asked Defendant if he was working the following day, 30 August 2018, and Defendant replied: "Yeah I always work [b]ut can get away anytime you can." When Danielle responded that she would "try to find a ride and leave school early[,]" Defendant sent a heart emoji and said: "I'd love it. 5 minutes or hours and I'll be stoked either way[.]"

On 30 August 2019, Defendant was arrested and charged with one count of first-degree statutory sex offense, one count of placing a child in sexual servitude, five counts of taking indecent liberties with a child, three counts of providing alcohol to a minor, one count of soliciting a child by computer, and one count of contributing to the delinquency of a minor—all stemming from his relationship with Danielle. On 31 August 2019, Danielle turned sixteen.

1. We use a pseudonym to protect the identity of the minor child. N.C. R. App. P. 42(b).

On 2 December 2019, a grand jury indicted Defendant on all charges. During trial, at the close of the State's evidence, Defendant made a motion to dismiss the charge of soliciting a child by computer, which was denied. At the close of all evidence, Defendant renewed his motion to dismiss which was again denied. The trial court dismissed one count of first-degree statutory sex offense, one count of placing a child in sexual servitude, and two counts of taking indecent liberties with a child. Defendant was found not guilty on one count of taking indecent liberties with a child. However, the jury found Defendant guilty on two counts of taking indecent liberties with a child, three counts of providing alcohol to a minor, one count of contributing to the delinquency of a minor, and one count of soliciting a child by computer.

Defendant timely appeals challenging only the sufficiency of the State's evidence regarding the charge of soliciting a child by computer.

II. Analysis

Defendant argues that the State failed to present sufficient evidence to support the charge of soliciting a child by computer. We disagree.

This Court reviews the denial of a motion to dismiss a criminal charge for insufficient evidence *de novo*. *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Further, we must determine, "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *Id.* at 378, 526 S.E.2d at 455 (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

Defendant specifically contends the State's evidence was insufficient, under N.C. Gen. Stat. § 14-202.3(a), to prove he intended to commit an unlawful sex act with a child younger than sixteen because the 29 August 2019 Snapchat messages with Danielle concerned actions Defendant aspired to take at an undefined future date as there was "no sort of plan or request to meet [Danielle] in person" prior to her sixteenth birthday.

Under N.C. Gen. Stat. § 14-202.3(a),

> A [defendant] is guilty of solicitation of a child by a computer if the [defendant] is 16 years of age or older and

> the [defendant] knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer or any other device capable of electronic data storage or transmission, a child who is less than 16 years of age and at least five years younger than the defendant, . . . to meet with the defendant . . . for the purpose of committing an unlawful sex act.

N.C. Gen. Stat. § 14-202.3(a) (2021). It is well established that intent is the state of mind that exists at the time the defendant commits an offense. *State v. Accor*, 277 N.C. 65, 73, 175 S.E.2d 583, 589 (1970) (internal marks and citations omitted); *see also State v. Keller*, 374 N.C. 637, 648, 843 S.E.2d 58, 66 (2020). Further, intent "may be read from a defendant's acts, conduct, and inferences fairly deducible from all the circumstances." *Accor*, 277 N.C. at 73, 175 S.E.2d at 589 ("If intent required definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent.").

Here, the State offered testimony from Danielle who stated Defendant knew she was fifteen years old but continued to communicate with her both online and in person. Danielle also testified at trial that, on multiple occasions, she visited Defendant at his home where he groped her beneath her dress, kissed her, and asked her to take her clothes off so he could see her bathing suit. Additionally, the State offered evidence of Defendant's 29 August 2019 Snapchat exchange with Danielle in which Defendant sent Danielle explicit messages describing how he thought of her every day and would have her "butt nekkid laying across [his] lap." Further, within that exchange, Danielle told Defendant she was not sure she would be able to meet him before her sixteenth birthday, yet Defendant continued to entice Danielle to meet him on 30 August 2019 saying he could "get away anytime" Danielle was available and would love to see her whether it be for five minutes or hours.

From this evidence—Defendant's previous conduct and the Snapchat conversation—it can be inferred, in the light most favorable to the State, Defendant intended to commit a sex act with Danielle despite the lack of a definite plan to meet up before her sixteenth birthday. Not only had Defendant previously met with Danielle, but the conversation indicated his intent to meet with her again, which a reasonable mind could conclude was intended to be on 30 August 2019, while she was still fifteen years old. Because Defendant's intent to meet with Danielle before her birthday can be inferred from his acts and conduct during past encounters as well as from the 29 August 2019 Snapchat conversation, the State introduced sufficient evidence of each essential

element of the offense charged under N.C. Gen. Stat. § 14-202.3(a)—solicitation of a child by a computer.

III. Conclusion

We hold the trial court did not err in denying Defendant's motion to dismiss the charge of soliciting a child by a computer.

NO ERROR.

Judges MURPHY and CARPENTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 7 March 2023)

ELLIOTT v. CUMBERLAND CNTY. No. 22-539	Cumberland (20CVS5751)	Reversed
FRANCE v. N.C. DEP'T OF PUB. SAFETY No. 22-707	Wake (22CVS5578)	Affirmed
IN RE D.D.K. No. 22-413	Henderson (19JT150) (19JT151)	Affirmed
IN RE E.D.N. No. 22-603	Gaston (19JT144) (19JT145)	Affirmed
IN RE K.M.K. No. 22-490	Burke (20JT56)	Affirmed
KIM v. WASHBURN No. 22-248	Guilford (17CVD3859)	Affirmed
SCOTT v. VURAL No. 22-611	Mecklenburg (21CVD2750)	Affirmed
STALEY v. WATERBURY ASS'N, INC. No. 22-684	Guilford (18CVD5582)	Affirmed
STATE v. BOBBITT No. 22-510	Granville (18CRS611-14)	No Error
STATE v. COZART No. 22-589	Randolph (20CRS50356-58)	Dismissed in part, Affirmed in part
STATE v. CUMBERLANDER No. 22-152	Catawba (17CRS51880-82) (17CRS51929) (21CRS2474)	Dismissed
STATE v. ELLISON No. 22-705	Wake (20CRS207865)	Affirmed
STATE v. FLORES-CONTRERAS No. 22-189	New Hanover (16CRS60436)	No Error
STATE v. MANESS No. 22-267	Davidson (19CRS1558) (19CRS1559) (19CRS54397)	No Error

STATE v. McCALL No. 22-496	Moore (19CRS53344) (20CRS51543) (20CRS51964)	Affirmed
STATE v. MORRISON No. 22-644	Wayne (19CRS50199-200)	Affirmed
STATE v. RABAS No. 22-616	Buncombe (18CRS711334) (18CRS90653)	No Error
STATE v. SMITH No. 22-313	Mecklenburg (17CRS203968-70)	No error in part; Vacated and remanded in part.
STATE v. WILLIAMS No. 22-636	Alamance (12CRS54901)	No plain error in part and no prejudicial error in part
WHEELER v. CITY OF CHARLOTTE No. 22-570	Mecklenburg (20CVS8390)	Affirmed

D&B MARINE, LLC, a Rhode Island Limited Liability Company, Plaintiff
v.
AIG PROPERTY CASUALTY COMPANY f/k/a CHARTIS PROPERTY CASUALTY COMPANY, Defendant

No. COA22-546

Filed 21 March 2023

1. Pleadings—motion to amend—additional claims allowed—later dismissed by second judge—no relation back

In plaintiff's action against an insurance carrier (defendant) regarding coverage for plaintiff's sunken yacht, where one trial judge had previously granted plaintiff's motion to amend its complaint to add claims for common law bad faith and unfair or deceptive trade practices (UDTP), a second trial judge properly granted partial summary judgment in favor of defendant on those claims on grounds that they were untimely. The original complaint did not give sufficient notice of the events or transactions giving rise to the bad faith and UDTP claims, and therefore the amended complaint did not "relate back" to the original complaint's filing date under Civil Procedure Rule 15(c). Further, the amended complaint did not automatically "relate back" simply because the first judge had granted the motion to amend. Finally, plaintiff could not invoke an exception to the general rule prohibiting one trial judge from modifying or overruling a judgment by another trial judge in the same action where plaintiff did not raise the "relation back" issue before the first judge and later invited the second judge to address the issue.

2. Estoppel—equitable—applicability to insurance policy exclusion—jury instruction—prejudice

In plaintiff's action against an insurance carrier (defendant) regarding coverage for plaintiff's yacht, which was repeatedly damaged during multiple unlucky voyages until it finally sank, where the trial court allowed defendant to add to the jury instructions and verdict form an affirmative defense relating to a policy exclusion for damage associated with rot and deterioration, the court properly denied plaintiff's request for a jury instruction on equitable estoppel (arguing that defendant should be equitably estopped from relying on the policy exclusion). Under North Carolina law, doctrines of waiver and estoppel may not be used to expand an insurance policy to cover damages that the policy expressly excludes from coverage. Further, even if the court had erred, plaintiff could not show

prejudice where the jury never reached the issue of whether the policy exclusion applied to the facts of this case.

3. Appeal and Error—preservation of issues—objection to jury instruction—failure to specifically object—failure to adequately brief the issue

In plaintiff's action against an insurance carrier (defendant) regarding coverage for plaintiff's sunken yacht, plaintiff failed to preserve for appellate review its objection to one of the trial court's jury instructions, where plaintiff did not raise that specific objection at the close of the charge conference or after the jury instructions were given. Even if plaintiff's objection had been preserved, it was subject to dismissal on appeal because plaintiff failed to adequately brief the issue pursuant to the requirements under Appellate Rule 28(b)(6).

Appeal by Plaintiff from final Judgment entered 25 March 2022 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 January 2023.

The Sumwalt Group, by Vernon Sumwalt, and Killeen & Stern, PC, by Robert J. Killeen (pro hac vice) and Robert C. Stern (pro hac vice), for Plaintiff-Appellant.

Cranfill Sumner LLP, by Steven A. Bader, and Steptoe & Johnson LLP by Roger E. Warin (pro hac vice) and John F. O'Connor (pro hac vice), for Defendant-Appellee.

RIGGS, Judge.

Plaintiff, D&B Marine, LLC, appeals from a partial summary judgment and a judgment entered after a jury trial on breach of contract and negligence claims with Defendant, AIG Property Casualty Company. Plaintiff claims that Mecklenburg Superior Court Judge Eric Levinson erred when he granted partial summary judgment finding that Plaintiff's claims for common law bad faith and Unfair or Deceptive Trade Practices (UDTP) under N.C. Gen. Stat. § 75-1.1 were untimely. Plaintiff also claims that the trial court erred when it denied Plaintiff's request for a jury instruction on equitable estoppel after allowing Defendant to include the affirmative defense of a policy exclusion related to rot and deterioration in the jury instruction and on the jury verdict form. Finally, Plaintiff claims the trial court erred when it gave a jury instruction

regarding whether the sinking of the yacht was a new "occurrence" rather than one of the two covered occurrences.

After review, we affirm Judge Levinson's grant of partial summary judgment. We affirm the trial court ruling denying the requested jury instruction for equitable estoppel. Finally, we dismiss the final argument because Plaintiff failed to properly preserve the issue for appellate review.

I. Procedural & Factual History

This claim involves the tale of the unluckiest yacht and the series of unfortunate events that she encountered. The tale begins in January of 2013 when Plaintiff renewed an insurance policy with Defendant to provide coverage for its seventy-two-foot, Goetz custom yacht, Fearless. Fearless was designed by the renowned naval architect Eric Goetz, who also designed the 1992 America's Cup winner, America. The insurance policy covered damages to Fearless and her contents "caused by an occurrence which happens within the policy period." The policy term began 1 January 2013 and was scheduled to run until 1 January 2014.

Only two days after Plaintiff renewed this yacht insurance policy, Fearless had her first fateful encounter. While sailing off the coast of St. Thomas in the U.S. Virgin Islands, Fearless struck a submerged rock. The encounter caused significant damage to her hull, and she had to be towed to a shipyard in St. Thomas for repairs.

Towards the end of January 2013, Plaintiff notified Defendant of this unfortunate encounter with a submerged rock, and Defendant accepted coverage for the claim. The parties vigorously dispute whether Plaintiff or Defendant was responsible for selecting the repair facilities for the yacht and whether Defendant should pay for repairs directly or reimburse Plaintiff for the repairs. However, the parties agree that Defendant issued payments to Plaintiff to cover repair expenses.

In early April 2013, the parties agreed that Fearless should be moved from St. Thomas to complete the repairs; however, the parties disagreed on where the repairs should be performed and who should make the decision. Eventually, the decision was made to move Fearless to the Rybovich shipyard in West Palm Beach, Florida, to complete the repairs. Before she left on this voyage, her captain discovered a crack in her hull along the aft section of her keel, in an area that had previously been repaired. Notwithstanding this crack, Fearless set sail for West Palm Beach, Florida.

During this voyage on 13 March 2013, Fearless had her second unfortunate event. While she was underway sailing toward the mainland,

her previously repaired rudder fell off. Plaintiff notified Defendant of these additional damages, and Defendant accepted coverage for the claim to repair the rudder, again. Once Fearless finally arrived at the Rybovich shipyard in West Palm Beach, Defendant was concerned that the damage from the rock encounter had caused water to seep into the hull resulting in moisture intrusion into the inner balsa, which could lead to long-term decay. Because of this concern, Rybovich hired a company, Fosters, to evaluate the damage to the hull. Fosters took a core sample of the hull on 3 July 2013 and recommended removing a six-foot-by-six-foot section of the hull because its balsa core was moist. This work was never performed, but it is unclear on this record why the work was not done. Plaintiff argued at trial that the failure to remove and replace this moist balsa core ultimately led to the untimely sinking of Fearless. Defendant argued that the responsibility to contract for and oversee repairs for Fearless was the responsibility of Plaintiff; it was only responsible for paying for the repairs.

Ultimately, the disputes between the parties regarding responsibility for the repairs of this unlucky yacht and a new issue—whether she needed a captain on board during her repairs—led Defendant to cancel the insurance policy on 6 September 2013, while Fearless was still sitting in Rybovich's yard waiting to be repaired. However, Defendant acknowledged that it would remain responsible for the cost of the repairs associated with the 3 January 2013 rock encounter and the 13 April 2013 rudder incident. Eventually, Plaintiff moved Fearless to Cracker Boy shipyard and completed the repairs towards the end of 2013.

We include the next portion of Fearless' tale because it is the story that the jury considered in deciding the issues that bear on this appeal. While Fearless had at least one uneventful voyage after the repairs were complete, it was not long until she has another unfortunate encounter. In October of 2014, the unlucky Fearless was docked near New Brunswick, Georgia, when she was struck by lightning and again suffered substantial damage. Only a few days before this lightning strike, Plaintiff had executed a new insurance policy for Fearless with a separate insurance company, Great Lakes Reinsurance ("Great Lakes"). After the lightning strike, Fearless motored to Savannah, Georgia, where she again underwent repairs, primarily to the electrical systems. The repairs for these damages were not completed until early 2016. Great Lakes paid for most of the damages associated with this lightning strike.

While Fearless was being repaired after the lightning strike, Plaintiff filed this suit against Defendant in Mecklenburg County Superior Court

for a single cause of action, breach of contract. The original suit was based upon failure to pay the full value of the insured loss for the damage associated with the 3 January 2013 rock encounter.

When the repairs from the lightning strike were complete, Fearless embarked on her final fateful voyage. In the early morning of 9 March 2016, she set sail from Georgia and headed to Charleston, South Carolina. Early that afternoon, Fearless began taking on water. The captain, Scott Sale, dropped anchor and called for Coast Guard assistance. The Coast Guard worked diligently into the night with Captain Sale attempting to reverse the influx of water and save Fearless. In the early morning hours, after all electronics on Fearless had failed and her interior was knee-deep with water that had a film of acid floating on it, the Coast Guard finally ordered the captain and his mate off poor Fearless. Fearless eventually sank into the Intracoastal Waterway. She was later found several nautical miles from where she was anchored with her massive keel missing.

After the 2016 demise of Fearless, Great Lakes filed a claim against Plaintiff in Federal Court, Western District of North Carolina, regarding Plaintiff's insurance claim for the total loss of Fearless; Plaintiff made a counterclaim for breach of contract, bad faith, and UDTP against Great Lakes on 4 August 2016. In Plaintiff's counterclaim with Great Lakes, it asserted that the total loss of Fearless was because she ran aground on 9 March 2016, and not because of the earlier damage from 2013. In its brief for that suit, Plaintiff said "the Coast Guard noticed Fearless 'bounce' as if striking bottom." Further, Plaintiff stated that in February 2016, after the repairs on Fearless were completed, it conducted a sea trial to ensure her seaworthiness and Fearless successfully completed the sea trial without any evidence of damage or residual effects of the *January 2013 incident*.

On 30 August 2017, Plaintiff amended its complaint in this action to add a cause of action for negligence, alleging that Defendant had breached its duty to ensure that all repairs were properly performed, and the vessel was seaworthy. Defendant filed an answer to the amended complaint on 20 November 2017. The trial court stayed the action in this claim on 30 January 2018, pending the resolution of the federal case with Great Lakes.

Almost two years later, on 5 September 2019, Plaintiff moved the court for a motion to amend the previously amended complaint under Rule 15 of the North Carolina Rules of Civil Procedure to add claims for common law bad faith and UDTP; Defendant opposed the motion. Superior Court Judge Louis Trosch held a hearing on the motion. During

the hearing, Judge Trosch stated that the strongest argument to deny the motion to amend was futility. The transcript of the hearing does not include any analysis of whether the amendment would relate back per Rule 15(c) of the North Carolina Rules of Civil Procedure. Since the parties disputed whether the claim was controlled by maritime law or North Carolina law, Judge Trosch indicated that it was not clearly evident if the amendment would be futile. Judge Trosch allowed the amendment, while noting that if the amendment was futile, the issue could be addressed at the motion to dismiss stage or at summary judgment. Additionally, in the written order, Judge Trosch stated the finding was based upon the liberal standard of Rule 15(a) of the North Carolina Rules of Civil Procedure. The written order did not address the relation back issue found in Rule 15(c).

Plaintiff filed their second amended complaint on 22 October 2019. Defendant filed its answer to this amended complaint on 20 December 2019. In the response, Defendant included twenty-seven affirmative defenses, including statute of limitations and terms of the policy.

Over a year later, in February and March 2021, both parties moved for summary judgment. In its motion for partial summary judgment, Defendant argued that the claims for common law bad faith and UDTP were untimely. Additionally, Defendant argued that if the claims were timely, the court should still grant summary judgment because the claims are not valid under maritime law. In its response, Plaintiff argued that its original complaint gave sufficient notice of the events or transactions which produced the claims of common law bad faith and UDTP; therefore, the amended complaint should relate back to the date of the original complaint making the claims timely.

On 26 March 2021, Superior Court Judge Eric Levinson[1] held a virtual hearing on the motions for summary judgement; however, there is no transcript of this hearing in the record. Judge Levinson granted partial summary judgment in favor of Defendant finding that the original pleadings did not give notice of the transactions, occurrences, or series of transactions or occurrences to be proven in the amended pleading. Therefore, the bad faith and UDTP claims did not relate back under Rule 15(c) of the North Carolina Rules of Civil Procedure and were untimely. In that order, filed 27 May 2021, Judge Levinson indicated that the parties agree that Judge Trosch did not rule on "whether UDTPA and

1. The Honorable Judge Eric L Levinson was designated to oversee the rest of this case under Rule 2.1 of the General Rules of Practice for Superior and District Courts on 3 December 2020.

bad faith claims would 'relate back' under Rule 15 of the N.C. Rules of Civil Procedure notwithstanding that [c]ourt's permission to amend the complaint to add the extra-contractual claims." Judge Levinson did not address the additional grounds regarding the conflicts of law issues or otherwise make any rulings implicating Judge Trosch's Rule15(a) order.

On 10 June 2021, Plaintiff moved for reconsideration of the order arguing that when Judge Trosch granted the motion to amend, he had ruled that the bad faith and UDTP claims relate back under Rule 15(c). Judge Levinson denied the motion for reconsideration on 7 July 2021. Plaintiff timely noticed appeal on this issue on 27 July 2021 and then filed an unopposed motion to dismiss the appeal without prejudice on 20 December 2021.

The case proceeded to a jury trial on claims of breach of contract and negligence as to whether Plaintiff was entitled to coverage from Defendant under its 2013 Policy for the 2016 sinking of Fearless. The trial judge held a jury charge conference with the parties that lasted from 2 March until 3 March 2022 and included a series of emails and an unrecorded phone conference in the evening on 2 March 2022. During the charge conference, the trial court allowed Defendant to add an affirmative defense, related to a policy exclusion for damage associated with gradual or sudden loss from deterioration, to the jury instructions and the verdict form. Plaintiff then requested that it be allowed to include a jury instruction for equitable estoppel because Defendant should not be allowed to rely on a policy exclusion for deterioration if its independent adjuster knew about the deterioration but did not notify Plaintiff. The trial judge denied that request.

At the close of the charge conference, Plaintiff made one objection to the jury instructions. Plaintiff requested a directed verdict on the "anti-concurrent clause exclusion" in the jury charge and on the verdict sheet and objected to the submission of the charge to the jury. The anti-concurrent exclusion clause, stated in Issue 1B on the verdict form, asked the jury to decide if the sinking of Fearless "was also attributable to or resulted directly or indirectly, in whole or in part or in combination with any other cause or causes, from deterioration or rot of the balsa core in the hull of S/V Fearless." Plaintiff argued that Defendant was equitably estopped from asserting this contract exclusion because any deterioration was caused by the misrepresentations of Defendant's independent contractor when they did not notify Plaintiff of the moist balsa in the hull. Neither party objected to the jury instructions after they were given.

Issue 1A on the jury form asked the jury: "Was the total loss of the S/V Fearless on or about March 9, 2016, caused by an 'occurrence' as that term is defined in the defendant's insurance policy?" The jury answered no to this question.[2] The form instructed the jury not to answer any remaining questions if they answered no on the first issue. The trial court entered a judgment based upon this jury verdict on 23 March 2022.

Plaintiff properly noticed appeal on 22 April 2022 from that judgment.

II. Analysis

Plaintiff appeals Judge Levinson's grant of partial summary judgment that Plaintiff's claims for bad faith and UDTP were untimely. Additionally, Plaintiff assigns two errors to the jury instructions. First, Plaintiff argues that the trial court erred when it denied Plaintiff's request for an equitable estoppel instruction after it allowed Defendant to include a specific policy exclusion in the jury instructions and verdict form. Second, Plaintiff argues that the trial court erred when instructing the jury that the sinking of Fearless had to be, according to Plaintiff's telling, a new occurrence rather than the result of one of the two admitted occurrences that happened during the policy term.

A. Partial Summary Judgment

[1] First, Plaintiff argues that Superior Court Judge Levinson erred when he granted a partial summary judgment in favor of Defendant on the issues of common law bad faith and UDTP when another Superior Court judge had granted Plaintiff's Motion for Leave to Amend their pleading to add these claims. We disagree.

1. Standard of Review

The parties present conflicting standards of review for this issue. Plaintiff asks this Court to consider whether the trial court abused its discretion when Judge Levinson held that the amendment allowed by Judge Trosch did not "relate back" to the original amended pleading. *See Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (noting the standard of review for motions to amend is abuse of discretion).

Defendant argues that this Court should review the summary judgment order by Judge Levinson *de novo*. *See Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (noting the standard of review for summary judgment is *de novo*).

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2. Because this jury found that the sinking was not caused by one of the 2013 occurrences and there was no decision in the earlier suit on whether she ran aground in 2016, the ultimate cause of Fearless' demise will forever remain a mystery.

Judge Trosch's order on 28 October 2019 was silent on the issue of whether the new claims of common law bad faith and UDTP would "relate back" to the amended complaint under Rule 15(c) of the North Carolina Rules of Civil Procedure. Further, in the order granting partial summary judgment, Judge Levinson clearly stated that the parties agree that Judge Trosch did not rule whether the bad faith and UDTP claims would "relate back" under Rule 15(c).[3] Therefore, because Judge Trosch did not resolve the issue, both parties conceded as much, and the ruling actually appealed is Judge Levinson's grant of partial summary judgment, we apply *de novo* review to that order.

2. Analysis

The well-established rule in North Carolina is that no appeal lies from one Superior Court judge to another; and that ordinarily, one judge may not modify, overrule, or change the judgment that another Superior Court judge previously made in the same action. *Calloway*, 281 N.C. at 501, 189 S.E.2d at 488. However, modifications or changes to an interlocutory order, such as an order granting pleading amendment, are proper where (1) the order is discretionary and (2) there has been a change of circumstances. *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984). This rule, known as the *Calloway* rule, protects the integrity of the court system, and we, therefore, consider the circumstances in the matter carefully so as not to disturb the integrity of this rule. *State v. Woolridge*, 357 N.C. 544, 549-50, 592 S.E.2d 191, 194 (2003).

Plaintiff argues that this Court should apply the *Calloway* rule to protect Judge Trosch's ruling, which allowed the amendment, from Judge Levinson's summary judgment ruling that dismissed the claims added by the amendment. In this appeal, Plaintiff argues that because Judge Trosch granted the motion to amend, the amendment "automatically" relates back based upon the use of the word "deemed" in the language of Rule 15(c). N.C. R. Civ. P. 15(c) (2022). However, the plain language of the statute and the case law, do not support the argument that the amendment automatically relates back. Further, in this case, we hold that the *Calloway* rule is not applicable because Plaintiff waived a *Calloway* analysis by encouraging Judge Trosch to grant the motion to amend its pleading while reserving resolution regarding the validity of the new claim for a later hearing and then inviting Judge Levinson to consider the issue of relation back.

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3. In their motion for reconsideration, Plaintiff denies agreeing that Judge Trosch did not rule on the issue of whether the amendment related back but there is no transcript of that hearing in the record.

In a Request for Motion to Amend under Rule 15(a), judges construe the rule liberally to allow amendments where the opposing party will not be materially prejudiced. *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999). This Court has determined that the proper reasons for denying a motion to amend include undue delay by the moving party, unfair prejudice to the nonmoving party, bad faith, futility of amendment, and repeated failure to cure defects by previous amendment. *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 45, 626 S.E.2d 315, 325 (2006).

Separately, under Rule 15(c), a claim asserted in an amended pleading is *deemed* to have been interposed at the time the claim in the original pleading was interposed, *unless* the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading. N.C. R. Civ. P. 15(c) (2022) (emphasis added). Whether an amended complaint will relate back to the original complaint does not depend upon whether it states a new cause of action but instead upon whether the original pleading gave defendants sufficient notice of the proposed amended claim. *Bowlin v. Duke University*, 119 N.C. App. 178, 184, 457 S.E.2d 757, 761 (1995). This Court has held that a motion to amend is not deemed to have been interposed at the time of the original pleading if the original pleading does not give notice of the transaction, occurrences, or series of transactions, to be proved pursuant to the amended pleading. *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 546, 589 S.E.2d 391, 395-96 (2003).

At the Motion to Amend hearing, the parties agreed that undue delay, bad faith, and repeated failure to cure defects did not apply to the facts of the proposed amendment. Defendant argued that allowing the amendment would be unfairly prejudicial because the case had been stayed for such a long time. Judge Trosch did not find that allowing the amendment would be unduly prejudicial because both parties agreed to the stay. Defendant also argued that the amendment was futile because Plaintiff was applying the wrong law to the case. Plaintiff argued that per *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, the regulation of marine insurance belongs to the States; therefore, its claims for common law bad faith and UDTP, which flow from the breach of contract claim for the 3 January 2013 occurrence, are allowed by North Carolina state law. 348 U.S. 310, 321, 99 L. Ed. 337, 346 (1955). Conversely, Defendant argued that per *Wilburn Boat Co.*, state law only applies to maritime insurance contracts in the absence of an applicable federal admiralty law; since a claim for UDTP conflicts with admiralty law, it

is prohibited. *Id.* at 320, 99 L. Ed. at 346; *See also Delta Marine, Inc. v. Whaley*, 813 F. Supp. 414, 417 (E.D.N.C. 1993) (dismissing a claim under the North Carolina UDTPA because it conflicts with requirements for awarding punitive damage under admiralty law). Further, Defendant argued that the standard for bad faith in North Carolina is lower than the punitive threshold under admiralty law, so the bad faith claim similarly fails. While Plaintiff argued that its amendment would not be futile, it proposed that the issues "may be best for a 12(b)(6) hearing where we can have a full lecture on admiralty law versus state law." Without resolving the conflicts of law issue, Judge Trosch stated that it was not clearly evident whether the amendment would be futile.

The transcript of the motion to amend hearing does not include any discussion of whether the original (amended) complaint dated 24 August 2017, which only included claims for breach of contract and negligence, gave notice of the transaction, occurrences, or series of transaction or occurrences, to be proved in the second amended complaint which included additional claims for bad faith and UDTP based upon the sinking of Fearless. Additionally, North Carolina Rules of Civil Procedure 9(b) and (k) establish special pleading requirements for fraud and punitive damages. This Court has held that when a claim requires unique factual allegations, those allegations must be present in the original complaint to meet the requirements of Rule 15(c) so that the amended complaint relates back to the original complaint. *State Farm Fire & Cas. Co.*, 161 N.C. App. at 546, 589 S.E.2d at 395.

The record is clear that at the close of the Motion to Amend hearing, Judge Trosch left open issues for resolution in future hearings; it is not clear from the transcript that the parties even argued the issue of whether the amendment would relate back to the amended complaint dated 24 August 2017. Additionally, in his written order allowing the amendment, Judge Trosch specifically stated he was "appl[ying] the liberal standard of Rule 15(*a*)." (emphasis added). Therefore, the record related to the Motion to Amend hearing supports the conclusion that Judge Trosch did not make a finding on whether the new claims relate back to the original claims under Rule 15(c).

Seventeen months later, both parties made motions for summary judgment. Defendant requested the trial court grant summary judgment for the claims of UDTP and bad faith on two grounds. First, the claims were untimely under the applicable statute of limitations. Second, the claims conflicted with substantive admiralty law.

At no point in the briefing for summary judgment did Plaintiff allege that the issue of whether the amendment related back had been

previously decided by Judge Trosch, nor did Plaintiff argue that the *Calloway* rule was applicable. In fact, in its responsive brief, Plaintiff invited Judge Levinson to consider the issue of relation back.

> Applying this standard, the [c]ourt can determine whether the claims asserted by D&B Marine in its [Second] Amended Complaint relate back to the date it filed its Original [Amended] Complaint by a comparison of the allegations in each of the Complaints.

Plaintiff then goes on to compare its original (amended) complaint and its second amended complaint to demonstrate that the original complaint gave notice of the events or transactions which produced the claim to enable Defendant to understand its nature and basis as required to establish relation back. *Pyco Supply Co. v. American Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988) (observing under the notice theory of pleading, a statement of a claim is adequate if it gives sufficient notice of the events or transaction which produced the claim to enable the adverse party to understand the nature and basis and to file a responsive pleading).

Further, while the record does not include a transcript of the summary judgment hearing, in his summary judgment order, Judge Levinson stated:

> the parties agree that Superior Court Judge Louis Trosch did not rule on whether the UDTPA and bad faith claims would "relate back" under Rule 15 of the N.C. Rules of Civil Procedure notwithstanding the [c]ourt's permission to amend the complaint to add extra contractual claims – and the parties agree this legal issue is before this [c]ourt.

Based upon the briefs and the hearing, Judge Levinson granted Defendant's motion for partial summary judgment, finding that the original pleadings did not give notice of the transactions, occurrences, or series of transactions or occurrences to be proved pursuant to the amended pleadings.

After this ruling, in the motion for reconsideration of summary judgment and in this appeal, Plaintiff impermissibly "switched horses" and argued that the act of granting the motion to amend "automatically" causes the amendment to relate back because of the word "deemed" in Rule 15(c). *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 678, 620 S.E.2d 232, 242 (2005) ("It is axiomatic with us that a litigant must be heard here on the theory of the trial below and he will not be permitted to switch horses on his appeal." (quoting *Graham*

v. Wall, 220 N.C. 84, 94, 16 S.E.2d 691, 697 (1941))). The argument that granting a motion to amend "automatically" causes an amendment to relate back does not align with the clear language of the statute or the case law. In Rule 15(c), the language includes a subordinate clause beginning with the word "unless" which limits the universe of scenarios where an amendment will relate back. N.C. R. Civ. P. 15 (2022). An amendment cannot "automatically" relate back when there are scenarios under which the amendment does not relate back. This Court has identified circumstances where an amendment does not relate back to the original complaint, including where the original complaint did not include the specialized pleading requirements for claims in the amended complaint. *See State Farm Fire & Cas. Co.*, 161 N.C. App. at 589, S.E.2d at 395.

The *Calloway* rule represents an important principle in maintaining respect for the rule of law, and reducing gamesmanship in litigation; for these reasons, we will not do anything to disrupt or undermine the rule. Here, however, Plaintiff appears to be engaging in the very gamesmanship that the rule was intended to avoid. Because Plaintiff encouraged Judge Trosch to grant the motion to amend without resolving all issues related to the validity of the amendment and invited Judge Levinson to consider the issue of relation back at summary judgment, we find that the issue was properly in front of Judge Levinson at the summary judgment hearing. The *Calloway* rule is inapplicable.

We therefore affirm Judge Levinson's grant of partial summary judgment.

B. Jury Instructions on Equitable Estoppel

[2] Next, Plaintiff argues that the trial court made a reversible error when it refused Plaintiff's request for an instruction on equitable estoppel after allowing Defendant to include the affirmative defense of a specific policy exclusion in the jury instructions and verdict form related to damages from rot and deterioration. We disagree, holding there was no error, and noting that even if it were an error, Plaintiff failed to show prejudice.

1. Standard of Review

For an appeal of jury instructions, this Court considers the jury charge contextually, in its entirety, and the party asserting the error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006). A specific jury

instruction should be given when: "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008). Failure to give a requested and appropriate jury instruction is a reversible error if the requesting party is prejudiced as a result of the omission. *Id.*

2. Analysis

On appeal, Plaintiff argues that the trial court had a "nondiscretionary duty" to provide a jury instruction on equitable estoppel after it allowed Defendant to include the affirmative defense[4] of a policy exclusion regarding responsibility for damages associated with deterioration on the verdict form. However, a jury instruction for equitable estoppel on an insurance policy exclusion does not align with North Carolina case law. Further, because the jury never reached the issue of whether the insurance policy exclusion applied to the facts of this case, Plaintiff cannot demonstrate that the denial of the jury instruction resulted in prejudice.

Our Supreme Court has established that the doctrines of waiver and estoppel are not available to bring within the coverage of a policy risks that are not covered by its terms or risks expressly excluded. *See Hunter v. Insurance Co.*, 241 N.C. 593, 595-96, 86 S.E.2d 78, 80 (1955) (holding estoppel can have a field of operation only when the subject matter is within the terms of the contract but cannot radically change the terms of the policy).

Here, Plaintiff requested a jury instruction that equitable estoppel would preclude Defendant from using an insurance policy exclusion to expand the coverage of the insurance policy to include rot and deterioration because Defendant's representative did not notify Plaintiff of the moist balsa in the hull during the repairs to the 2013 damage. The policy that Plaintiff and Defendant executed stated:

> There shall be no insurance under Part III – Property Coverage for any loss, damage, claim or expense attributable to or resulting directly or indirectly, in whole or in part or in combination with any other cause or causes from:

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4. Plaintiff refers to this as an unpled affirmative defense, however Defendant's answer includes an affirmative defense of terms of the policy.

- Gradual or Sudden Loss

  Osmosis, blistering, fiberglass or surface coat blistering, electrolysis, delamination, rust, corrosion or oxidation, marine life, marine borers, moth or vermin, rot, fungi, mold or infestation, warping or shrinkage, change of temperature or humidity, deterioration, lack of maintenance, wear and tear or inherent vice.

The policy clearly excluded damages due to rot, deterioration, and delamination from the scope of the policy; therefore, Plaintiff cannot use equitable estoppel to bring that within the scope of the policy. For that reason, the jury instruction on equitable estoppel would not be a correct statement of the law, and the trial court did not err when it denied the request to include a jury instruction on equitable estoppel.

Assuming, *arguendo*, that the refusal to give the equitable estoppel instruction was error, Plaintiff has failed to show that the refusal resulted in prejudice. The requested equitable estoppel instruction applied to whether the policy exclusion for rot and deterioration was applicable to the facts of the case, which was part of issue 1B on the jury verdict form. Since the jury concluded in issue 1A that the loss of Fearless was not caused by an "occurrence" as the term was defined in the insurance policy, the verdict form directed them not to reach a conclusion on any remaining issues. Because the jury did not consider issue 1B, Plaintiff cannot demonstrate that the requested instruction would result in a different outcome in the trial.

Accordingly, we affirm the trial court ruling.

C. Jury Instruction on "Occurrence"

[3] Plaintiff's final argument is that the trial court erred in instructing the jury and on the verdict form that the sinking of Fearless had to result from a new "occurrence" instead of the result of one of the two covered occurrences that happened during the policy term. However, Plaintiff did not object to any specific language at the close of the jury conference regarding the term "occurrence" nor did they object to the jury charge after the jury instructions were concluded.

Rule 10(a)(2) of the North Carolina Rules of Appellate Procedure specifically address challenges to jury instructions and provides that:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, *stating distinctly that to*

> *which objection is made and the grounds of the objection*; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(a)(2) (2022) (emphasis added). Where a portion of the charge is challenged, it must be identified in the record on appeal by clear means of reference. *Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E.2d 372, 377 (1984).

Here, the record reveals that the trial court provided the parties with the opportunity to make objections to the jury instructions at the close of the charge conference and after the jury instructions were delivered. The record is clear that both parties voiced disagreement with the decisions of the trial court during this charge conference. However, at the conclusion of the charge conference, only one objection was placed on the record.

> [PLAINTIFF'S COUNSEL]: Plaintiff D&B Marine moves for a directed verdict on the anti-concurrent clause exclusion, which is in the jury charge and the verdict as Issue 1B. There is no evidence and [Defendant] is relying upon its own breach of its contractual policy to invoke this exclusion. Therefore, on behalf of [P]laintiff D&B Marine, we object to the submission of this charge to the jury.

This objection does not state that it applies to the language around the term "occurrence." Neither party made an objection on the record after the Judge read the instructions to the jury. Further, we find no other support for Plaintiff's argument that this matter is preserved for appeal in Plaintiff's briefing. Accordingly, we dismiss this issue.

Assuming *arguendo* that the issue was preserved, Plaintiff does not cite to specific language in the jury charge or on the jury verdict form that was in error. In its brief, Plaintiff failed to provide a standard of review for this issue as required in North Carolina Rules of Appellate Procedure. N.C. R. App. P 28(b)(6) (2022). Additionally, Plaintiff failed to provide a citation of any authorities upon which they are relying for the argument as required in Rule 28. *Id.* Issues where there is no reason or argument stated will be taken as abandoned. *Id.* Under our appellate rules, it is the duty of the appellant to provide sufficient legal authority to this Court and failure to do so will result in dismissal. *Zhu v. Deng*, 250 N.C. App. 803, 810 794 S.E.2d 808, 814 (2016).

The jury charge included the definition of "occurrence" as defined by the insurance policy executed by the parties. The verdict form asks

the jury if the total loss of Fearless was caused by an occurrence as defined in the insurance policy. There is no reference to a "new occurrence" in the jury charge or on the jury form. Plaintiff's brief contains conclusory statements that the jury could not find that the sinking was not covered because Defendant had paid for the repairs associated with covered damages. However, Plaintiff fails to provide reasoning or authorities to support this conclusion. It is not the duty of the Court to peruse the record, to construct an argument for the appellant. *Person Earth Movers, Inc. v. Thomas*, 182 N.C. App. 329, 333, 641 S.E.2d 751, 754 (2007).

Accordingly, we note that if the issue was preserved, we dismiss the issue because it was not adequately briefed.

III. Conclusion

After a detailed review of the issues presented by both parties, we affirm the grant of partial summary judgment by Judge Levinson. Further, we affirm the trial court's ruling on the jury instruction for equitable estoppel. Finally, we dismiss the issue on the jury instruction for "occurrence" because it was not properly preserved for appeal.

AFFIRMED IN PART; DISMISSED IN PART.

Judges GORE and STADING concur.

IN THE MATTER OF A.W.

No. COA22-489

Filed 21 March 2023

Termination of Parental Rights—grounds for termination—neglect, dependency, and prior involuntary termination of parental rights—sufficiency of evidence

The trial court's order terminating respondent-father's parental rights to his child based upon neglect, dependency, and prior involuntary termination of parental rights was affirmed where clear, cogent, and convincing evidence supported the findings of fact, which supported the conclusions of law. Among other things, the father had a history of mental health issues, domestic violence, and substance abuse; he failed to take responsibility for his actions; he continued to place blame on others for his domestic violence; he continued to show emotional dysregulation; he continued to engage in maladaptive behaviors due to his persistent mental health issues; he continued to use impairing substances; and he showed no empathy for his child.

Appeal by Respondent-Father from order entered 9 March 2022 by Judge Sherri T. Murrell in Orange County District Court. Heard in the Court of Appeals 8 March 2023.

Stephenson & Fleming, LLP, by Deana K. Fleming, for Petitioner-Appellee Orange County Department of Social Services.

Winston & Strawn LLP, by Stacie C. Knight, for Appellee-Guardian ad Litem.

Robert W. Ewing for Respondent-Appellant Father.

COLLINS, Judge.

Respondent-Father appeals from the trial court's order terminating his parental rights to his child based upon neglect, dependency, and prior involuntary termination of parental rights. Father argues that there is no clear, cogent, and convincing evidence to support the trial court's findings that (1) the neglect experienced by the juvenile will repeat or continue if returned to Father's care and custody; (2) Father is incapable

of providing for the proper care and supervision of the juvenile; and (3) Father lacks the ability or willingness to establish a safe home. We affirm.

I. Factual Background and Procedural History

On 10 September 2018, the Orange County Department of Social Services ("DSS") received a report regarding a domestic violence incident that occurred on 8 September 2018. The report alleged that Father grabbed Mother by the hair, dragged her into the living room, and hit her in the back of the head in the presence of their juvenile son, Alan.[1] Father then picked up Alan and put him in his crib before throwing Mother against the wall, grabbing her throat, and strangling her until she lost consciousness. After the incident, Father sent text messages to Mother threatening to kill her and Alan. Father was charged with felony assault by strangulation, misdemeanor assault on a female, and misdemeanor communicating threats. After the incident, DSS assisted Mother in obtaining a Domestic Violence Protective Order ("DVPO") against Father. However, despite the DVPO in effect, Father continued to have contact with Mother.

On 23 January 2019, DSS filed a juvenile petition and obtained non-secure custody of Alan due to the parents' continued contact despite the DVPO that was in effect. DSS placed Alan with the same family that had adopted his older sister after Father's parental rights were involuntarily terminated and Mother voluntarily relinquished her rights.

Following a hearing, the trial court entered an order on 10 May 2019 adjudicating Alan neglected and ordering that custody remain with DSS. On 23 June 2021, the trial court entered a permanency planning review order changing the permanent plan from reunification to adoption with a secondary plan of guardianship. On 29 June 2021, DSS filed a petition to terminate Father's parental rights, alleging that (1) he neglected Alan; (2) he is incapable of providing for the proper care and supervision of Alan; and (3) his parental rights with respect to another child have previously been involuntarily terminated and he lacks the ability or willingness to establish a safe home.[2]

Hearings took place on 26 October 2021, 2 December 2021, 6 January 2022, and 31 January 2022, after which the trial court entered an order

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1. Alan is a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

2. DSS also filed a petition to terminate Mother's parental rights to Alan, but it was dismissed after Mother voluntarily relinquished her rights.

on 9 March 2022 terminating Father's parental rights. Father timely appealed the permanency planning order ceasing reunification efforts and the order terminating his parental rights.

II. Discussion

Father argues that clear, cogent, and convincing evidence does not support the trial court's adjudication that grounds existed to terminate Father's rights.

A. Standard of Review

"Termination of parental rights involves a two-stage process." *In re L.H.*, 210 N.C. App. 355, 362, 708 S.E.2d 191, 196 (2011) (citation omitted). "At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under section 7B-1111(a) of our General Statutes." *In re D.C.*, 378 N.C. 556, 559, 862 S.E.2d 614, 616 (2021) (quotation marks and citation omitted). "If the petitioner meets its evidentiary burden with respect to a statutory ground and the trial court concludes that the parent's rights may be terminated, then the matter proceeds to the disposition phase, at which the trial court determines whether termination is in the best interests of the child." *In re H.N.D.*, 265 N.C. App. 10, 13, 827 S.E.2d 329, 332-33 (2019) (citation omitted). If, in its discretion, the trial court determines that it is in the child's best interests, the trial court may then terminate the parent's rights. *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 161 (2003).

In reviewing a trial court's adjudication of grounds for termination, this Court must "determine whether the findings are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law" that one or more grounds for termination exist. *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quotation marks and citation omitted). "If clear, cogent, and convincing evidence supports a trial court's findings which support its determination as to the existence of a particular ground for termination of a respondent's parental rights, the resulting adjudication of the ground for termination will be affirmed." *In re J.R.F.*, 380 N.C. 43, 47, 867 S.E.2d 870, 874 (2022) (citation omitted). Unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citation omitted). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

We review a trial court's assessment of a juvenile's best interest at the disposition for abuse of discretion, reversing only where the

decision is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019) (quotation marks and citation omitted). "The trial court's dispositional findings of fact are reviewed under a 'competent evidence' standard." *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020) (citations omitted).

B. Adjudication

1. Neglect

Father contends that "clear, cogent and convincing evidence does not support the trial court's ultimate findings and conclusions that Alan's neglect would be repeated in the future if he was returned to his father's care[.]"

A trial court may terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) if it determines that the parent has neglected the child within the meaning of N.C. Gen. Stat. § 7B-101(15). N.C. Gen. Stat. § 7B-1111(a)(1) (2022). A neglected juvenile is defined, in relevant part, as a juvenile "whose parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline" or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(a), (e) (2022).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.

In re D.L.W., 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citation omitted). "When determining whether such future neglect is likely, the [trial] court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citation omitted).

Here, the trial court made the following relevant findings of fact regarding past neglect and a likelihood of future neglect:

> 33. Respondent parents have an on/off again relationship that began when Respondent mother was a minor marked by domestic violence due to Respondent father's documented mental health issues, including angry outbursts,

and history of substance use, including but not limited to, alcohol abuse.

34. Respondent father had a history of mental health issues that include psychiatric hospitalizations, medical noncompliance, and substance abuse.

. . . .

85. While Respondent father has acknowledged it was wrong for him to lose control, Respondent father has continued to place blame on Respondent mother for pushing him to a breaking point in which he lost self-control and physically assaulted her in the juvenile's presence.

. . . .

111. Despite regular engagement [in] therapeutic services to address his mental health needs, including medication management, individual therapy, individual and group DBT, Respondent father continues to demonstrate difficulty regulating his emotions, becomes argumentative, agitated, and he is difficult to redirect.

112. On more than one occasion, Respondent father has sent multiple text messages and/or left voice mail messages ranting, using curse words, and making accusations against OCDSS staff, including while actively engaged in medication management, individual therapy, individual and group DBT . . . .

113. On 29 December 2020 and 4 January 2021, Respondent father became dysregulated and aggressive after visits with the juvenile. Respondent father raised his voice against the social worker and got physically closer to her in a threatening manner while his anger escalated.

. . . .

121. Respondent father continues to exhibit the inability to control and regulate his emotions.

122. In communication, including his own written correspondence, Respondent father often refers to the behaviors of the other party as the person that cause[s] him to negatively react in the situation.

123. Despite his Alcohol and Cannabis Use Disorder diagnoses, over the course of the case, Respondent father continued to use marijuana and alcohol contrary to recommendations regarding his mental health diagnoses and psychiatric medications.

124. Respondent father minimizes his substance use and identifies that he uses impairing substances in time of stress . . . .

125. Respondent father admitted use and tested positive for marijuana in drug screens during the underlying case in September 2019, December 2019, and January 2020.

126. Respondent father has acknowledged alcohol misuse in August 2020 and December 2020. Respondent father has not sustained sobriety which has been consistently recommended due to his mental health diagnoses.

127. On 11 August 2021, Respondent father was charged with driving while impaired, resisting a public officer, and reckless driving wanton disregard in Randolph County. These charges remain pending.

. . . .

132. It is likely that the neglect experienced by the juvenile in the care of Respondent father will repeat or continue if the juvenile is returned to Respondent father's care and custody. Specifically, this court finds the following facts:

> a. Findings made elsewhere in this order are incorporated as though fully set out here.
>
> b. Respondent father completed a Batterer's Intervention Program; however, he continues to minimize his role in domestic violence and places blame on Respondent mother for pushing him to his limits.
>
> c. Respondent father failed to abide by the terms of the DVPO while it was in place by having contact with Respondent mother.
>
> d. Respondent father had clandestine contact with Respondent mother when he was under court order of no contact and despite their well-documented history of domestic violence and engagement in recommended services.

> e. Despite engagement in consistent individual therapy, individual DBT, and group DBT, Respondent father continued to show emotional dysregulation which includes becoming angry and aggressive, argumentative, and escalated in a manner that is difficult to redirect.
>
> f. These behaviors subject the juvenile to the continued risk of physical, emotional, or mental impairment if he were in Respondent father's care even if not directed at the juvenile.
>
> g. Despite the role that alcohol played in the domestic violence incident on 8 September 2018 when Respondent father assaulted Respondent mother in the juvenile's presence, Respondent father has continued to use impairing substances, specifically alcohol and marijuana, as a coping mechanism for stress.
>
> h. Respondent father's continued use of impairing substances creates an injurious environment for the juvenile if he were in his care and custody.
>
> i. Respondent father has not established a safe home for the juvenile.

In making these findings of fact, the trial court considered testimony from Dr. Kristi Matala, the psychologist who evaluated Father; Emily Allen, the DSS worker assigned to this case; Nicole Roman, the Guardian ad Litem District Administrator; Connie Price, Alan's Guardian ad Litem; and Alan's foster mother. The trial court also considered Dr. Karin Yoch's 2017 psychological evaluation of Father; Dr. Matala's psychological evaluation of Father; Father's letter to the court; emails between Father and Alan's foster mother; and the Guardian ad Litem's report. Thus, there is clear, cogent, and convincing evidence in the record to support the trial court's findings of fact that the neglect experienced by Alan would repeat or continue if he was returned to Father's care and custody.

The trial court's findings of fact support its conclusions of law that Father neglected Alan, that there is a high likelihood of repetition of similar neglect if Alan remained in Father's care or custody, and that Alan would remain at substantial risk of physical, mental, and/or emotional impairment in Respondent father's care and custody. *See In re K.Q.*, 381 N.C. 137, 146, 871 S.E.2d 500, 506 (2022) (holding that the trial court did not err by concluding that there was a likelihood of future neglect where the father continued to deny his role in the domestic violence, failed to

acknowledge the effects that the domestic violence had on the child, and refused to accept any responsibility for the child's removal).

2. Dependency

Father contends that clear, cogent, and convincing evidence does not support the trial court's findings and conclusions that Father was incapable and unable to provide for Alan's proper care and supervision. Specifically, Father contends that "the trial court did not make the ultimate findings of fact on the issue of whether these conditions rendered him incapable or unable to parent his child." (emphasis omitted).

A trial court may terminate parental rights for dependency if it determines that "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future." N.C. Gen. Stat. § 7B-1111(a)(6) (2022). Incapability may be the result of "substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile[.]" *Id.* A dependent juvenile has no parent, guardian, or custodian to provide for their care or supervision and no appropriate alternative childcare arrangement.[3] N.C. Gen. Stat. § 7B-101(9) (2022).

Here, the trial court made the following relevant findings in determining that Father was incapable of providing for Alan's proper care and supervision, and that there was a reasonable probability that Father's incapability would continue for the foreseeable future:

> 136. To evaluate Respondent father's current psychological functioning related to the juvenile's case, he was referred for an updated psychological evaluation.
>
> 137. On 26 June 2019, Dr. Matala conducted an updated psychological evaluation of Respondent father.
>
> 138. While Dr. Matala reviewed and considered Dr. Yoch's prior psychological evaluation, she completed an independent evaluation which included a review of records, mental status examination, clinical interview, and psychological testing of Respondent father.

---

3. Father does not argue that the trial court failed to make findings of fact regarding the availability of alternative childcare arrangements.

. . . .

143. Respondent father acknowledged prior suicide attempts, five or six times, usually by overdosing on substances or medication.

144. Respondent father reported experiencing symptoms of mania, including quickly moving thoughts and constant physical movement. His report is consistent with observations of the professionals involved in this case, including pacing in visitation.

145. Respondent father acknowledged going nine days without sleeping as well as difficulty sleeping, concentrating, and controlling his thoughts.

. . . .

147. Respondent father acknowledged his diagnosis of borderline personality disorder, and that he was regularly engaged in individual therapy and medication management. Despite engagement in services, he was not able to articulate information from interventions or coping skills learned from services.

148. When describing the domestic violence incident against Respondent mother witnessed by the juvenile, he expressed no empathy for the juvenile despite his own exposure to domestic violence as a child.

149. Respondent father demonstrated a lack of self-control over his emotions and thoughts. He remained fixated on Respondent mother and continued to blame others for his actions.

. . . .

151. Despite engagement in services and treatment, Dr. Matala noted that Respondent father continued to exhibit maladaptive behaviors in functioning, including that he lacked empathy and blames others for his actions. Further, testing indicates severe psychological difficulties with possible psychotic thought process and distorted perceptions. Consequently, Respondent father requires long-term intensive treatment.

152. Dr. Matala diagnosed Respondent father with Bipolar Disorder with mixed features, Borderline Personality

Disorder, Post-Traumatic Stress Disorder (PTSD), Alcohol Use Disorder, Cannabis Use Disorder, and Opioid Use Disorder in sustained remission.

153. . . . Additionally, use of alcohol and/or marijuana negatively impacts his mental health functioning.

. . . .

155. While Respondent father has engaged in medication management, individual therapy, and DBT individual and group therapy, he continues to demonstrate emotional dysregulation consistent with his persistent mental health diagnoses.

. . . .

157. Ultimately, Respondent father is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. § 7B-101, due to his persistent mental health diagnoses and associated maladaptive behaviors as set forth herein.

158. There is a reasonable probability that such incapability will continue for the foreseeable future due to the following:

> a. Findings made elsewhere in this order are incorporated as though fully set out here.
>
> b. Respondent father's diagnoses are persistent mental health conditions that require constant management through engagement in services.
>
> c. Respondent father has engaged in medication management and individual therapy that preceded the juvenile's birth which has not alleviated related symptoms.
>
> d. Respondent father has engaged in individual and group DBT therapy, and while he has shown improvement with emotional regulation during engagement in these services, he does not have the ability to maintain engagement in these services.
>
> e. Even with engagement in services, the behaviors associated with the conditions remain present,

> including the inability to manage anger which negatively impacts relationships and the juvenile's safety as demonstrated by domestic violence.

Based on the same evidence that supported the trial court's findings of fact concerning neglect, we determine that clear, cogent, and convincing evidence supports the trial court's findings that Father is incapable of providing for the proper care and supervision of Alan, and that there is a reasonable probability that the incapability will continue for the foreseeable future.

These findings of fact support the trial court's conclusions of law that Father is incapable of providing for the proper care and supervision of Alan, and that such incapability "is the result of mental illness and substance use disorder[.]" *See In re A.L.L.*, 254 N.C. App. 252, 266-67, 802 S.E.2d 598, 608-09 (2017) (holding that the trial court did not err by concluding that a mother was incapable of caring for her children where she suffered from severe depression and PTSD and failed to follow recommendations for treatment, even though there was testimony that her mental health had improved).

3. Prior Termination of Parental Rights

Father contends that clear, cogent, and convincing evidence does not support the trial court's findings and conclusions that Father was unwilling to establish a safe home for Alan.

Under N.C. Gen. Stat. § 7B-1111(a)(9), a trial court may terminate parental rights if "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." N.C. Gen. Stat. § 7B-1111(a)(9) (2022). "Termination under § 7B-1111(a)(9) thus necessitates findings regarding two separate elements: (1) involuntary termination of parental rights as to another child, and (2) inability or unwillingness to establish a safe home." *In re L.A.B.*, 178 N.C. App. 295, 299, 631 S.E.2d 61, 64 (2006). Safe home is defined as "[a] home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect." N.C. Gen. Stat. § 7B-101(19) (2022).

Father does not dispute that his parental rights were involuntarily terminated with respect to another child. Rather, Father argues that the record does not support a finding that he was unwilling to establish a safe home. However, the trial court made numerous findings relevant to its determination that Father was unable or unwilling to establish a safe home:

162. On 16 April 2018, Alamance County District Court, Juvenile Court Division, entered an Order to Terminate Parental Rights against Respondent father as to the juvenile . . . .

. . . .

164. There are notable similarities between the Alamance County Termination of Parental Rights Order . . . and the findings of fact set forth herein. Summary examples include, but are not limited to the following:

a. Respondent father was engaged in medication management with Dr. Su of Carolina Behavioral Health.

b. Respondent father was engaged in individual therapy with Sheryl Harper. It was acknowledged that he learned some anger management, parenting, and coping skills during sessions; however, Respondent father was not addressing the underlying issues as to why the juvenile was in agency custody.

c. Respondent father did not adequately address his substance use disorder, and he did not demonstrate sobriety.

d. Respondent father had a conflictual relationship with his social worker marked by difficulty in communication.

e. Respondent father was consistent and appropriate in supervised visitation . . . .

165. Respondent father lacks the ability or willingness to establish a safe home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect. The juvenile would be at substantial risk of physical, mental, or emotional impairment if he were in the home of Respondent father. In support of this ultimate finding of fact, the court specifically finds as follows:

a. Findings made elsewhere in this order are incorporated as though fully set out here.

b. Despite engagement in the Batterer's Intervention Program, Respondent father does not recognize his role in domestic violence and shifts blame on partners.

> c. Respondent father has not abided by no contact orders in place and continued to maintain some level of contact or relationship with Respondent mother despite their documented history of domestic violence.
>
> d. Respondent father has engaged in therapeutic services, including medication management, individual therapy, and DBT individual and group therapy. Despite engagement in these services, Respondent father continued to have incidents of emotional dysregulation, including but not limited to aggression, compulsive texting, and difficulty in communication.
>
> e. Respondent father has not demonstrated sobriety. He continued to use marijuana and alcohol during the proceedings despite substance use disorder related to the substances.

Based on the same evidence that supported the trial court's findings of fact concerning neglect and dependency, we determine that clear, cogent, and convincing evidence in the record supports the trial court's findings of fact that Father lacks the ability or willingness to establish a safe home for Alan.

These findings of fact support the trial court's conclusions of law that Father's parental rights with respect to another child have been terminated involuntarily, and that Father lacks the ability or willingness to establish a safe home. *See In re V.L.B.*, 168 N.C. App. 679, 684, 608 S.E.2d 787, 791 (2005) (holding that the trial court did not err by concluding that respondents lacked the ability to establish a safe home where, inter alia, the mother's psychological evaluation revealed that she suffered from "depression, high levels of anxiety and tension, a low frustration tolerance, poor impulse control, and anger management difficulties").

III. Conclusion

The trial court did not err by concluding that grounds existed to terminate Father's parental rights based upon neglect, dependency, and prior involuntary termination of parental rights. Father does not challenge the trial court's dispositional determination that termination was in the child's best interests. Accordingly, we affirm the trial court's order terminating Father's parental rights.

AFFIRMED.

Judges GRIFFIN and STADING concur.

IN THE MATTER OF C.T.T.

No. COA22-585

Filed 21 March 2023

1. Jurisdiction—termination of parental rights case—sufficiency of service of process—statutory requirements

The trial court had personal jurisdiction over respondent mother in a termination of parental rights action that was initiated by the child's father where the original summons contained all statutorily required information—despite respondent's argument that it lacked the name of her provisional counsel—and where respondent and her provisional counsel were personally served with the summons and petition. Since the original summons was legally compliant, a later defective service by publication did not affect the trial court's jurisdiction.

2. Termination of Parental Rights—parental right to counsel—failure of respondent to appear—dismissal of provisional counsel—inquiry by trial court

In a private termination of parental rights action in which respondent mother and her provisional counsel were properly served with a summons and petition but respondent did not appear at the hearing, the trial court made the requisite inquiry into counsel's efforts to contact respondent before releasing her as provisional counsel.

Appeal by Respondent-Mother from Orders entered 19 October 2021 by Judge Roy H. Wiggins in Mecklenburg County District Court. Heard in the Court of Appeals on 21 February 2023.

Miller Bowles Cushing, PLLC, by Bethany Mulhern and Nicholas L. Cushing for Petitioner-Appellee Father.

Deputy Parent Defender Annick Lenoir-Peek for Respondent-Appellant Mother (allowed as substitute counsel by order filed 1 March 2023 and notice of appearance filed 3 March 2023; Record on Appeal, Appellant's Brief, and Reply Brief filed by Stam Law Firm, PLLC, by R. Daniel Gibson, allowed to withdraw as attorney of record by order filed 1 March 2023).

RIGGS, Judge.

Appellant-Mother appeals from the trial court's Order Terminating Parental Rights and Order Denying Motion to Dismiss the Petition for Termination of Parental Rights to her minor child C.T.T. The trial court's Order entered on 19 October 2021, was adjudicated on grounds that she neglected and willfully abandoned C.T.T. for the last nine years. She contends the trial court erred in establishing personal jurisdiction over her due to insufficient service of process because: (1) the Original Summons did not list her provisional counsel by name; and (2) Notice of Service by Publication did not indicate her parental rights would be terminated if she did not file an answer within 30 days, among other things. She alleges both methods of service are defective pursuant to North Carolina General Statute § 7B-1106(b)(4) (2021). She also alleges that the trial court did not make the requisite inquiry before releasing her provisional counsel. After careful review of the record, we hold that Appellant-Mother was personally served with a summons that complied with statutory requirements of notice that her parental rights were subject to termination, so the trial court's exercise of personal jurisdiction was proper; and the trial court conducted a proper inquiry into Mother's contact with her provisional counsel. Therefore, we affirm the trial court's orders for termination of parental rights.

Factual and Procedural Background

Appellee-Father ("Father") and Appellant-Mother ("Mother") are the biological parents of C.T.T., born July 2010. Although the parties never married, C.T.T. resided in both his parents' care from birth until April 2012, due to Mother and Father cohabitating throughout several different states (Texas, Hawaii, Nevada). When C.T.T. was seven months old, Mother moved to Las Vegas with C.T.T., without Father's knowledge or consent. Mother informed Father she was going to visit her family in Las Vegas with C.T.T. and stopped all communication. As a result, Father moved from Hawaii to Nevada to be closer to C.T.T.

During the family's time in Las Vegas, Mother's lifestyle involved illicit drug use and unstable housing. She also displayed harmful and neglectful behavior towards C.T.T. On one occasion, Mother called Father to pick up C.T.T. because she needed him to provide childcare and gave Father the address of C.T.T.'s location. When Father arrived at the location, it was a casino, and Mother was nowhere to be found. Mother left then seven-month-old C.T.T. in a car seat unsupervised in a parked car left with an unknown valet attendant. During the months of February, March, and April 2012, a significant amount of suspicious bruising was observed on C.T.T.'s face. When confronted, Mother stated C.T.T. received his facial injuries from falling. Consequently, Father

notified Children's Protective Services in Nevada to report suspected abuse, and the report was later substantiated.

In April 2012, Father moved to Greensboro, North Carolina with C.T.T. At the time of their move, Mother's whereabouts were unknown. In September 2012, Mother arrived with C.T.T.'s maternal grandmother to Father's home in North Carolina to visit C.T.T. Mother stated she was going to visit with C.T.T. outside and then placed C.T.T. in a car and drove away with his grandmother. Mother then drove to Tyler, Texas with C.T.T. and rejected all telephone calls from Father. In response, Father immediately filed for Child Custody and a Motion for Ex Parte Emergency Child Custody. Father was later awarded permanent sole legal and sole physical custody of C.T.T. on 10 October 2012. As of September 2012, Mother has not seen C.T.T., has not provided any financial support, nor has she communicated with him.

On 11 February 2021, Father filed a petition to terminate Mother's parental rights to C.T.T. and a summons was issued the same day. On 15 February 2021, provisional counsel was appointed to Mother and therefore, appointed counsel's name was not listed on the summons issued four days earlier.[1] On 9 March 2021, Father personally served Mother via process server in Las Vegas, Nevada with the summons and petition. On 9 April 2021, Mother's provisional counsel was served via U.S. postal mail. At the first pretrial status conference on 27 April 2021, Mother's provisional counsel moved to have service dismissed due to the current summons form not being used. Mother was not in attendance at this status conference. The judge advised Father to file another summons and reattempt service, because the summons form had been updated. On 7 July 2021, at the trial court's urging, Father moved for service by publication because Mother's previous home was vacant, her whereabouts were unknown, and personal service could not be effectuated. On 9 July 2021, the trial court entered an Order Granting Leave To Serve By Publication in response to Father's request for notice by publication. During the months of July and August 2021, Father ran the following publication in Las Vegas news advertisements:

> In Re: [. . .], a minor juvenile. To: PAISLEY LAIS SANSONE, Respondent. Take notice that a Petition for Termination of Parental Rights has been filed in the above action. The nature of the relief being sought is as follows: Termination of Parental Rights. You have 40 days to file a Reply, which

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1. Indeed, as the trial court correctly noted, provisional counsel is not typically appointed until after a petition is filed, so the name of provisional counsel could not be listed on the summons executed at the same time as a petition.

> is 40 days from the first publication of this notice. Upon your failure to reply, the party seeking service against you will apply to the Court for the relief sought.

On 13 September 2021, Father filed the above Las Vegas publication along with an attached Affidavit of Publication. On 1 October 2021, Mother's provisional counsel filed a Motion to Dismiss in response to the publication notice failing to meet the statutory requirements of North Carolina General Statute § 7B-1106(b). Provisional counsel argued the petition should be dismissed for insufficiency of process. Specifically, counsel argued the following information was missing from the publication: C.T.T.'s first name [was missing]; notice that Mother's parental rights may be terminated if she did not file a written answer with the clerk within 30 days after service of the summons and petition [was missing]; and the appointed counsel [was missing].

On 1 October 2021, the motion was heard, and the trial court concluded the Original Summons was a legally compliant summons, although a newer version of the summons form existed. Moreover, the issue of notice by publication was moot, due to Mother being properly served the first time with the Original Summons. In response, Mother's provisional counsel argued her client was not properly served in accordance with the statutory requirements for notice, because provisional counsel was not listed on the summons. Father's trial counsel argued even if service was improper, Mother's provisional counsel had already made a general appearance in two status conferences in April and July 2021 and was in conversations with opposing counsel regarding settlement talks. Mother's provisional counsel also conceded that she had been in contact with her client, and her client was aware of the hearing scheduled that day, although she was not present. Specifically, Mother told her provisional counsel, who recounted to the trial court, that she did not have the financial resources to travel from Las Vegas to North Carolina for the in-person hearing. After the trial court denied Mother's Motion for Dismissal, provisional counsel stated, "I'm provisional counsel . . . [a]s the Court has found that mother is properly served, that [sic] by statute, I'm out." As a result, Mother's provisional counsel was dismissed by the court. Thereafter, on 19 October 2021, the trial court entered an Order Terminating Mother's Parental Rights and an Order Denying her Motion to Dismiss the Termination of Parental Rights petition to C.T.T.

Standard of Review

This Court reviews a trial court's orders for termination of parental rights to determine if the "findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support

the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). In termination of parental rights cases, a trial court's conclusions of law are reviewed *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008).

Analysis

1. Statute

Article 11 of Chapter 7B (Juvenile Code) of the North Carolina General Statutes governs termination of parental rights proceedings. N.C. Gen. Stat. §§ 7B-1100–1111 (2021). Section 7B-1104 sets forth two ways in which a party may commence termination of parental rights proceedings: either by petition or by motion. N.C. Gen. Stat. § 7B-1104. First, section 7B-1102(a) permits state agencies such as the Department of Social Services ("DSS") to file a motion in district court for termination of parental rights in pending abuse, neglect, or dependency proceedings involving juveniles. Second, if no such pending action exists, then DSS or a parent or guardian seeking to terminate the parental rights of another parent may file a petition to terminate their rights. N.C. Gen. Stat. § 7B-1103. The petition or motion must be entitled "In Re (juvenile's last name), a minor juvenile." N.C. Gen. Stat. § 7B-1104. The petition or motion must also allege, "[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). Absent exceptions in preliminary proceedings for unknown parents, once a petition or motion is filed for termination of parental rights, the trial court "shall cause a summons to be issued." N.C. Gen. Stat. § 7B-1106(a). The summons must be provided to all parties named as respondents in the case, including the minor child, the child's parents, any appointed guardian or custodian appointed by the court, and DSS or child placing agency. *Id.*

When termination of parental rights is sought, the respondent parent may file a written answer to the claim within 30 days after service of the summons and petition. N.C. Gen. Stat. § 7B-1106(b)(2). Absent good cause, the trial court must hold an adjudicatory hearing within 90 days from the filing of the petition or motion seeking termination of parental rights. N.C. Gen. Stat. § 7B-1109(a), (d). The trial court may terminate a respondent parent's parental rights if the findings establish (1) one or more grounds for termination exist, and (2) termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110.

2. Summons and Notice

In addition to service requirements, the statutory content of section 7B-1106 is required in the summons for termination of parental rights.

N.C. Gen. Stat. § 7B-1106(a)-(b). When respondent parents receive notice by publication, the publication must also comply with the notice requirements under subsection 7B-1106(b)(4). *In re C.A.C.*, 222 N.C. App. 687, 688, 731 S.E.2d 544, 545 (2012). Subsection 7B-1106(b)(4), provides: "[N]otice that if the parent is indigent and is not already represented by appointed counsel, the parent is entitled to appointed counsel, that provisional counsel has been appointed and that the appointment of the provisional counsel will be reviewed by the court at the first hearing after service." If a respondent parent does not appear at the first hearing after service, the "court shall dismiss the provisional counsel." N.C. Gen. Stat. § 7B-1101.1(a)(1).

3. Personal Jurisdiction

[1] A trial court's jurisdiction over a person is generally achieved through the issuance and service of a summons. *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009). Subsection 7B-1106(a2), requires provisional counsel to receive notice through issuance of the summons and complaint when a petition alleges "a juvenile is abused, neglected, or dependent." N.C. Gen. Stat. § 7B-602 (2021). However, there is no statutory requirement that the attorney's name must be listed on the summons form–the statutory requirement, outside of the content of the summons, is simply that provisional counsel be served with the petition and summons. N.C. Gen. Stat. §§ 7B-1106(a2) and 7B-602 (collectively establish).

In this case, Mother was personally served on 9 March 2021 with the summons and petition. On 9 April 2021, provisional counsel was served via U.S. postal mail and attended the first pretrial status conference on 27 April 2021. The statutory requirements contained in subsection 7B-1106(b)(4) do not require that provisional counsel be listed by name. Rather, the statute requires that notice be provided: to appointed counsel; that the parent is entitled to appointed counsel; that provisional counsel has been appointed–and that review of the appointment of provisional counsel will occur at the first hearing after service. N.C. Gen. Stat. §§ 7B-1106(a2), (b)(4) and 7B-602. Between 9 March 2021 and 9 April 2021, before the first hearing, all of these requirements were satisfied. First, our review of the Original Summons, issued on 11 February 2021, confirms the trial court's conclusion that all statutorily required information was contained in that Summons. N.C. Gen. Stat. § 7B-1106(b)(4). Provisional counsel's name was not listed on the summons, but provisional counsel was served on 9 April 2021, which is all that the statute requires: the statute does not require provisional counsel's name be listed on the summons. N.C. Gen. Stat. § 7B-1106(a2). With the issuance of a legally compliant summons, the court established

personal jurisdiction over Mother when that summons, and petition was personally served upon her on 9 March 2021.

Furthermore, Mother was notified she was entitled to a lawyer to represent her in the termination of parental rights proceedings regarding C.T.T., and she was in communication with that appointed lawyer. Although notice by publication was defective, this issue is moot since the Original Summons was found to be, and we agree was, legally compliant.

[2] As to the remaining issues raised in Mother's brief, because we found she was properly served with the Original Summons, we do not need to reach the second and third issues raised in her appeal. As it relates to the fourth issue, we agree that the trial court was required to make some inquiry into counsel's efforts to contact Mother before releasing her as provisional counsel. *In re D.E.G.*, 228 N.C. App. 381, 386–387, 747 S.E.2d 280, 284 (2013). Here, that was satisfied because the record demonstrates competent evidence of the following: Mother was personally served with the summons and petition, so she learned of the proceedings directly. Provisional counsel indicated to the trial court on 1 October 2021 that she was in communications with Mother about what was going on in the proceedings; was in settlement talks with opposing counsel; and was aware Mother would not be present at the last hearing due to financial constraints. Finally, the trial court explicitly inquired of provisional counsel at the adjudication hearing as to the status of communications with Mother, and provisional counsel answered. The purpose of the appointment of provisional counsel is to ensure a respondent parent's rights are adequately protected for termination proceedings. *Id.* And at the adjudication hearing, the trial court must consider whether provisional counsel must be retained or released, should the respondent parent fail to appear. N.C. Gen. Stat. §§ 7B-1108.1(a)(1) and 7B-1101(a)(1). On this record, the trial court made the requisite inquiry into the communication and overtures effectuated, that determined counsel made adequate efforts to make the respondent parent aware of their rights in the termination proceedings, before releasing provisional counsel when a parent is not present.

Conclusion

For the foregoing reasons, we affirm the 2021 Order Terminating Parental Rights and Order Denying Motion to Dismiss Petition for Termination of Parental Rights by the trial court.

AFFIRMED.

Judges ZACHARY and FLOOD concur.

IN THE MATTER OF K.M.C. & M.C.C.

No. COA22-573

Filed 21 March 2023

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—drug abuse—noncooperation with case plan

After the department of social services took custody of a mother's children on three separate occasions because of persistent drug abuse in the home, the trial court properly terminated the mother's parental rights for failure to make reasonable progress in correcting the conditions leading to the children's removal (N.C.G.S. § 7B-1111(a)(2)). According to the court's unchallenged findings, the mother "belatedly obtained" several psychological and substance abuse evaluations pursuant to her case plan, but she neither provided accurate information nor complied with the recommendations following those evaluations; she refused thirty-nine drug screens and admitted to doing so because she was still abusing drugs; and, even though both of her children had tested positive for illegal drugs and the youngest child suffered from brain cancer, she failed to take the children to various medical appointments.

2. Appeal and Error—preservation of issues—termination of parental rights—collateral estoppel—failure to object at trial

At a termination of parental rights hearing, respondent-mother failed to preserve for appellate review her argument that collateral estoppel principles barred the trial court from considering certain facts from two prior orders adjudicating her children as neglected. The mother neither raised the argument at the hearing nor objected to petitioner's evidence regarding the prior neglect adjudications. Additionally, she testified at the hearing about those adjudications and presented other evidence relating to them.

Appeal by defendant from judgment entered 20 April 2022 by Judge Gene Johnson in Henderson County District Court. Heard in the Court of Appeals 21 February 2023.

Mercedes O. Chut, for the respondent-appellant mother.

Susan Davis, for the petitioner-appellee.

Battle, Winslow, Scott & Wiley, PA, by M. Greg Crumpler for guardian ad litem.

TYSON, Judge.

Tanya Butler Carroll ("Mother") appeals from an order entered on 20 April 2022, which terminated both Mother's and Father's parental rights. Mother appeals. We affirm.

I. Background

Henderson County Department of Social Services ("DSS") obtained custody of Mother's children, Kevin and Michael, who were adjudicated neglected juveniles on three separate occasions. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). The Guardian Ad Litem's Court Report asserted "[d]rug abuse is the root cause of what has brought these children into [DSS's] custody three times."

The juveniles were first adjudicated as neglected on 14 January 2016 after Mother and Father were arrested for felony and misdemeanor drug charges. Twenty-two-months old Kevin and six-months old Michael were present when their parents were arrested. Law enforcement officers "discovered numerous uncapped syringes used for methamphetamines and knives on the floor within reach of both juveniles, including a knife in the living room with a 5-6 inch blade and 2 uncapped syringes found in the couch." Law enforcement also found methamphetamines and narcotics present inside the home. Custody of both boys was returned to Mother six months later on 19 July 2018. Father was incarcerated at the N.C. Department of Corrections.

The juveniles were again adjudicated as neglected a year later on 25 July 2019. While conducting a traffic stop of a vehicle Mother was driving on 1 March 2019, law enforcement found "28.27 grams of methamphetamine, 9 MM bullets, Clon[az]epam, precut corner bags, a measuring spoon[,] and brass knuckles." Kevin, the older son, and two other adults were also present inside the car. Nineteen days later, law enforcement found methamphetamine, needles, baggies with drug residue, drug paraphernalia, and a suboxone patch in the home where the juveniles were living. Kevin and Michael both tested positive for methamphetamine and amphetamines and were removed from the home. Custody was again returned to Mother on 6 July 2020, because Mother represented she was no longer staying with Father, who had not completed his case plan. Father returned to the home within two days after Mother had regained custody.

The juveniles were adjudicated neglected for the third and most recent time on 21 December 2020. The juveniles were taken into DSS's custody on 7 October 2020 and have since remained outside of Mother's and Father's home.

When most recently adjudicating the children as neglected, the trial court found: (1) the juveniles were left alone on two separate occasions in July and August 2020; (2) Mother failed to bring Michael to his MRI appointments on three separate occasions, which were critical to Michael's ongoing follow-up care for brain cancer; (3) a domestic violence altercation purportedly occurred on 6 October 2020 between the parents in the presence of the juveniles where Mother stabbed Father in the hand with a pair of scissors; (4) DSS was unable to access the home because the parents' bedroom was padlocked; (5) Father admitted to recent substance abuse; (6) Mother refused one hair follicle test and three urine drug screens; (7) Mother and Father asserted and held themselves as being separated, but they appeared to be living together during each of the social worker's multiple home visits; and, (8) Michael tested positive for amphetamines and methamphetamines.

At the disposition hearing, the trial court set forth reunification requirements, specifically for Mother:

> a. Mother shall obtain a Comprehensive Clinical Assessment from a certified provider acceptable to [DSS,] [and] [p]rovide the assessor with truthful and accurate information.
>
> b. Mother shall follow and successfully complete all the recommendations of the assessment.
>
> c. Mother shall submit to random drug screens.
>
> . . .
>
> g. Mother shall cooperate and/or ensure that the juveniles' medical, dental, developmental evaluations and treatment needs are met and comply with recommendations.
>
> . . .
>
> j. Mother shall obtain and maintain an appropriate and safe residence for the juveniles.
>
> . . .
>
> l. Mother shall provide the Social Worker with a physical residence address, a mailing address if different from the

> residence address, [and] a current and an operational telephone number. Mother shall promptly update this information with the Social Worker upon any changes.
>
> m. Mother shall sign and keep current any and all releases of information necessary to allow the exchange of information between [DSS] and the providers.

Permanency Planning Review hearings were held on 4 March 2021 and 1 April 2021, and the trial court added the following requirements for Mother in the order filed on 6 May 2021:

> a. The mother shall sign a release of information for October Road to enable [DSS] to access the substance use assessment on file.
>
> b. The mother shall sign a release of information for Pardee Hospital, LabCorp, Wolfe, Inc. and Pardee Urgent Care for any records concerning the mother's drug use and/or drug screens.

The trial court found after the hearing to terminate parental rights:

> 27. The mother has completed several Comprehensive Clinical Assessments. However, she did not provide truthful and accurate information on the assessments.
>
> 28. On October 27, 2020, the mother completed an assessment with RHA. She provided inaccurate information and was asked to complete another assessment.
>
> 29. On March 11, 2021, the mother completed an assessment with October Road. The mother admitted to the Social Worker that she lied on the assessment to try to control the service recommendations.
>
> 30. On May 13, 2021, the mother completed an assessment with MAHEC. Again, the mother provided inaccurate information and was asked to complete a new assessment.
>
> 31. On June 16, 2021, the mother was voluntarily committed to Advent Hospital due to suicidal ideation. The mother denies she was there for suicidal ideation, but rather she was hoping to be admitted to address her drug use. At Advent the mother admitted to using methamphetamine, marijuana[,] and heroin. The mother was discharged on June 23, 2021.

32. The mother has not completed any of the recommendations from the various assessments.

33. RHA recommended medication management, group therapy, individual therapy, and peer support.

34. The October Road assessment recommended 240 hours of partial hospitalization for Stimulant Use Disorder, Severe and Cannabis Use Disorder.

35. MAHEC recommended Al-Anon meetings and individual therapy.

36. Advent recommended outpatient therapy with Blue Ridge Health and to contact First Contact.

37. On October 7, 2021, the court required the mother to complete a full psychological assessment at GRANDIS.

38. The first available appointment was February 2, 2022. The mother completed the assessment on this day.

39. During the assessment the mother stated she resides with her husband, [Redacted]. She stated there are verbal conflicts with her husband. She admitted to using marijuana 3 days a week, twice a day and that she last used methamphetamine one month prior.

40. The GRANDIS assessment recommended intensive substance abuse treatment, group therapy, parenting classes, intimate partner violence classes[,] and mental health treatment services. The mother received these recommendations 10 days prior to today's hearing.

41. The prognosis from the GRANDIS evaluation found that the mother's treatment motivation is somewhat lower than is typical of individual[s] being seen in a treatment setting. Her responses suggest that she is satisfied with herself as she is, that she is not experiencing marked distress and[,] as a result, she sees little need for changes in her behaviors. As such, the mother would be at risk for early termination from her programs.

42. From December 2020 through March 2022, [DSS] requested the mother to submit to 39 drug screens. The mother did not submit to any of those screens.

43. The mother stated on multiple occasions that she will not take drug screens as it would not benefit her situation to do so.

44. The mother admitted on the stand that she did not submit to the requested drug screens because she had smoke[d] marijuana throughout the case and every now and then used methamphetamine.

45. The mother stated she used marijuana and methamphetamines because she was not allowed to see her children.

46. On July 22, 2021, and September 10, 2021, the mother stated she thinks she would benefit from rehab but does not need detox.

47. On November 11, 2021, the mother entered a detox program at ADATC, but left against recommendations on November 22, 2021.

48. The mother is very forthcoming about the father's fentanyl use.

. . .

75. The parents reside together. The Social Worker has not been permitted access to the inside of the parent's home. The Social Worker scheduled a home visit for February 21, 2021, nobody was home. The home visit for March 3, 2021, was canceled by the mother as she stated she was sick. On April 27, 2021, the parents spoke to the Social Worker outside the home but would not let the Social Worker in the home. On July 22, 2021, the parents did not permit the Social Worker to go into the home. On August 16, 2021, the Social Worker made an unannounced home visit, nobody answered the door. On August 31, 2021, the mother canceled the home visit. On January 26, 2022, the mother cancelled the home visit and rescheduled it to January 31, 2022. On January 31, 2022, the parents did not answer the door when the Social Worker arrived for the home visit. The Social Worker made an unannounced visit on March 17, 2022[,] and spoke with the mother outside. The mother agreed to allow the Social Worker to see the inside of the home on March 21, 2022. On March 21, 2022, the mother canceled the visit.

> . . .
>
> 77. The mother is not consistent in maintaining contact with the Social Worker. She responds to messages and calls selectively. She does not consistently attend scheduled Child and Family Team Meetings.
>
> 78. The mother is not consistent about updating the Social Worker with an active telephone number. The mother does have a consistent email address and has maintained the same psychical [sic] address throughout the case.
>
> 79. The mother has signed some of the requested releases of information, but not all of them. The mother failed to sign the releases of information for Pardee Urgent Care and Wolfe, Inc as well as from ADATC detox and Appalachian Counseling[,] which were specifically ordered in the order filed on May 6, 2021. The mother stated since she did not submit to any drug screens, she did not see the necessity for signing these releases of information.

The trial court concluded grounds existed for the termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2021). The court specifically found and concluded Mother had: (1) neglected the individuals and there was a probability such neglect would re-occur, (2) willfully left the juveniles in foster care or placement outside of the home for more than twelve months without reasonable progress, and, (3) for the six months prior to the filing of the petition for termination willfully failed to pay costs for care of the juveniles despite being able to do so.

The court ordered that the parental rights of Mother and Father be terminated on 20 April 2022. Father did not appeal. Mother filed a timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

Mother argues the trial court improperly ordered the termination of her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2021).

She also argues collateral estoppel prevents the trial court from considering certain facts from the previous two orders adjudicating

the juveniles neglected or the requirements contained in Mother's prior case plans.

IV. Termination of Parental Rights

[1] "[A]n adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. . . . [I]f this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted).

A. Standard of Review

This Court reviews a trial court's decision to terminate parental rights by examining "whether the court's findings of fact are supported by clear, cogent[,] and convincing evidence and whether the findings support the conclusions of law. Any unchallenged findings are deemed supported by competent evidence and are binding on appeal. The trial court's conclusions of law are reviewed de novo." *In re T.B.*, 380 N.C. 807, 812, 2022-NCSC-43, ¶ 13, 870 S.E.2d 119, 123 (2022) (quoting *In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 24, 862 S.E.2d 180 (2021)).

B. Analysis

A trial court may terminate parental rights for neglect under N.C. Gen. Stat. § 7B-1111(a) where the parent has neglected the juvenile within the meaning of N.C. Gen. Stat. § 7B-101. *Id.* at 812, ¶ 14, 870 S.E.2d at 123. Our general statutes define a neglected juvenile as one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." *Id.*; N.C. Gen. Stat. § 7B-101(15) (2021).

Four statutory bases are available to terminate a parent's rights under N.C. Gen. Stat. § 7B-1111(a). Under the second prong, a trial court may terminate parental rights after:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2).

The trial court is not strictly limited to the initial twelve months following separation when reviewing a parent's progress under § 7B-1111(a)(2), and "evidence gleaned from the twelve-month period immediately preceding the petition would provide the trial court with the most recent facts and circumstances exhibiting a parent's progress or lack thereof." *In re Pierce*, 356 N.C. 68, 74-75, 565 S.E.2d 81, 86 (2002).

"Leaving a child in foster care or placement outside the home is willful when a parent has the ability to show reasonable progress, but is unwilling to make the effort." *In re A.J.P.*, 375 N.C. 516, 525, 849 S.E.2d 839, 848 (2020) (citation, internal quotation marks, and alterations omitted).

"[A] respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress during the year preceding the DSS petition sufficient to warrant termination of parental rights under section 7B-1111(a)(2)." *In re J.W.*, 173 N.C. App. 450, 465–66, 619 S.E.2d 534, 545 (2005) (citation and internal quotation marks omitted), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780 (2006).

Our Supreme Court has stated:

> Parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2). However, in order for a respondent's noncompliance with her case plan to support the termination of her parental rights, there must be a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home.

In re J.S., 374 N.C. at 815-16, 845 S.E.2d at 71 (citation, internal quotation marks, and alterations omitted).

Our Supreme Court also upheld the termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(2) in *In re B.J.H.*:

> At the time of the 7 February 2020 adjudicatory hearing, Ben and John had been in an out-of-home placement for more than twenty-six months. Respondent-father had belatedly obtained a psychological evaluation but had yet to pursue the recommended treatment. Regardless of whether he obtained a substance abuse assessment in June 2018, respondent-father had refused his most recent

> drug screen and had tested positive for both amphetamine and methamphetamine in the preceding drug screen. Although he had completed parenting classes and consistently attended visitations with the children, respondent-father had not made satisfactory progress toward stable employment or housing suitable for the children. Because respondent-father had not meaningfully improved the conditions leading to the children's removal after more than two years, we affirm the trial court's adjudication as sufficiently supported by the evidence contained in the record. Having upheld the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2), we do not need to address respondent-father's arguments pertaining to N.C.G.S. § 7B-1111(a)(1).

In re B.J.H., 378 N.C. 524, 555, 2021-NCSC-103, ¶ 65, 862 S.E.2d 784, 806 (2021), (citing *In re J.S.*, 374 N.C. at 819-21, 845 S.E.2d 66; and *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417 (2019)).

The facts before us are similar to those in *In re B.J.H. Id.* Just like respondent-father there, Mother "belatedly obtained" several psychological and substance abuse evaluations, but she was not candid with accurate information and failed to comply with the recommendations. *Id.* Mother was recalcitrant. She "stated on multiple occasions that she will not take drug screens as it would not benefit her situation to do so" and refused thirty-nine drug screens. She also "admitted on the stand that she did not submit to the requested drug screens because she had smoke[d] marijuana throughout the case and every now and then used methamphetamine."

Both Kevin and Michael have previously tested positive for methamphetamines and amphetamines while in Mother's care. Mother has failed to cooperate and attend the juvenile's medical appointments, including failing to take Michael for multiple scheduled medical visits to monitor and treat his brain cancer. In sum, Mother has willfully failed to meaningfully improve the conditions leading to Michael's and Kevin's removal and to demonstrate reasonable progress to overcome those conditions. *Id.*

We need not review any of Mother's other arguments regarding termination of parental rights under the first and third prong of N.C. Gen. Stat. § 7B-1111(a), because another ground for termination exists under N.C. Gen. Stat. § 7B-1111(a)(2). *Id.*; *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71. Mother's argument is overruled.

V. Collateral Estoppel

[2] Mother argues collateral estoppel should have barred the trial court from considering and referencing prior orders and cases involving Mother's neglect of the juveniles.

At the hearing, the social worker testified about the circumstances of the first two petitions and adjudications without objection from Mother. Petitioner also presented the adjudication orders and permanency planning order as exhibits and these were admitted as evidence without objection from Mother.

Mother's argument is waived, because she failed to properly preserve this issue by raising the issue or objecting at trial. N.C. R. App. P. 10(a)(1) (explaining that "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 . . . [and] obtain[ed] a ruling upon the party's request, objection, or motion."); *In re D.R.S.*, 181 N.C. App. 136, 140, 638 S.E.2d 626, 628 (2007) ("Respondent argues next that the proceedings for termination of parental rights were barred by principles of collateral estoppel and *res judicata*. However, respondent raises the defenses of collateral estoppel and *res judicata* for the first time on appeal, and thus failed to properly preserve the issue."). Mother failed to object to Petitioner's evidence regarding the two prior adjudications. In addition, Mother testified about the prior adjudications and presented testimony and evidence spanning the entire time period of DSS's involvement, from 2015 to the time of the hearing. This argument is dismissed.

VI. Conclusion

The trial court properly terminated Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). Mother's repeated failure to submit to drug screens, reluctance to submit to psychological and substance abuse evaluations or provide releases, and her inability to comply with the juveniles' medical care collectively demonstrate and support the trial court's finding of her lack of reasonable progress. *In re B.J.H.*, 378 N.C. at 555, ¶ 65, 862 S.E.2d at 806.

Mother has consciously and repeatedly chosen a life of crimes, addictions, and use of dangerous and illegal narcotics, to the degree both young sons tested positive for these illegal drugs. Her choices, actions, and neglect have repeatedly placed her sons at gross and substantial risks of harm. While there are no "three strikes" in termination of parental rights cases, the record before us clearly supports a conclusion

that Mother has been presented with a multitude of opportunities for help and treatments to overcome her addictions and illegal drug use to be reunited with her sons. She utterly failed to recognize the need for and take advantage of these opportunities to overcome her poor and life-threatening choices in preference to caring for and raising her sons.

Mother's other arguments regarding termination of parental rights under the first and third prong of § 7B-1111(a) are moot, because grounds to affirm termination exists under N.C. Gen. Stat. § 7B-1111(a)(2). *Id.*; *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71.

Mother's collateral estoppel argument was not preserved and is dismissed. N.C. R. App. P. 10(a)(1); *In re D.R.S.*, 181 N.C. App. at 140, 638 S.E.2d at 628. The order terminating Mother's parental rights is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge STROUD and Judge ARROWOOD concur.

IN THE MATTER OF S.I.D.-M.

No. COA22-503

Filed 21 March 2023

Termination of Parental Rights—grounds for termination—willful abandonment—findings—evidentiary support

The trial court properly terminated a father's parental rights to his daughter on the basis of willful abandonment where the evidence supported the court's findings that, for a period of at least six months preceding the filing of the petition by the child's mother, respondent did not contact the mother about the child's well-being even though he had her contact information, he did not take steps to resume visitation with his daughter, and he did not send any cards or gifts to his daughter. The findings, which did not contradict each other, in turn supported the court's conclusion that respondent willfully abandoned his daughter.

Judge TYSON concurring in part and dissenting in part.

Appeal by petition for writ of certiorari by respondent-father from order entered 18 March 2022 by Judge Christy E. Wilhelm in District Court, Cabarrus County. Heard in the Court of Appeals 21 February 2023.

Richard Croutharmel, for respondent-appellant-father.

No brief for petitioner-appellee-mother.

STROUD, Chief Judge.

Respondent-father appeals from an order terminating his parental rights for willfully abandoning his child. Father argues he did not willfully abandon his child because he attempted to reach out to Mother by email, through the parties' attorneys, two weeks before the termination petition was filed. Because clear, cogent, and convincing evidence exists in the record to support the trial court's findings of fact, and the trial court's findings support its conclusion that the minor child was an abandoned juvenile, the trial court's termination of Father's parental rights is affirmed.

I. Background

Sidney[1] was born to Mother and Father in February 2018. Mother and Father were never married. In a previous custody proceeding in Mecklenburg County, Mother was granted full custody of Sidney with scheduled visitation for Father. Venue of the custody proceeding was later transferred to Cabarrus County.

In early August 2019, Father "attempted suicide and was hospitalized for mental health purposes." On 13 August 2019, Mother secured an *ex parte* custody order suspending Father's visitation. Mother also filed a motion to modify visitation, and on 28 August 2019, the District Court in Cabarrus County entered a written order extending the *ex parte* order and suspending Father's visitation (the "Order Suspending Visitation") until he "presents himself to the Court and shows just cause as to why his visits should be reinstated."[2] The relevant portions of the Order Suspending Visitation, which is not at issue on appeal, state:

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1. A pseudonym is used.

2. The original custody order is not in the record on appeal, but the petition made detailed allegations regarding the Custody Order and the Order Suspending Visitation, and Father admitted these allegations in his answer.

FINDING AS FACT

. . . .

3. An ex parte order was entered herein on or about August 13, 2019;

4. The Cabarrus County Department of Social Services has opened an investigation and has been unable to locate the [Father];

5. Service by the Sheriff was returned unserved and [Mother] has no information regarding [Father]'s present whereabouts;

6. [Father]'s mental stability is in question and it would be contrary to the minor child's best interest for him to have visitation at this time.

Based on these Findings of Fact, the Court hereby makes the following:

CONCLUSIONS OF LAW

. . . .

2. This temporary order is in the best interest of the minor child.

And based on these Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED ADJUDGED AND DECREED as follows:

1. [Father]'s visitation with the minor child [Sidney] is suspended until such time as he presents himself to the Court and shows just cause as to why his visits should be reinstated.

Father was unable to return to work for several months because of his mental health issues but his therapist eventually approved his return to work in March 2020.

On 24 July 2020, Mother filed a "Petition for Termination of Parental Rights" (the "Petition") in the District Court, Cabarrus County. The Petition recited basic facts about the parties, that Mother had full custody of Sidney and Father had visitation, and then alleged:

7. Petitioner alleges that the following facts establish grounds for the [Father]'s parental rights to be terminated:

a. Pursuant to 7B–1111(a)(4), [Father] has willfully failed without justification to adequately pay for the care, support, and education of the juvenile in that he has fallen behind on his child support obligation and currently has an arrearage of approximately $2,500.00.

b. Pursuant to 7B–1111(a)(6), [Father] is incapable of providing for the proper care and supervision of the juvenile in that:

   i. On or about August 2, 2019, [Father] attempted suicide by jumping off [a bridge]. [Father] was saved by a Charlotte-Mecklenburg Police Officer. He was then escorted by ambulance to Novant–Mill Hill where he was hospitalized for a mental health evaluation.

c. Pursuant to 7B–1111(a)(7), [Father] has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of this petition based upon the following:

   i. Respondent has not visited with the child since July 2019;

   ii. Since the Order on August 28, 2019, [Father] has not made any efforts to reach out to [Mother] about the minor child nor has he filed anything in the Chapter 50 Action to have his visitation reinstated;

   iii. Respondent has at all times known how to contact [Mother] either via phone or email. [Father] knows [Mother]'s residential address as well as how to contact [Mother] through her family[.]

Father filed an answer 10 September 2020 admitting the allegations regarding the parties' and child's residences, the parties' status as parents of the child, and allegations regarding the prior custody action and the Order Suspending Visitation. Father denied the remaining allegations of the Petition. As to the grounds for termination, Father's answer stated:

> 7. The allegations contained in Paragraph 7 are denied.
>   a. Denied as to willfulness. [Father] was out of work following his mental health crisis and began to resume his child support payments upon returning to work.
>   b. Admitted as to the incident [of attempted suicide], but denied as to a continual issue that would render [Father] incapable of providing for the proper care and supervision of the juvenile following his treatment after his mental health crisis.
>   c. Denied as to willfulness.
>   i. Admitted as to time [Father] has not seen his child.
>   ii. Denied. [Father] obtained counsel and reached out via counsel as to what documentation was needed to resume visits on July 13, 2020 and Petitioner responded by filing to terminate his rights on July 23, 2020.
>   iii. [Father] has [Mother's] email and was communicating with her via email through at least August 2019 about their child.

A Guardian *ad litem* ("GAL") was appointed 15 September 2020 and the hearing was continued until 27 October 2020.[3] The Termination of Parental Rights ("TPR") hearing was then repeatedly continued before ultimately being set for 21 February 2022.

3. At the TPR hearing both parties reference a motion Father apparently made September 2020 to attempt to resume visitation. The trial court's TPR order also references this motion. The record does not contain this motion and the evidence presented at the hearing did not address the details of the motion or the disposition, if any. The only document filed by Father in September 2020 in the record is Father's answer.

Our dissenting colleague notes that the TPR hearing was "inexplicably" delayed, and while we agree the record does not fully explain all the continuances, it does include all the relevant motions and orders. We also note Father did not raise any argument on appeal as to any continuance or the trial court's denial of his motion to continue filed just before the final hearing. In fact, the delay would have served only to benefit Father, as it gave him more time and opportunity to demonstrate his concern for the child by requesting an opportunity to see or communicate with her, seeking information regarding her development and welfare, or sending gifts or cards.

According to the record, on 27 October 2020, both parents, their counsel, and the GAL were present and the Pretrial Order was entered; the date of the TPR hearing was to be determined. On 20 April 2021, a "status review" hearing was set for 11 May 2021. At the 11 May 2021 hearing, a continuance order was issued for purposes of the GAL report and hearing was set for 25 May 2021. At the 25 May 2021 hearing, the hearing was continued to 6 July 2021 for purposes of review of the status of the GAL report and the hearing was "continued for Dom Setting Request" and set for 6 July 2021. On 4 June 2021, Mother's counsel filed a "Juvenile Case Request for Setting," and on 15 June 2021, the Chief District Court Judge set the matter for hearing on 26 August 2021. On or about 24 August 2021, Father filed an "Objection to Holding Audio-Video Hearing and Motion to Continue" to the hearing set for 26 August 2021. According to Father's Motion to Continue, the hearing had been set as an in-person hearing but on 23 August 2021, Mother's counsel "notified the Court of a health issue that would prevent her client from attending the hearing in person." Father informally objected by email to a remote hearing, but then received an order setting the hearing as a WebEx hearing on the originally-scheduled date of 26 August 2021. Father objected to a remote hearing for various reasons and requested that the case be continued "until such time as it is safe for the matter to be heard in person." On 24 August 2021, the trial court entered an order denying Father's motion to continue. The trial court found that the minor child had tested positive for COVID and the parties had attempted to find an alternative in-person hearing date within the following 30 days but were unable to find a suitable date. The trial court denied continuance to avoid further delay. However, on 26 August 2021, the trial court entered a Continuance Order noting Mother's COVID exposure and that both attorneys had agreed to continue the hearing to 12 October 2021. On 12 October 2021, the trial court entered an "Order Continuing Case Off Calendar" finding Father's attorney made a motion to continue in open court and Mother's attorney consented to continue to a new date to be

determined. On the same day, Mother's attorney filed a "Juvenile Case Request for Setting," and on 19 October 2021, the Chief District Court Judge noticed the TPR hearing for 21 February 2022.

The TPR hearing was held 21 February 2022. Father's arguments on appeal only address the adjudicatory phase of the hearing. During the adjudicatory phase of the hearing, Father testified that at the time, in August 2019, when he was having his mental health crisis, he was not aware of the return hearing for the *ex parte* order, but later he did become aware of the Order Suspending Visitation entered 28 August 2019. Father then testified that although he did not personally schedule anything with the trial court to resume visitation, as directed in the Order Suspending Visitation, he did attempt to resume visitation by communicating with Mother through his attorney.

Father testified he thought "there was a no[-]contact order in place" and he "did not want to violate that order, so what [he] did was just try to make sure everything was done with [his] mental health so [he] could get documentation proving that [he was] not a threat to [his] child." Father also testified he believed the Order Suspending Visitation was similar to a domestic violence protective order, and Mother "advised [him] that there was a no[-]contact order in place[,]" which is why he attempted to work with his attorney to resume visitation and never reached out to Mother directly. Father testified he had not attempted to send gifts or otherwise contact Sidney while he recovered from his mental health crisis and confirmed by the time of the hearing it had been approximately 18 months since he had contact with Sidney.

Mother testified she had not heard from Father since he was released from the hospital in August 2019. Mother testified her contact information had not changed since the last time she spoke to Father and that Father had also been provided Mother's sister's contact information that he could use to reach out to contact Mother. Mother then testified she had heard from Father as part of the TPR proceedings in July 2020.

As to the Order Suspending Visitation, Mother confirmed she spoke with Father and "let him know that there was an order in place and he had to contact the county case worker that was assigned to the case and that they were trying to locate him." Mother also testified the Order Suspending Visitation was not a no-contact order and Mother "told [Father] that he would have to go through the county case worker and through court to file the motion" to resume visitation with Sidney. Mother then testified she was told about the July 2020 email from Father's attorney; the email said Father was "looking to resume visits;" and the email was received prior to her filing of the Petition.

Less than 30 days following the hearing, as required by North Carolina General Statute § 7B-1109, on 18 March 2022, the trial court entered an order terminating Father's parental rights (the "TPR Order"). The TPR Order makes adjudicatory findings of fact addressing the Custody Order and Father's attempted suicide. The TPR Order also finds as fact that Father made no efforts to contact Mother since 2019, even though Father had contact information for Mother, and Father's attorney did contact Mother's attorney in July 2020. The trial court also found Father had resumed paying child support upon returning to work.

The trial court ultimately found evidence did not exist to support termination of Father's parental rights on the grounds he failed to pay child support or that Father was incapable of providing for the care and supervision of Sidney. The trial court did conclude Father's parental rights should be terminated "[p]ursuant to [North Carolina General Statute §] 7B–1111(a)(7), [because Father] ha[d] willfully abandoned [Sidney] for at least six consecutive months immediately preceding the filing of th[e] petition based upon" the trial court's findings and Father's statements at the TPR hearing and also because "[f]or at least the six (6) months preceding the filing of the Petition, [Father] withheld his presence, love, and care from the child." The Order then makes dispositional findings and concludes Father's parental rights should be terminated. Father filed notice of appeal 21 April 2022.

II. Jurisdiction

Father filed a Petition for Writ of Certiorari with this Court stating his notice of appeal was untimely, but also noting no certificate of service was attached to the trial court's TPR Order. The record does not contain a certificate of service attached to the TPR Order so our record does not provide the date Father was served with the TPR Order. Father also noted "[o]ur Juvenile Code requires that both [Father] and his trial counsel sign the notice of appeal[,]" *see* N.C. Gen. Stat. § 7B-1001(c) (2022); N.C. R. App. P. 3.1(a), otherwise this Court is without jurisdiction to hear an appeal from a termination of parental rights. *See In re L.B.*, 187 N.C. App. 326, 331-32, 653 S.E.2d 240, 244 (2007). The signature date on Father's notice of appeal is 12 April 2022. Father asserts he and his trial counsel met on 12 April 2022 to sign the notice of appeal and he had no control over trial counsel's actions after he signed the notice of appeal; the potentially late filing is therefore no fault of his own.

North Carolina General Statute § 7B-1001(b) requires notice of appeal to "be made within 30 days after entry *and service* of the order" appealed from. N.C. Gen. Stat. § 7B-1001(b) (2022). However, there is

no indication in the record when Father was served the 18 March 2022 TPR Order. If the TPR Order was served between 18 March 2022 and 20 March 2022, then Father's 21 April 2022 notice of appeal was untimely. If Father was served after 21 March 2022, then Father's 21 April 2022 notice of appeal was timely.

We have considered the gravity of termination of Father's parental rights and Father's assertion that he timely met with his counsel and signed the notice of appeal. In addition, if Father's appeal was actually filed late, the greatest period by which Father's appeal could be untimely was the short, 3-day difference between 18 April 2022 and 21 April 2022. In an abundance of caution and in our discretion we allow Father's Petition for Writ of Certiorari. *See generally* N.C. R. App. P. 21; *see also State v. Gardner*, 225 N.C. App. 161, 165, 736 S.E.2d 826, 829 (2013) ("We have also held that where a [respondent] has lost his right of appeal through no fault of his own, but rather as a result of the actions of counsel, failure to issue a writ of *certiorari* would be manifestly unjust.").

III. Father's Appeal

Our Juvenile Code establishes a two-stage framework for the termination of parental rights; the first stage is adjudicatory and the second dispositional. *See* N.C. Gen. Stat. §§ 7B-1109, -1110 (2020). Father only challenges the adjudication of Sidney as abandoned, and his sole argument on appeal is that "[t]he trial court reversibly erred in concluding the existence of the ground of abandonment to terminate [Father]'s parental rights because the evidence failed to support the findings of fact and the findings of fact failed to support this conclusion of law." For the reasons below, we disagree and affirm the trial court's TPR Order.

A. Standard of Review

At the adjudicatory stage, "[t]he standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re C.M.P.*, 254 N.C. App. 647, 654, 803 S.E.2d 853, 858 (2017) (quotation marks omitted). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *Id.* (quotation marks omitted). "Unchallenged findings of fact are conclusive on appeal and binding on this Court." *Id.* (quotation marks omitted). The trial court's conclusions of law are reviewed *de novo*. *Id.* (citation omitted).

B. Abandonment of a Juvenile

The trial court terminated Father's parental rights pursuant to North Carolina General Statute § 7B-1111(a)(7) for willfully abandoning Sidney at least six months before the Petition was filed. North Carolina General Statute § 7B-1111(a)(7) provides that:

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]

N.C. Gen. Stat. § 7B-1111(a)(7) (2020).

Our Supreme Court has further defined willful abandonment:

> We have held that "[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)); *see also Pratt v. Bishop*, 257 N.C. 486, 502, 126 S.E.2d 597, 608 (1962) ("Abandonment requires a wil[l]ful intent to escape parental responsibility and conduct in effectuation of such intent."). "It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* at 501, 126 S.E.2d at 608.

In re E.H.P., 372 N.C. 388, 393, 831 S.E.2d 49, 52 (2019). "In this context, the word [']willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation. Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re A.K.D.*, 227 N.C. App. 58, 61, 745 S.E.2d 7, 9 (2013) (quotation marks omitted). But, "[a] delinquent parent may not dissipate at will the legal effects of his abandonment by merely expressing a desire for the return of the abandoned juvenile." *In re C.J.H.*, 240 N.C. App. 489, 504, 772 S.E.2d 82, 92 (2015) (citation omitted).

Further, " '[a]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and

intentions, the "determinative" period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition.' " *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619, 810 S.E.2d 375, 378 (2018)). Here, because the Petition was filed 24 July 2020, the relevant six-month period for purposes of North Carolina General Statute § 7B-1111(a)(7) was 24 January 2020 to 24 July 2020. *See* N.C. Gen. Stat. § 7B-1111(a)(7).

We first address the findings of fact Father specifically challenges as unsupported by the evidence presented at the TPR hearing. This Court reviews the challenged findings for whether they "are supported by clear, cogent and convincing evidence[, and] . . . [i]f the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re C.M.P.*, 254 N.C. App. at 654, 803 S.E.2d at 858 (citation and quotation marks omitted).

1. Finding 14

Finding 14 states: "In July 2020, an attorney for [Father] contacted the attorney for [Mother]." Father asserts finding 14 is "erroneous as a matter of law because it fails to include the reason for the July 2020 [email]," and the reason for the email, that Father wanted to resume visits, "negated the TPR ground of abandonment."

We first note a copy of this email is not in the record on appeal. However, Mother testified about an email from July 2020:

> [Father's Counsel]: Did your attorney communicate when she received communications in your case from either a party or an attorney?
>
> [Mother]: Yes.
>
> [Father's Counsel]: And were you made aware of an e-mail that was sent in July?
>
> [Mother]: I believe it was -- she attached it, or there was a forward in there, so yes.
>
> [Father's Counsel]: Did you (inaudible) an e-mail?
>
> [Mother]: Yes
>
> [Father's Counsel]: On [Father's] behalf about re-starting visitation?
>
> [Mother]: It was sent through the -- I think what the e-mail said was he's looking to resume visits, yes.

> [Father's Counsel]: Okay. And when did you get that in comparison to when you filed the TPR?
>
> [Mother]: That was all in July.
>
> [Father's Counsel]: And did you get the e-mail before you filed the TPR?
>
> [Mother]: Yes.

After this exchange, Mother admitted her response after receiving the email was to file the Petition. This exchange is the only reference in the entire record to the substance of an email in July 2020 in which Father sought to resume visits with Sidney.

Finding 14 is supported by the evidence, as Father's attorney did contact Mother's attorney by email. But the sole evidence indicating this email had anything to do with visitation is Mother's uncertain statement: "I think what the e-mail said was he's looking to resume visits, yes." Father did not testify about the substance of the email sent in July 2020; he only testified about general contact with his attorney "about getting everything started back up for my visitation." And, as stated above, the email was not presented to the trial court and is not in the record for this Court to review.

Father's argument that finding 14 "is woefully inadequate in that it fails to indicate the nature of the July 2020 [email] contact" is without merit. The trial court has the duty of evaluating the weight and credibility of the evidence, *see*, *e.g.*, *In re K.W.*, 282 N.C. App. 283, 290, 871 S.E.2d 146, 152 (2022) (citation omitted), and in a TPR case, before making a finding of fact, the trial court must be sufficiently satisfied with the evidence to be able to find the facts by clear, cogent, and convincing evidence. *In re B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 751 (2020). Considering the minimal evidence that the email was regarding visitation, the trial court's finding is proper. The finding acknowledges there was a contact between the parties' attorneys and the trial court did not have any obligation to address the nature of the July 2020 contact further.

2. Findings 12 and 21

Father next disputes findings 12 and 21 because "[t]hese two findings are contradicted by finding of fact #14[.]" Finding 12 states, "[Father] did not make any further efforts to contact [Mother]." Finding 21 states, "Other than the one phone call to [Mother] in August 2019, [Father] did not attempt to contact [Mother] to set up a visit or to check on the child."

Finding 12 is not inconsistent with finding 14. Finding 12 immediately followed finding 11, which was unchallenged on appeal and stated:

> [Father] called [Mother] one time in August 2019 after he was released from the hospital. [Mother] informed him that there was a new custody order in place and indicated that he should contact the social worker handling the Department of Social Services case.

Finding 11 summarizes the direct contact between Father and Mother since Father's mental health crisis. When read in context, finding 12 builds on the context from finding 11, and there was "ample, competent evidence[,]" *In re C.M.P.*, 254 N.C. App. at 654, 803 S.E.2d at 858, to support a finding that Father did not attempt to directly call or contact Mother to seek visitation with Sidney between August 2019 and July 2020.

At trial, Father testified he believed a no-contact order was in place. Father also testified he was never served with a no-contact order, and he believed the Order Suspending Visitation was a no-contact order because he did not read the order thoroughly enough. The Order Suspending Visitation was in evidence and it has no provisions barring Father from contact or communication with Mother or Sidney; it only suspends his visitation set by prior order "until such time as he presents himself to the Court and shows just cause as to why his visits should be reinstated." When questioned on his contact with Mother, Father admitted he never texted or called Mother, although he had her contact information; Father agreed he never "tried to send any cards or gifts or letters[;]"and Father agreed he never "tried to communicate with [Mother] in any way about [Sidney's] well[-]being over the last couple years[.]"

Mother testified that she had not heard from Father since August 2019, her contact information had not changed, and he was not blocked from communicating with her in any way. Similar to finding 14, the only evidence that Father contacted Mother regarding *anything* to do with Sidney is an equivocal statement by Mother that she heard from Father in July of 2020 and she thought Father had expressed a desire to resume visitation. The evidence in the Record is sufficient to support finding 12, and finding 12 does not contradict finding 14. Finding 21 is not erroneous for the same reasons. There was competent evidence to support the trial court's findings that Father did not attempt to contact Mother between August 2019 and July 2020 regarding Sidney's welfare.

3. Finding 25

Finding 25 states: "At the time of the filing of the Petition, it had been eleven (11) months since the [Father] had visited with the child or communicated with the [Mother] about her well-being, a fact which he admits." Father asserts this finding is erroneous for the same reasons as findings 12, 14, and 21. Father asserts his attorney's email contained a request for visitation and "[s]uch a contact was tantamount to a communication with [Mother] about Sidney's well-being." We disagree. We have already addressed all the evidence regarding the substance of the email, which is minimal. There was no evidence Father requested any information about Sidney's health, development, or welfare. At most, the email between the parties' attorneys was Father "merely expressing a desire for the return of the abandoned juvenile." *In re C.J.H.*, 240 N.C. App. at 504, 772 S.E.2d at 92. For the reasons discussed above, this finding is supported by the evidence.

4. Conclusions of Law

Father then challenges finding 36 and asserts finding 36 is actually a conclusion of law because "it mirrors the language from the TPR statute on the abandonment ground." We agree and will review finding 36, as well as the trial court's other conclusions, *de novo*. *In re C.M.P.*, 254 N.C. App. at 654, 803 S.E.2d at 858; *see also In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 675-76 (1997) ("[A]ny determination requiring the exercise of judgment, . . . or the application of legal principles, . . . is more properly classified a conclusion of law.").

Finding 36 states:

> 36. That the Court finds by clear, cogent and convincing evidence that the following grounds exist to terminate the parental rights of [Father] . . . :
>
> a. Pursuant to 7B–1111(a)(7), [Father] has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of this petition based upon the previously stated Findings of Fact and [Father]'s own admission.
>
> b. For at least the six (6) months preceding the filing of the Petition, [Father] withheld his presence, love, and care from the child.

> c. The Court specifically reviewed the Supreme Court of North Carolina's ruling in 372 N.C. 388 *In the Matter of E.H.P. and K.L.P.* filed August 16, 2019 in which a termination of parental rights was upheld even with a no-contact order actually in place.

The trial court ultimately concluded:

> 3. That by clear, cogent and convincing evidence [Father]: has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition as set forth in § 7B–1111[(a)](7).

Father's conduct met the statutory standard for willful abandonment under North Carolina General Statute § 7B-1111(a)(7), and these conclusions were not made in error.

By Father's own admission, he had no contact with Sidney during the six months preceding the filing of the Petition. Father made no effort to inquire about Sidney's welfare, either before or after the Petition was filed, even though he had current contact information, and he was not blocked from communicating with Mother. It is unfortunate he did not read the Order Suspending Visitation well enough to realize it was not a "no[-]contact" order particularly because the order set forth what he needed to do to resume visitation. And although the trial court must consider Father's conduct during the six months *preceding* the filing of the petition determinative, "the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions." *In re N.D.A.*, 373 N.C. at 77, 833 S.E.2d at 773. During a time period of over thirty months from August 2019, when Father was released from the hospital, until the TPR hearing in February 2022, Father's sole attempts at contact or communication with Mother or Sidney were the one phone call to Mother in August 2019 and the July 2020 email from his attorney to Mother's attorney.

Father's admission to not fully reading the Order Suspending Visitation cuts both ways. The trial court could have believed Father acted reasonably when he did not seek to see Sidney based upon his erroneous belief he was subject to a no-contact order. Father argues the trial court should have interpreted the evidence in this manner, and our dissenting colleague would agree. Or the trial court could infer—and did infer——Father was not sufficiently motivated or interested in resuming contact with Sidney even to take a few moments to read the Order Suspending Visitation carefully, even though he admittedly knew the

order addressed custody of his child. On the one occasion Father contacted Mother in August 2019, Mother told Father that he simply needed to contact the county official managing Sidney's case and show the trial court that he had adequately recovered from his mental health crisis and then Father would be able to resume visits with Sidney. Mother's comments to Father were consistent with the provisions of the order, which noted that "[t]he Cabarrus County Department of Social Services ["DSS"] has opened an investigation and has been unable to locate the [Father]; . . . [Father]'s mental stability is in question and it would be contrary to the minor child's best interest for him to have visitation at this time[;]" and "visitation with the minor child [Sidney] is suspended until such time as he presents himself to the Court and shows just cause as to why his visits should be reinstated." But Father did not contact Cabarrus County DSS and did not present himself to the trial court to demonstrate he had recovered sufficiently to resume visitation, although he testified that he had stopped seeing his therapist and returned to work in March 2020–four months prior to the filing of the Petition. Father also testified he did not attempt to file a motion to resume visitation with Sidney with the trial court until September 2020, several months after the Petition was filed.

The trial court's findings were sufficient to support the conclusion that Father willfully abandoned Sidney. The trial court's findings addressed Father's mental health crisis, his contact with Mother in August 2019, his receipt of the Order Suspending Visitation, his failure to attempt to contact Mother again, and his failure to take any other action to resume visitation or even to send a card or a gift to the child, even though he was not prohibited from doing so.

We conclude the trial court's findings support its conclusion of abandonment as defined by § 7B-1111(a)(7). *See In re C.M.P.*, 254 N.C. App. at 654, 803 S.E.2d at 858. Because Father did not challenge the dispositional portion of the TPR hearing, we do not review the trial court's dispositional findings and conclusions.

IV. Conclusion

The trial court's adjudicatory findings are supported by clear, cogent, and convincing evidence and were not made in error. These findings support the trial court's conclusions of law. The trial court's termination of Father's parental rights is affirmed.

AFFIRMED.

Judge ARROWOOD concurs.

Judge TYSON concurs in part and dissents in part.

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

I concur to allow Father's Petition for Writ of *Certiorari*. *See* N.C. R. App. P. 21. "We have also held that where a [respondent] has lost his right of appeal through no fault of his own, but rather as a result of the actions of counsel, failure to issue a writ of *certiorari* would be manifestly unjust." *State v. Gardner*, 225 N.C. App. 161, 165, 736 S.E.2d 826, 829 (2013). Father's appeal is properly before us.

In this private termination of parental rights petition ("TPR") brought by Mother, I also agree the trial court correctly found and concluded Mother's evidence did not support her asserted TPR grounds alleging Father had failed to pay child support or that Father was incapable of providing for the care and supervision of his daughter, Sidney, to terminate Father's parental rights.

The sole basis the trial court found to support Mother's petition to terminate Father's parental rights was "[p]ursuant to [N.C. Gen. Stat. §] 7B-1111(a)(7), [on the grounds Father] ha[d] willfully abandoned [Sidney] for at least six consecutive months immediately preceding the filing of th[e] petition based upon" the trial court's findings and Father's statements at the TPR hearing and also because "[f]or at least the six (6) months preceding the filing of the Petition, [Father] withheld his presence, love, and care from the child."

Father challenges the adjudication of Sidney as being "abandoned" and argues "[t]he trial court reversibly erred in concluding the existence of the ground of abandonment to terminate [Father]'s parental rights because the evidence failed to support the findings of fact and the findings of fact failed to support this conclusion of law." I agree with Father that Mother has failed to carry her burden and to prove Father's abandonment by clear, cogent, and convincing evidence. I respectfully dissent.

I. Standard of Review

Mother, as petitioner, carries and maintains the burden of proof. "The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re C.M.P.*, 254 N.C. App. 647, 654, 803 S.E.2d 853, 858 (2017) (citations and quotation marks omitted). The trial court's conclusions of law are reviewed *de novo* on appeal. *Id.* (citation omitted).

Our Supreme Court has recently held:

> While the question of willful intent is a factual one for the trial court to decide based on the evidence presented, and while the trial court's factual determination is owed deference, it remains [the appellate court's] responsibility as the reviewing court to examine whether the evidence in the case supports the trial court's findings and whether, as a legal matter, the trial court's findings support its conclusions of law.

In re B.R.L., 379 N.C. 15, 18, 863 S.E.2d 763, 767 (2021) (citations omitted).

II. Analysis

While Father was undergoing medical treatment, Mother sought and secured an *ex parte* custody order suspending Father's visitation with his daughter on 13 August 2019. Mother also filed a motion to modify visitation. The trial court entered a written order on 28 August 2019 extending the *ex parte* order and suspended Father's visitation (the "Order Suspending Visitation") until Father "presents himself to the Court and shows just cause as to why his visits should be reinstated." Less than a year later and after Father had twice contacted Mother to resume visitation with his daughter, Mother filed a "Petition for Termination of Parental Rights" on 24 July 2020.

Father's answer was filed 10 September 2020. He admitted the allegations regarding the parties' and child's residences, the parties' status as parents of the child, the prior custody action, and Mother's *ex parte* petition pre-emptively seeking the Order Suspending Visitation.

The record shows the court appointed a Guardian *ad litem* ("GAL") on 15 September 2020, and the scheduled hearing was continued until 27 October 2020. During this time, and while the Order Suspending Visitation prevented visitation between Father and his daughter, Sidney, the Termination of Parental Rights hearing was inexplicably and repeatedly continued before ultimately being held on 21 February 2022. The order from the hearing was entered 18 March 2022.

Mother's pre-emptive *ex parte* Order has succeeded in denying Father of visitation with Sidney for nearly four (4) years. Mother testified her husband, Sidney's step-father, plans to adopt Sidney "immediately" if and after Father's parental rights were terminated. ("Yes, we'd like to do [an adoption] immediately."). Father's persistence to maintain his parental rights in the face of Mother's repeated efforts to exclude

him from his daughter's life clearly demonstrates he did not and has no intent to willfully "abandon" her. *In re B.R.L.*, 379 N.C. at 18, 863 S.E.2d at 767. The majority's opinion asserts "the Petition was filed 24 July 2020, [and] the relevant six-month period for purposes of North Carolina General Statute § 7B-1111(a)(7) was 24 January 2020 to 24 July 2020. *See* N.C. Gen. Stat. § 7B-1111(a)(7)."

The record is clear Mother did everything she could to deny Father of any contact with his daughter and calculated to take deliberate advantage of Father's mental illness. Immediately after Father's release, undisputed evidence shows and the trial court found Father directly contacted Mother to resume his visitation. Mother testified and admitted Father had communicated with her regarding resuming visitation and she had "let him know that there was an order in place and he had to contact the [DSS] county case worker that was assigned to the case and that they were trying to locate him."

Mother also testified and admitted she had "told [Father] that he would have to go through the county case worker and through court to file the motion" to resume his visitation with Sidney. Mother also admitted she knew or was told about the July 2020 email from Father's attorney, the email said Father was "looking to resume visits," and the email was received prior to her filing the Petition.

Father correctly argues finding of fact 14 is "erroneous as a matter of law because it fails to include the reason for his attorney's July 2020 [email]," his retaining of counsel to resume visitation, and the reason for the email asserting Father wanted to resume visits, "negated the TPR ground of abandonment" under the statute. Mother expressly admitted during cross-examination by Father's attorney that she had received written notice from Father or his attorney in July 2020, expressing Father's desire to resume visitation with Sidney. Mother's response after receiving the email was to file the private TPR Petition before us.

In addition, both parties reference a motion Father made in September 2020 to attempt to resume visitation. The trial court's TPR order also expressly references this motion.

Here, Mother's evidence does not support the trial court's finding that Father "willfully abandoned" Sidney during the relevant six-month period. *In re B.R.L.*, 379 N.C. at 18, 863 S.E.2d at 767. "Abandonment requires a wil[l]ful intent to escape parental responsibility and conduct in effectuation of such intent." *Pratt v. Bishop*, 257 N.C. 486, 502, 126 S.E.2d 597, 608 (1962) (citation omitted). "It has been held that if a parent withholds his presence, his love, his care, the opportunity to display

filial affection, *and* wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* at 501, 126 S.E.2d at 608 (citation omitted) (emphasis supplied).

"To find that a parent has willfully abandoned his or her child, the trial court must 'find evidence that the parent deliberately eschewed his or her parental responsibilities *in their entirety.*' " *In re A.L.L.*, 376 N.C. 99, 110, 852 S.E.2d 1 (2020) (emphasis supplied) (quoting *In re E.B.*, 375 N.C. 310, 318, 847 S.E.2d 666, 673 (2020)). The trial court's rejection of Mother's allegations that Father had failed to pay child support or that Father was incapable of providing for the care and supervision of his daughter, Sidney, also supports Father's claim he had not willfully "eschewed his . . . parental responsibilities *in their entirety.*" *Id.* (emphasis supplied).

Our Supreme Court has held: "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)). This Court has held: "[i]n this context, the word 'willful' encompasses more than an intention to do a thing; *there must also be purpose and deliberation.*" *In re A.K.D.*, 227 N.C. App. 58, 61, 745 S.E.2d 7, 9 (2013) (quotation marks omitted)(emphasis supplied).

The trial court's conclusion to terminate Father's parental rights is not supported by its findings of fact of either "willful" *and* "purpose and deliberation" of Father's intent to abandon Sidney. *Id.*

Under the statute, "the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, [but] the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (quotation marks omitted) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619, 810 S.E.2d 375, 378 (2018)).

Father's arguments have merit. Mother failed to carry her burden to produce clear, cogent, and convincing evidence to support the trial court's findings. As such on *de novo* review, the trial court's conclusions of law are unsupported by the findings of fact and are erroneous and prejudicial. *In re B.R.L.*, 379 N.C. at 18, 863 S.E.2d at 767.

Father also disputes findings of fact 12 and 21 and argues "[t]hese two findings are contradicted by finding of fact # 14[.]" Finding of fact 12 states: "[Father] did not make any further efforts to contact [Mother]."

Finding of fact 21 states: "Other than the one phone call to [Mother] in August 2019, [Father] did not attempt to contact [Mother] to set up a visit or to check on the child." As noted above, the undisputed evidence and testimony clearly shows otherwise.

The majority's assertion "the trial court must be sufficiently satisfied with the evidence to be able to find the facts by clear, cogent, and convincing evidence" misstates this Court's standard of review by summarily affirming its conclusion to terminate Father's parental rights for abandonment of his daughter. That conclusion is not based upon clear, cogent, and convincing evidence and findings. *See id.* In light of Mother's failure to carry her burden, Father's constitutionally-protected parental rights prevail and must be preserved. *Id.*

III. Conclusion

I concur to allow Father's PWC and to affirm the trial court's conclusions that Father supported his daughter and of him being a fit and proper parent to resume visitation with his child.

Mother's undisputed motives, admitted actions, and her failure to carry her burden under the statute, considered together with Father's undisputed efforts to make repeated contacts, and retaining counsel to preserve his parental rights, compels reversal. The trial court's adjudicatory findings are not supported by clear, cogent, and convincing evidence and its conclusions are affected by error. *Id.* These findings do not support the trial court's conclusions of law to terminate Father's constitutionally-protected parental rights based solely on Father's abandonment.

The trial court's TPR order, based solely on the grounds of Father's "willful abandonment", is affected by error and is properly reversed. *Id.* I respectfully dissent.

STATE OF NORTH CAROLINA
v.
GARRY JUNIOR JONES, DEFENDANT

No. COA22-151

Filed 21 March 2023

1. Evidence—prior bad acts—substantially similar—attempted breaking or entering

In defendant's prosecution for possession of burglary tools and misdemeanor attempted breaking or entering a building, the trial court did not err by admitting Rule 404(b) evidence of a prior breaking and entering for which defendant had pled guilty where the incident was substantially similar to the charged conduct—both incidents involved a residential shed shortly after midnight with the use of a small knife or box cutter. Furthermore, admission of the evidence was not an abuse of discretion under Rule 403 given the substantial similarities between the two incidents and the trial court's careful handling of the process in admitting the 404(b) evidence.

2. Evidence—authentication—404(b) evidence—video surveillance

In defendant's prosecution for possession of burglary tools and misdemeanor attempted breaking or entering a building, the trial court did not err by allowing video surveillance evidence of a prior breaking and entering to which defendant had pled guilty where the State sufficiently authenticated the video through the testimony of the investigating officer—that the video was the same video she had seen the night of the prior crime and that it matched the events the victim had described. Even if the State had not sufficiently authenticated the video, defendant failed to show prejudice, as significant other evidence about the same incident was before the jury.

Appeal by defendant from judgment entered on or about 29 July 2021 by Judge Clint D. Rowe in Superior Court, New Hanover County. Heard in the Court of Appeals 4 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Forrest P. Fallanca, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for defendant-appellant.

STROUD, Chief Judge.

Defendant Garry Junior Jones appeals from a judgment, entered following a jury trial, for (1) possession of burglary tools and (2) misdemeanor attempted breaking or entering a building. Because a prior breaking and entering incident involving Defendant was substantially similar to the charged conduct, temporally proximate, and introduced for a non-propensity purpose, the trial court did not err in admitting evidence about the prior incident on Rule of Evidence 404(b) grounds. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). Further, because the probative value of the same evidence was not substantially outweighed by unfair prejudice, the trial court did not err in admitting it on Rule of Evidence 403 grounds. N.C. Gen. Stat. § 8C-1, Rule 403 (2019). Finally, as the surveillance video of the prior breaking and entering incident was properly authenticated, the trial court did not err in admitting the video. Thus, we conclude there was no error.

I. Background

The State's evidence at trial showed, "a little bit after midnight" on 15 November 2020, Defendant entered the yard of a private home in Wilmington and "was trying to get into" the homeowner's storage shed. Specifically, Defendant "grabb[ed] the door" and "rattle[d] the knob" in a way the homeowner said the homeowner would do "to make sure it's locked[.]"

The homeowner's security camera captured Defendant approaching the shed and sent an alert to the homeowner. As the homeowner watched the security video, which was on "a few second delay," Defendant grabbed the door and then went around the side of the shed, which was off camera, towards another door into the shed. At the same time, the homeowner called 911. After calling 911, the homeowner did not see Defendant again. Defendant did not "make entry into any other part of [the] home" or "outside" the home, and the homeowner "kn[e]w of" nothing that was stolen.

When police officers arrived, the homeowner explained what happened, showed the officers the security footage, and gave them a description of the person he saw on the security video. After receiving the description, police officers "canvassed the area for a suspect" and saw Defendant—who matched the homeowner's description and who the officers identified as the person in the security video—about 50 yards from the original home where Defendant was seen on the security video. When Defendant saw the police officers he "dipped into a neighborhood's [sic] yard" to try to "get out of sight from" them and then "conceal[ed] himself behind [a] vehicle[.]" As Defendant put his hands up in line with commands from the officers, he dropped "a pair of

bolt cutters." The officers then arrested Defendant. After the arrest, the officers also found Defendant had a flashlight, a "box cutter that had a screwdriver head," and an "aluminum or steel pipe" with an attachment consistent with drug use.

On or about 8 March 2021, Defendant was indicted for (1) felony attempted breaking and entering ("attempted B&E") and (2) possession of implements of a housebreaking/ burglary tools ("possession of burglary tools"). On or about the same day, Defendant was also indicted for habitual felon status, to which he subsequently pled guilty.

The case came for trial starting on 26 July 2021. At trial, the homeowner and one of the police officers who responded to the homeowner's 911 call testified consistent with the above summary of facts. As part of the homeowner's testimony, the State admitted into evidence the homeowner's 911 call and the security video of the incident. As part of the police officer's testimony, the State admitted into evidence: body camera footage of Defendant's arrest; the bolt cutters and the pipe Defendant had on him when arrested; and "still shots" from the security video that homeowner sent the officer. The State also had the officer show the jury the flashlight and box cutter found on Defendant as part of his testimony.

The State's final witness at trial was the investigating officer for a previous breaking and entering case where Defendant had pled guilty. The State sought to introduce the evidence of the prior breaking and entering pursuant to Rule of Evidence 404(b), consistent with its pretrial "Notice of State's Intent to Present 404(b) Evidence at Trial[.]" (Capitalization altered.) Outside the presence of the jury, the trial court held a hearing on the admissibility of the evidence of the prior breaking and entering incident.

During the hearing, the investigating officer testified, on *voir dire*, Defendant pled guilty to breaking and entering for a 2018 incident in which he broke into a residential shed shortly after midnight using a small knife. In the 2018 incident, a homeowner called police after his surveillance camera alerted him Defendant was breaking into the homeowner's shed. The investigating officer received surveillance video of the prior incident from the homeowner, which led to Defendant being charged. Defendant pled guilty to felony breaking and entering for the incident. The State admitted the transcript of Defendant's guilty plea and judgment into evidence for purposes of the hearing.

As part of the investigating officer's *voir dire* testimony, the State also sought to introduce the surveillance video of the prior breaking and

entering incident. As part of laying the foundation for admittance of the video, the investigating officer testified: the video was the same one she had seen the night of the incident; "to [her] knowledge" the video surveillance system was working correctly at the time of the incident; and the homeowner from the prior incident described what happened to the investigating officer in a way that matched the surveillance footage. As to the video specifically, Defendant's attorney objected on authentication grounds because the homeowner whose surveillance system captured the prior incident did not testify. The trial court admitted the video as part of the *voir dire* hearing over that objection.

Following the investigating officer's testimony and the introduction of the surveillance video of the prior breaking and entering incident, each side argued about whether the evidence about the past incident could be admitted on Rule 404(b) grounds. Defendant also argued the evidence of the prior incident was "highly prejudicial" and had "very limited probative nature[.]" The trial court ruled the evidence about the prior breaking and entering was admissible, but said neither the prosecutor nor the investigating officer could "characterize what's happening in" the surveillance video.

Following the admissibility hearing, the investigating officer testified about the prior breaking and entering consistent with her testimony during the hearing, over Defendant's renewed objection. As part of that testimony, the State admitted into evidence the arrest warrant, guilty plea transcript, and judgment for the prior incident. The trial court also received into evidence the surveillance video of the prior incident, which the jury then watched.

Defendant did not present any evidence at trial. The jury then convicted Defendant of non-felonious attempted B&E and possession of burglary tools. On or about 29 July 2021, the trial court sentenced Defendant to a term of 35 to 54 months in prison, as enhanced by his habitual felon status. Defendant gave oral notice of appeal in open court.

II. Analysis

On appeal, Defendant challenges multiple aspects of the trial court's decision to allow the State to present evidence of his prior incident of breaking and entering conviction. First, Defendant argues "the trial court erred by admitting testimony and video surveillance evidence regarding" the prior incident under Rules of Evidence 404(b) and 403. (Capitalization altered.) Second, Defendant contends the trial court erred by admitting the video surveillance of the past incident because

"the video was not properly authenticated" under Rule of Evidence 901. (Capitalization altered.) We review each contention in turn.

A. Admission of Evidence of Prior Breaking and Entering Under Rules 404(b) and 403

[1] We first examine Defendant's argument the trial court erred by admitting evidence of the prior breaking and entering incident under Rules 404(b) and 403. 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" but it "may . . . 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). Rule 403 provides even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. When the admission of the same evidence is challenged based on both Rules 404(b) and 403, we review the evidence on 404(b) grounds first before turning to Rule 403. *See State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (explaining the court would review under Rule 404(b) first before then reviewing under Rule 403); *see also State v. Hembree*, 368 N.C. 2, 13, 770 S.E.2d 77, 85 (2015) (explaining Rule 403 "supplies an independent limitation on the ability of trial courts to admit evidence under" Rule 404(b)). As such, after discussing the standards of review, we will first examine the admissibility of the evidence under Rule 404(b) and then under Rule 403.

1. Standards of Review

Our Supreme Court has explained "when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *Id.* "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

"We then review the trial court's Rule 403 determination for abuse of discretion." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a

reasoned decision." *State v. Cagle*, 346 N.C. 497, 506-07, 488 S.E.2d 535, 542 (1997) (citation and quotation marks omitted).

2. Rule 404(b)

We first review *de novo* the trial court's ruling admitting the evidence of the prior breaking and entering under Rule 404(b). *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. Initially, we must address the State's argument "Defendant has failed to preserve for appellate review any argument concerning the admissibility" of the past incident evidence "under Rule 404(b), specifically, because he did not object on 404(b) grounds at trial and did not argue plain error on appeal."

Under our Rules of Appellate Procedure, "[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). The objection must be made in the presence of the jury. *See State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) ("An objection made only during a hearing out of the jury's presence prior to the actual introduction of the testimony is insufficient." (citation and quotation marks omitted)). But if the party made a specific objection outside the presence of the jury, a general objection in the presence of the jury can be sufficient when it is clear from context the party was renewing the same objection made outside the presence of the jury. *See State v. Rayfield*, 231 N.C. App. 632, 637-38, 752 S.E.2d 745, 751 (2014) (holding an issue was preserved for appellate review when the defendant made an objection at trial that did not state the grounds for the objection because it was "clear from the context" the defendant was renewing an earlier objection made in a pretrial motion to suppress).

Here, as the State argues, Defendant's attorney only stated, "Objection" without any reasoning when the State sought to introduce video surveillance of the prior breaking and entering incident during testimony by the investigating officer from the prior incident. But it is "clear from the context" this objection related back to the objections Defendant's attorney made during the extensive *voir dire* of the same witness. *Rayfield*, 231 N.C. App. at 637-38, 752 S.E.2d at 751. During that *voir dire*, Defendant's attorney specifically argued the evidence of the prior incident could not be admitted under Rule 404(b) because the prior breaking and entering did not involve "an unusual set of facts" and was also "very different" from the charged conduct. Since the objection before the jury clearly related back to the 404(b) objection during *voir dire*, Defendant properly preserved the 404(b) argument. *See id.*

Turning to the merits, "[g]enerally, Rule 404 acts as a gatekeeper against 'character evidence': evidence of a defendant's character—as illustrated through either direct testimony or evidence of prior bad acts—admitted for the purpose of proving that he acted in conformity therewith on a particular occasion." *State v. Pabon*, 380 N.C. 241, 258, 867 S.E.2d 632, 643-644 (2022) (citation and quotation marks omitted). Notwithstanding that "important protective role[,]" our Supreme Court has "repeatedly held that 'Rule 404(b) state[s] a clear general rule of *inclusion*.' " *Id.* at 258, 867 S.E.2d at 644 (brackets and emphasis in original) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)). Specifically, "relevant evidence of past crimes, wrongs, or acts by a defendant are generally admissible for any one or more of the purposes enumerated in Rule 404(b)'s non-exhaustive list, 'subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.' " *Id.* (emphasis in original) (quoting *Coffey*, 326 N.C. at 279, 389 S.E.2d at 54).

Rule 404(b)'s inclusive nature "is still 'constrained by the requirements of similarity and temporal proximity.' " *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (quoting *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002)). For the similarity requirement, "prior acts are considered sufficiently similar under Rule 404(b) 'if there are some unusual facts present in both crimes that would indicate that the same person committed them.' " *Pabon*, 380 N.C. at 259, 867 S.E.2d at 644 (quoting *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159). The similarities need only "be specific enough to distinguish the acts from any generalized commission of the crime[;]" they do not need to " 'rise to the level of the unique and bizarre.' " *Id.* (quoting *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159). The other constraint, temporal proximity, is considered on a case-by-case basis. *See id.* at 259, 867 S.E.2d at 645 ("[R]emoteness for purposes of 404(b) must be considered in light of the specific facts of each case[.]" (quoting *Beckelheimer*, 366 N.C. at 132, 726 S.E.2d at 160)).

Thus, Rule 404(b) has three requirements for the admission of evidence. First, relevant evidence of the past acts by a defendant must have probative value beyond showing "the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Id.* at 258, 867 S.E.2d at 644. Second, the past act must be similar enough to the charged crime to "distinguish the acts from any generalized commission of the crime[.]" *Id.* at 259, 867 S.E.2d at 644. Third, the past act must be temporally proximate to the presently charged act. *See id.*

Of those three requirements, Defendant only contests whether the past breaking and entering incident was similar enough to the charged incident. Defendant specifically argues "[t]he similarities between the incidents begin and end with generic features of breaking and entering—trying to open or opening and entering a shed at night." Further, Defendant highlights certain differences between the past and present incidents.

Contrary to Defendant's arguments, the past breaking and entering incident is similar enough to the charged incident to be admissible under Rule 404(b). The bar for similarity in cases where houses are broken into, such as a breaking and entering case, *see* N.C. Gen. Stat. Chapter 14, Subchapter IV, Article 14 (grouping the offenses with which Defendant was charged in an Article entitled "Burglary and Other Housebreakings"), is relatively low. In *State v. Martin*, while doing a 404(b) analysis in a burglary case, this Court summarized a past decision on similarity in relation to breaking and entering as follows: "This Court has found prior acts of '(1) shoplifting of a vacuum cleaner from K–Mart, (2) breaking and entering and larceny at a place of business, and (3) car theft . . . relevant to show defendant's intent and motive for unlawfully entering the victim's residence.' " *State v. Martin*, 191 N.C. App. 462, 467-68, 665 S.E.2d 471, 474-75 (2008) (ellipses in original) (brackets omitted) (quoting *State v. Hutchinson*, 139 N.C. App. 132, 136-37, 532 S.E.2d 569, 572 (2000)). In *Martin* itself, this Court found a prior incident with both breaking and entering and larceny was relevant to the burglary charge at issue in the case because both involved breaking into a car at a residential location. *See id.*

Here, the incidents are even more similar than the incidents discussed in *Martin*. *See id.* In the previous situation, Defendant pled guilty to felony breaking and entering for an incident where he broke into a residential shed shortly after midnight using a small knife. In the instant case, Defendant approached a shed shortly after midnight with, among other items, a box cutter. In *Martin*, the similarities in residential setting and type of item broken into were sufficient for the 404(b) similarity requirement. *See id.* Here, those similarities are present because in both instances Defendant broke into or attempted to break into a residential shed. Additionally, here both the prior and current incidents took place shortly after midnight. And Defendant had a similar instrument with him each time, a knife in the prior incident and a box cutter in the instant case. Thus, the State presented adequate evidence of the similarity of the prior offense and the current conduct.

Defendant's arguments do not convince us otherwise. Defendant first argues "[t]he similarities between the incidents begin and end with

generic features of breaking and entering—trying to open or opening and entering a shed at night." Defendant is wrong to describe "trying to open or opening and entering a shed at night" as the "generic features of breaking and entering[.]" "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) *of any building* (3) with the intent to commit any felony or larceny therein." *State v. Cox*, 375 N.C. 165, 172, 846 S.E.2d 482, 488 (2020) (emphasis added) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 14-54(a) (2019) ("Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon."). Under the statute, a building is "any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." N.C. Gen. Stat. § 14-54(c). Our past cases on breaking and entering have shown a wide variety of buildings that can fit within the element of "any building." *Id.*; *see, e.g.*, *State v. Avery*, 315 N.C. 1, 24, 337 S.E.2d 786, 799 (1985) (business complex); *State v. Bost*, 55 N.C. App. 612, 613, 615, 286 S.E.2d 632, 633-34 (1982) (trailer on construction site); *State v. Winston*, 45 N.C. App. 99, 101, 262 S.E.2d 331, 333 (1980) (office of county clerk of court). As a result, the fact that both instances involved trying to or actually entering a shed alone takes them beyond the generic features of breaking and entering. The commonalities in timing and instruments carried, as discussed above, further demonstrate the similarities between the prior incident and the instant case are not merely superficial. As a result, we reject Defendant's argument the incidents both involve only the "generic features of breaking and entering[.]"

Defendant's focus on the differences between the two incidents is also misplaced. When reviewing the similarity requirement in a Rule 404(b) analysis, "we must not 'focus on the differences between the prior and current incidents,' but rather 'review the similarities noted by the trial court.' " *State v. Wilson-Angeles*, 251 N.C. App. 886, 893, 795 S.E.2d 657, 664 (2017) (brackets omitted) (quoting *Beckelheimer*, 366 N.C. at 131-32, 726 S.E.2d at 159). As already explained, there are sufficient similarities between the past breaking and entering incident and the current one to meet the first 404(b) requirement.

The other two requirements, probative value for some non-propensity reason and temporal proximity, are also met here. *See Pabon*, 380 N.C. at 259, 867 S.E.2d at 644. Focusing on non-propensity probative value first, as the prosecutor argued at trial and the State argues on appeal, the prior breaking and entering incident had probative value as to Defendant's intent. The State had to prove Defendant had the intent to commit a

breaking for the charges of attempted B&E and possession of burglary tools under both N.C. Gen. Stat. § 14-54 and § 14-55. *See* N.C. Gen. Stat. §§ 14-54, 14-55; *Cox*, 375 N.C. at 172, 846 S.E.2d at 488 ("The essential elements of felonious breaking or entering are (1) the breaking or entering (2) *of any building* (3) with the intent to commit any felony or larceny therein." (emphasis added)); *State v. Bagley*, 300 N.C. 736, 740-41, 268 S.E.2d 77, 79-80 (1980) (holding, under N.C. Gen. Stat. § 14-55, "the burden rests on the State to show beyond a reasonable doubt that the defendant possessed the article in question with a general intent to use it at some time for the purpose of facilitating a breaking"); *see also State v. Smith*, 300 N.C. 71, 79, 265 S.E.2d 164, 169-70 (1980) (explaining one of the elements of "an attempt to commit a crime" is "the intent to commit the substantive offense"). Defendant pleading guilty to felony breaking and entering for a similar previous incident is probative of intent here because it shows in the past in similar circumstances Defendant had the requisite intent. If Defendant in similar circumstances in the past had the intent to commit a breaking, the jury could reason he had the same intent in the instant case.

The prior breaking and entering was also temporally proximate to the conduct in the instant case. First, we note " 'remoteness in time is less significant when,' as is the case here, 'the prior conduct is used to show intent[.]' " *Martin*, 191 N.C. App. at 467, 665 S.E.2d at 474-75 (brackets from original omitted) (quoting *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991)). Second, the gap in time between the offenses is not particularly long in light of our precedent. The prior breaking and entering occurred on 31 January 2018. The instant offense occurred on 15 November 2020. Thus, the gap in time is a little over two and a half years. In another case regarding house break-ins, with a 404(b) analysis, this Court "d[id] not find the time span of two years to be too remote in time to show motive and intent." *See id.* at 468, 665 S.E.2d at 475. We similarly do not find a time span just a few months longer to be too remote in time to show intent in this case. *See id.*

Thus, all three requirements for evidence to be admissible under Rule 404(b) are met here. Therefore, after our *de novo* review, we conclude the trial court did not err on Rule 404(b) grounds in admitting the evidence about the past breaking and entering incident.

3. Rule 403

Defendant also argues the evidence about the past breaking and entering incident "was inadmissible under Rule 403." Specifically, Defendant contends "utilizing multiple types of evidence—testimony, court records and videos—was needlessly cumulative and unnecessary"

and "[t]he cumulative effect of this evidence was that the probative value was substantially outweighed by the danger of unfair prejudice to" Defendant. We review the trial court's decision to admit the evidence of the prior breaking and entering over Defendant's Rule 403 objection for abuse of discretion. *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159.

Under Rule 403, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. " 'Unfair prejudice,' as used in Rule 403 means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Cagle*, 346 N.C. at 506, 488 S.E.2d at 542 (citation and quotation marks omitted).

In the context of evidence of prior acts admissible under Rule 404(b), the Rule 403 inquiry has two components. First, reviewing courts again consider the similarities between the prior conduct and charged conduct. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161 (finding no abuse of discretion based in part on "the similarities between the accounts of the victim and the 404(b) witness"); *State v. Mangum*, 242 N.C. App. 202, 213-14, 773 S.E.2d 555, 564 (2015) (finding no abuse of discretion based in part on "the significant points of commonality between the Rule 404(b) evidence and the offense charged"). This consideration addresses the probative side of Rule 403's weighing of whether evidence's "probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403; *see Pabon*, 380 N.C. at 258-59, 867 S.E.2d at 643-45 (explaining the role of similarity in a Rule 404(b) analysis after saying Rule 404(b) evidence "is objectionable not because it has no appreciable probative value but because it has too much" such that similarity relates to probativeness (citation and quotation marks omitted)).

Second, reviewing courts consider whether the trial court "careful[ly] handl[ed] the process[.]" *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161 (finding no abuse of discretion in part because of "the trial judge's careful handling of the process"); *see also Mangum*, 242 N.C. App. at 213-14, 773 S.E.2d at 564 (finding no abuse of discretion based in part on "the trial court's conscientious handling of the process"). When examining this issue, reviewing courts consider whether the trial court "first heard the testimony of the 404(b) witness outside the presence of the jury" to help rule on its admissibility; excluded testimony about any incidents without sufficient similarity; and gave limiting instructions to the jury. *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160-61 (discussing

those facts before determining the trial judge had carefully handled the process); *Mangum*, 242 N.C. App. at 213-14, 773 S.E.2d at 564 (mentioning the trial court's review of the evidence outside the jury's presence and use of limiting instructions). The trial court's careful handling of the process relates to the other part of the Rule 403 weighing equation, "the potential danger of unfair prejudice[.]" *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160-61 (starting its discussion of whether the trial court carefully handled the process by stating, "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant" (quoting *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998))).

Here, reviewing both factors, the trial court did not abuse its discretion when it determined the danger of unfair prejudice did not substantially outweigh the probative value of the prior breaking and entering incident. As we have explained above in the main Rule 404(b) analysis, the prior incident and the charged conduct shared substantial similarities. Further, the trial court carefully handled the process. The trial court conducted a *voir dire* of the investigating officer from the prior incident outside the jury's presence to rule on whether the evidence about the past incident would be admissible. The trial court also gave a limiting instruction that explicitly told the jury the purposes for which they could consider the prior breaking and entering incident and warned them they could "not consider it for any other purpose."

Defendant's other argument that "utilizing multiple types of evidence—testimony, court records and videos—was needlessly cumulative and unnecessary" was not preserved. Longstanding precedent dictates when a defendant fails to make an argument before the trial court, he cannot "swap horses between courts in order to get a better mount[.]" *See, e.g.*, *State v. Hamilton*, 351 N.C. 14, 22, 519 S.E.2d 514, 519 (1999) (quoting, *inter alia*, *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Before the trial court, Defendant's attorney only argued the evidence of the prior breaking and entering was "highly prejudicial" and had "very limited probative nature." Defendant made no argument below that the multiple types of evidence were unnecessarily cumulative. Therefore, we do not address this unpreserved argument.

Given the similarities between the prior incident and charged conduct as well as the trial court's "careful handling of the process," *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161, the trial court did not abuse its discretion in ruling under Rule 403 that the probative nature of the evidence was not substantially outweighed by any unfair prejudice. Because we have already concluded the trial court did not err under Rule

404(b), we now hold the trial court did not commit error in allowing the State to present evidence of the prior breaking and entering incident.

B. Authentication of Video Surveillance of Prior Breaking and Entering

[2] Beyond his arguments on Rule 404(b) and 403 grounds, Defendant contends "the trial court erred by allowing video surveillance of" the prior breaking and entering because "the video was not properly authenticated." (Capitalization altered.) Specifically, Defendant asserts the State failed to present testimony the security cameras used "were generally reliable" and did not address the "type of recording equipment that was used."

1. Standard of Review

We review *de novo* rulings on authentication issues under Rule of Evidence 901. *See State v. Crawley*, 217 N.C. App. 509, 515-16, 719 S.E.2d 632, 637 (2011) (explaining a trial court ruling on authentication "is reviewed *de novo* on appeal as a question of law" in a case about the admission of cell phone records under Rule 901).

2. Merits

Turning to the merits for our *de novo* review, N.C. Gen. Stat. § 8-97 allows a party to introduce, *inter alia*, videotapes "as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements." N.C. Gen. Stat. § 8-97 (2019). For authentication purposes, the main evidentiary requirement comes from Rule of Evidence 901. Rule 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2019). Rule 901(b) then provides a non-exhaustive list of "examples of authentication or identification conforming with the requirements of this rule[.]" N.C. Gen. Stat. § 8C-1, Rule 901(b).

In *State v. Snead*, our Supreme Court recognized the example listed in Rule 901(b)(9) applies to surveillance videotapes like the ones at issue here: "Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process under Rule 901(b)(9)." *Snead*, 368 N.C. at 814, 783 S.E.2d at 736 (citation and quotation marks omitted). As a result, "[e]vidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission as substantive

evidence." *Id.* Additionally, video surveillance can be authenticated by a witness testifying the video "accurately depicted events that he had observed[.]" *See State v. Moore*, 254 N.C. App. 544, 565, 803 S.E.2d 196, 210 (2017) (holding the video was not properly authenticated in part because no testimony was presented about "whether the video accurately depicted events that [a witness] had observed").

Two examples are illustrative. In *State v. Fleming*, the investigating officer testified "the surveillance video system was functioning properly at the time the video was captured and the video images introduced at trial were unedited and were the same video images created by this system." *State v. Fleming*, 247 N.C. App. 812, 817-18, 786 S.E.2d 760, 765-66 (2016). As a result, this Court held the "surveillance video was adequately authenticated." *Id.* at 818, 786 S.E.2d at 766. By contrast, in *Moore*, this Court held the State "failed to offer a proper foundation" to admit video surveillance testimony because "no testimony was elicited at trial concerning the type of recording equipment used to make the video, its condition" on the date of the offense, "or its general reliability." *Moore*, 254 N.C. App. at 565, 803 S.E.2d at 210. Further, no witness testified "the video accurately depicted events that he had observed." *Id.*

Here, the State sufficiently authenticated the surveillance video of the prior breaking and entering incident. The investigating officer testified multiple times the surveillance video introduced at trial was the same video that she had seen the night of the prior breaking and entering, thereby fulfilling one requirement. *See Snead*, 368 N.C. at 814, 783 S.E.2d at 736 (requiring "the video introduced at trial" to be "the same video that was produced by the recording process").

The State also presented sufficient evidence that the recording process was reliable. Similar to *Fleming*, *see* 247 N.C. App. at 817-18, 786 S.E.2d at 765-66, the investigating officer testified "to [her] knowledge" the video surveillance system was working correctly that night. In addition, the investigating officer testified the footage the homeowner sent matched what the homeowner described had happened. This testimony resembles the scenario discussed in *Moore* where video surveillance can be authenticated by a witness testifying the video "accurately depicted events that he had observed[.]" *Moore*, 254 N.C. App. at 565, 803 S.E.2d at 210. While the homeowner did not testify to this directly, the fact that his description matched the footage provides further support for the reliability of the surveillance footage by showing it recorded accurately as checked by someone who had observed the events. Thus, the State sufficiently authenticated the surveillance video of the prior breaking and entering incident.

Even if the State had not sufficiently authenticated the surveillance video, we would still reject Defendant's argument because Defendant failed to show prejudice from this purported error. For errors in rulings on authentication grounds, a defendant must show prejudice. *See Moore*, 254 N.C. App. at 565-66, 803 S.E.2d at 210 (addressing prejudice immediately after ruling the trial court erred in admitting video surveillance on authentication grounds). According to our statutes:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

N.C. Gen. Stat. § 15A-1443(a) (2019).

Defendant cannot carry that burden here. As already discussed, the video surveillance of the prior breaking and entering was introduced to prove Defendant had the requisite intent. Taking away the surveillance video, the jury had before it significant other evidence of Defendant's intent because evidence about the same incident came in through multiple other avenues. *See Moore*, 254 N.C. App. at 566-67, 803 S.E.2d at 210-11 (summarizing other evidence presented on the same issue as a piece of evidence admitted in error to determine whether there was prejudice from the error in admitting the one piece of evidence). First, the State admitted into evidence the plea agreement and judgment from the prior incident. Further, the investigating officer testified about the prior breaking and entering depicted in the surveillance footage. As part of that testimony, the investigating officer specifically said the homeowner had surveillance footage that depicted "a male suspect" inside the shed, and, based in part on those clips, she charged Defendant with felony breaking and entering for the prior incident. This testimony clearly suggests the surveillance footage depicted Defendant breaking and entering into the shed in this prior instance, which as discussed above helps show his intent to commit a breaking in the current case.

In another part of his brief, Defendant even implicitly recognized the large amount of evidence presented on the prior breaking and entering incident. Specifically, Defendant argued, as part of his Rule 403 argument, "utilizing multiple types of evidence—testimony, court records and videos—was needlessly cumulative and unnecessary." If the surveillance

videos helped make the evidence about the prior break-ins "needlessly cumulative and unnecessary[,]" then, taking away the videos, the other evidence was still sufficient on its own to show intent. As a result, Defendant cannot show a reasonable possibility a different verdict would have happened at trial even if that admission were error and therefore cannot demonstrate prejudice. *See* N.C. Gen. Stat. § 15A-1443(a).

III. Conclusion

After reviewing all the issues on appeal, the trial court did not commit an error. The past breaking and entering incident was sufficiently similar and temporally proximate to the charged conduct, and the State introduced it for a permissible purpose. As a result the trial court did not err in admitting the evidence of the past incident on Rule 404(b) grounds. The trial court also did not err in admitting the evidence about the prior incident on Rule 403 grounds because its probative value was not substantially outweighed by the risk of unfair prejudice. Finally, the State properly authenticated surveillance footage of the prior breaking and entering incident, and, even if it had been error to admit the footage, Defendant could not demonstrate prejudice. Therefore, we conclude there was no error.

NO ERROR.

Judges MURPHY and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 21 March 2023)

APOLLO MEDFLIGHT, LLC v. NELSON No. 22-695	New Hanover (20CVS3859)	Reversed and Remanded.
CHAPPELL v. CHAPPELL No. 22-607	Burke (12CVD1555)	Affirmed.
DEUTSCHE BANK NAT'L TR. CO. v. GAYDOS No. 22-661	Mecklenburg (18CVS6946)	Dismissed
DONATI v. DONATI No. 22-635	Henderson (20CVD4)	Affirmed
IN RE A.D. No. 22-246	Mecklenburg (19JT117) (19JT118)	Affirmed.
IN RE A.L.O. No. 22-482	New Hanover (20JT45) (20JT46)	Affirmed
IN RE E.G.R. No. 22-602	Henderson (19JT116) (19JT117)	Affirmed
IN RE E.J.M. No. 22-334	Surry (20JT4)	Affirmed
IN RE T.M.P. No. 22-532	Durham (20JT47-50)	Affirmed
OAKRIDGE 58 INVS. v. DURHILL LLC No. 22-772	Durham (20CVS1267)	Affirmed
PUGH v. PUGH No. 21-652	Wake (19CVD15100)	Affirmed
SMITH v. GREENWALD No. 22-860	Wake (20CVD9071)	Dismissed
STATE v. CAMPBELL No. 22-634	Union (20CRS50552)	No Error
STATE v. CONNOR No. 22-424	Haywood (20CRS577-580)	No Error

STATE v. IZARD No. 22-312	Lincoln (19CRS52886) (19CRS52915)	No error in part, Reverse in part, remanded
STATE v. JONES No. 22-712	Forsyth (17CRS57185)	No Error
STATE v. JONES No. 22-723	Wake (17CRS220241) (17CRS220317) (17CRS220318)	VACATED IN PART AND REMANDED
STATE v. MADRID No. 22-757	Wake (15CRS220984)	Affirmed
STATE v. PURCELL No. 22-600	Robeson (14CRS57477) (14CRS57478) (14CRS57479)	No Prejudicial Error; Remanded for Resentencing.
STATE v. ROSE No. 22-619	Carteret (20CRS701465)	No Error
STATE v. SAWYER No. 22-397	Pasquotank (18CRS51130) (20CRS174)	No Error
STATE v. SMITH No. 22-307	Guilford (18CRS74175)	Affirmed
WILLIAMS v. MARYFIELD, INC. No. 22-785	Guilford (17CVS4138)	Affirmed

EDWARD BARTELS, ADMINISTRATOR OF THE ESTATE OF
JEANNE ELLEN BARTELS, Plaintiff
v.
FRANKLIN OPERATIONS, LLC d/b/a FRANKLIN MANOR ASSISTED LIVING CENTER,
SABER HEALTHCARE GROUP, LLC, and KIMBERLY RICHARDSON, Defendants

No. COA22-746

Filed 4 April 2023

Appeal and Error—interlocutory order—substantial right—res judicata defense—lack of specific assertions

In a negligence action brought against the owners of an assisted living center (defendants) by the estate of a patient who fell multiple times during her two-week stay, the appellate court determined that it had no jurisdiction to hear defendants' appeal from the trial court's order denying defendants' motion to dismiss (which defendants based on collateral estoppel and res judicata principles after a federal court granted defendants' motion for summary judgment in a prior suit involving the same facts). Since the trial court's order was interlocutory, defendants had the burden of showing that the order was immediately appealable as affecting a substantial right, but they failed to do so by not including in their opening brief—as part of the statement of grounds for appellate review—an explanation of how the challenged order would either create a risk of inconsistent verdicts or otherwise affect a substantial right on the particular facts of the case.

Interlocutory appeal by defendants from order entered 25 April 2022 by Judge Vince M. Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 21 February 2023.

Gugenheim Law Offices, P.C., by Stephen J. Gugenheim, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Scott E. Bayzle and Daniel E. Peterson, for defendant-appellant.

FLOOD, Judge.

Defendants argue the trial court erred in denying their motion for summary judgment on *res judicata* and collateral estoppel grounds. As we explain in further detail below, we lack appellate jurisdiction to hear Defendants' interlocutory appeal.

I. Facts and Procedural Background

Defendant Franklin Operations, LLC ("Franklin Operations") is a Virginia corporation with a principal place of business in Franklin County, North Carolina, and that does business in North Carolina as the licensed owner and operator of an adult care home known as Franklin Manor Assisted Living Center (Defendant "Franklin Manor"). Defendant Saber Healthcare Group, LLC ("Saber") is an Ohio corporation that does business in North Carolina as the manager of Franklin Manor. Defendant Kimberly Richardson ("Richardson") was Executive Director of Franklin Manor and, allegedly, a joint employee of Saber.[1]

From 28 October 2015 to 13 November 2015, Jeanne Ellen Bartels ("Ms. Bartels") was a resident of the Alzheimer's Dementia special care unit at Franklin Manor. During her approximately two weeks at Franklin Manor, Ms. Bartels suffered three falls: one on 4 November, one on 6 November, and one on 13 November. Ms. Bartels died within two years after her discharge from Franklin Manor. Plaintiff is the administrator of Ms. Bartels' estate.

A. The Federal Action

On 24 May 2016, Ms. Bartels and two others[2] filed a Class Action Complaint against Franklin Manor, Saber, and others,[3] in Franklin County Superior Court, alleging they had entered into an "Assisted Living Residency Agreement" (the "Agreement") with the defendants. The plaintiffs sought relief for, *inter alia*, breach-of-contract, and alleged the defendants violated the Agreement by failing "to comply with their contractual obligations to provide services to meet the safety, good grooming and well-being needs of the [p]laintiffs and Class Members." The plaintiffs contended the defendants' contractual obligations included "assistance with walking, toileting, housekeeping, grooming, eating, delivering medications, and overall supervision to ensure that the residents remain safe[,]" and Franklin Manor was staffed "in such a manner that they were unable to provide the [required] services."

The case was removed to the United States District Court for the Eastern District of North Carolina. On 21 October 2020, the federal court

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1. This group is collectively referred to as "Defendants."

2. Plaintiff and Class Members in the trial level contract suit will be referred to as "the plaintiffs."

3. Defendants in the trial level contract suit and federal contract suit will be referred to as "the defendants."

denied the plaintiffs' motion for class certification, and the case proceeded on the individual claims of Plaintiff and his co-plaintiffs. That case was litigated in federal court for more than five years. As part of discovery, the defendants provided the expert report of Dr. James S. Parson, who reviewed records concerning Ms. Bartels' medical records and the care she received at Franklin Manor. The defendants also provided the expert report of Stacy Macey.

On 30 April 2021, the defendants moved for summary judgment. On 27 January 2022, the federal court granted the defendants' motion.

B. The Current Action

On 3 October 2018, while the federal action was pending, Plaintiff filed the original complaint of the current action in Wake County Superior Court. In addition to Franklin Operations and Saber, Richardson was named as Defendant. Plaintiff sought relief for alleged ordinary and corporate negligence or, in the alternative, for medical malpractice. As part of the negligence claim, Plaintiff alleged "Saber['s] . . . employees and agents had a duty to exercise reasonable care to ensure the safety of the residents of Franklin Manor, including [Ms. Bartels]." Plaintiff contended, "[a]s a direct and proximate result of the above-described negligence of Defendant Saber . . . and its employees and agents, [Ms. Bartels] suffered injuries to her person, and such injuries caused her great physical and mental pain and suffering, and caused her to incur medical expenses[.]" Further, "[t]he acts and failures of Defendant Saber . . . and its managing employees and managing agents were committed in reckless disregard of the rights of [Ms. Bartels], were grossly negligent and resulted in [her] serious and permanent injury[.]"

On 4 March 2022, after the deadline for Plaintiff to appeal the federal court's judgment expired, Defendants filed both a notice of the federal court's final order and judgment and a Motion for Summary Judgment. Defendants moved on the grounds that Plaintiff's recovery is barred under the doctrines of *res judicata* and under the doctrine of collateral estoppel. On 25 April 2022, the trial court entered an order denying the motion. Defendants timely appealed.

II. Jurisdiction

In most instances, a party has "no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "immediate review is available where the order affects a substantial right." *Smith v. Polsky*, 251 N.C. App. 589, 594, 796 S.E.2d 354, 358 (2017). An interlocutory appeal of the "denial of a motion to dismiss premised on *res judicata*

and collateral estoppel does not *automatically* affect a substantial right; the burden is on the party seeking review of the interlocutory order to show how it will affect a substantial right absent immediate review." *Whitehurst Inv. Properties, LLC v. NewBridge Bank*, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014) (emphasis in original); *see also Dewey Wright Well and Pump Co., Inc. v. Worlock*, 243 N.C. App. 666, 669, 778 S.E.2d 98, 100–01 (2015) ("The appellant bears the burden of demonstrating that the order is appealable despite the interlocutory nature.").

"[T]o meet its burden of showing how a substantial right would be lost without immediate review, the appealing 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." *Whitehurst*, 237 N.C. App. at 96, 764 S.E.2d at 490; *see also Smith*, 251 N.C. App. at 596, 796 S.E.2d at 360 ("Interlocutory appeals are limited to the situation when the rejection of defenses based upon res judicata or collateral estoppel give rise to a risk of two actual trials resulting in two different verdicts.") (citation and internal quotation marks omitted). "In making this determination, [we] take a restricted view of the substantial right exception to the general rule prohibiting immediate appeals from interlocutory orders." *Id.* at 595, 796 S.E.2d at 359.

In *Bockweg v. Anderson*, our Supreme Court held "the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). Following our Supreme Court's decision, this Court issued several opinions where we cited *Bockweg*, and held a denial of a motion for summary judgment on the basis of *res judicata* affects a substantial right and entitles a party to immediate interlocutory appeal (the "*Moody* line of cases"). *See Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005) ("The denial of a motion for summary judgment on the basis of res judicata affects a substantial right and, thus, entitles a party to immediate appeal."); *see also Clancy v. Onslow Cty.*, 151 N.C. App. 269, 271, 564 S.E.2d 920, 922 (2002); *see also Wilson v. Watson*, 136 N.C. App. 500, 501, 524 S.E.2d 812, 813 (2000); *see also Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999).

This Court, however, has issued a separate, more specific line of cases where we "noted the permissive language in *Bockweg*, emphasizing that *Bockweg* holds the denial of summary judgment based on a defense of *res judicata may* affect a substantial right." *Brown v. Thomson*, 264 N.C. App. 137, 140, 825 S.E.2d 271, 273 (2019) (emphasis added) (internal quotation marks omitted) (citing *Country Club of*

Johnston Cnty., Inc. v. U.S. Fidelity and Guar Co., 135 N.C. App. 159, 166, 519 S.E.2d 540, 545 (1999)). Likewise, in regard to collateral estoppel, this Court has provided "the denial of summary judgment based on collateral estoppel . . . *may* expose a successful defendant to repetitious and unnecessary lawsuits. . . . [and] *may* affect a substantial right[.]" *See McCallum v. N.C. Co-op Ext. Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001) (emphasis added); *see also Dewey*, 243 N.C. App. at 670, 778 S.E.2d at 101 ("When a trial court enters an order rejecting the affirmative defenses of res judicata and collateral estoppel, the order *can* affect a substantial right and *may* be immediately appealed. Incantation of the two doctrines does not, however, automatically entitle a party to an interlocutory appeal of an order rejecting those defenses.") (emphasis added) (citation omitted).

Although an order rejecting the defenses of *res judicata* and collateral estoppel "*can* affect a substantial right and *may* be immediately appealed[,]" an interlocutory appeal from such an order is "limited to the situation when the rejection of defenses based upon res judicata or collateral estoppel give[s] rise to a risk of two actual trials resulting in two different verdicts[.]" *Smith*, 251 N.C. App. at 596, 796 S.E.2d at 359–60 (emphasis in original) (internal quotation marks omitted) (citing *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534, *disc. rev. denied*, 361 N.C. 567, 650 S.E.2d 602 (2007)). In the more recent case of *Denney v. Wardson Construction, Inc.*, 264 N.C. App. 15, 824 S.E.2d 436, (2019), we distinguished the *Moody* line of cases from the more specific line of cases and explained how an appellant must meet its burden of showing there is a risk of two different, inconsistent verdicts.

In *Denney*, the defendant filed an interlocutory appeal to this Court for the trial court's denial of its motion to dismiss and contended, "rejection of a res judicata defense is like rejection of a sovereign immunity defense—meaning there is no need to explain why the facts of this particular case warrant immediate appeal." 264 N.C. App. at 18, 824 S.E.2d at 438–39. The defendant "point[ed] to a series of [decade-old] decisions made by this [C]ourt that, in its view, expressly adopted a bright-line rule that any order rejecting a res judicata defense is immediately appealable." *Id.* at 18, 824 S.E.2d at 439; *see Moody*, 169 N.C. App. at 83, 609 S.E.2d at 261 (2005); *see also Wilson*, 136 N.C. App. at 501, 524 S.E.2d at 813 (2000); *see also Little*, 134 N.C. App. at 487, 517 S.E.2d at 902 (1999). We were unpersuaded by the defendant's argument, and provided:

> To confer appellate jurisdiction in this circumstance, the appellant *must* include in *its opening brief*, in *the statement of grounds for appellate review*, sufficient facts and

argument to support appellate review on the ground that the unchallenged order affects a substantial right.

Importantly, this Court will not construct arguments for or find support for appellant's right to appeal from an interlocutory order on our own initiative. That burden falls solely on the appellant. As a result, if the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of the appellate jurisdiction.

. . . .

We are not persuaded the [*Moody* line of cases] mean what [the defendant] claims. To be sure, these cases all permitted an immediate appeal of a res judicata issue. But none of these cases examined and rejected the notion that the appellants *must* show the appeal is permissible based on the *particular facts of their case*. Instead, the Court in these cases simply held that the appeal was permissible, without a detailed distinction between the types of issues that categorically affect a substantial right and those that must be considered on a case-by-case basis.

More importantly, there is a separate, more specific line of cases holding that an individualized factual showing is required in res judicata cases. As this Court recently reaffirmed, when a trial court enters an order rejecting the affirmative defense of res judicata, the order *can* affect a substantial right and *may* be immediately appealed.

. . . .

The [more specific] line of cases applied this reasoning and held that rejections of a res judicata defense, while not categorically appealable in every case, *may* be immediately appealable if it creates a risk of inconsistent verdicts. Thus, even assuming there is a conflict between the [more specific] line of cases and the [*Moody* line of] cases . . . we must follow the [more specific line of cases] because that line of precedent both came first and, over time, expressly addressed and distinguished the reasoning of the cases cited by [the defendant].

Applying this controlling line of precedent, we again reaffirm that an appellant seeking to appeal an interlocutory

> order involving res judicata *must* include in the statement of the grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts or otherwise affect a substantial right on the particular facts of that case.

Denney, 264 N.C. App. at 17–19, 824 S.E.2d at 438–39 (emphasis added) (internal citations and internal quotation marks omitted). As the defendant in *Denney* failed to include in its statement of the grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts *on the particular facts of the case*, we dismissed the defendant's interlocutory appeal for lack of appellate jurisdiction. *Id.* at 19–20, 824 S.E.2d at 439–40.

Here, in the statement of grounds for appellate review in their opening brief, Defendants assert:

> The [trial court's] order affects a substantial right and is therefore immediately appealable. Franklin Manor and [Saber] are deprived of the benefit of a previous final ruling and judgment in their favor by a court of competent jurisdiction, and would therefore be subjected to a subsequent trial on matters previously and finally adjudicated.

To support this assertion, Defendants cite language from *McCallum v. N.C. Co-op Ext. Serv. of N.C. State Univ.*; specifically, that "the denial of a motion for summary judgment based on the defense of *res judicata* . . . is immediately appealable[,]" and "we hold that the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right, and . . . [the] defendants' appeal, although interlocutory, is properly before us." 142 N.C. App. at 51, 542 S.E.2d at 231.

Defendants do not allege in their opening brief they are categorically entitled to immediate appeal for the trial court's rejection of their *res judicata* defense, but their argument, together with the language they cite from *McCallum*, supports only that contention. As we have clarified, there is no categorical right to immediate appeal from denial of a *res judicata* defense in every case; denial of a motion for summary judgment based on *res judicata can* affect a substantial right and *may* be immediately appealed.[4] *See Denney*, 264 N.C. App. at 19, 824 S.E.2d

4. We note that, in *McCallum*, immediately after the language cited by Defendants, we provided, "the denial of summary judgment based on the defense of *res judicata can* affect a substantial right and *may* be immediately appealed." 142 N.C. App. at 51, 542 S.E.2d at 230 (emphasis added).

at 439; *see Brown*, 264 N.C. App. at 140, 825 S.E.2d at 273. Likewise, as provided in *McCallum*—the relevant language of which is *cited by Defendants*—denial of a motion for summary judgment based on collateral estoppel *can* affect a substantial right and *may* be immediately appealed. *See McCallum*, 142 N.C. App. at 51, 542 S.E.2d at 230. Immediate appeal from the denial of *res judicata* and collateral estoppel defenses is proper where the rejection of these two defenses gives rise to the risk of inconsistent verdicts (and therefore affects a substantial right), but the appellant *must* meet its burden of showing this risk.[5] *See Denney*, 264 N.C. App. at 19–20, 824 S.E.2d at 439–40; *see Smith*, 251 N.C. App. at 596, 796 S.E.2d at 359–60; *see Whitehurst*, 237 N.C. App. at 95, 764 S.E.2d at 489; *see also Dewey*, 243 N.C. App. at 669, 778 S.E.2d at 100–01.

Applying the "controlling line of precedent," Defendants are not categorically entitled to immediate appeal from the trial court's denial of their Motion for Summary Judgment premised on *res judicata* and collateral estoppel. *See Denney*, 264 N.C. App. at 19, 824 S.E.2d at 439. Per *Denney*, it was incumbent upon Defendants to include, in their opening brief, an explanation of how the trial court's order would create a risk of inconsistent verdicts or otherwise affect a substantial right based on the *particular facts of this case*. *See Denney*, 264 N.C. App. at 19–20, 824 S.E.2d at 439–40; *see Whitehurst*, 237 N.C. App. at 95, 764 S.E.2d at 489. Although *Denney* pertained singularly to an interlocutory appeal premised on *res judicata*, interlocutory appeals premised on collateral estoppel are, like with *res judicata*, limited to situations where the rejection of a collateral estoppel defense gives rise to the risk of two inconsistent verdicts. *See Smith*, 251 N.C. App. 596, 796 S.E.2d 359–60. The burden is on the appellant to show this risk, and we delineated in *Denney* the requirements for an appellant to meet this burden. *See Denney*, 264 N.C. App. at 17–19, 824 S.E.2d at 438–39. Accordingly, the rules set forth in *Denney* apply not only to our analysis of Defendants'

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5. In *Skinner v. Quintiles Transnational Corp.*, we noted an "apparent conflict" in our caselaw—that we have held "the denial of a motion for judgment on the pleadings based on *res judicata* affects a substantial right and is immediately appealable[,]" while "another panel of this Court has limited such interlocutory appeals to situations where the prior decision involved a jury verdict." 167 N.C. App. 478, 482, 606 S.E.2d 191, 193 (2004). We did not attempt to resolve this conflict, and instead invoked Rule 2 of the North Carolina Rules of Appellate Procedure to hear the appellant's interlocutory appeal premised on *res judicata*. *Id.* at 482, 606 S.E.2d at 193. Since *Skinner*, however, we have clarified in the more specific line of cases that, for interlocutory appeals, an individualized factual showing is required in *res judicata* cases. *See Denney*, 264 N.C. App. at 18–19, 824 S.E.2d at 439.

appeal premised on *res judicata*, but also their appeal premised on collateral estoppel.

Defendants do not explain in their opening brief, based on the *particular facts of this case*, how the trial court's order creates a risk of inconsistent verdicts or otherwise affects a substantial right under either the defenses of *res judicata* or collateral estoppel. Rather, Defendants argue, without further support, "[t]he [trial court's] order affects a substantial right and is therefore immediately appealable[,]" and Defendants "are deprived of the benefit of a previous final ruling and judgment in their favor by a court of competent jurisdiction and would therefore be subjected to a subsequent trial on matters previously and finally adjudicated." Defendants do, in their reply brief, assert "the federal court held that the adequacy of Ms. Bartels' supervision and care at Franklin manor *was* the factual issue 'at the heart' of Plaintiff's Federal Action[,]" and "[t]he factual issues are the same, and there is the possibility of inconsistent verdicts if this case proceeds to trial." Defendants' assertion in their reply brief does not meet the requirements as set forth in *Denney*; Defendants do not show in their opening brief, in the statement of the grounds for appellate review, that appeal is permissible based on the particular facts of this case. *See Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. Defendants have failed to meet their burden of demonstrating the trial court's order affected a substantial right, and we will not on our own initiative construct arguments for or find support for Defendants' right to appeal from an interlocutory order. *See Smith*, 251 N.C. App. at 595, 796 S.E.2d at 358-59; *see Denney*, 264 N.C. App. at 19–20, 824 S.E.2d at 439–40.

III. Conclusion

Defendants failed to show in their opening brief, in the statement of grounds for appellate review, why their appeal is permissible on the facts of this case. We therefore dismiss Defendants' interlocutory appeal for lack of appellate jurisdiction.

DISMISSED.

Judges ZACHARY and RIGGS concur.

KATHERINE AIMEE BROSNAN, Plaintiff
v.
GEORGE GEOFFREY CRAMER, Defendant

No. COA22-654

Filed 4 April 2023

1. Appeal and Error—interlocutory order—divorce case—post-separation support—certiorari allowed

In an action for absolute divorce, the Court of Appeals granted an ex-husband's petition for a writ of certiorari to review an order granting post-separation support to his ex-wife. Although the order was interlocutory and not otherwise appealable (the trial court did not certify the order under Civil Procedure Rule 54(b), and post-separation support orders do not affect a substantial right), appellate courts have discretion to issue writs of certiorari where no right of appeal from an interlocutory order exists and where doing so would serve the administration of justice.

2. Divorce—jurisdiction—post-separation support—voluntarily dismissed—raised again after divorce judgment entered—not "pending"

In an action for absolute divorce, where the ex-wife voluntarily dismissed her claim for post-separation support and did not raise it again before the divorce judgment was entered, the trial court lacked subject matter jurisdiction to grant the ex-wife's request for post-separation support after the divorce judgment had been entered because, at that point, the claim was not "pending" within the meaning of N.C.G.S. §§ 50-11(c) and 50-19.

Appeal by Defendant from Order entered 8 February 2022 by Judge Anna E. Worley in District Court, Wake County. Heard in the Court of Appeals 24 January 2023.

Parker Bryan Britt Tanner & Jenkins, PLLC, by Amy L. Britt, Stephanie T. Jenkins, and Alicia J. Journey, for Plaintiff-Appellee.

Connell & Gelb, PLLC, by Michelle D. Connell, Raleigh, for Defendant-Appellant.

STADING, Judge.

George Geoffrey Cramer ("Defendant") appeals from an order entered 8 February 2022 granting Katherine Aimee Brosnan ("Plaintiff") postseparation support. Defendant filed a Petition for Writ of Certiorari on 7 October 2022. Plaintiff filed a Motion to Dismiss Defendant's Appeal on 17 August 2022. Based on the foregoing reasons, we grant Defendant's Petition for Writ of Certiorari and deny Plaintiff's Motion to Dismiss Appeal. We vacate and remand the Order of the trial court with instructions consistent with this Opinion.

I. Factual and Procedural History

Defendant and Plaintiff married on 1 November 2008. Plaintiff filed for alimony, attorney's fees, child custody, child support, equitable distribution, and postseparation support on 15 October 2020. Defendant filed his answer, counterclaims, and affirmative defenses on 20 January 2021. Plaintiff filed her reply on 15 March 2021. Thereafter, on 8 April 2021, Plaintiff filed a notice of voluntary dismissal specifically stating "[t]he Plaintiff gives notice of voluntary dismissal without prejudice in this case of her claim for postseparation support as to the Defendant."

Under a separate case number, Defendant filed a complaint seeking absolute divorce on 19 April 2021 pursuant to N.C. Gen. Stat. § 50-6. Plaintiff accepted service of the complaint on 27 April 2021. Plaintiff did not attempt to revive the postseparation support claim by answering the complaint with a counterclaim or by any other means prior to the entry of judgment of absolute divorce. In the absence of a responsive pleading, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Defendant filed a Motion for Summary Judgment on the claim for absolute divorce on 9 June 2021. Defendant's Motion for Summary Judgment was granted on 2 July 2021. Twenty days later, on 22 July 2021, Plaintiff filed a motion in the cause for postseparation support in an effort to reinstate the previously dismissed postseparation support claim.

In response to Plaintiff's Motion in the Cause filed to reestablish a claim for postseparation support, Defendant filed a Motion to Dismiss. On 8 February 2022 the trial court denied Defendant's Motion to Dismiss Plaintiff's claim for postseparation support. Additionally, the trial court ordered Defendant to pay monthly postseparation support from 1 December 2021 until "the death of either party, Plaintiff's remarriage, Plaintiff's cohabitation, the dismissal of Plaintiff's alimony claim, or the entry of an order resolving Plaintiff's alimony claim, whichever occurs first." The trial court ordered a stay of the postseparation support portion of the judgment pending disposition of this appeal.

Defendant filed and served a notice of appeal on 17 February 2022. Plaintiff filed a motion to dismiss Defendant's interlocutory appeal on 17 August 2022, claiming that the appealed order neither affected a substantial right nor fell within a category permitting immediate appeal. Defendant filed a notice of Rule 60(b) motion on 7 October 2022, requesting this Court to delay consideration of his appeal from the trial court's order until the trial court entered an order indicating how it would be inclined to rule on the Rule 60 motion were this appeal not pending. This Court denied Defendant's request for delayed consideration by order on 20 October 2022. Additionally, Defendant filed a Petition for Writ of Certiorari on 7 October 2022.

II. Jurisdiction

[1] "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citations omitted). Defendant acknowledges the appeal of postseparation support based on subject-matter jurisdiction is interlocutory. When an appeal is interlocutory, Defendant's avenues for appellate review are limited. *See* N.C. Gen. Stat. § 50-19.1.

> "An interlocutory order may be immediately appealed in only two circumstances: (1) when the trial court, pursuant to N.C.R. Civ. P. 54(b), enters a final judgment as to one or more but fewer than all of the claims or parties and certifies that there is no just reason to delay the appeal; or (2) when the order deprives the appellant of a substantial right that would be lost absent appellate review prior to a final determination on the merits."

Akers v. City of Mount Airy, 175 N.C. App. 777, 779, 625 S.E.2d 145, 146 (2006). In the present matter, there is not a Rule 54(b) certification on the order for postseparation support. Additionally, existing case law has established that a "postseparation support order is a temporary measure, it is interlocutory, it does not affect a substantial right, and it is not appealable." *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998).

However, this Court has the discretion to issue extraordinary writs "to supervise and control the proceedings of any of the trial courts of the General Court of Justice" pursuant to N.C. Gen. Stat. § 7A-32(c) (2022). "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of

trial tribunals when . . . no right of appeal from an interlocutory order exists . . . ." N.C. R. App. P. 21. Moreover, "the appellate courts of this State in their discretion may review an order of the trial court, not otherwise appealable, when such review will serve the expeditious administration of justice or some other exigent purpose." *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975). After careful review of the question presented, we grant Defendant's Petition for Writ of Certiorari.

III. Analysis

[2] Defendant argues that a recent ruling by this Court in *Smith v. Smith*, 282 N.C. App. 735, 870 S.E.2d 154 (2022), resolves the issue before us and eliminates the need to consider the current appeal. However, the facts of *Smith* are distinguishable from this case in that "[n]o formal claims for postseparation support, alimony, or equitable distribution were filed until after the judgment of absolute divorce was entered . . . ." *Id.* The present dispute diverges factually in that the claim for postseparation support was filed and voluntarily dismissed by Plaintiff before the judgement of absolute divorce was entered. Thus, we consider the merits of the appeal.

Here, despite Plaintiff's dismissal of the postseparation support claim prior to the entry of absolute divorce, the trial court denied Defendant's Motion to Dismiss and ordered postseparation support on 8 February 2022. The Order specifically decreed "[b]eginning December 1, 2021 and continuing on the first day of each month thereafter, Defendant shall pay [a specific amount of] postseparation support to Plaintiff[.]" Furthermore, the trial court held that "[t]he postseparation support payments are stayed pending appeal of this order." With respect to the trial court's order on postseparation support, we consider the trial court's findings of fact to be supported by competent evidence and no further factual development to be required. *See Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962). However, issues of statutory interpretation are questions of law, fully reviewable under a *de novo* standard of review. *See In re Summons Issued to Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009).

As Defendant correctly points out, "[b]ecause postseparation orders are interlocutory, there is little case law addressing this very common, independent claim." Although no specific case law was cited or referenced, the trial court ordered postseparation support on 8 February 2022 by finding:

> [C]onsidering the purposes of postseparation support (i.e., to provide temporary support pending the award or

> denial of alimony), the case law surrounding alimony and the language of N.C. Gen. Stat. § 50-16.1A(4), postseparation support in this action is not foreclosed. N.C. Gen. Stat. § 50-16.2A clearly states that you can raise postseparation support by motion. At the time of the divorce, Plaintiff's alimony claim remained pending, and Defendant was on notice that there was a claim for spousal support pending in this matter.

And in accordance with the North Carolina Rule of Civil Procedure addressing dismissal of actions, absent a more specific statute, a claim dismissed without prejudice would normally survive:

> [A]n action or any claim therein may be dismissed by the plaintiff without order of court . . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal[.]

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2022).

However, the text of the statute entitled "The effects of absolute divorce" speaks more directly to the issue presented to this Court:

> A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or postseparation support pending at the time the judgment for divorce is granted. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or postseparation support or affect any other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the judgment of absolute divorce.

N.C. Gen. Stat. § 50-11(c) (2022) (emphasis added).

Similarly, the language contained in N.C. Gen. Stat. § 50-19 (2022) addresses the "[m]aintenance of certain actions[,]" including claims of postseparation support. It states that "[n]otwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action described in subdivision (a)(1) through (a)(5) of this section that is filed as an independent, separate action may be prosecuted during the *pendency* of an action for divorce under G.S. 50-5.1 or G.S. 50-6." *Id.* (emphasis added).

This case presents a conflict between a generally applicable provision of the North Carolina Rules of Civil Procedure and the more specific sections of Chapter 50 of the North Carolina General Statutes. To resolve such contradictions, our appellate courts have consistently applied a canon of statutory construction known as *generalia specialibus non derogant*. "North Carolina's appellate courts have repeatedly recognized that '[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability.' " *Perry v. GRP Fin. Servs. Corp.*, 196 N.C. App. 41, 49, 674 S.E.2d 780, 785 (2009) (citation omitted). Accordingly, since N.C. Gen. Stat. § 50-11(c) and N.C. Gen. Stat. § 50-19 specifically address the voluntarily dismissed claim at issue in this case, the language in those statutes are controlling.

Having settled the appropriate controlling statutory authority, we must now consider the text of those statutes and determine its application in this particular setting. This Court must review the words chosen by the General Assembly to ensure that both the purpose and the intent of the legislation are effectuated. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). When the language used is clear and unambiguous, this Court must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 466, 232 S.E.2d 184, 193 (1977). An application of the aforementioned principle requires consideration of the plain meaning of the words used in the more controlling statutes. Specifically, we are charged with acknowledging the plain meaning of the statutory language "postseparation support *pending* at the time the judgment for divorce is granted" in N.C. Gen. Stat. § 50-11(c) (2022) (emphasis added) and "action may be prosecuted during the *pendency* of an action for divorce" in N.C. Gen. Stat. § 50-19 (2022) (emphasis added).

Merriam-Webster defines "pending" as "not yet decided; being in continuance." *Pending*, Merriam-Webster Dictionary (11th ed. 2003). The use of "pending" and "pendency" indicates that the General Assembly was referring to claims that remain active at the time a judgment for divorce is granted. "It is presumed that the legislature intended each portion of [a statute] to be given full effect and did not intend any provision to be mere surplusage." *Porsh Builders, Inc. v. Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). The General Assembly's use of the words "pending" and "pendency" in both statutes is not coincidental, nor is it mere surplusage. Here, Plaintiff's claim for postseparation support was voluntarily dismissed and not reinstated before the judgment for divorce was granted, so it could not have been *pending*.

Consequently, the trial court was divested of subject-matter jurisdiction to enter an order awarding postseparation support. For these reasons, we conclude the trial court erred in denying Defendant's Motion to Dismiss Plaintiff's claim for postseparation support.

III. Conclusion

Since the trial court lacked subject-matter jurisdiction to award Plaintiff postseparation support, the trial court erred in denying Defendant's Motion to Dismiss. As such, we vacate the trial court's Order and remand with instructions to grant Defendant's Motion to Dismiss.

VACATED AND REMANDED.

Judges GORE and RIGGS concur.

THE ESTATE OF DESMOND JAPRAEL STEPHENS, LARRY F. STEPHENS, ADMINISTRATOR, Plaintiff
v.
ADP TOTALSOURCE DE IV, INC., MICRON PRECISION, LLC d/b/a KING MACHINE OF NORTH CAROLINA and KORY J. KACHUR, Defendants

No. COA22-372

Filed 4 April 2023

1. Workers' Compensation—Industrial Commission's exclusive jurisdiction—exceptions—willful negligence of employer

Where decedent was crushed to death at his workplace when his employer's on-site vice president directed him to stand beneath and disassemble a 2,000-pound metal tire mold that was suspended by a forklift—which had been modified without manufacturer approval—without the support necessary to prevent a crushing-type accident, decedent's estate (plaintiff) alleged facts sufficient to establish an exception to the Industrial Commission's exclusive jurisdiction over plaintiff's claims against decedent's employer (defendant). Plaintiff alleged that the employer intentionally engaged in conduct knowing it was substantially certain to cause serious injury or death to decedent, who did not have the proper experience, training, or safety equipment to perform the work that caused his death.

2. Workers' Compensation—Industrial Commission's exclusive jurisdiction—exceptions—willful negligence of co-employee

Where decedent was crushed to death at his workplace when his employer's on-site vice president (defendant) directed him to stand beneath and disassemble a 2,000-pound metal tire mold that was suspended by a forklift—which had been modified without manufacturer approval—without the support necessary to prevent a crushing-type accident, decedent's estate (plaintiff) alleged facts sufficient to establish an exception to the Industrial Commission's exclusive jurisdiction over plaintiff's claims against defendant. Plaintiff alleged that defendant acted with willful, wanton, and reckless negligence and that his negligence resulted in the death of decedent, who did not have the proper experience, training, or safety equipment to perform the work that caused his death.

Judge DILLON concurring in part and dissenting in part.

Appeal by Defendants from order entered 20 December 2021 by Judge Stanley L. Allen in Caswell County Superior Court. Heard in the Court of Appeals 19 October 2022.

Hendrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, G. Anderson Stein, and Tyler A. Stull, for Defendants-Appellants.

Law Offices of James Scott Farrin, by Coleman Cowan and Preston W. Lesley, and Law Offices of R. Lee Farmer, PLLC, by R. Lee Farmer, for Plaintiff-Appellee.

COLLINS, Judge.

Desmond Japrael Stephens was crushed to death at his workplace when part of a 2,000-pound metal tire mold that was elevated by a forklift that had been modified without manufacturer approval fell onto his chest. Plaintiff filed willful negligence claims against Stephens' employer and his on-site supervisor (collectively "Defendants"). Defendants moved to dismiss the claims under North Carolina Rules of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and 12(b)(6), for failure to state a claim upon which relief can be granted, arguing that the North Carolina Industrial Commission has exclusive jurisdiction over workplace injuries and Plaintiff failed to allege facts sufficient to establish an exception to the Commission's exclusive jurisdiction. The trial court denied Defendants' motions and Defendants appealed. Because Plaintiff alleged facts sufficient to establish exceptions to the Commission's exclusive jurisdiction, we affirm.

I. Factual Background

The facts of this case, as Plaintiff alleged, are as follows: King Machine operates a facility in Caswell County "where it manufactures tire molds and repurposes tire molds for tire manufacturers[,]" which weigh "approximately two thousand (2,000) pounds and [are] used in the tire manufacturing process to give tires their final shape, taking on tread pattern and sidewall engraving." Defendant Kory J. Kachur "was the on-site Vice President of King Machine and was responsible and familiar with the work that was being performed by the employees of Defendant King Machine who were present at the facility . . . ." "At the time of the incident, [Stephens] was employed by King Machine as a general laborer and had been an employee for approximately three (3) weeks[,]" prior to which Stephens had "never worked in a factory or manufacturing facility and never repaired and/or repurposed tire molds," nor had he "receive[d] training as to the proper method of repairing and repurposing tire molds."

On 30 April 2019, although "Defendants knew [Stephens] was not trained, qualified or experienced" to work with tire molds, Defendants "pulled [Stephens] from another part of the Plant" and "instructed [Stephens] to detach bolts from below a two-piece tire mold weighing approximately two thousand (2,000) pounds elevated by a forklift." Stephens was "not supervised" or "provided with adequate personal protective/supportive equipment while undertaking the tasks assigned to him." "Shortly after [Stephens] was instructed to perform work under the tire mold a bolt snapped causing one part of the two piece mold to collapse from the elevated position" onto Stephens' chest, killing him.

After Stephens' death, the North Carolina Occupational Safety and Health Division of the North Carolina Department of Labor ("NCOSH") investigated the Caswell County Plant and concluded that King Machine had violated several sections of the Occupational Safety and Health Act ("OSHA"). Specifically, NCOSH concluded that King Machine "committed a 'Willful Serious' violation of 29 CFR 1910.178(m)(2), whereby employees stood under or passed under the elevated portion of a [forklift][,] . . . while unbolting metal plates weight approximately 1,705 pounds." NCOSH also concluded that King Machine "committed a violation of 29 CFR 1910.178(a)(4) and 29 CFR 1910.178(a)(5), whereby Defendant King Machine modified their [forklifts] without manufacturer approval with a single hook beam front-end forklift attachment to transport and lift approximately 1,705 pound metal plates."

II. Procedural History

Plaintiff filed its initial complaint in superior court in October 2020, alleging willful negligence against King Machine and Kachur and seeking compensatory and punitive damages. Defendants answered in January 2021, denying Plaintiff's allegations, and asserting that the court lacked subject matter jurisdiction because Plaintiff had failed to allege conduct that warranted an exception to the Industrial Commission's exclusive jurisdiction over workplace injuries. In July 2021, Plaintiff filed a motion for leave to amend its complaint to add allegations clarifying its claims, which was granted. Plaintiff filed its amended complaint in September 2021, which included a negligence claim against King Machine in addition to the previous allegations of willful negligence against each defendant. Defendants answered in October 2021, denying Plaintiff's allegations and reasserting that the court lacked subject matter jurisdiction to hear the case. Defendants filed motions to dismiss Plaintiff's complaint under North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) in December 2021. After hearing the parties' arguments, the trial court denied Defendants' motions. Defendants appealed.

The record on appeal was settled on 22 April 2022. Defendants filed their principal brief on 8 July 2022. Plaintiff filed a supplement to the record on appeal on 4 August 2022 pursuant to North Carolina Rules of Appellate Procedure 9(b)(5), asserting that the settled record on appeal was insufficient to respond to the issues presented in Defendants' brief. On 8 August 2022, Plaintiff filed its brief. Defendants subsequently moved to strike Plaintiff's 9(b)(5) supplement, arguing that the documents in the supplement were not appropriate additions to the record on appeal because they "were neither filed with the trial court, submitted to the trial court for consideration at the hearing, admitted by the trial court, or made the subject of an offer of proof[.]" Plaintiff also moved on 11 October 2022, pursuant to North Carolina Rules of Appellate Procedure 9(b)(5)(b) and 37, to add the transcript from the December 2021 hearing on Defendants' motions to dismiss to the record on appeal; Defendants opposed the motion.

III. Discussion

A. Motions on Appeal

1. *Defendants' Motion to Strike Plaintiff's Rule 9(b)(5) Supplement to the Record on Appeal*

Plaintiff's brief, filed four days after it filed the 9(b)(5) supplement, extensively referenced documents in the supplement. Defendants moved

to strike the supplement, arguing that its contents were not appropriate additions to the record on appeal. Defendants further requested that this Court strike all references to the supplement in Plaintiff's brief.

Rule 9(b)(5)(a) of the North Carolina Rules of Appellate Procedure states, "If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief . . . , the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9." N.C. R. App. P. 9(b)(5)(a). Rule 9(d) states, "Exhibits and other items that have been filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be included in the record on appeal . . . ." N.C. R. App. P. 9(d).

It is well-settled that this Court may "only consider the pleadings and filings before the trial court . . . ." *Twaddell v. Anderson*, 136 N.C. App. 56, 68, 523 S.E.2d 710, 719 (1999). As Defendants argue, Plaintiff has failed to demonstrate that the documents in the 9(b)(5) supplement had been filed, served, submitted for consideration, admitted, or made the subject of an offer of proof. Accordingly, Defendants' motion to strike the 9(b)(5) supplement and all references to its contents is allowed.

2. Plaintiff's Motion to Add the Hearing Transcript

After all briefs in this matter had been filed, Plaintiff moved pursuant to Rule 9(b)(5)(b) to add the transcript of the hearing on Defendants' motions to dismiss to the record on appeal. Rule 9(b)(5)(b) states, "On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal." N.C. R. App. P. 9(b)(5)(b).

In support of its motion, Plaintiff argues that inclusion of the transcript will assist this Court's understanding of the issues and that no prejudice would result from the addition as both parties reference the hearing in their briefs. Defendants oppose the motion, arguing that, because all briefs had already been filed, Defendants would have no opportunity to respond to any issue raised by the introduction of the transcript. Defendants also argue that their proposed issues on appeal are the same issues presented in their brief, and thus good cause does not exist to add the transcript to the record after the record on appeal was settled.

After considering the parties' arguments, in our discretion, we deny Plaintiff's motion to add the hearing transcript to the record on appeal.

B. Appellate Jurisdiction

The trial court's order denying Defendants' motions to dismiss is not a final order and is therefore interlocutory. *Veazey v. City of Durham*,

231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). A party generally has "no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an interlocutory order may be immediately appealable if the judgment affects a substantial right. N.C. Gen. Stat. § 7A-27(b)(3)(a) (2021). Our Supreme Court has determined that the denial of a motion to dismiss under Rule 12(b)(1) and the exclusivity provision of the North Carolina Workers' Compensation Act ("the Act") affects a substantial right and is immediately appealable. *See Burton v. Phoenix Fabricators & Erectors, Inc.*, 362 N.C. 352, 661 S.E.2d 242 (2008). Similarly, this Court has recognized that denial of a motion to dismiss under Rule 12(b)(6) is immediately appealable as affecting a substantial right to the extent that the motion relates to the exclusivity provision of the Act. *Est. of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 491-92, 751 S.E.2d 227, 231-32 (2013).

Defendants' motions to dismiss under Rules 12(b)(1) and 12(b)(6) are based on the exclusivity provision of the Act and its effect on the trial court's jurisdiction over the matter. Thus, the trial court's order denying Defendants' motions affects a substantial right and is immediately appealable. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a). Accordingly, this Court has jurisdiction to review the trial court's order.

C. Standard of Review

Defendants make interrelated arguments that the trial court erred by failing to dismiss Plaintiff's claims under North Carolina Rules of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and 12(b)(6), for failure to state a claim upon which relief can be granted.

We review an order denying a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure de novo. *Hatcher v. Harrah's N.C. Casino Co.*, 169 N.C. App. 151, 155, 610 S.E.2d 210, 212 (2005) (citation omitted). Under de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

We likewise review a trial court's order denying a Rule 12(b)(6) motion to dismiss de novo. *Est. of Long v. Fowler*, 378 N.C. 138, 148, 861 S.E.2d 686, 694 (2021). In ruling on a Rule 12(b)(6) motion to dismiss,

"the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quotation marks and citation omitted). Dismissal under Rule 12(b)(6) is proper only in the following circumstances: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

Because a trial court's jurisdiction over workers' compensation matters depends on whether an exception to the Act's exclusivity provision applies, the threshold question is whether Plaintiff has stated a claim which fits within those exceptions. *See Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 589, 678 S.E.2d 245, 249 (2009). Thus, we review whether Plaintiff's complaint stated a claim for which relief can be granted under Rule 12(b)(6).

D. Analysis

Defendants argue that the North Carolina Industrial Commission has exclusive jurisdiction over Plaintiff's claims under the Act because Plaintiff failed to state a claim that falls within exceptions to the Act's exclusivity provision.

The Act states:

> Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified.

N.C. Gen. Stat. § 97-9 (2021). The Act also provides:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall

> exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

Id. § 97-10.1 (2021).

In effect, the Act provides an avenue for injured employees to receive "sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003). "In return, the Act limits the amount of recovery available for work-related injuries and removes the employee's right to pursue potentially larger damages awards in civil actions." *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991) (citation omitted).

The exclusivity provision generally precludes common law negligence actions against employers and co-employees whose negligence caused the injury. *Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985). However, our Supreme Court recognizes two exceptions to the exclusivity provision. First, an employee may pursue a civil action against an employer when the employer "intentionally engages in misconduct knowing it is substantially certain to cause injury or death to employees and an employee is injured or killed by that conduct[.]" *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228. Second, an employee may pursue a civil action against a co-employee for their willful, wanton, and reckless negligence. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 250.

1. Willful Negligence of King Machine (Woodson Claim)

[1] Defendants argue that Plaintiff failed to allege facts sufficient to establish an exception to the Commission's exclusive jurisdiction under *Woodson*. To state a *Woodson* claim, a plaintiff "must allege that the employer intentionally engaged in misconduct knowing that such conduct was substantially certain to cause injury or death . . . ." *Vaughn*, 230 N.C. App. at 494, 751 S.E.2d at 233-34 (citing *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228). " 'Substantial certainty' under *Woodson* is more than the 'mere possibility' or 'substantial probability' of a serious injury or death. No one factor is determinative in evaluating whether a plaintiff has stated a valid *Woodson* claim; rather, all of the facts taken together must be considered." *Arroyo v. Scottie's Prof. Window Cleaning, Inc.*, 120 N.C. App. 154, 159, 461 S.E.2d 13, 16 (1995) (citations omitted).

In *Woodson*, decedent worked for defendant-employer, a subcontractor who was hired to help dig two trenches to lay sewer lines.

Woodson, 329 N.C. at 334-35, 407 S.E.2d at 225. In the interest of time, the general contractor provided a second crew to dig the second trench. *Id.* at 335, 407 S.E.2d at 225. The foreman for the second crew refused to work on the second trench without a trench box, as safety regulations required. *Id.* Defendant-employer procured a trench box for the second crew but did not do so for his own crew. *Id.* While decedent was working in the first trench without the protection of a trench box, the trench collapsed, and decedent was killed. *Id.* at 336, 407 S.E.2d at 225-26.

The administrator of decedent's estate filed a wrongful death action in superior court against defendant-employer and forecast evidence that the soil conditions were such that the trench was substantially certain to fail, that defendant-employer knew of the dangers associated with trenching and had disregarded safety regulations, and that defendant-employer had been at the site and had observed the trench firsthand. *Id.* at 345-46, 407 S.E.2d at 231-32. The trial court granted summary judgment in favor of defendant-employer. *Id.* at 333, 407 S.E.2d at 224. Our Supreme Court reversed, stating that plaintiff's forecast of evidence was sufficient to show that there was a genuine issue of material fact as to whether defendant-employer's conduct satisfied the substantial certainty standard. *Id.* at 345, 407 S.E.2d at 231.

Our Supreme Court revisited the *Woodson* exception, again in a summary judgment posture, in *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 597 S.E.2d 665 (2003). There, decedent worked for the town of Scotland Neck as a general maintenance worker who assisted in the operation of a garbage truck. *Id.* at 553, 597 S.E.2d at 666. Part of decedent's job involved attaching a dumpster to a latching mechanism on the garbage truck, which allowed the truck to lift the dumpster and empty the dumpster's contents into the truck. *Id.* One day, while the dumpster was being lifted, the latching mechanism failed, causing the dumpster to swing towards decedent and pin him against the truck. *Id.* at 553-54, 597 S.E.2d at 666. Although decedent's co-workers freed him, he later died from his injuries. *Id.* at 554, 597 S.E.2d at 666.

An investigation revealed that the truck's latching mechanism was broken and the dumpster was bent, and that these defects were the direct cause of the accident. *Id.* Although several of decedent's co-workers indicated that the latching mechanism had been broken for at least two months prior to the accident, decedent's supervisor denied any knowledge of such defects. *Id.* Additionally, an NCOSH investigation found five state labor law violations, including "failure to train employees in the safe operation of garbage truck equipment, failure to properly supervise employees in the operation of garbage truck equipment, failure to

implement a program for inspection of garbage truck equipment, operation of defective garbage truck equipment, and unsafe operation of garbage truck equipment." *Id.*

Plaintiffs, the co-administrators of decedent's estate, filed a complaint in superior court against the town and its officials alleging "willful, wanton, reckless, careless and gross negligence." *Id.* at 554, 597 S.E.2d at 666-67. Defendants moved to dismiss plaintiffs' claim under Rule 12(b)(6) and were denied. *Whitaker v. Town of Scotland Neck*, 154 N.C. App. 660, 662, 572 S.E.2d 812, 813 (2002). However, the trial court later granted defendants summary judgment. *Id.* This Court reversed, relying on a six-factor test established in *Wiggins v. Pelikan, Inc.*, 132 N.C. App. 752, 513 S.E.2d 829 (1999). *Id.* at 663-65, 572 S.E.2d at 814-15. Our Supreme Court reversed this Court and reinstated the trial court's order granting summary judgment. *Whitaker*, 357 N.C. at 558, 597 S.E.2d at 669. In doing so, the Supreme Court "explicitly reject[ed] the *Wiggins* test and rel[ied] solely on the standard originally set out . . . in *Woodson v. Rowland*." *Id.* at 556, 597 S.E.2d at 667. The Supreme Court emphasized that "[t]he *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves." *Id.* at 557, 597 S.E.2d at 668.

The Supreme Court distinguished the facts before it from those in *Woodson*, specifically noting that:

> On the day of the accident, none of the Town's supervisors were on-site to monitor or oversee the workers' activities. Decedent was not expressly instructed to proceed into an obviously hazardous situation as in *Woodson*. There is no evidence that defendants knew that the latching mechanism on the truck was substantially certain to fail or that if such failure did occur, serious injury or death would be substantially certain to follow.

Id. at 558, 597 S.E.2d at 668. The Supreme Court pointed out that "in *Woodson*, the employee worked in a deep, narrow trench in which it was impossible for him to escape . . . [,]" and that "decedent was not so helpless." *Id.* at 558, 597 S.E.2d at 669. The Supreme Court concluded that "[t]he facts of this case involve defective equipment and human error that amount to an accident rather than intentional misconduct." *Id.*

This Court examined the *Woodson* exception in the context of a motion to dismiss under Rule 12(b)(6) in *Arroyo* and *Vaughn*. In *Arroyo*, plaintiff had been working as a window washer for less than a year when he was instructed to wash windows on a tall building by climbing

down a ladder from the roof without safety equipment. 120 N.C. App. at 157, 461 S.E.2d at 15. To reach some of the windows, plaintiff was required to stand on a narrow ledge and lean outward. *Id.* Plaintiff and a coworker attempted to balance each other by locking arms, but plaintiff's supervisor instructed them to stop because they were working too slowly. *Id.* Shortly after plaintiff ceased locking arms with his coworker for balance, he fell and suffered permanent injury. *Id.* at 158, 461 S.E.2d at 15-16.

Plaintiff filed a complaint in superior court alleging that he had never been given any safety training in the cleaning of high-rise exterior windows; that his employer did not publish safety rules or enforce State and Federal safety measures; that his employer was aware that permitting or requiring him to work from a great height without safety equipment was dangerous and substantially certain to cause serious injury or death; and that his employer intentionally forewent safety precautions because they were considered too cumbersome. *Id.* at 155-157, 461 S.E.2d at 14-15. The trial court dismissed plaintiff's complaint for failure to state a claim. *Id.* at 155, 461 S.E.2d at 14. This Court reversed, holding that plaintiff's allegations were "sufficient to state a legally cognizable claim under *Woodson* that defendant intentionally engaged in conduct that it knew was substantially certain to cause serious injury or death." *Id.* at 159-60, 461 S.E.2d at 17.

In *Vaughn*, decedent worked as a groundman who assisted other employees working on overhead power distribution lines. 230 N.C. App. at 486, 751 S.E.2d at 229. Decedent's supervisor directed decedent to climb a utility pole and retrofit a live transformer, in part by "removing the hotline clamp from the primary line which [left] the primary line exposed." *Id.* at 487-88, 751 S.E.2d at 230. This task was ordinarily "reserved for [a] trained and experienced lineman[,]" as opposed to decedent, who was a groundman. *Id.* at 488, 751 S.E.2d at 230. While decedent was attempting this procedure, he was electrocuted. *Id.*

Plaintiff filed a complaint in superior court alleging that decedent had not received any training to perform the work required of a lineman, that decedent had not been provided with proper safety equipment, that decedent's employer was aware that requiring an untrained groundman to perform the work of a trained lineman was certain to result in death or serious injury, and that decedent's employer knew that groundmen were instructed to perform the inherently dangerous activities reserved for trained linemen. *Id.* at 487-89, 751 S.E.2d at 229-30. The trial court denied the employer's motion to dismiss. *Id.* at 490, 751 S.E.2d at 231. This Court reversed, noting that plaintiff made no factual allegations

to support his contention that the employer knew groundmen were instructed to perform the inherently dangerous activities reserved for trained linemen. *Id.* at 498-99, 751 S.E.2d at 236. Furthermore, plaintiff's allegations established that the practice was in clear violation of the employer's published work methods and safety manuals, suggesting that the employer "did not intend for any of its groundmen, including [d]ecedent, to climb utility poles and de-energize transformers." *Id.* at 499, 751 S.E.2d at 236.

In *Arroyo*, plaintiff alleged facts that, taken as true, were sufficient to establish that the employer intentionally placed plaintiff in the dangerous situation knowing the danger involved. *See Arroyo*, 120 N.C. App. at 159-60, 461 S.E.2d at 16-17. On the other hand, in *Vaughn*, plaintiff was unable to articulate specific facts indicating that the employer knew of and disregarded safety procedures, and his conclusory allegations were discordant with the employer's published safety policies. *See Vaughn*, 230 N.C. App. at 498-99, 751 S.E.2d at 236-37.

Here Plaintiff alleged the following:

> 17. Upon information and belief, [Stephens] had no experience and received no training in the repair and/or replacement of tire molds and the proper method of disconnecting the two-piece tire molds in use at Defendant King Machine.
>
> 18. At the time of the incident, Defendants knew working under heavy loads without proper support or using proper equipment was certain to result in death or serious injury.
>
> . . . .
>
> 20. Upon information and belief, Defendant King Machine . . . instructed [Stephens] to detach bolts from below a two-piece tire mold weighing approximately two thousand (2,000) pounds elevated by a forklift.
>
> 21. Defendants knew [Stephens] was not trained, qualified or experienced to undertake such a dangerous activity.
>
> . . . .
>
> 25. Upon information and belief, [Stephens] was not provided with adequate personal protective/supportive equipment while undertaking the tasks assigned to him.
>
> . . . .

35. Following [Stephens'] death, an investigation was performed by [NCOSH].

36. [NCOSH] reached the following conclusions as a result of their investigation:

a. Defendant King Machine committed a "Willful Serious" violation of 29 CFR 1910.178(m)(2), whereby employees stood under or passed under the elevated portion of a [forklift] . . . while unbolting metal plates weight approximately 1,705 pounds.

. . . .

c. Defendant King Machine committed a violation of 29 CFR 1910.178(a)(4) and 29 CFR 1910.178(a)(5), whereby Defendant King Machine modified their [forklifts] without manufacturer approval with a single hook beam front-end forklift attachment to transport and lift approximately 1,705 pound metal plates.

37. Under information and belief, Defendants knew or should have known the proper safety measures in the industry and Defendant knew or should have known of the proper method of elevating heavy equipment, like tire molds, so that the two piece molds can be disassembled.

. . . .

52. As alleged herein, Defendant King Machine . . . intentionally engaged in conduct knowing it was substantially certain to cause serious injury or death to [Stephens]. Among other things, this conduct included the following:

a. Instructing [Stephens], a new general laborer, to perform work below an approximately 2,000 pound tire mold, work that he had not been trained to perform and was inherently dangerous to perform;

b. Instructing [Stephens] to work below the tire mold without proper experience, training, or safety equipment;

c. Fostering a work environment in which speed is prioritized such as [Stephens] was forced to

perform dangerous and deadly work for which he had not been trained and for which he was unqualified to perform.

d. Instructing [Stephens] to perform work from below a forklift without the proper supports necessary to prevent a crushing type incident;

e. The violation of applicable statutes, rules and regulations, including with limitation 29 CFR 1910.178(a)(4), 29 CFR 1910.178(a)(5), 29 CFR 1910.178(l)(3)(i)(M), and 29 CFR 1910.178(m)(2); and

f. Such other intentional and/or aggravated conduct as may be revealed during discovery.

Plaintiff's allegations are more like those in *Arroyo* than those in *Vaughn*. Specifically, Plaintiff alleged that King Machine "knew working under heavy loads without proper support or using proper equipment was certain to result in death or serious injury[,]" that NCOSH concluded King Machine had committed a " 'Willful Serious' violation of [OSHA], whereby employees stood under or passed under the elevated portion of a [forklift] . . . while unbolting metal plates weight approximately 1,705 pounds[,]" and that NCOSH concluded King Machine had "modified their [forklifts] without manufacturer approval" to facilitate this process. As in *Arroyo*, Plaintiff alleged facts that, taken as true, establish that King Machine was both aware of and encouraged the misconduct that resulted in Stephens' death.

Additionally, Plaintiff alleged facts that, taken as true, establish that King Machine's conduct "was substantially certain to cause injury or death . . . ." *Vaughn*, 230 N.C. App. at 494, 751 S.E.2d at 233-34 (citing *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228). In *Woodson*, our Supreme Court held that directing employees to dig a trench without a trench box was substantially certain to result in the trench caving in. In *Arroyo*, this Court held that directing employees to clean high-rise windows with no fall protection was substantially certain to result in an employee falling from the building. Here, directing employees to stand beneath and disassemble 2,000-pound metal tire molds—suspended by forklifts that had been modified without manufacturer approval—without the proper supports necessary to prevent a crushing-type incident is substantially certain to result in the tire mold falling on and crushing the employee.

Defendants argue that Plaintiff's allegations are insufficient to state a *Woodson* claim because "Plaintiff does not allege a history of safety violations or the removal of safety equipment[,]" and because "Plaintiff does not allege [King Machine] knew the bolt would snap." (Capitalization altered).[1] Although the *Woodson* exception is narrow and fact-bound, these exact allegations are not required to state a *Woodson* claim. *Woodson* itself did not state the cause of the trench cave-in, only that the cave-in was substantially certain. Nor did *Arroyo* state how plaintiff fell, only that a fall was substantially certain. Here, Plaintiff made no argument that the mold was secure but for a bolt that snapped. Instead, Plaintiff explicitly alleged that the mold was improperly suspended, and that if a safe method for working beneath the mold exists, Stephens was not so informed.

The dissent asserts that *Whitaker* is a more appropriate case by which to measure the present facts. The dissent's reliance on *Whitaker* is misplaced as *Whitaker* is procedurally and factually distinguishable. Unlike the present case, *Whitaker* and *Woodson* were decided on motions for summary judgment rather than on motions to dismiss like *Arroyo* and *Vaughn*. In fact, in *Whitaker*, as here, the trial court denied defendant's motion to dismiss plaintiffs' claim under Rule 12(b)(6). *Whitaker*, 154 N.C. App. at 662, 572 S.E.2d at 813.

"The distinction between a Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality." *Locus v. Fayetteville St. Univ.*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991). At summary judgment, the parties, and the court, have the benefit of discovery. *See* N.C. Gen. Stat. §1A-1, Rule 56 ("The judgment sought shall be rendered forthwith 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 . . . ."). On a motion to dismiss, the question is solely whether the allegations are legally sufficient. *Wood v. Guilford Cnty.*, 355 N.C. at 166, 558 S.E.2d at 494 (citation omitted).

In *Woodson*, our Supreme Court had the benefit of expert testimony indicating that the soil conditions were ripe for a cave-in. In *Whitaker*, the trial court denied defendant's motion to dismiss but granted summary judgment after plaintiff had the opportunity to present evidence that the town knew its garbage truck was defective and failed to do

1. The dissent, too, improperly focuses on the precipitating event. Plaintiff's allegation, and our decision, is that requiring employees to work beneath 2,000-pound metal plates without proper supports is substantially certain to result in serious injury or death to anyone standing below, no matter what they are doing.

so. Here, Plaintiff has had no such opportunity, and it would be inappropriate to compare his allegations to a case that emerged from a significantly more developed evidentiary record.[2] Accordingly, this case is more appropriately compared to *Arroyo* and *Vaughn*, which arose from the same procedural posture.

In addition to the distinct procedural posture, the facts alleged in Plaintiff's amended complaint are not, as the dissent asserts, "much closer to those in *Whitaker* than those in *Woodson*." In *Whitaker*, the Court emphasized that "[o]n the day of the accident, none of the Town's supervisors were on-site to monitor or oversee the workers activities[,]" and that "[d]ecedent was not expressly instructed to proceed into an obviously hazardous situation . . . ." *Whitaker*, 357 N.C. at 558, 597 S.E.2d at 668. Here, Plaintiff alleged that Kachur "was the on-site Vice President of King Machine and was responsible and familiar with the work that was being performed[,]" and that Kachur "did, in fact, instruct [Stephens] to work below the approximately 2,000 pound tire mold . . . ." Furthermore, in *Whitaker*, the Court could not conclude that the town engaged in intentional misconduct because plaintiff failed to present evidence that the town knew its garbage truck was faulty. *Id*. Here, Plaintiff alleged that King Machine "modified their [forklifts] without manufacturer approval . . . to transport and lift approximately 1,705 pound metal plates" and "actively create[ed], through its use of [a forklift] vs crane, a dangerous condition such that workers, like [Stephens], were unable to perform their duties safely and subject themselves to bodily harm and death[.]"

The dissent further mischaracterizes our decision by invoking an explicitly-rejected six-factor test and using it as a lens through which to view our analysis. As our Supreme Court stated when it disavowed that test, "[*Woodson*'s] guidelines stand by themselves." *Id*. at 557, 597 S.E.2d at 668. Our decision was reached, as *Whitaker* instructs, by applying the substantial certainty standard as it existed in *Woodson* and without reference to the *Wiggins* factors.

Because Plaintiff alleged facts that, taken as true, establish that King Machine intentionally engaged in misconduct knowing that such conduct was substantially certain to, and in fact did, cause Stephens' death, Plaintiff's allegations are sufficient to state a legally cognizable claim under *Woodson*. *See Arroyo*, 120 N.C. App. at 159-60, 461 S.E.2d at 17.

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2. Plaintiff acknowledged this limitation in both his complaint and his brief.

2. Willful Negligence of Kory J. Kachur (Pleasant Claim)

[2] Defendants argue that Plaintiff failed to allege facts sufficient to establish an exception to the Commission's exclusive jurisdiction under *Pleasant*. To state a *Pleasant* claim, a plaintiff must allege that a co-employee acted with willful, wanton, and reckless negligence; and that the co-employee's negligence resulted in plaintiff's injury. *Pleasant*, 312 N.C. at 717-18, 325 S.E.2d at 250. Willful negligence is "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *Id.* at 714, 325 S.E.2d at 248 (citations omitted). Wanton conduct is "an act manifesting a reckless disregard for the rights and safety of others." *Id.* (citations omitted). "This does not require an actual intent to injure, but can be shown constructively when the co-employee's conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified." *Vaughn*, 230 N.C. App. at 500, 751 S.E.2d at 237 (quotation marks and citation omitted).

In *Pleasant*, plaintiff's co-employee on a construction site attempted to drive a truck as close to plaintiff as possible without striking him, but miscalculated and struck plaintiff, seriously injuring him. *Pleasant*, 312 N.C. at 711, 325 S.E.2d at 246. Our Supreme Court held that this behavior constituted willful, wanton, and reckless negligence and allowed the case to proceed in superior court. *Id.* at 718, 325 S.E.2d at 250.

Our Supreme Court revisited the *Pleasant* exception in *Pendergrass v. Card Care Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993), where it held that two co-employees' alleged negligence did not rise to the level of the negligence in *Pleasant*. There, plaintiff was seriously injured when his arm was caught in a final inspection machine that he was operating. *Id.* at 236, 424 S.E.2d at 393. Plaintiff filed a complaint in superior court alleging that two co-employees were grossly and wantonly negligent "in directing [plaintiff] to work at the final inspection machine when they knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards." *Id.* at 238, 424 S.E.2d at 394. Our Supreme Court held that the co-employees' conduct, as plaintiff alleged, did not fall within the *Pleasant* exception, reasoning that:

> Although they may have known certain dangerous parts of the machine were unguarded when they instructed [plaintiff] to work at the machine, we do not believe this supports an inference that they intended that [plaintiff] be

> injured or that they were manifestly indifferent to the consequences of his doing so.

Id.

More recently, in *Vaughn*, this Court held that plaintiff had alleged facts sufficient to state a *Pleasant* claim against his supervisor.[3] In *Vaughn*, decedent worked as a groundman who assisted other employees working on overhead power distribution lines. 230 N.C. App. at 486, 751 S.E.2d at 229. Decedent's supervisor directed decedent to climb a utility pole and retrofit a live transformer, in part by "removing the hotline clamp from the primary line which [left] the primary line exposed." *Id.* at 487-88, 751 S.E.2d at 230. This task was ordinarily "reserved for [a] trained and experienced lineman[,]" as opposed to decedent, who was a groundman. *Id.* at 488, 751 S.E.2d at 230. While decedent was attempting this procedure, he was electrocuted. *Id.*

This Court held the supervisor's behavior was "not less egregious than that of the co-employee in *Pleasant* . . . ." *Id.* at 502, 751 S.E.2d at 238. Noting that decedent was "an untrained groundman who had previously worked as a truck driver," this Court held that the supervisor's alleged direction to decedent to climb the power pole and work on live power lines without the necessary training, equipment, or experience was "sufficient to create an inference that [the supervisor] was manifestly indifferent to the consequences of his actions . . . ." *Id.* at 503, 751 S.E.2d at 239.

Here, Plaintiff alleged the following:

> 17. Upon information and belief, [Stephens] had no experience and received no training in the repair and/or replacement of tire molds and the proper method of disconnecting the two-piece tire molds in use at Defendant King Machine.
>
> 18. At the time of the incident, Defendants knew working under heavy loads without proper support or using proper equipment was certain to result in death or serious injury.
>
> . . . .

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3. Although this Court held that plaintiff's allegations were insufficient to state a claim against the employer under *Woodson*, this Court held that plaintiff had alleged facts sufficient to state a claim against the supervisor under *Pleasant*. *Vaughn*, 230 N.C. App. at 503, 751 S.E.2d at 239.

20. Upon information and belief, Defendant King Machine, under guidance or lack thereof from Defendant Kachur, instructed [Stephens] to detach bolts from below a two-piece tire mold weighing approximately two thousand (2,000) pounds elevated by a forklift.

21. Defendants knew [Stephens] was not trained, qualified or experienced to undertake such a dangerous activity.

22. Despite [Stephens'] training or lack thereof, the task that [Stephens] was instructed to perform was inherently dangerous for a skilled laborer, let alone a newly hired employee with no training.

23. Upon information and belief, [Stephens] was not supervised while undertaking the dangerous activity of disassembling tire molds.

24. Upon information and belief, [Stephens] was pulled from another part of the Plant in the moments leading up to the incident described herein due to staffing shortages.

25. Upon information and belief, [Stephens] was not provided with adequate personal protective/supportive equipment while undertaking the tasks assigned to him.

. . . .

45. At the time of the incident alleged in this Complaint, Defendant Kachur knew, or was substantially certain, that instructing [Stephens], who had no training or experience to work under an approximately 2,000 pound tire mold without any supports or safety measures posed a serious risk of injury or death.

46. Despite knowledge that instructing [Stephens] to perform this work posed a serious risk of injury or death to [Stephens], Defendant Kachur did, in fact, instruct [Stephens] to work below the approximately 2,000 pound tire mold by failing to provide the appropriate equipment that is standard in the industry.

47. In directing, instructing and requiring that [Stephens] work below heavy tire molds, a task that Defendant Kachur knew [Stephens] was not trained for or experienced in, the conduct of Defendant Kachur demonstrated willful negligence, wanton negligence, reckless negligence, a

> reckless disregard for the rights and safety of others, and a manifest indifference to others, including [Stephens].

Plaintiff's allegations are similar to the allegations in *Vaughn*. Here, like in *Vaughn*, Plaintiff alleged that Kachur knowingly directed Stephens—an untrained employee who had been working elsewhere in the plant—to detach bolts from beneath a 2,000-pound metal tire mold—which was suspended by a forklift that had been modified without manufacturer approval—without any training, supervision, or safety equipment. Like in *Vaughn*, this conduct is sufficient to create an inference that Kachur was manifestly indifferent to the consequences of his actions. *See Vaughn*, 230 N.C. App. at 503, 751 S.E.2d at 239. Thus, like the supervisor's conduct alleged in *Vaughn*, Kachur's conduct as Plaintiff alleged is sufficient to state a legally cognizable claim under *Pleasant*.

The dissent asserts without further support, "I do not believe that the factual allegations in the complaint are sufficient to establish a *Pleasant* claim against Mr. Stephens' supervisor." Again, focusing on a contrived theory that a bolt on the tire mold was defective,[4] the dissent claims Kachur's actions "fall short to show that he had actual or constructive intent to injure Mr. Stephens . . . ." However, Plaintiff expressly alleged that Kachur knew the danger of working beneath a 2,000-pound metal tire mold, knew that Stephens had no training or experience in working beneath a 2,000-pound metal tire mold, and directed Stephens to perform the work anyway, without protective equipment, instruction, or supervision. Such an action cannot be characterized as anything less than a manifest indifference to the consequences of his actions.

3. Ordinary Negligence of King Machine (Stranger to Employment Claim)

Plaintiff argues, in the alternative, that King Machine was not Stephens' employer when the incident occurred, and therefore Plaintiff's negligence action against King Machine does not fall within the Commission's jurisdiction. Specifically, Plaintiff argues that "[Stephens] was an employee of TotalSource at all times and never an employee of [King Machine]."

Our Supreme Court has interpreted the Act's exclusivity provision as "allowing an injured worker to bring a common law negligence action against a third party . . . when the third party is a 'stranger to the employment.' " *Wood v. Guilford Cnty.*, 355 N.C. 161, 164, 558 S.E.2d 490, 493-94

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4. Plaintiff made no allegation that any part of the mold was defective.

(2002) (citations omitted). However, Plaintiff's argument depends entirely on an alleged employment agreement that is not in the record on appeal. Furthermore, the record on appeal shows that Plaintiff alleged,[5] and Defendants admitted,[6] that King Machine was Stephens' employer at the time of the incident. Accordingly, we decline to address Plaintiff's argument that the Act does not apply.

IV. Conclusion

Because Plaintiff alleged facts sufficient to establish exceptions to the Commission's exclusive jurisdiction over this case under *Woodson* and *Pleasant*, the trial court did not err by denying Defendants' motions to dismiss pursuant to Rule 12(b)(6). Because Plaintiff sufficiently pled *Woodson* and *Pleasant* claims, the trial court did not err by denying Defendants' motions to dismiss pursuant to Rule 12(b)(1). The trial court's order denying Defendants' motions to dismiss is affirmed.

AFFIRMED.

Judge WOOD concurs.

Judge DILLON concurs in part and dissents in part by separate opinion.

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

Desmond Stephens was tragically crushed to death in a workplace accident by half of a heavy two-piece tire mold which fell on him when a bolt providing support for the mold failed. His estate filed this action against his employers and supervisor for his death. Because I conclude the complaint fails to allege a claim establishing any exception to the Industrial Commission's exclusive jurisdiction, my vote is to reverse the trial court's order denying Defendants' motion to dismiss. Therefore, I respectfully dissent.[1]

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5. Paragraph 13 of Plaintiff's complaint states, "At the time of the incident, [Stephens] was employed by King Machine as a general laborer and had been an employee for approximately three (3) weeks."

6. Paragraph 13 of Defendants' answer states, "The allegations of Paragraph 13 are admitted, upon information and belief."

1. I concur in Section III.A. of the majority opinion disposing of the parties' motions on appeal.

Woodson Claim Against Employers

Generally, our Workers' Compensation Act provides the sole remedies against an employer for a workplace accident. However, in its 1991 landmark *Woodson* decision, our Supreme Court carved out a narrow exception to the Act's exclusivity, that a tort action apart from the Act may be maintained where an employee's injury or death is caused by intentional conduct of the employer and the employer knew it was substantially certain that such conduct would cause the injury or death:

> We hold that when an employer *intentionally* engages in misconduct *knowing* it is *substantially certain* to cause serious injury or death to employees and an employee is injured or killed by the misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Woodson v. Rowland, 329 N.C. 330, 341-42, 407 S.E.2d 222, 228 (1991).

The majority relies primarily on our Court's 1995 *Arroyo* opinion handed down four years after *Woodson*, to conclude that Mr. Stephens' estate has properly alleged a *Woodson* claim. *Arroyo v. Scottie's*, 120 N.C. App. 154, 461 S.E.2d 13 (1995). I conclude that this reliance on *Arroyo* is misplaced and that our Supreme Court's more recent guidance in *Whitaker v. Scotland Neck*, 357 N.C. 552, 597 S.E.2d 665 (2003) compels reversal of the trial court's order, as explained below.

In *Arroyo*, our Court relied on several factors to conclude that an employee had proved a *Woodson* claim. In 1999, four years after *Arroyo*, our Court identified and weighed six factors to conclude that an employee had proved a *Woodson* claim. *Wiggins v. Pelikan*, 132 N.C. App. 752, 513 S.E.2d 829 (1999). In *Wiggins*, we expressly relied on *Arroyo* for two of the factors; namely, whether the employer knew of, but failed to take, additional safety precautions which would have reduced the risk *and* whether the employer's conduct which created the risk violated state or federal work safety regulations. *Id.* at 757, 513 S.E.2d at 833.

The majority in the present case relies, in part, on allegations supporting the existence of the two "*Arroyo*" factors restated in *Wiggins*: Mr. Stephens' employers failed to take additional safety precautions by failing to provide Mr. Stephens "adequate personal protective/supportive equipment," and Mr. Stephens' employers willfully violated government

safety regulations. The majority also cites allegations in the complaint supporting the existence of another *Wiggins* factor, namely that Mr. Stephens "was not trained, qualified or experienced" to perform the task assigned to him by his employers. *Id.* at 758, 513 S.E.2d at 833 (factor which considers "[w]hether the defendant-employer offered training").

However, in 2003, four years after *Wiggins* and eight years after *Arroyo*, our Supreme Court reversed a decision of our Court in which we allowed a plaintiff's *Woodson* claim to proceed, holding that "the six-factor test created by the Court of Appeals in *Wiggins* misapprehends the narrowness of the substantial certainty standard set forth in *Woodson*." *Whitaker*, 357 N.C. at 555-56, 597 S.E.2d at 667.

Our Supreme Court reiterated that *Woodson* provided a "*narrow* exception to the general exclusivity of the [Act]" by allowing an employee or his estate to sue the employer in tort "*only in the most egregious cases* of employer misconduct" where said conduct is intentional and "where such misconduct is *substantially certain* to lead to the employee's serious injury or death." *Id.* at 557, 597 S.E.2d at 668 (emphasis added). The Court reminded that a *Woodson* claim is not stated where the evidence shows a "mere possibility" or even a "substantial probability" that the employer's intentional misconduct would result in injury or death. *Id.*

In *Whitaker*, the evidence showed that a sanitation worker was crushed to death by a dumpster as the dumpster was suspended as its contents were being emptied into a garbage truck and the mechanism which latched the dumpster to the truck during the process failed, causing the dumpster to swing around and strike the employee. *Id.* at 558, 597 S.E.2d at 669. The Court in *Whitaker* distinguished these facts with those shown in *Woodson*. Specifically, the Court noted that a valid tort claim existed in *Woodson* because the evidence there showed the employer "disregarded all safety measures and intentionally placed his employee into a hazardous situation in which experts concluded *that only one outcome was substantially certain to follow*: an injurious, if not fatal, cave-in of the trench." *Id.* at 557-58, 597 S.E.2d at 668.

The evidence in *Whitaker* showed the latching mechanism holding the suspended dumpster in place was defective and the employer had committed five "serious" violations of state labor law, including among others a "failure to train employees" and a "failure to properly supervise employees[.]" *Id.* at 554, 597 S.E.2d at 666. The Court, though, concluded that no *Woodson* claim existed, in part, because "[t]here was no evidence that [the employer] knew that the latching mechanism on the truck was substantially certain to fail[.]" *Id.* at 668, 597 S.E.2d at 668.

The facts as alleged in the complaint in the case before us are much closer to those in *Whitaker* than those in *Woodson*. It is true that it was substantially certain Mr. Stephens would be seriously injured or die *if* a bolt keeping the tire mold suspended failed. But there is no allegation that it was substantially certain that the bolt would fail as Mr. Stephens was working under the mold, much less that Mr. Stephens' employers knew that the bolt was going to fail. There is no allegation that Mr. Stephens' inexperience contributed to the bolt failing. This is not to say that there was not a strong possibility or probability that the bolt would fail; however, there is no allegations to suggest that it was *substantially certain* that the bolt would fail. The allegations only show willful negligence by the employers and a tragic accident.

Pleasant Claim Against Supervisor

I do not believe that the factual allegations in the complaint are sufficient to establish a *Pleasant* claim against Mr. Stephens' supervisor. While the factual allegations show that Mr. Stephens' supervisor willfully breached duties he may have owed to Mr. Stephens, they fall short to show that he had actual or constructive intent to injure Mr. Stephens much less that he knew or had reason to know that the bolt which failed causing Mr. Stephens' death was defective. *See Pleasant v. Johnson*, 312 N.C. 710, 714-15, 325 S.E.2d 244, 248 (1985) (noting the "distinction between the willfulness which refers to the breach of duty and the willfulness which refers to the injury" stating that "[i]n the former only the negligence is willful, while in the latter the injury is intentional").

ALVIN MITCHELL, Petitioner
v.
THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS, Respondent

No. COA21-639

Filed 4 April 2023

1. Public Officers and Employees—termination—tenured university professor—neglect of duty and misconduct—due process

The termination of a tenured university professor (petitioner) for neglect of duty (for failing both to resolve a student grading issue and to timely open an online class that had been assigned to him) and misconduct (for sending a written letter to his direct supervisor with racially inflammatory language) did not violate petitioner's right to due process and was in accordance with the procedures set forth in the Code of the Board of Governors of the University of North Carolina. The Chancellor, as final decision-maker, was not required to adopt the recommendation of the Faculty Hearing Committee (FHC) to reverse sanctions upon its determination that the university failed to make out a prima facie case; petitioner was given the opportunity to present further evidence after the Chancellor sent the matter back to the FHC but chose not to; and petitioner did not present any evidence to overcome the presumption that the Chancellor acted in good faith and in compliance with governing law when the Chancellor reached a different conclusion than the FHC.

2. Public Officers and Employees—termination—tenured university professor—use of racially inflammatory language—freedom of speech—matter of public concern

The termination of a tenured university professor for misconduct—based on his use of racially inflammatory language in a letter he wrote to his direct supervisor—did not violate the professor's constitutional right to free speech because the letter did not involve a matter of public concern but, rather, consisted of the professor's personal criticisms of his supervisor's work and disagreement with some of her decisions.

Judge MURPHY concurring in part and dissenting in part.

Appeal by Petitioner from Order entered 26 July 2021 by Judge Martin B. McGee in Forsyth County Superior Court. Heard in the Court of Appeals 11 May 2022.

Allison Tomberlin for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Zach Padget, for respondent-appellee.

HAMPSON, Judge.[1]

Factual and Procedural Background

Alvin Mitchell (Petitioner) appeals from the trial court's Order affirming a decision of The University of North Carolina Board of Governors (BOG) which, in turn, upheld Petitioner's discharge from employment as a tenured professor at Winston-Salem State University (WSSU). The Record before us tends to reflect the following:

Petitioner was hired by WSSU in July 2006 as an Associate Professor of Justice Studies in the Department of Social Sciences and was granted tenure in December 2008. In July 2015, Dr. Cynthia Villagomez and Dr. Denise Nation became co-chairs of the Department of Social Sciences and, thus, Petitioner's direct supervisors. This appeal arises out of Petitioner's discharge from employment based on three alleged acts of misconduct by Petitioner taking place between the Fall of 2015 and the Fall of 2017 while he was under the supervision of Dr. Villagomez and Dr. Nation.

First, during Petitioner's Introduction to Corrections course in the Fall 2015 semester, a student submitted a paper that Petitioner did not feel met the necessary requirements. Petitioner provided the student an opportunity to resubmit the paper, which led to the student receiving a grade of "incomplete" in the class. Throughout 2016, the student and his academic success counselor attempted to reach out to Petitioner without success. Pursuant to WSSU policy, in December 2016, the student's grade of "incomplete" converted to an F. Dr. Nation and Petitioner's supervising Dean, Dr. Doria K. Stitts, both attempted to resolve the grade issue with him over email, but he did not respond. Dr. Nation and Dr.

1. Judge Murphy contributed substantial authorship of those portions of the Opinion of the Court on which we are unanimous. This specifically includes the Factual and Procedural Background and our discussion of the alleged procedural errors asserted by Petitioner.

Villagomez approached Petitioner to discuss the issue as Petitioner was teaching a class, leading to a verbal altercation in which Dr. Villagomez called the police.

Second, sometime during the 2016-2017 academic year, two students in Petitioner's Research Methods class conducted research to draft a paper. The students learned about a conference in New Orleans—the Race, Gender & Class Conference—where they could present their findings. They approached Dr. Nation to obtain funding to attend the conference, but she did not approve the funding, instead recommending a different conference by the American Society of Criminology (ASC). One of the students believed that Dr. Nation may have encouraged the students to look into the ASC conference because it was primarily Caucasian. When Petitioner learned of the conversation, he wrote a letter to Dr. Nation in response:

> Hi Denise, it was brought to my attention that you told a student that the conference I and two of my students are presenting at has no substance or standards, meaning that it is useless and unaccredited, and anyone can present. In addition, you told the student she should try to present at the ASC held in November because it is a better conference and has a lot of substance. You are entitled to your opinion. However, you should not be telling the student things like that, especially with no proof. The Race, Gender & Class conference is locally, regionally, and internationally known and ha[s] scholars from around the world presenting. In addition, the conference has been in existence for over 20 years. Thirdly, this conference does not take anyone. You have to be accepted through their process. It is amazing how you always try to debunk what I do. Yet you complain that I tell students negative things about you. It would have been better to tell the student that you did not want to help fund her instead of telling her falsehoods about the RGC conference and asking her to present on scholarship day. That is not appropriate behavior as a chair.
>
> After all these years, it is amazing that you still think that anything white is better. I looked up the ASC and nothing but a bunch of white men (some white women) are running it. Keep promoting and praising those white folks who are associated with the ASC. As I told you before, you can graduate from and praise their schools, come up with a

> great theory, hangout with them, praise Latessa and other European professors (you need to ask them about their civil rights record), wear their European style weaves, walk with their bounce, hire them, present at their conferences, and even publish in their journals. In their eyes you will never be equal to them. They still look at you as a wanna be white, an international nigger, an international coon, and an international sambo (lol) because you display that kind of behavior. You will never get it. Wake up.

Dr. Nation believed the letter created a hostile workplace, and, while she ultimately decided to not file a formal complaint with the Equal Employment Opportunity Commission, she did report the incident to the Dean and Provost and sent them a copy of the letter.

Third, Petitioner's Summer 2017 semester Constitutional Law class was involuntarily reassigned by Dr. Nation to another professor because of concerns regarding the rigor of the course and his failure to provide a syllabus in a previous semester. Less than one week before the Fall 2017 semester, Petitioner informed Dr. Nation and Dr. Villagomez via email that he did not feel comfortable teaching Research Methods II—a course given to him in lieu of Constitutional Law—despite having already approved the course on his schedule and having taught it for at least six years. Dr. Nation did not allow him to change courses. On 22 August 2017, one day after the semester began, Dr. Nation informed Petitioner that he had failed to open an online course he was teaching. Petitioner responded by stating "I do not know my schedule anymore . . . ." However, Dr. Villagomez reiterated that his schedule had not changed.

On 31 August 2017, WSSU Interim Provost Carolynn Berry provided Petitioner with notice of WSSU's intent to discharge him pursuant to Section 603 of *The Code of the Board of Governors of the University of North Carolina* (UNC Code) for neglect of duty and misconduct. According to the UNC Code, "neglect of duty[] includ[es] sustained failure to meet assigned classes or to perform other significant faculty professional obligations[,]" and "misconduct . . . includ[es] violations of professional ethics, mistreatment of students or other employees, research misconduct, financial fraud, criminal, or other illegal, inappropriate or unethical conduct." However, "[t]o justify serious disciplinary action, such misconduct should be either (i) sufficiently related to a faculty member's academic responsibilities as to disqualify the individual from effective performance of university duties, or (ii) sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member."

On 10 January 2018, a hearing was held before the Faculty Hearing Committee (FHC). Following the presentation of WSSU's case, the FHC determined that WSSU had not made a prima facie case and recommended the Chancellor overturn the sanctions. Despite this recommendation, in accordance with the UNC Code's procedure, the Chancellor issued a letter on 30 January 2018 disagreeing with the FHC's determination and sent the matter back to the FHC to conclude the hearing. After the Chancellor's determination, Petitioner informed the FHC he did not wish to present any further evidence. The FHC once again found WSSU had not proven its case. However, after reviewing the transcript, the FHC's recommendation, and all of the evidence received by the FHC, the Chancellor issued his decision on 7 March 2018 and upheld the Provost's decision to discharge Petitioner. The Chancellor determined Petitioner violated the UNC Code via neglect of duty because he failed to provide his student with a final grade and failed to open the online course. The Chancellor also further determined Petitioner violated the UNC Code via misconduct when he sent the letter to Dr. Nation.

Following the Chancellor's determination, Petitioner appealed to the WSSU Board of Trustees (BOT). The Appeals Committee of the BOT concluded WSSU had produced sufficient evidence to uphold Petitioner's dismissal for neglect of duty and misconduct. Petitioner then sought review of the BOT's decision to the BOG, which upheld the BOT's decision on 23 May 2019. The BOG concluded as follows:

> Substantively, based upon a careful consideration of the record as a whole, statements submitted by the parties, and consideration of all controlling laws and policies, there is sufficient evidence in the record to support a determination that [Petitioner] failed to adequately resolve a grading issue, resulting in the student receiving a failing grade for the class and endangering the student's eligibility to receive financial aid, which failure constitutes neglect of duty under Section 603(1) of [the UNC Code]. In addition, there is sufficient evidence in the record to support the determination that [Petitioner] failed to timely open [a]n online class that he knew he was scheduled to teach, and that he continued to fail to open the class at least six days after being directed to do so by his department chairs and his [D]ean, which failure constitutes neglect of duty under Section 603(1) of [the UNC Code]. Finally, there is sufficient evidence in the record to support the determination that [Petitioner] wrote and delivered to his direct supervisor [a] personally and professionally insulting,

> racially inflammatory note in which he referred to her as a "nigger," a "coon," and a "sambo," which constitutes misconduct under Section 603(1) of [the UNC Code].

The BOG also found that "[Petitioner] erroneously characterize[d] his letter to Dr. Nation as [a] letter written by him in his capacity as a private citizen, on a matter of public concern."

Petitioner sought judicial review in Superior Court. After a whole record review, the trial court affirmed the decision of the BOG. The trial court concluded:

> the decision to terminate the Petitioner for (1) his neglect of duty for failing to open the online course, (2) his neglect of duty for failing to issue a final grade, and (3) misconduct for the derogatory and racially charged letter to [Dr. Nation] . . . is supported by substantial evidence in the record and is not arbitrary, capricious, or an abuse of discretion[.]
>
> . . . .
>
> the decision to discharge the Petitioner . . . was not in violation of any constitutional provisions, in excess of statutory authority or jurisdiction of the agency, made upon unlawful procedure or affected by other error of law. The Petitioner's discharge related to his letter of March 2017 was not in violation of his First Amendment rights and proper procedures were followed.

The trial court also ruled the process afforded Petitioner at the agency level was adequate. Petitioner timely appealed to this Court.

Issues

On appeal to this Court, Petitioner raises two primary issues: (I) whether the BOG's decision upholding Petitioner's discharge from employment was affected by unlawful procedures during the proceedings before WSSU's FHR and Chancellor; and (II) whether Petitioner's discharge from employment was in violation of his First Amendment right of free speech where the discharge was based, in part, on the letter he sent to Dr. Nation.

Analysis

"Appellate review of a superior court order concerning an agency decision requires an examination of the trial court's order for any errors

of law." *Emp. Sec. Comm'n of N.C. v. Peace*, 128 N.C. App. 1, 6, 493 S.E.2d 466, 470 (1997), *aff'd in part, rev. dismissed in part*, 349 N.C. 315, 507 S.E.2d 272 (1998). Our standard of review is defined by statute:

> A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence.

N.C. Gen. Stat. § 150B-52 (2021). Here, Petitioner "challenges the trial court's law-based inquiries, including whether the [BOT's] decision violated constitutional provisions, was made upon unlawful procedure, was in excess of statutory authority, or was affected by other error of law[.]" The trial court reviewed these asserted errors under N.C. Gen. Stat. § 150B-51(c) and "the [trial] court's findings of fact shall be upheld if supported by substantial evidence." *Id.*

When conducting our review, the agency is entitled to a presumption of good faith.

> The agency's decision is presumed to be made in good faith and in accordance with governing law. Therefore, the burden is on the party asserting otherwise to overcome such presumptions by competent evidence to the contrary when making a claim that the decision was affected by error of law or procedure.

Richardson v. N.C. Dep't of Pub. Instruction Licensure Section, 199 N.C. App. 219, 223-24, 681 S.E.2d 479, 483, *disc. rev. denied*, 363 N.C. 745, 688 S.E.2d 694 (2009) (citation omitted). "It is well established that an agency's construction of its own regulations is entitled to substantial deference." *Morrell v. Flaherty*, 338 N.C. 230, 237, 449 S.E.2d 175, 179-80 (1994) (citation and quotation marks omitted). We must also generally defer to the agency's interpretation of its regulations "unless it is plainly erroneous." *Id.* at 238, 449 S.E.2d at 180.

I. WSSU Hearing Procedures

[1] "To assert a due process claim, [Petitioner] must show that [he was] deprived of a protected property interest in employment. If tenured, an employee has a protected property right because tenure constitutes a promise of continued employment." *Pressman v. Univ. of N.C. at Charlotte*, 78 N.C. App. 296, 302, 337 S.E.2d 644, 648 (1985) (citations

omitted). Here, Petitioner was a tenured professor who held a protected property interest in his employment. "Section 603 specifies the due process protections to which a tenured faculty member is entitled and contains a detailed schedule of steps involving notice and hearings which the university must take prior to discharging a tenured faculty member." *Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 299, 683 S.E.2d 428, 431 (2009). Even if the UNC Code satisfies the requirements of due process, WSSU must then comply with its own procedures. *McAdoo v. Univ. of N.C. at Chapel Hill*, 225 N.C. App. 50, 68-69, 736 S.E.2d 811, 824 (2013) ("A state actor violates due process when it fails to follow its own rules and procedures." (citations omitted)). Petitioner puts forward three instances in which he believes his due process rights were violated by WSSU's failure to comply with its own procedures: the Chancellor ignoring the prima facie determinations made by the FHC; Petitioner's own waiver of a full hearing; and the trial court's reliance on what were purportedly the Chancellor's findings of fact instead of the FHC's.

A. *Chancellor Declining to Accept the FHC's Recommendation*

First, Petitioner asserts that the Chancellor could not move forward with his dismissal when the FHC determined twice that WSSU had failed to make out a prima facie case. We disagree. While the Chancellor is required to consider the recommendations of the FHC, the decision to discharge ultimately remains with the Chancellor under the UNC Code. The FHC's decision at the end of the hearing is transmitted to the Chancellor as a written recommendation. The Chancellor is expressly allowed to "decline[] to accept a [FHC] recommendation that is favorable to the faculty member[.]" According to Petitioner, this renders the due process protections outlined in the Faculty Handbook meaningless.[2] However, the Faculty Handbook contemplates that a record will be made at the FHC hearing which can be used on the multiple levels of appeal available to WSSU and faculty members: "[T]he purpose of the hearing is to create a record of testimony and documentary evidence for review by the parties, the [BOT] and/or [BOG], should the Faculty Member seek further review of the discharge or imposition of other serious sanctions." For a better record, "[i]f the Chancellor disagrees with the [FHC's] determination [of whether a prima facie case has been presented], he/she will send it back for a full hearing."

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2. Mitchell does not argue that the Chancellor did not provide a meaningful review of the FHC's recommendations.

Indeed, in this case, the Chancellor expressly sent the matter back to the FHC for the FHC to conclude the hearing and provide Petitioner an opportunity to present evidence. Petitioner declined. Furthermore, WSSU submits a different interpretation of the UNC Code. WSSU, as a government agency, interprets its procedure to mean that the Chancellor has the final say if the Chancellor and the FHC disagree. "It is well established that an agency's construction of its own regulations is entitled to substantial deference." *Morrell*, 338 N.C. at 237, 449 S.E.2d at 179-80 (citation and quotation marks omitted). We must also generally defer to the agency's interpretation of its regulations "unless it is plainly erroneous." *Id.* at 238, 449 S.E.2d at 180. The agency's interpretation of the ultimate decision maker is not plainly erroneous. The text of the UNC Code aligns with the interpretation followed by WSSU: "The [C]hancellor shall issue a *final* written opinion within 30 [d]ays after receiving the hearing documents including the transcript of the hearing. The [C]hancellor's decision shall be based on the recommendations and evidence received from the FHC including the Transcript of the hearing." (emphasis added.)

We find it analytically relevant that the FHC is tasked with providing "recommendations," while the Chancellor issues a "final written opinion" based on those recommendations. The Chancellor and the FHC clearly have separate roles to play in the discipline process; therefore, it was not plainly erroneous for WSSU to interpret the role of the Chancellor as the final decision maker in instances of disagreement with the FHC.

B. Petitioner's Decision Not to Present Further Evidence

Second, Petitioner argues that he could not have knowingly, intelligently, and voluntarily waived his right to a full hearing because he erroneously believed the Chancellor was bound by the FHC's recommendations. Petitioner was represented by counsel at the FHC's hearing and aware of the purposes of the hearing as described in the notice provided to him. Petitioner made his own decision not to present further evidence after the prima facie determination was rejected by the Chancellor. He was also aware of his ability to present evidence at that point in the hearing; the WSSU Faculty Handbook states that "[t]he Faculty Member shall have the right to counsel, to present the testimony of witnesses and other evidence, to confront and cross-examine adverse witnesses and to examine all documents and other adverse demonstrative evidence, and to make argument." Petitioner's decision not to present argument after the prima facie determination was rejected by the Chancellor does not make the procedure afforded to him defective or violate his due process rights.

C. Chancellor Acting as a Fact Finder

Third, Petitioner argues that only the FHC was authorized to function as a fact finder and not the Chancellor. Even presuming, without deciding, Petitioner's argument is correct, Petitioner has presented no evidence that the Chancellor ignored the findings of fact reached by the FHC.

> The agency's decision is presumed to be made in good faith and in accordance with governing law. Therefore, the burden is on the party asserting otherwise to overcome such presumptions by competent evidence to the contrary when making a claim that the decision was affected by error of law or procedure.

Richardson, 199 N.C. App. at 223-24, 681 S.E.2d at 483 (citation omitted). Without anything in the Record to support Petitioner's assertion, he has not overcome the presumption that the Chancellor acted in good faith and in accordance with governing law when reviewing the recommendations of the FHC, as the Chancellor could have reached a different conclusion than the FHC using the same set of facts. Thus, regardless of whether it would constitute a violation of due process for the Chancellor to have acted in a fact-finding capacity, Petitioner presented no evidence to support that the Chancellor so acted; accordingly, this argument fails.

For all the reasons stated above, Petitioner's due process rights were not violated when the Chancellor rejected the prima facie determination made by the FHC; when he chose not to present argument after the prima facie determination; or when the Chancellor reached a different conclusion than the FHC after reviewing the record and recommendation. Accordingly, the procedure used to terminate Petitioner's employment was not unlawful, defective, or in violation of his due process rights.

II. Discharge based on Petitioner's Letter to Dr. Nation

[2] Petitioner further argues the trial court's decision upholding the BOG's final decision upholding Petitioner's discharge—based in part on Petitioner's letter to Dr. Nation—was in error because, Petitioner contends, his letter "touched upon a matter of public concern." As such, he argues that, as a public employee, his discharge implicated his First Amendment right to free speech and violated his protected interest in freedom of expression. We disagree.

"Public employment may not be conditioned on criteria that infringes the employees' protected interest in freedom of expression."

Pressman, 78 N.C. App. at 300, 337 S.E.2d at 647 (citation omitted). "An employee may not be discharged for expression of ideas on a matter of public concern." *Id.* (citation omitted). "The expression need not be public but may be made in a private conversation." *Id.* (citation omitted).

"To make out a claim under the First Amendment, the [public] employee must show that his speech is concerning a matter of public concern." *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L .Ed. 2d 708 (1983)). "A matter is of public concern if when fairly considered it relates 'to any matter of political, social, or other concern to the community.' " *Id.* at 300-01, 337 S.E.2d at 647 (quoting *Connick*, 461 U.S. at 146, 103 S. Ct. at 1690, 75 L. Ed. 2d at 719). "The context, form, and content of the employee's speech as revealed by the whole record are used to determine the nature of the speech." *Id.* at 301, 337 S.E.2d at 647. "Whether speech is a matter of public concern is a question of law for the courts to decide." *Id.* at 301, 337 S.E.2d at 647-48.

"If the speech is upon a matter of public concern, there must be a 'balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.* (quoting *Connick*, 461 U.S. at 142, 103 S. Ct. at 1687, 75 L. Ed. 2d at 717 (citation and quotation marks omitted)). "The balancing of interests is a question of law for the courts." *Id.* (citation omitted).

Here, the BOG determined Petitioner failed to present any evidence that his letter to Dr. Nation addressed a matter of public concern. The BOG further noted Petitioner "erroneously characterized" his letter as addressing a matter of public concern. The trial court affirmed this ruling.

Indeed, on appeal, Petitioner again cites no record support for his contention. Instead, Petitioner contends, without citation, his letter was "an impassioned plea" and a "strongly worded condemnation of racism within academia and Nation's perceived participation in that racist culture." There is no evidence in this Record, however, that Dr. Nation's decision to deny funding to Petitioner's students for Petitioner's chosen conference was racially motivated or a product of racial bias in academia. There is, further, also no evidence that Petitioner intended his letter to be an effort to combat racism in academia or to advocate on the part of his students for funding to attend his preferred conference on that basis.

To the contrary, the context, form, and content of Petitioner's speech—as revealed by the whole Record—reflects Petitioner's speech

was nothing more than an expression of his personal grievance towards Dr. Nation and his displeasure with her administrative decision not to provide funding for Petitioner's preferred conference. That Petitioner did so by invoking his own racist epithets does not convert his letter into one addressing a matter of public concern. In fact, in *Pressman*, this Court addressed a professor's statements during a meeting concerning a Dean's lack of administrative competence, including a lack of opportunity for personal growth because of a heavy workload, lack of guidance for grading, and the failure to develop a master's program and a recruiting program. *Pressman*, 78 N.C. App. at 301, 337 S.E.2d at 648. This Court found the "criticism not based on public-spirited concern but more narrowly focused on [the professor's] own personal work and his personal displeasure with internal policies." *Id.* at 301-02, 337 S.E.2d at 648. Thus, the Court concluded the professor failed to show his speech was addressing a matter of public concern and, thus, did not implicate the professor's First Amendment protections as a public employee. Here, even ignoring Petitioner's racial invectives directed towards Dr. Nation, the letter, taken in context, is nothing more than criticism focused on Petitioner's own work, broader disagreements with Dr. Nation and her criticism of him, and his displeasure with her decision not to provide funding.

Thus, Petitioner's letter to Dr. Nation, in this case, did not implicate a matter of public concern. Therefore, the BOG did not commit any error of law by upholding Petitioner's discharge from employment based, in part, on his letter to Dr. Nation. Consequently, the trial court did not err in affirming the BOG.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's 26 July 2021 Order.

AFFIRMED.

Judge ZACHARY concurs.

Judge MURPHY concurs in part and dissents in part in separate opinion.

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

While I agree with the Majority's analysis as to whether Petitioner was afforded adequate process during termination proceedings, I dissent in part from the Majority on the basis that Petitioner's remarks

implicated a matter of public concern, therefore requiring the trial court to conduct a First Amendment balancing test.

"It is clearly established that a State may not discharge an employee on a basis that infringes the employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383 (1987). This is true "despite the fact that the statements are directed at their [] superiors." *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968). "The threshold question . . . is whether [Petitioner's] speech may be fairly characterized as constituting speech on a matter of public concern." *Id.* "The determination of whether speech is protected under the First Amendment is a question of law." *Holland v. Harrison*, 254 N.C. App. 636, 643 (2017).

Controversial speech by a public employee is not a novel issue. In *Pressman v. University of North Carolina at Charlotte*, a nontenured professor was denied reappointment after he "attended a faculty meeting where the faculty discussed [the university dean's] lack of administrative competence." *Pressman v. University of North Carolina at Charlotte*, 78 N.C. App. 296, 298 (1985). The professor expressed his concern over a variety of workplace topics at the meeting. *Id.* Establishing North Carolina's two-pronged test regarding free speech by government employees, we said the following:

> To make out a claim under the First Amendment, the employee must show that his speech is concerning a matter of public concern. A matter is of public concern if when fairly considered it relates "to any matter of political, social, or other concern to the community." The context, form, and content of the employee's speech as revealed by the whole record are used to determine the nature of the speech. Whether speech is a matter of public concern is a question of law for the courts. If the speech is upon a matter of public concern, there must be a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The balancing of interests is a question of law for the courts.

Id. at 300-01 (quoting *Connick v. Myers*, 461 U.S. 138 (1983)). We held that the professor's "speech was not upon a matter of public concern." *Id.* at 301. Instead, "[h]is speech can be more accurately described as an employee grievance concerning internal policy." *Id.* His "criticism [was] not based on public-spirited concern but more narrowly focused on his

own personal work and his personal displeasure with internal policies." *Id.* at 301-02.

Here, Petitioner's letter to Dr. Nation reads, in whole, as follows:

> Hi Denise, it was brought to my attention that you told a student that the conference I and two of my students are presenting at has no substance or standards, meaning that it is useless and unaccredited, and anyone can present. In addition, you told the student she should try to present at the ASC held in November because it is a better conference and has a lot of substance. You are entitled to your opinion. However, you should not be telling the student things like that, especially with no proof. The Race, Gender & Class conference is locally, regionally, and internationally known and ha[s] scholars from around the world presenting. In addition, the conference has been in existence for over 20 years. Thirdly, this conference does not take anyone. You have to be accepted through their process. It is amazing how you always try to debunk what I do. Yet you complain that I tell students negative things about you. It would have been better to tell the student that you did not want to help fund her instead of telling her falsehoods about the RGC conference and asking her to present on scholarship day. That is not appropriate behavior as a chair.
>
> After all these years, it is amazing that you still think that anything white is better. I looked up the ASC and nothing but a bunch of white men (some white women) are running it. Keep promoting and praising these white folks who are associated with the ASC. As I told you before, you can graduate from and praise their schools, come up with a great theory, hangout with them, praise Latessa and other European professors (you need to ask them about their civil rights record), wear their European style weaves, walk with their bounce, hire them, present at their conferences, and even publish in their journals. In their eyes you will never be equal to them. They still look at you as a wanna be white, an international nigger, an international coon, and an [i]nternational sambo (lol) because you display that kind of behavior. You will never get it. Wake up.

Under *Pressman*, the question this letter raises is twofold and subject to resolution as a matter of law: (1) whether the speech at issue,

holistically and in context, addresses a matter of public concern and (2) whether the interests of the employee in expressing the concern outweigh the employer's interest in the efficient administration of its services. As the extent of the discussion of this constitutional issue at trial was a singular statement that Petitioner's termination "was not in violation of any constitutional provisions," I understand the trial court to have ruled, without discussion, that the letter did not address a matter of public concern.

At the threshold, I make two notes. First, the broader subject of academia's relationship with race has long been acknowledged as a subject of public concern and remains so, now more than ever. Universities in this state and across the country market themselves to, and communicate with, the public based on demographic diversity with respect to—among other things—race. *See*, *e.g.*, Duke University Office of the Provost, *Duke's Commitment to Diversity and Inclusion*, https://provost.duke.edu/initiatives/commitment-to-diversity-and-inclusion (last accessed 5 January 2023); Wake Forest University, *Diversity & Inclusion*, https://admissions.wfu.edu/experience-wake-forest/diversity/ (last accessed 5 January 2023); Harvard University, *Diversity and Inclusion*, https://www.harvard.edu/about/diversity-and-inclusion/ (last accessed 5 January 2023); Stanford Graduate School of Business, *Diversity*, *Equity & Inclusion*, https://www.gsb.stanford.edu/experience/diversity-equity-inclusion (last accessed 5 January 2023); *see also Campus Ethnic Diversity: National Universities*, U.S. News & World Report, https://www.usnews.com/best-colleges/rankings/national-universities/campus-ethnic-diversity (last accessed 5 January 2023). Copious amounts of ink have been spilled over what the significance of race in academia should be, what constitutes racism, and how to solve the myriad of problems it poses. *See*, *e.g.*, Kevin Laland, *Racism in academia*, *and why the 'little things' matter*, Nature (Aug. 25, 2020), https://www.nature.com/articles/d41586-020-02471-6; John McWhorter, *Words Have Lost Their Common Meaning*, The Atlantic (Mar. 31, 2021), https://www.theatlantic.com/ideas/archive/2021/03/nation-divided-language/618461/; Yuvraj Joshi, *Racial Transition*, 98 Wash. U. L. Rev. 1181, 1203-1208 (2021). The U.S. Department of Education has reported on racial diversity in higher education. United States Department of Education, *Advancing Diversity and Inclusion in Higher Education: Key Data Highlights Focusing on Race and Ethnicity and Promising Practices* (Nov. 2016), https://www2.ed.gov/rschstat/research/pubs/advancing-diversity-inclusion.pdf (last accessed 5 January 2023). The way race is taught in schools has become one of the defining political issues of this decade. *See* Lauren Camera, *Congressional Democrats*

Target Bans on Teaching About Racism in Schools, U.S. News & World Report (Feb. 2, 2022, 3:06 p.m.), https://www.usnews.com/news/education-news/articles/2022-02-02/congressional-democrats-take-aim-at-efforts-to-ban-critical-race-theory (last accessed 5 January 2023); Stephen Kearse, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, Pew (June 14, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools. Few topics could be more legitimately said to constitute issues of public concern.

Second, the bulk of authoritative caselaw addressing adverse employment action in response to employee speech has attempted to cleanly differentiate speech concerning sociopolitical issues from speech concerning strictly personal or administrative issues. In *Connick v. Myers*, the U.S. Supreme Court laid out the then-recent history of developments in First Amendment jurisprudence concerning adverse employment action:

> For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights. The classic formulation of this position was Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: "A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." For many years, Holmes' epigram expressed this Court's law.
>
> The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950s and early 1960s to require public employees, particularly teachers, to swear oaths of loyalty to the state and reveal the groups with which they associated. In *Wieman v. Updegraff*, 344 U.S. 183[] . . . (1952), the Court held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. In *Cafeteria Workers v. McElroy*, 367 U.S. 886[] . . . (1961), the Court recognized that the government could not deny employment because of previous membership in a particular party. By the time *Sherbert v. Verner*, 374 U.S. 398[] . . . (1963), was decided, it was already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon

a benefit or privilege." It was therefore no surprise when in *Keyishian v. Board of Regents*, 385 U.S. 589[] . . . (1967), the Court invalidated New York statutes barring employment on the basis of membership in "subversive" organizations, observing that the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected.

In all of these cases, the precedents in which *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968),] is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive." The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Pickering . . . followed from this understanding of the First Amendment. In *Pickering*, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was a matter of legitimate public concern upon which free and open debate is vital to informed decision-making by the electorate.

Our cases following *Pickering* also involved safeguarding speech on matters of public concern. The controversy in *Perry v. Sindermann*, 408 U.S. 593[] . . . (1972), arose from the failure to rehire a teacher in the state college system who had testified before committees of the Texas

> legislature and had become involved in public disagreement over whether the college should be elevated to four-year status—a change opposed by the Regents. In *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274[] . . . (1977), a public school teacher was not rehired because, allegedly, he had relayed to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The memorandum was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues, and indeed, the radio station promptly announced the adoption of the dress code as a news item. Most recently, in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410[] . . . (1979), we held that First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly. Although the subject-matter of Mrs. Givhan's statements were not the issue before the Court, it is clear that her statements concerning the school district's allegedly racially discriminatory policies involved a matter of public concern.

Connick, 461 U.S. at 143-46 (marks and extratextual citations omitted). *Pressman*, which cited *Connick* in its articulation of the two-pronged test cited above, reached a different result than the most recent cases *Connick* cited, holding that a state employee's speech was simply "an employee grievance concerning internal policy" rather than one "based on public-spirited concern" when it concerned a college administration's "lack of opportunity for personal development . . . , lack of guidance for grading, failure to develop a masters program, failure to recruit quality students and faculty, and inadequate or inappropriate educational direction . . . ." *Pressman*, 78 N.C. App. at 298, 301-302.

While the Majority treats the fact pattern in *Pressman* and the ensuing holding as directly controlling in this case, Petitioner's letter fits only with great difficulty into the framework set out in *Connick* and *Pressman*; it reads, simultaneously and inseparably, as a defense of the academic legitimacy of a conference, an expression of dissatisfaction on the state of racial diversity in academia, and a statement of frustration with Dr. Nation, both personally and with any potential unconscious biases. Admittedly, examining the speech at issue holistically and in context—as we must, *see Pressman*, 78 N.C. App. at 300-01—the letter's status is not immediately clear on its face. Its first paragraph, while

critical of Dr. Nation's conduct toward a student, reads not simply as a rebuke, but an attempt to defend the broader academic legitimacy of the RGC conference by appealing to its level of recognition, longevity, and internal vetting process. And the second paragraph—the only part of the letter discussed by the trial court—was not an isolated set of remarks; rather, it was an elaboration on the first paragraph and an expression of Petitioner's belief that racial bias informed the perception that the RGC was less academically legitimate than other conferences. Petitioner's personal criticisms of Dr. Nation, while undeniably present, were predicated on concern for her impact on the perceived social and academic value of the conference and informed by the social and academic influence she exerted by virtue of her position.

Given the blended nature of the letter, we have been tasked with answering whether the personally offensive character of the letter precludes our holding that it addresses a matter of public concern under *Pressman* and *Connick*. And the answer, as informed by the analysis of the U.S. Supreme Court in *Givhan v. W. Consol. Sch. Dist.*, 439 U.S. at 411-413, is no. There, as discussed in the above-quoted portion of *Connick*, the Court held that an employee's views on a matter of public concern are protected even when expressed privately. *Givhan*, 439 U.S. at 414 ("This Court's decisions . . . do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly."). The remarks by the plaintiff in that case were more than just private; they were, according to the defendant school district, " 'insulting,' 'hostile,' 'loud,' and 'arrogant[,]' " yet they were held to address a matter of public concern nonetheless. *Id.* at 412. So too here.[1]

To be clear, in concluding that Petitioner's letter—especially its second paragraph—addressed a matter of public concern rather than merely being a statement of racial abuse, I am cognizant of its *precise* framing and context. Petitioner's use of racially-charged rhetoric in the letter was not a statement that Mitchell regarded Dr. Nation as lesser because of her race; rather, it was a statement of Petitioner's perception that *other* academics saw Dr. Nation as lesser because of her race—a perception presumably informed by his own experience as a Black academic and scholar. Indeed, the Record indicates that the letter may

1. I further note that the remarks at issue in *Givhan*, much like the remarks here, were most immediately trained on the policies of the school at which the petitioner in that case was employed while also implicating broader social issues. *Id.* at 412-13 (marks omitted) (noting that the "petitioner had made demands on [] two occasions" but that "all the complaints in question involved employment policies and practices at the school which petitioner conceived to be racially discriminatory in purpose or effect").

have been prompted in the first instance by a *student's* concerns that Dr. Nation had recommended the ASC over the RGC on a racially preferential basis. Our courts are duly attuned to the fact that, in the ordinary case, use of racial slurs and epithets, especially when employed to insult a member of a different racial group, are inflammatory, deeply wounding, and sufficient to constitute constitutionally unprotected "fighting words." *See In re Spivey*, 345 N.C. 404, 414-15 (1997).[2] However, this is not the ordinary case; and, while I express no opinion on the

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2. Our Supreme Court's full reasoning in *Spivey* was as follows:

> By another assignment of error, [the] respondent Spivey contends that his removal from office for his behavior, including the use of the word "nigger" and other tasteless language, violates the First Amendment to the Constitution of the United States and Article I, Section 14 of the Constitution of North Carolina. Spivey argues that he has been wrongly removed from office because of the content of his speech. He claims that this violated his constitutionally protected right to express his viewpoint. We disagree.
>
> Taken in context, the use of the word "nigger" by Spivey squarely falls within the category of unprotected speech defined by the Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568[] . . . (1942). In *Chaplinsky*, the United States Supreme Court wrote
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>> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.
>
> *Id.* at 571-72[] . . . . At the hearing on this matter, there was testimony concerning the hurt and anger caused African-Americans when they are subjected to racial slurs by white people. We question, however, whether such testimony was necessary to the findings of the superior court in this case. Rule 201(b) of the North Carolina Rules of Evidence provides that a trial court may take judicial notice of a fact if it is not subject to reasonable dispute in that it is generally known within the territorial jurisdiction of the trial court. N.C.G.S. § 8C-1, Rule 201(b) (1992). No fact is more generally known than that a white man who calls a black man a "nigger" within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate. The trial court was free to judicially note this fact. Additionally, evidence concerning the circumstances surrounding Spivey's verbal outbursts in the bar tends to show that his use of this racial epithet in the present case was intended by him to hurt and anger Mr. Jacobs and to provoke a confrontation with him. " 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.' " *Chaplinsky*, 315 U.S. at 572[] . . . (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10[] . . . (1940)).

underlying veracity of Petitioner's remarks, their *function* was more than simple derogation.

I would reverse the trial court's determination that Petitioner's speech did not address a matter of public concern. However, as the trial court's tacit determination that Petitioner's speech did not implicate the First Amendment discontinued its analysis before it conducted a balancing test under the second prong of *Pressman*, I would also remand the case for further proceedings, as that issue has not yet been "raised and passed upon in the trial court." *State v. Morrow*, 200 N.C. App. 123, 127 (2009) (emphasis added) ("Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised *and passed upon* in the trial court."); *see also Pressman*, 78 N.C. App. at 300-01 (marks and citations omitted) (emphasis added) ("If the speech is upon a matter of public concern, there must be a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. The balancing of interests is a question of law *for the courts*."). Should the trial court have then determined that Petitioner's interests in making the statements in the letter outweighed any countervailing interests of WSSU in terminating him, the trial court may have further determined whether any of the remaining bases offered by WSSU, independently or in combination, supported Petitioner's termination.

I respectfully dissent in part.

> [The] [r]espondent Spivey cites *Bond v. Floyd*, 385 U.S. 116[] . . . (1996), for the proposition that governmental restriction on the ability of elected officials to express their views, however objectionable, stifles public debate and violates the First Amendment. We conclude that nothing in that opinion protects the use of racial invective by a public official against a member of the public in a bar. Spivey's use of the word "nigger" and his abusive conduct on the night in question did not in any way involve an expression of his viewpoint on any local or national policy. In fact, Spivey himself has repeatedly asserted since the incident in question that the use of the racial epithet "nigger" does not in any way reflect his views about race.
>
> Mr. Spivey's abusive verbal attack on Mr. Jacobs which gave rise to the inquiry removing him from office is not protected speech under the First Amendment. Instead, when taken in context, his repeated references to Mr. Jacobs as a "nigger" presents a classic case of the use of "fighting words" tending to incite an immediate breach of the peace which are not protected by either the Constitution of the United States or the Constitution of North Carolina. We overrule this assignment of error.

In re Spivey, 345 N.C. 404, 414-15 (1997).

STATE OF NORTH CAROLINA
v.
RICHARD FRANKLIN COLLINS, Defendant

No. COA22-488

Filed 4 April 2023

1. Evidence—expert testimony—child sexual abuse case—statement that the child was "not coached"

The trial court in a child sexual abuse case properly admitted expert testimony by a forensic interviewer indicating that the victim had not been "coached." Although an expert may not testify that a prosecuting child-witness in a sexual abuse trial is credible or is not lying about the alleged abuse, a statement that the child was "not coached" is not a statement on the child's truthfulness.

2. Evidence—cross-examination—child sexual abuse case—child's school records—Rule 403 analysis—remoteness

In a child sexual abuse case, where defendant was charged with statutory rape and other crimes against his eleven-year-old step-granddaughter, the trial court did not abuse its discretion under Evidence Rule 403 by preventing defendant from cross-examining the child about conduct referenced in her elementary school records, including instances where she cheated on a test and stole a pen. The conduct described in those records—having occurred between four and six years before the alleged abuse—was too temporally remote from the charged crimes and was only marginally probative of the child's propensity for truthfulness at the time of defendant's trial.

3. Evidence—interrogation video—child sexual abuse case—footage showing polygraph testing equipment—Rule 403 analysis

In a child sexual abuse case, where defendant was charged with statutory rape and other crimes against his eleven-year-old step-granddaughter, the trial court did not abuse its discretion under Evidence Rule 403 by admitting into evidence a video of defendant's interrogation where, even though defendant contended that the footage showed equipment relating to a polygraph test that he took, and polygraph evidence is inadmissible under North Carolina law, the court thoroughly reviewed the video and concluded that it only depicted miscellaneous items on the interrogation table and not the actual polygraph evidence.

Appeal by defendant from judgment entered 9 December 2021 by Judge Edwin G. Wilson, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 11 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamika L. Henderson for the State.

Mark Montgomery for the Defendant.

DILLON, Judge.

Defendant was convicted by a jury of statutory rape of a child by an adult, taking indecent liberties with a child, and a sex act by a substitute parent or guardian after having sexual intercourse with his eleven-year-old step-granddaughter, Carol.[1] Our review shows Defendant received a fair trial, free from reversible error.

I. Background

Carol and her sister were placed in the custody and care of their grandmother, Marie Collins. In 2017, Ms. Collins married Defendant Richard Frank Collins, at which time Defendant moved into Ms. Collin's home where both granddaughters resided.

Evidence offered at trial tended to show that when Carol was eleven years old in May 2017, Defendant forcibly raped Carol while they were home alone. Defendant was found guilty by a jury of statutory rape of a child by an adult, taking indecent liberties with a child, and a sex act by a substitute parent or guardian. The trial court entered a consolidated judgment and imposed an active sentence of 300 to 420 months. Additionally, the trial court ordered Defendant to register as a sex offender for life and to have no contact with Carol. Defendant timely appeals.

II. Analysis

Defendant makes three arguments on appeal, which we address in turn.

A. Admissibility of Expert Testimony

[1] Defendant first contends that the trial court erred when it allowed expert testimony, over objection, by a forensic interviewer. The

1. Pseudonym used for the protection of the juvenile and for the ease of reading.

forensic interviewer testified that she saw no indication Carol had been "coached." Our Supreme Court has held that "an expert may not testify that a prosecuting child-witness in a sexual abuse trial is believable [or] is not lying about the alleged sexual assault." *State v. Baymon*, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994). However, in *Baymon*, the Court appears to agree with the State's argument in that case that "a statement that a child was not coached is not a statement on the child's truthfulness." *Id.* And our Court has interpreted *Bayman* as an endorsement of that argument. *State v. Ryan*, 223 N.C. App. 325, 333-34, 734 S.E.2d 598, 604 (2012) (stating that "our Supreme Court has agreed that 'a statement that a child was not coached is not a statement on the child's truthfulness' "). Our Supreme Court, though, ultimately based its decision in *Bayman* on a different issue. *Id.* at 760, 446 S.E.2d at 7.

Neither party cites a published opinion which *holds*, one way or another, whether an opinion regarding coaching is admissible. We note a recent unpublished opinion wherein our court held it was *not* error for the trial court to allow an opinion that a child victim was not coached. *State v. Clark*, 270 N.C. App. 639, 838 S.E.2d 694 (2020) (unpublished), *aff'd in part*, *rev'd in part on other grounds*, 380 N.C. 204, 858 S.E.2d 56 (2022) (not resolving whether expert opinion about coaching was erroneous, but simply holding it was not plain error to allow the "allegedly erroneous testimony").

Where there is no controlling precedent, it would not seem improper for us to predict how our Supreme Court would rule based on their precedent as federal courts do. *See*, *e.g.*, *Moore v. Circosta*, 494 F.Supp.3d 289, 330 (M.D.N.C. 2020) ("[T]his court's job is to predict how the Supreme Court of North Carolina would rule on the disputed state law question."). Based upon our Supreme Court's statement in *Baymon* and our Court's interpretation of that statement, we conclude it was not error for the trial court to allow expert testimony that Carol was not coached.

B. Motion for a New Trial

[2] Defendant next contends that he is entitled to a new trial because the trial court granted the State's *motion in limine* which prevented his cross-examination of Carol about conduct referenced in her elementary school records. He contends that these school records reflect Carol's propensity for untruthfulness.

Rule 608(b) permits questioning of a witness with respect to specific instances of conduct in the narrow situation where: (1) the purpose of the evidence is to impeach or enhance credibility by proving the conduct indicates his/her character for truthfulness or untruthfulness and is

not too remote in time; (2) the conduct in question is, in fact, probative of truthfulness or untruthfulness and is not too remote in time; (3) the conduct did not result in conviction; and (4) the inquiry into the conduct is not during cross-examination. *State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986).

However, the trial court has discretion to apply the safeguards of Rule 403 and may exclude the proffered evidence if it determines that the risk of unfair prejudice substantially outweighs the probative value of the evidence. *Id.* at 634. The trial court may only be reversed when there is an abuse of discretion or when the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986).

In this case, the State filed its *motion in limine* to prevent Defendant from cross-examining Carol about her confidential school records. The behavior in the records occurred between 2011 and 2013 when Carol would have been in kindergarten, first grade, and second grade. It was not an abuse for the trial court to consider Carol's behavior during that time as too remote in time from Defendant's alleged sexual assault of Carol. Further, the conduct contained in the records, which includes childhood conduct, such as cheating on a test and stealing a pen, was marginally probative regarding Carol's truthfulness years later. Therefore, we conclude that the trial court did not abuse its discretion by not allowing Defendant to cross-examine Carol concerning these records.

III. Admissibility of Video Evidence

[3] Lastly, Defendant argues that the trial court committed reversible error by admitting, over his objection, the video tape of his interrogation. Defendant contends the video tape showed equipment relating to a polygraph examination.

Rule 403 prohibits the admission of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid., Rule 403(2) (2022). This Court reviews a trial court's decision to admit evidence under Rule 403's balancing test for abuse of discretion. *State v. Bedford*, 208 N.C. App. 414, 419, 702 S.E.2d 522, 528 (2010).

We conclude that the trial court did not err in allowing the video into evidence. To be sure, our Supreme Court has held that "polygraph

evidence is no longer admissible in any trial." *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). And the State did stipulate that a polygraph test was given, and the results of the test would not be admitted. However, the trial court thoroughly reviewed the video and concluded that it merely depicted miscellaneous items on the table and not the actual polygraph evidence. Further, all references in the video to the polygraph examination were redacted and kept from the jury.

III. Conclusion

We conclude Defendant received a fair trial, free of reversible error.

NO ERROR.

Judges TYSON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
ANTONIO DUPREE JEFFERSON

No. COA22-450

Filed 4 April 2023

Constitutional Law—right to be present at criminal trial—refusal to attend—disruption and delay

Even assuming he preserved the issue for review, defendant waived his right to be present during a portion of his criminal trial by refusing to attend and by rejecting the trial court's repeated offers for him to attend. The record showed that defendant was aware of his right to be present and that his decision not to attend was an attempt to disrupt and delay the proceedings; even so, the trial court gave defendant every opportunity to attend and complied with N.C.G.S. § 15A-1032, which permits a trial judge to remove a disruptive defendant from the courtroom.

Appeal by Defendant from Judgment entered 17 November 2021 by Judge Joseph N. Crosswhite in Rutherford County Superior Court. Heard in the Court of Appeals 16 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Katherine A. Murphy and Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Antonio Dupree Jefferson (Defendant) appeals from Judgment entered 17 November 2021 upon jury verdicts finding Defendant guilty of Assault by Strangulation, Habitual Misdemeanor Assault, and being a Habitual Felon.[1] The Record before us tends to reflect the following:

On 19 August 2019, Defendant was indicted for Assault by Strangulation, Assault on a Female, and Second-Degree Kidnapping. On 9 December 2019, Defendant was indicted for Habitual Misdemeanor Assault, and on 24 August 2020, Defendant was charged in a superseding indictment as having attained Habitual Felon status.

This matter came on for trial on 15 November 2021. Defendant was present in the courtroom on the first day of proceedings and expressed he was not ready for his case to go to trial. The trial court adjourned and informed all parties, including Defendant, proceedings would resume the following morning.

However, the next day, Defendant refused to leave his jail cell to attend the trial court proceedings. The trial court asked Defendant's counsel to take his cellphone to Defendant so the trial court could address Defendant. The trial court engaged in a colloquy with Defendant offering to give Defendant "every opportunity . . . to let [Defendant] participate in this trial and let [Defendant] participate in [his] own defense."

After conferring with Defendant's counsel and the State, the trial court engaged in a second colloquy with Defendant by phone to determine whether Defendant was still unwilling to attend trial. When the trial court repeatedly asked Defendant if he would attend trial, Defendant did not respond. The trial court then informed Defendant it is his "right not to participate, but if [he] continue[s] to say that [he] won't participate, then [the trial court] fully want[s] [Defendant] to know that we are going to proceed." The trial court further informed Defendant his absence would preclude him from participating in his trial or providing

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1. The Judgment contained in the Record does not reflect a file-stamp. However, the Statement of Organization of Trial Tribunal in the settled Record reflects this Judgment was, in fact, entered.

assistance to his counsel. Defendant continued to ignore the trial court's inquiries, stating he would instead be taking a shower.

The trial court stated on the record:

> The Court has attempted to give [Defendant] the right to proceed with this trial and to participate in this trial; that [Defendant] has continually interrupted this Court, the prosecutor, and his attorney over and over again. [Defendant] has indicated that he will not participate in this trial. The Court will find that his behavior is willfully disruptive.

The trial court also made findings detailing the prior history of the case, the time Defendant and his counsel had to prepare his defense, and Defendant's refusal to cooperate with his defense counsel over the prior year. The trial court further noted: "The Court has, through numerous telephone conversations today offered the defendant to be here, offered to have the defendant brought clothes or to make a phone call, or to do anything the Court can to make his appearance here more comfortable and more beneficial to the defendant." The trial court stated on the record: Defendant refused to attend trial or assist his counsel in preparing his defense and Defendant was obstructing justice. Based on these findings, the trial court announced its intention to proceed with trial, beginning later that morning.

The trial court again beseeched Defendant: "I will tell you everything that I just said, I will completely take it back. We will welcome you to be here. We will give you every opportunity to change clothes and participate in trial. I certainly hope that you reconsider that between now and the next little bit that we bring the jury over here." The trial court offered Defendant another opportunity to address the court, and Defendant again asserted his desire to instead take a shower. Yet again, the trial court informed Defendant: "Well, I will tell you this. I will again offer you the ability to get your clothes changed and get on over here. You're just a walk across the street. So we will sit here, and we will wait, but I will tell you it's every intention I have to proceed with this trial in about 15 minutes when the jury gets back. So hopefully you will have a change of heart, but I certainly am not going to force them to restrain you and carry you over here, okay?"

The trial court again delayed the start of trial, after Defendant later appeared to indicate he wished to be present; however, Defendant ultimately declined to attend the proceedings. Before opening statements, the trial court addressed the jury: "Before we get started, I just want to

inform you that . . . the defendant in this matter, was given an opportunity to be here this morning, and he declined. In the Court's discretion, this trial will proceed in his absence. I instruct you that the guilt or innocence of [Defendant] is to be based on the evidence presented in court and the law that I will give to you. The fact that [Defendant] is not present in court should not influence your decision in any way."

After hearing testimony from the State's first witness, the trial court announced a recess and outside the presence of the jury, asked Defendant's counsel to speak with Defendant once again about attending the proceedings. Defendant's counsel spoke with Defendant via the jail's intercom system; however, Defendant refused to attend and hung up on his trial counsel. Even after this, the trial court again asked Defendant's counsel to visit his client at the jail and to try one more time to invite Defendant to take part in his trial. Defendant refused to speak with his counsel or the trial court.

The trial court reconvened, and the State called additional witnesses to testify. After the last of the State's witnesses testified, the trial court took a brief recess. When the trial court resumed, Defendant chose to attend the hearing. Defendant did not explain his prior absence. The trial court informed Defendant he still had the right to testify in his defense; however, Defendant chose not to testify. The trial court engaged Defendant in a brief colloquy for the purpose of recording Defendant's stipulation to his prior convictions. Defendant stipulated to prior convictions of Assault by Strangulation and Assault on a Detention Employee.

On 17 November 2021, the trial court reconvened for the final day of proceedings—with Defendant in attendance. The State presented the trial court with a recorded phone call from the prior morning in which Defendant stated he was attempting to delay the trial court from moving forward. The trial court admitted the recording into evidence and noted it would not be published to the jury unless it became relevant at a later point in time.

The same day, the jury returned a verdict finding Defendant guilty of Assault by Strangulation and guilty of Assault on a Female. The jury also returned a verdict finding Defendant guilty of having the status of being a Habitual Felon.

The trial court subsequently entered its Judgment. The trial court applied Defendant's conviction for Assault on a Female as the basis for Defendant's charge of Habitual Misdemeanor Assault, and therefore arrested judgment on the Assault on a Female conviction. The trial court consolidated the remaining charges—one count of Habitual

Misdemeanor Assault and one count of Assault by Strangulation, each enhanced by Defendant's Habitual Felon status—for purposes of sentencing. The trial court sentenced Defendant as a Habitual Felon to a consolidated, active sentence of 97 to 129 months of imprisonment. Defendant provided oral Notice of Appeal in open court.

Issue

The dispositive issue on appeal is whether Defendant, through his actions, waived his right to be present during a portion of trial by actively refusing the trial court's repeated offers for Defendant to attend trial made during multiple colloquies between Defendant and the trial court.

Analysis

Defendant contends the trial court erred by proceeding in Defendant's absence as he did not validly waive his right to be present at trial. Specifically, Defendant claims his waiver was uninformed and thus, invalid, as the trial court failed to ensure Defendant was aware of his "obligation" to be present. The State, however, argues Defendant failed to preserve the issue of his absence from trial as he did not object to the trial court proceeding in his absence. The State further asserts the trial court did not err in proceeding with trial in Defendant's absence where Defendant refused to leave his cell despite the trial court's entreaties to him to voluntarily take part in the trial.

"When a party fails to timely object at trial, he has the burden of establishing his right to appellate review by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error." *State v. Miller*, 146 N.C. App. 494, 501, 553 S.E.2d 410, 415 (2001) (citations omitted). Defendant concedes plain error review is not available in this case. Instead, Defendant contends his right to appellate review is governed by N.C. Gen. Stat. § 15A-1446, which provides no objection is required to preserve an argument "[t]he defendant was not present at any proceeding at which his presence was required." N.C. Gen. Stat. § 15A-1446(d)(15) (2021). However, our Court has also held "[t]he failure to object at trial to the alleged denial of [a defendant's constitutional right to be present at all stages of the trial] constitutes waiver of the right to argue the denial on appeal." *Miller*, 146 N.C. App. at 501, 553 S.E.2d at 415 (citations omitted).

However, even presuming the issue of Defendant's right to be present for the entirety of his trial was preserved, a defendant, through his actions, may waive that right. The right of the defendant to be present at criminal proceedings is protected by both the federal and state

constitutions. *See* U.S. Const. amends. VI, XIV; N.C. Const. art. I, § 23. "In particular, our state Constitution provides in pertinent part: 'In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony. . . .' " *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991) (quoting N.C. Const. art. I, § 23). Nevertheless, "[i]n noncapital felony trials, this right to confrontation is purely personal in nature and may be waived by a defendant." *Id.* (citing *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985)); *see also Taylor v. United States*, 414 U.S. 17, 19, 94 S. Ct. 194, 195, 38 L. Ed. 2d 174, 177 (1973) ("[w]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." (citations and quotation marks omitted)). In other words, "[i]n every criminal prosecution it is the right of the accused to be present throughout the trial, unless he waives the right." *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962). For example, "[a] defendant may waive the general right to be present at his trial through his voluntary and unexplained absence from court." *State v. Davis*, 186 N.C. App. 242, 243, 650 S.E.2d 612, 614 (2007). "[I]n order to waive the right to be present, however, the defendant must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away." *State v. Sides*, 376 N.C. 449, 458, 852 S.E.2d 170, 177 (2020) (citation and quotation marks omitted).

Here, it is evident Defendant, by his own choice, elected to absent himself from trial—notwithstanding the efforts of his trial counsel and the trial court to convince him otherwise. On multiple occasions, the trial court interacted with Defendant and provided him the opportunity to be present, advised him that the trial would proceed in Defendant's absence, attempted to impress upon Defendant that his absence would impair Defendant's ability to assist in his defense and make it harder to defend the case, and offered to delay the trial briefly to allow Defendant to change clothes and appear in court. Indeed, it is clear Defendant was aware of the processes taking place and his right to be present. Further, Defendant offered no sound reason for his absence.

Nevertheless, on appeal, Defendant contends his absence did not constitute a voluntary waiver of his right to be present at trial because he was not sufficiently made aware of his "obligation to be present." Specifically, Defendant claims two particular instances in the trial

court's repeated colloquies with Defendant in which the trial court stated: "I suppose that is really your right not to participate" and "if you don't want to participate, again, that is your right" somehow nullified the voluntariness of Defendant's absence from trial. Defendant argues the trial court's suggestion Defendant had a "right" not to participate at trial was error because "there is, in general, no right for a defendant to be absent from his own trial[.]"

Defendant cites no case law to suggest a trial court is required to engage in a colloquy with a defendant prior to the defendant absenting themselves from trial. Defendant also makes no argument or showing that he was not, in fact, aware of his obligation to attend his own trial. To the contrary, the Record reflects Defendant's obstinance and refusal to attend trial was an attempt to disrupt and delay the trial in the forlorn hope the trial court would not proceed in his absence.

Defendant broadly cites *State v. Shaw*, 218 N.C. App. 607, 721 S.E.2d 363 (2012), in support of his position. It is true, in *Shaw*, this Court observed: "there are no cases recognizing a defendant's absolute right to not be present at trial." *Id.* at 609, 721 S.E.2d at 364. However, *Shaw* addressed a defendant's argument that it was error for the trial court to compel his presence and force him to appear at trial—an argument this Court rejected. *Id.* Indeed, this Court expressly noted:

> [t]he court will always require the presence of the prisoner in court during the trial . . . if he be in close custody of the law, unless in case the prisoner expressly himself, and not by counsel, waives his right to be present; but the court may require it, if it shall deem it advisable to do so.

Id. at 609, 721 S.E.2d at 365 (quoting *State v. Kelly*, 97 N.C. 404, 407-08, 2 S.E. 185, 187 (1887)). Thus, *Shaw* recognized the long-standing rule that a defendant may waive his right to be present and the trial court *may* compel the defendant's presence if the trial court deems it advisable to do so. Notably, in this case, Defendant does not contend the trial court was required to compel Defendant's presence and force him to appear at trial. In fact, it is clear the trial court, in its colloquies with Defendant, did not deem it advisable to compel Defendant to appear in order to avoid further disruption by Defendant. By advising Defendant it was Defendant's "right" not to be present, the trial court was plainly conveying to Defendant that the choice to appear or waive his presence at trial was Defendant's. This is not inconsistent with our opinion in *Shaw*.

Moreover, although not addressed by the parties on appeal, the trial court astutely and prudently also complied with N.C. Gen. Stat.

§ 15A-1032, which permits a trial judge to remove a disruptive defendant from the trial. Section 15A-1032 provides:

> (a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.
>
> (b) If the judge orders a defendant removed from the courtroom, he must:
>
> (1) Enter in the record the reasons for his action; and
>
> (2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.
>
> A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior.

N.C. Gen. Stat. § 15A-1032 (2021). Here, the trial court warned Defendant—outside the presence of the jury—that his continued conduct, including his refusal to appear, would not be permitted to delay the trial further. The trial court also stated on the record, outside the presence of the jury, the reasons for determining Defendant's conduct was disruptive of the proceedings. The trial court also appropriately instructed the jury not to consider Defendant's absence in determining Defendant's guilt. Finally, the trial court instructed Defendant's trial counsel to try and meet or talk with Defendant during breaks in the proceedings and repeatedly offered Defendant the opportunity to return to the courtroom—and Defendant ultimately did return to the courtroom prior to the conclusion of the evidence. Defendant makes no argument the trial court failed to comply with the statute or in finding Defendant's behavior disruptive so as to justify proceeding in Defendant's absence. As such, this provides a separate ground to affirm the trial court.

Thus, Defendant, though his actions, waived his right to be present during a portion of trial by actively refusing the trial court's repeated offers for Defendant to attend trial made during multiple colloquies between Defendant and the trial court. Therefore, the trial court did not

err in permitting the trial to proceed, in part, in Defendant's absence. Consequently, the trial court, in turn, did not err in entering judgment upon the jury's verdict resulting from that trial.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the trial court's 17 November 2021 Judgment.

NO ERROR.

Judges ZACHARY and GRIFFIN concur.

TONYA IRENE SARTOR WATSON, Plaintiff
v.
THOMAS STEUART WATSON, Defendant

No. COA22-473

Filed 4 April 2023

Divorce—alimony—adultery—summary judgment—before party complied with relevant discovery requests

In an action for alimony and other relief, where the wife admitted to committing adultery, the trial court erred by granting partial summary judgment in favor of the husband on the wife's claim for alimony because the husband had not yet responded to certain discovery requests that could establish that he also had committed adultery during the marriage.

Appeal by plaintiff from judgment entered 15 July 2021 by Judge Robert A. Mullinax, Jr., in Catawba County District Court. Heard in the Court of Appeals 24 January 2023.

Robinson and Lawing, LLP, by L. Bruce Scott and Melissa G. Jackson, for Plaintiff-Appellant.

Adkins Law, PLLC, by C. Christopher Akins and Jacqueline M. Keenan, for Defendant-Appellee.

DILLON, Judge.

Plaintiff Tonya Irene Sartor Watson ("Wife") commenced this domestic action against her husband Defendant Thomas Steuart Watson ("Husband"). Wife is appealing from an order granting Husband partial summary judgment on her claim for alimony based on Wife's admission to committing adultery and from an order denying her subsequent motion seeking an amendment to, or relief from, the partial summary judgment order. As explained below, we conclude Wife failed to notice her appeal in time, but in our discretion, we issue a writ of *certiorari* to address her appeal. On the merits, we conclude that the trial court was premature on granting summary judgment, as Husband had not responded to certain discovery requests from Wife where his responses could provide evidence sufficient to establish that he, too, engaged in sexual acts with another woman during the marriage. Accordingly, we vacate the trial court's grant of partial summary judgment and remand the matter for further proceedings. On remand, the trial court may reconsider Husband's motion for summary judgment after the discovery issue is resolved.

I. Background

Husband and Wife were married in 2004 and had one child during the marriage. In 2020, Wife commenced this action against Husband, requesting alimony and other relief.

In July 2021, after a hearing on the matter, the trial court granted Husband partial summary judgment on Wife's claim for alimony. Later that month, Wife moved for the judgment to be amended or, in the alternative, for relief from the judgment. On 2 December 2021, the trial court denied Wife's motion.

On 7 December 2021, Wife filed her written notice of appeal from both the July 2021 partial summary judgment order and the December 2021 order denying her subsequent motion.

II. Analysis

A. Appellate Jurisdiction

The record on appeal suggests that the orders being appealed from are interlocutory because there is nothing in the record showing that certain claims alleged by Wife have been resolved. For instance, the record does not show that Wife's claim for equitable distribution has been resolved.

Generally, "there is no right of immediate appeal from interlocutory orders." *Wing v. Goldman Sachs*, 382 N.C. 288, 293, 876 S.E.2d 390, 395 (2022). Our appellate rules require that an appellant's brief contain

"[a] statement of the grounds for appellate review." N.C. R. App. P. 28(b)(4) (2021). An appellant's failure to state a proper ground for our Court's jurisdiction subjects the appeal to dismissal. *See Larsen v. Black Diamond*, 241 N.C. App. 74, 78, 772 S.E.2d 93, 96 (2015) (appeal subject to dismissal because appellants "failed to state *any* grounds for appellate review in their principal brief.").

In her brief, Wife cites, as grounds for our appellate jurisdiction, that the July 2021 summary judgment order dismissing her alimony claim "is a final judgment, and appeal therefore lies as a matter of right directly to the Court of Appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 50-19.1." Husband makes no argument challenging our jurisdiction over Wife's appeal.

The record does not show that the trial court's July 2021 summary judgment on Wife's alimony claim was a final judgment. However, Wife is correct that N.C. Gen. Stat. § 50-19.1 provides that a litigant in a domestic case may appeal immediately from "an order or judgment adjudicating a claim for" one of a number of domestic claims, including a claim for alimony "[n]otwithstanding any other pending claims filed in the same action." N.C. Gen. Stat. § 50-19.1 (2021). That is, our General Assembly provides a litigant the option to appeal an interlocutory judgment resolving a domestic claim *either* before all domestic claims have been resolved *or* when all claims have been resolved. *Id.*

However, when a litigant elects to appeal an interlocutory judgment resolving a domestic claim while other claims are pending, the litigant still must comply with Rule 3 of our Rules of Appellate Procedure, requiring that the notice of appeal be filed "within thirty days after entry of judgment[.]" N.C. R. App. P. 3(c)(1) (2021).

In this matter, the trial court entered summary judgment on Wife's alimony claim in July 2021, but Wife did not notice her appeal from that order until December, well outside the 30-day limit allowed by our Rule. We conclude Wife's subsequent motion for amendment of/relief from the summary judgment pursuant to Rules 52, 59, and 60 did not toll the running of her time to notice her appeal. Specifically, Rule 52 deals with amendments to "findings", and summary judgment orders do not contain findings. *Hodges v. Moore*, 205 N.C. App. 722, 723, 697 S.E.2d 406, 407 (2010) (holding that "the provisions of Rule 52 . . . do not apply to orders granting summary judgment."). Rule 59 deals with "trials", not summary judgment orders. *See TD Bank v. Eagle Crest*, 249 N.C. App. 235, 791 S.E.2d 651 (2016) (holding that "Rule 59 [is] not a valid route to challenge the order for summary judgment"). And Rule 60 motions do

not toll the running of the time to notice an appeal. *Lovallo v. Sabato*, 216 N.C. App. 281, 283, 715 S.E.2d 909, 911 (2011) (reiterating that "[m]otions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal.").

However, our General Assembly, though, has empowered our court to issue writs of *certiorari* "in aid of [our] own jurisdiction[] or to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.]" N.C. Gen. Stat. § 7A-32(c) (2021). And our appellate courts may grant certiorari *ex mero motu*. *Brown v. Renaissance*, 350 N.C. 587, 516 S.E.2d 382 (1999) (issuing the writ *ex mero motu* to review a decision from our court); *State v. Mangum*, 270 N.C. App. 327, 336, 840 S.E.2d 862, 869 (2020) (recognizing our court's "discretion to issue a writ of certiorari *ex mero motu*").

We exercise our discretion to issue a writ of *certiorari* to review Wife's appeal. We conclude that this matter represents a rare situation where issuing the writ is warranted based on a number of factors. Wife's argument has merit, as discussed in the section below. Husband does not appear to have suffered any prejudice by Wife's failure to timely appeal. In fact, if we were not to issue the writ, Wife could still appeal this interlocutory order when all her claims are resolved. *See* N.C. Gen. Stat. § 50-19.1 ("A party does not forfeit his right to appeal under this section if the party fails to immediately appeal from [an interlocutory judgment on an alimony claim]."). In the interest of judicial economy, it would be better to resolve Wife's challenge to the trial court's grant of summary judgment on her alimony claim at this time.

B. Merits of Wife's Challenge

Husband moved for summary judgment on Wife's alimony claim on the basis that Wife had engaged in illicit sexual behavior during the marriage, prior to the date of separation. Indeed, a dependent spouse is generally barred from receiving alimony if she is found to have committed "an act of illicit sexual behavior" during the marriage and prior to separation. N.C. Gen. Stat. § 50-16.3A(a) (2021).

At the hearing on his motion, Husband produced sworn statements from alleged paramours of his Wife that each had engaged in adultery with Wife during their marriage with Husband. Typically, such proof alone may not be sufficient to warrant summary judgment to defeat a claim for alimony, as it is the supporting spouse who bears the burden of proof to show that their spouse had engaged in such behavior. *See, e.g.*, *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976) (explaining the narrow circumstances where the party with the burden

of persuasion may be entitled to summary judgment on the strength of the affidavits of his witnesses). Here, though, Wife has conceded to engaging in at least one affair.

Accordingly, summary judgment for Husband would be appropriate *unless* Wife met her burden of showing *either* Husband consented to the affair *or* Husband also engaged in at least one act of illicit sexual behavior. *See* N.C. Gen. Stat. § 50-16.3A(a).

Evidence showing illicit sexual behavior need not be direct evidence but rather may be also based on "circumstantial evidence" of an "adulterous disposition, or inclination" of Husband and an alleged paramour and "the opportunity created to satisfy their mutual [] inclinations." *In re Estate of Trogdon*, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991).

In her complaint, Wife does allege that Husband engaged in adultery and other illicit sexual behavior during the marriage. We note that her complaint is verified, but that she makes her allegation regarding Husband's adultery and illicit sexual behavior "upon information and belief[,]" so that the verified allegation is not sufficient evidence for a summary judgment hearing.

In any event, Wife argues the trial court should not have ruled on Husband's motion while Husband had not yet turned over discovery which the trial court had ordered him to produce and which could show Husband had inclination and opportunity to commit illicit sexual acts during the marriage.

Our Supreme Court has instructed that "[o]rdinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979); *see also Howse v. Bank of America*, 255 N.C. App. 22, 30, 804 S.E.2d 552, 558 (2017). This rule is not absolute, and our review of a trial court's decision to grant summary judgment with discovery pending is within the discretion of the trial court. *Id.*

Based on the record before us, we conclude it was an abuse of discretion to rule on Husband's summary judgment motion. Specifically, we note that Wife has knowledge of several suspicious texts between Husband and a co-worker and that she had sought from Husband, among other documents, his Facebook messages and travel records during the time she suspects Husband to have engaged in an illicit affair. The record shows that Wife filed a motion to compel discovery

of these documents when Husband failed to timely respond; that the trial court granted Wife's motion to compel as to these and other documents; and that Husband still had not complied at the time of the hearing on Husband's summary judgment motion. We cannot say whether Husband's responses will result in the discovery of evidence to support Wife's contention that Husband engaged in illicit sexual acts. But his responses "might lead to production of [such] evidence[.]" *Conover*, 297 N.C. at 512, 256 S.E.2d at 220.

III. Conclusion

We grant *certiorari* to consider Wife's appeal. Considering the merits, we agree with Wife that the trial court abused its discretion in granting Husband summary judgment on Wife's alimony claim where the record shows that Husband had yet to comply with discovery requests ordered by the trial court. We, therefore, vacate that order and remand for further proceedings. On remand, the trial court may consider Husband's motion after resolution of the discovery issue.

VACATED AND REMANDED.

Judges GORE and RIGGS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 4 April 2023)

Case	County	Disposition
CRAIG v. TOWN OF HUNTERSVILLE No. 22-142	Mecklenburg (19CVS16070)	AFFIRMED IN PART AND DISMISSED IN PART
IN RE A.K.R. No. 22-627	Stokes (20JT66) (20JT67)	Affirmed
IN RE A.R.C. No. 22-480	Rutherford (21JT52)	Vacated and Remanded.
IN RE J.D.C. No. 22-610	Lincoln (20JT43)	Affirmed.
IN RE M.J.K. No. 22-592	Wake (20JT160)	Affirmed
IN RE P.J.W.W. No. 22-511	Nash (21JT31)	Affirmed
MANN v. VAICKUS No. 22-20	Wake (14CVD16153)	Affirmed in Part; Remanded in Part
N.C. FARM BUREAU MUT. INS. CO., INC. v. MEBANE No. 22-708	Wake (21CVS7683)	Affirmed
O'BRIEN v. O'BRIEN No. 21-155	Mecklenburg (18CVD10038)	Affirmed in part; vacated and remanded in part; reversed in part.
SELPH v. SELPH No. 22-881	Johnston (22CVD2249)	Dismissed
STATE v. CARRASCO No. 22-704	Ashe (21CRS50540-44)	No Error
STATE v. EDWARDS No. 22-60	McDowell (19CRS52070)	No Error
STATE v. FAGGART No. 22-798	Forsyth (18CRS57956)	No Error
STATE v. HUCKS No. 22-766	New Hanover (19CRS59539)	No Error.

STATE v. JONES No. 22-700	Mecklenburg (20CRS14182) (20CRS219947) (20CRS219950)	No Error
STATE v. PATTERSON No. 22-606	Carteret (20CRS50579-80) (20CRS50584-85) (20CRS50589-90) (20CRS527)	Vacated and Remanded
STATE v. POWERS No. 22-717	Robeson (19CRS53971)	Appeal Dismissed; No Error.
STATE v. RIDINGS No. 22-594	Davie (18CRS51680) (19CRS51194) (19CRS51194) (19CRS51194) (21CRS146)	Vacated and Remanded
STATE v. TOMLIN No. 22-780	Cabarrus (20CRS53855) (20CRS53856)	Affirmed in Part and Remanded.
STEIN v. CASH-JANKE No. 22-726	Wake (20CVD1846)	Vacated and Remanded

D.W., a minor, by and through his parent, Jessie Sanders, Petitioners
v.
ONSLOW COUNTY BOARD OF EDUCATION, Respondent

No. COA22-770

Filed 18 April 2023

1. Appeal and Error—mootness—high school student's disciplinary reassignment—subsequent graduation from high school—factual dispute

In an action filed on behalf of a minor by and through his mother (petitioners) against a county board of education (respondent) where—after the minor was issued a ten-day out-of-school suspension from his high school for instigating a fight with another student—respondent issued a written decision affirming the minor's reassignment to an alternative school, petitioners' appeal from the trial court's denial of their petition for judicial review of respondent's decision was not moot. Based on the parties' competing affidavits, a factual dispute existed regarding whether the minor had already completed his high school education and graduated by the time petitioners' appeal came on for review.

2. Schools and Education—disciplinary reassignment—affirmed by board of education—petition for judicial review—subject matter jurisdiction

In an action filed on behalf of a minor by and through his mother (petitioners) against a county board of education (respondent) where—after the minor was issued a ten-day out-of-school suspension from his high school for instigating a fight with another student—respondent issued a written decision affirming the minor's reassignment to an alternative school, the trial court properly determined that it lacked subject matter jurisdiction under N.C.G.S. § 115C-45(c) to review respondent's decision. The minor's assignment to the alternative school constituted a "disciplinary reassignment" as defined in N.C.G.S. § 115C-390.7(e), which states that a disciplinary reassignment is not a "long-term suspension" subject to judicial review as provided in the due process procedures described in N.C.G.S. § 115C-390.8.

Judge TYSON concurring in result only by separate opinion.

Appeal by petitioners from order entered 22 April 2022 by Judge Henry L. Stevens, IV in Superior Court, Onslow County. Heard in the Court of Appeals 27 February 2023.

Legal Aid of North Carolina, Inc., by Carlton Powell, Jennifer Richelson Story, Crystal Ingram, Celia Pistolis, and Kilpatrick Townsend & Stockton LLP, by Carl Sanders and Callie Thomas, for petitioners-appellants.

Tharrington Smith, L.L.P, by Stephen G. Rawson, Daniel Clark, and Deborah R. Stagner, for respondent-appellee.

Peggy D. Nicholson and Crystal Grant, for amicus curiae Duke University School of Law Children's Law Clinic.

Aly Martin and Hayley Lampkin Blyth, for amicus curiae Council for Children's Rights.

STROUD, Chief Judge.

D.W., a minor, by and through his parent, Jessie Sanders, (collectively "Petitioners") appeals from order entered 22 April 2022 dismissing their petition for judicial review for lack of subject matter jurisdiction. We affirm.

I. Background

D.W. was a fifteen-year-old student at Northside High School ("NHS") in the Onslow County Public School System in 2021. D.W. was a new student and felt he was targeted by other students while riding on the bus and while in the hallways.

D.W. was accused of instigating a fight between his sister and another female on 27 August 2021. D.W. received a five-day suspension. His mother, Sanders, asked NHS staff to assign a social worker to assist her son and to institute a behavior plan for him. D.W. was referred to PRIDE in North Carolina, Inc., a private organization, which provides services to individuals with mental illness, developmental disabilities, and behavioral disorders. NHS staff told Sanders and D.W. that he would be removed from NHS if he became involved in another fight. D.W. served the five-day suspension from his sister's fight and returned to school.

Two weeks later, D.W. and another student exchanged words on the school bus to NHS on 13 September 2021. D.W. alleged the other

student had called him racial slurs. The other student proposed they meet to fight and the two boys later met in a school bathroom to fight. The fight ended when a teacher entered the bathroom. D.W. was issued a 10-day out-of-school suspension, and he was referred to Onslow County Schools' alternative school, Onslow County Learning Center ("OCLC").

Sanders believed D.W.'s placement at OCLC would be temporary and he would return to NHS after completing his 10-day suspension. While attending class at OCLC, a teacher told D.W. that he was required to stay at OCLC until at least January. Sanders requested an appeal hearing before members of the school board in late September and again requested an appeal on 6 October 2021.

Respondent convened a hearing panel on 18 November 2021. Respondent issued a written decision affirming D.W.'s placement at OCLC "until such time as he has met his established goals[.]" Respondent sent a letter to Sanders informing her of her purported "right to appeal the Board panel's decision on placement at the OCLC by filing a petition for judicial review in the Superior Court of Onslow County." Petitioners filed a petition for judicial review on 17 December 2021. In a later letter dated 28 January 2022, Respondent asserted Saunders had no right to seek judicial review of the Board's decision.

Respondent filed a motion to dismiss on 17 February 2022. Following a hearing on 18 April 2022, the superior court allowed the motion to dismiss for lack of subject matter jurisdiction by order dated 22 April 2022. Petitioner appeals. Respondent has filed a motion to dismiss Petitioner's appeal as moot, alleging D.W. had graduated 7 February 2023 with a regular North Carolina high school diploma and is no longer attending the Onslow County Public School System.

II. Jurisdiction

This Court possesses jurisdiction pursuant to North Carolina General Statute § 7A-27(b) (2021).

III. Respondent's Motion to Dismiss as Moot

[1] In this case, the entire substantive issue on appeal is subject matter jurisdiction. Petitioner contends the Superior Court has subject matter jurisdiction under North Carolina General Statute § 115C-45(c) (2021) to review the Board's ruling; Respondent disagrees. Respondent also filed a motion to dismiss this appeal as moot, and mootness also raises an issue of subject matter jurisdiction. *See Yeager v. Yeager*, 228 N.C. App. 562, 565-66, 746 S.E.2d 427, 430 (2013) ("[A] moot claim is not justiciable, and a trial court does not have subject

matter jurisdiction over a non-justiciable claim[.]" (citing, *inter alia*, *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585-86, 347 S.E.2d 25, 30 (1986))). As a result, we believe it is prudent first to consider whether we can address the *substantive legal* jurisdictional issue—subject matter jurisdiction under Section 115C-45(c)—before the jurisdictional issue based upon facts that develop "during the course of the proceedings" raised by a motion to dismiss as moot. *In re Peoples*, 296 N.C. 109, 148, 250 S.E.2d 890, 912 (1978).

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law. *Benvenue Parent-Teacher Association v. Nash County Board of Education*, 275 N.C. 675, 170 S.E.2d 473 (1969); *Crew v. Thompson*, 266 N.C. 476, 146 S.E.2d 471 (1966); *In re Assignment of School Children*, 242 N.C. 500, 87 S.E.2d 911 (1955); *Savage v. Kinston*, 238 N.C. 551, 78 S.E.2d 318 (1953); 1 Strong's N.C. Index 3rd *Actions* § 3, *Appeal & Error* § 9 (1976).
>
> Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action. *Allen v. Georgia*, 166 U.S. 138, 17 S. Ct. 525, 41 L. Ed. 949 (1897); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, *cert. denied* 344 U.S. 824, 73 S.Ct. 24, 97 L. Ed. 642 (1952); 20 Am.Jur.2d *Courts* § 81 (1965).

Id. at 147-48, 250 S.E.2d at 912. Thus, "the usual response should be to dismiss" as moot based upon facts that develop during the course of litigation, if the issue is actually moot and there is no other justification to rule upon the issue, because courts should rule only on real controversies. *Id.* at 148, 250 S.E.2d at 912.

In this scenario—where mootness and the substantive issue of jurisdiction under North Carolina General Statute § 115C-45(c) both involve subject matter jurisdiction—we will address mootness before the substantive jurisdictional issue. In this type of scenario, if a court did not address mootness first, it would have unfettered discretion to choose

to issue what may be an advisory opinion or to dismiss an appeal and avoid addressing the substantive issue based on factual mootness. But we should not "determine abstract principles of law" if the case has become moot. *Id.* at 147-48, 250 S.E.2d at 912.

Here, on 21 February 2023, Respondent filed a motion to dismiss this appeal as moot, contending "[o]n 7 February 2023, D.W. graduated early from the Onslow County Schools, having earned all necessary credits to receive his diploma under North Carolina law and State Board policy." According to the affidavit of the principal of Swansboro High School filed with Respondent's motion, D.W. was certified for "early graduation" based upon his "completion of the requirements for graduation and receipt of a high school diploma." In addition, his transcript "reflects his graduation from Swansboro High School" and the "Onslow County Learning Center program does not appear on his transcript or his diploma." Respondent contends this appeal became moot upon D.W.'s graduation since this court's ruling can no longer provide "any meaningful relief for D.W. in this case[.]" Respondent also argues the public interest exception to mootness should not apply in this case. And if the issue of mootness were clear, we would allow Respondent's motion to dismiss as moot, assuming without deciding the public interest exception would not apply.

But in this case, the facts alleged to support the motion to dismiss as moot are disputed, and this Court cannot resolve factual disputes. *See, e.g.*, *Johnston v. State*, 224 N.C. App. 282, 302, 735 S.E.2d 859, 873 (2012) ("Normally, the appellate courts do not engage in fact finding." (citation and quotation marks omitted)). According to Petitioner:

> D.W. began the 2022-2023 school year at Swansboro High School as a junior with an identified disability requiring an Individualized Education Program (IEP). He still required several classes to complete his junior year, let alone satisfy all requirements for graduation from high school. And yet after a single semester and despite his disability, Respondent now asserts that D.W. has not only satisfied all graduation requirements, but also has *graduated* from high school. To accomplish this feat, Respondent pushed D.W. through completing multiple semester-long courses out of sequence and via virtual platforms that included no direct instruction, ultimately "graduating" him upon awarding credit for an English course completed in *seven days* without access to critical and required special education services.

> Respondent supplied D.W. with deficient educational services while he was suspended and, upon his return to school, Respondent now again tries to deprive D.W. of his constitutional right to "the privilege of education" while avoiding its duty "to guard and maintain that right" by attempting to rush him out of school to avoid this Court's review. N.C. Const. Art. I, § 15. D.W. has not received the education he is owed by the State and has not completed the requirements to graduate from high school. Thus, the issue before this Court is not moot.

(Emphasis in original.)

Petitioner goes on to discuss the details of D.W.'s transcript and notes that he had "only taken and passed English I[;]" he was "enrolled concurrently in English III and in English IV[;]" he was enrolled in English II "in a virtual platform with no instruction[,]" and he "reportedly completed this semester-long course in **just seven days**, after which OCS [Onslow County Schools] 'graduated' him the following day." (Emphasis in original.) Petitioner further alleges his IEP team "just met on 27 January 2023 and determined" he needed "an increase in his special education services," but OCS did not provide the "ninety-five daily minutes of special education services or his weekly thirty-minute counseling sessions required by his IEP[.]" According to the affidavit of D.W.'s mother, she did not "learn that D.W. had been graduated or that he was no longer eligible to receive his special education services until" she was informed by her attorney on 21 February 2023.[1] D.W.'s mother also alleges as of 8 March 2023, neither she nor D.W. has received "a final report card or his diploma[,]" although the principal informed her D.W. would have to " 'walk the stage' later this year" to get the diploma.

The competing affidavits filed with and in response to the motion to dismiss raise a factual dispute as to whether D.W. had met the requirements to graduate from Swansboro High School. Notably, since this factual dispute focuses on D.W.'s time at Swansboro High School, it does not relate to D.W.'s course of study or opportunity to progress towards graduation while on disciplinary reassignment at OCLC, which Petitioners here have not challenged.

We assume Respondent would likely challenge Petitioner's contentions as to D.W.'s graduation, but based upon the information before this Court, there is a factual dispute raised by the competing affidavits. This Court cannot adjudicate factual disputes. *See*, *e.g.*, *Johnston*, 224

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1. Oral argument of this case was held less than one week later, on 27 February 2023.

N.C. App. at 302, 735 S.E.2d at 873 (explaining appellate courts generally "do not engage in fact finding"). According to Petitioners, as of the end of January, D.W.'s mother, Sanders, was not aware of any possibility of D.W. being able to graduate before the usual end of the school year, and she did not learn of his alleged graduation until less than a week before the argument of this appeal. D.W.'s mother contends Respondent rushed to push D.W. through a semester-long English class, without any of the special education services required by his IEP, in one week, alone in a room on a computer, allowing Respondent to end its obligation to provide special education services to D.W. and to file its motion to dismiss D.W.'s appeal as moot.

Because there is a factual dispute regarding whether D.W. has actually completed his high school education and graduated, we deny Respondent's motion to dismiss this appeal as moot.

IV. Subject Matter Jurisdiction Under Relevant Statutes

[2] Having addressed Respondent's motion to dismiss the appeal as moot, we now turn to the substantive issue of jurisdiction under North Carolina General Statute § 115C-45(c), which depends on the interpretation of Sections 115C-390.7(e) and 115C-390.1(b)(7) in this case. *See* N.C. Gen. Stat. § 115C-45(c) (granting an appeal to superior court of a local board of education review of a final administrative decision on, *inter alia*, "[t]he discipline of a student under G.S. 115C-390.7"); N.C. Gen. Stat. § 115C-390.7(e) (2021) (exempting "[d]isciplinary reassignments" from long-term suspensions in a section specifically on such suspensions); N.C. Gen. Stat. § 115C-390.1(b)(7) (2021) (providing an initial definition for "Long-term suspension"). We first explain the standard of review and then analyze the relevant statutes.

A. Standard of Review

"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).

B. Analysis

We now analyze *de novo* whether the trial court had subject matter jurisdiction in this case. *Id.* We first explain the rules of statutory construction and then apply those rules to the relevant statutes here.

1. Rules of Statutory Construction

In our analysis, we are guided by several well-established principles of statutory construction. "The principal goal of statutory construction

is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the [plain] 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).

"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).

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)).

Our Supreme Court has examined the court's proper application of generally applicable statutes to more specific, special statutes and held:

> Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true *a fortiori* when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage.

McIntyre v. McIntyre, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (citations omitted).

2. Statutory Construction Analysis

Turning to the relevant statutes in this case, North Carolina General Statute § 115C-390.1(b)(7) defines long-term suspension as:

> The *exclusion for more than 10 school days* of a student from school attendance for disciplinary purposes from the school to which the student was assigned at the time of the disciplinary action. If the offense leading to the long-term suspension occurs before the final quarter of the school year, the exclusion shall be no longer than the remainder of the school year in which the offense was committed. If the offense leading to the long-term suspension occurs during the final quarter of the school year, the exclusion may include a period up to the remainder of the school year in which the offense was committed and the first semester of the following school year.

N.C. Gen. Stat. § 115C-390.1(b)(7) (emphasis supplied).

North Carolina General Statute § 115C-390.7(e) was enacted in 2011 and specifically exempts disciplinary reassignment from the provisions of long-term suspensions, providing:

> *Disciplinary reassignment of a student to a full-time educational program* that meets the academic requirements of the standard course of study established by the State Board of Education as provided in G.S. 115C-12 and provides the student with the opportunity to make timely progress towards graduation and grade promotion *is not a long-term suspension* requiring the due process procedures described in G.S. 115C-390.8.

N.C. Gen. Stat. § 115C-390.7(e) (emphasis supplied).

Contrary to Petitioners' arguments, the clear intent of the General Assembly is expressed in the plain language of North Carolina General Statute § 115C-390.7(e). The General Assembly reaffirms the doctrine that certain student disciplinary decisions are properly made in the classroom or upon review before the superintendent and the school board, and not in the courtroom. As the trial court properly found: "[A]lthough reassignment of a student from the attendance of his regular high school to any other school is by definition a 'long-term suspension', it is not a 'long-term suspension' requiring judicial review as provided in the due process procedures described in NCGS 115C-309.8 for other long-term suspensions."

The superior court correctly concluded the plain and more specific language of the 2011 amendment in North Carolina General Statute § 115C-390.7(e) controls under these facts and is properly viewed as a specified exception to the general definition of "long-term suspension" in North Carolina General Statute § 15C-390.1(b)(7). *See Electric Service v. City of Rocky Mount*, 20 N.C. App. 347, 350, 201 S.E.2d 508, 510 (1974) (When a general statute conflicts with a more specific, special statute, the "special statute is viewed as an exception to the provisions of the general statute[.]"), *aff'd*, 285 N.C. 135, 203 S.E.2d 838 (1974).

Petitioners do not argue D.W.'s assignment to OCLC fails to meet the requirements from North Carolina General Statute § 115C-12 or that D.W.'s disciplinary reassignment does or did not provide him with the "opportunity to make timely progress towards graduation and grade promotion." N.C. Gen. Stat. § 115C-390.7(e). Petitioners' argument is overruled.

V. Conclusion

The General Assembly specifically exempted a "disciplinary reassignment" complying with the specific requirements of North Carolina General Statute § 115C-12 from being defined and treated as a "long-term suspension." *See* N.C. Gen. Stat. § 115C-390.7(e) and N.C. Gen. Stat. § 115C-390.1(b)(7). The trial court's order dismissing Petitioners' petition for judicial review for lack of subject matter jurisdiction is affirmed. *It is so ordered.*

AFFIRMED.

Judge STADING concurs.

Judge TYSON concurs in result only by separate opinion.

TYSON, Judge, concurring in the result.

I concur in the result to affirm the superior court's order. The trial court properly found: "although reassignment of a student from the attendance of his regular high school to any other school is by definition a 'long-term suspension', it is not a 'long-term suspension' requiring judicial review as provided in the due process procedures described in NCGS 115C-309.8 for other long-term suspensions." The clear intent of the General Assembly, as is expressed in the plain language of N.C. Gen. Stat. § 115C-390.7(e) (2021), reaffirms the doctrine that certain student disciplinary decisions are properly made in the classroom or upon

review before the superintendent and the school board, and not in the courtroom. *Id.*

We all agree the superior court correctly concluded Petitioner's disciplinary reassignment is unchallenged on either of the two bases set forth in N.C. Gen. Stat. § 115C-390.7(e), which exempts judicial review of disciplinary reassignments in compliance with the statute. *Id.* The sole proper holding and mandate is to affirm the superior court's order as the law of the case.

"Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 290, 517 S.E.2d 401, 403-04 (1999) (citing *Harris v. Pembaur*, 84 N.C. App. 666, 353 S.E.2d 673 (1987)).

The majority's opinion correctly states: "it is prudent first to consider whether we can address the *substantive legal* jurisdictional issue—subject matter jurisdiction under Section 115C-45(c)—before the jurisdictional issue based upon facts that develop 'during the course of the proceedings' raised by a motion to dismiss as moot. *In re Peoples*, 296 N.C. 109, 148, 250 S.E.2d 890, 912 (1978)." "[A] moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim[.]" *Yeager v. Yeager*, 228 N.C. App. 562, 566, 746 S.E.2d 427, 430 (2013)(citing, *inter alia*, *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585-86, 347 S.E.2d 25, 30 (1986)).

It is a waste of judicial economy to examine unresolved factual disputes, which are wholly unnecessary to resolve the sole issue properly before us: whether the trial court possesses subject matter jurisdiction for judicial review of their petition. Any further discussion of any factual disputes on a motion to dismiss as moot is unnecessary and an advisory *obiter dicta*. Petitioners do not argue D.W.'s disciplinary assignment to OCLC fails to meet the requirements from N.C. Gen. Stat. § 115C-12 or that D.W.'s disciplinary reassignment does or did not provide him with the "opportunity to make timely progress towards graduation and grade promotion[.]" N.C. Gen. Stat. § 115C-390.7(e).

The trial court properly concluded it lacked subject matter jurisdiction for judicial review of a "[d]isciplinary reassignment of a student to a full time educational program." *Id.* As such, it is unnecessary to reach Petitioners' or Respondent's arguments on mootness or the factual dispute of D.W.'s purported high school graduation or award of a high school diploma. I vote to affirm the superior court's order.

HENRY FONVIELLE, Petitioner-Appellant
v.
NORTH CAROLINA COASTAL RESOURCES COMMISSION,
Respondent Agency-Appellee

and

WBRP, L.L.C.; THOMAS G. CONLEY; and TIMOTHY R. CONLEY,
Intervenor-Respondents-Appellees

No. COA22-742

Filed 18 April 2023

Administrative Law—Coastal Area Management Act minor permit—contested case hearing—petition untimely filed—subject matter jurisdiction

In a case about neighboring oceanfront properties owned by petitioner and intervenor-respondents, where intervenor-respondents were issued a Coastal Area Management Act minor permit to construct a new residence on their property, the Coastal Resources Commission properly denied petitioner's request for a contested case hearing challenging the permit's issuance, because petitioner had filed his request well past the twenty-day window for doing so (under N.C.G.S. § 113A-121.1(b)), and therefore the Commission lacked subject matter jurisdiction to consider the request. Further, where the trial court upheld the Commission's decision, there was sufficient evidence in the whole record to support the court's determination of when intervenor-respondents' permit application was complete (for purposes of determining when the statutory twenty-day period began). Finally, the issue of whether petitioner was an "adjacent riparian landowner" entitled to notice of the permit application (under 15A N.C. Admin. Code 07J.0204(b)(5)(B)) had no bearing on the jurisdictional issue.

Appeal by petitioner-appellant from order entered 5 April 2022 by Judge Thomas H. Lock in New Hanover County Superior Court. Heard in the Court of Appeals 22 March 2023.

Law Offices of G. Grady Richardson, Jr., P.C., by Susan Groves Renton and G. Grady Richardson, Jr., for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for respondent agency-appellee.

McGuireWoods LLP, by Elizabeth Z. Timmermans, Zachary L. McCamey, and John Huske Anderson, Jr., for intervenor-respondents-appellees.

FLOOD, Judge.

Petitioner argues the trial court erred in affirming the Coastal Resources Commission's denial of Petitioner's request for a contested case hearing, and holding Petitioner was not an adjacent riparian landowner entitled to actual notice. As we explain in further detail below, the Coastal Resources Commission did not have subject matter jurisdiction to consider Petitioner's request, and the trial court did not err.

I. Factual and Procedural History

This case concerns two oceanfront properties in the Town of Wrightsville Beach (the "Town"): the first is the site at issue (the "Site") located at 15 East Augusta Street and owned by Intervenor-Respondents Thomas Conley and Timothy Conley through WBRP, LLC ("Intervenor-Respondents"), and the second is the property located at 18 East Augusta Street and owned by Petitioner Henry Fonvielle ("Petitioner"). The Site and Petitioner's property are separated by the end of East Augusta Street at the public beach access, which lies to the south of the Site and to the north of Petitioner's property.

In October 2019, Intervenor-Respondents applied for a Coastal Area Management Act ("CAMA") minor permit, as required by statute, to demolish the existing house and develop the Site. *See* N.C. Gen. Stat. § 113A-118 (2021). Application for a CAMA minor permit requires, *inter alia*, certification of "Notice of Adjacent Property Owners." On 11 January 2021, Scott Sullivan, acting as an agent of Intervenor-Respondents, applied for a subsequent CAMA minor permit application (the "Application") to construct a home on the Site. In the Application, Intervenor-Respondents certified to having given notice to the owner of the northern adjacent property to the Site, but Petitioner was not identified as a property owner to whom Intervenor-Respondents gave notice. With the Application, Intervenor-Respondents submitted a Preliminary Site Plan drawing, which consists of a map detailing home construction plans on the Site, elevation lines, and the "Static Line." Notice of Application was posted on the Site, in the form of a "placard," on 22 January 2021. The Application was accepted as complete on 25 January 2021 by CAMA Local Permit Official Tony Wilson (the "LPO").

On 5 February 2021 the LPO issued CAMA Minor Development Permit No. WB21-0002 (the "Permit") to Intervenor-Respondents, authorizing

construction of a new single-family residence. On 21 July 2021, the LPO contacted Department of Coastal Management ("DCM") staff to arrange a meeting with Petitioner on the Site, to discuss Petitioner's concerns about the construction on the Site and discuss the Static Line drawn between the Site and Petitioner's property. On 23 July 2021, DCM staff met with the LPO and Petitioner at Petitioner's residence.

On 30 July 2021, the LPO issued a Stop Work Order, and provided, (1) the roof of the home under construction on the Site was over the setback line, and (2) Intervenor-Respondents failed to provide notice to Petitioner. The LPO requested an "as-built survey" from Intervenor-Respondents confirming the construction conformed to the Permit requirements. Soon after, Intervenor-Respondents provided to the LPO the requested "as-built survey" (the "Underwood Survey"), and the LPO lifted the Stop Work Order based on the information provided in the Underwood Survey.

On 3 August 2021, Petitioner submitted to the North Carolina Coastal Resources Commission (the "Commission") his request for a third-party contested case hearing. On 20 August 2021, the Commission issued its decision, denying Petitioner's request as untimely and holding the Commission lacked subject matter jurisdiction to consider the request as it was not brought within twenty days of the Permit's issuance. *See* N.C. Gen. Stat. § 113A-121.1(b) (2021). Petitioner appealed the Commission's decision to New Hanover Superior Court.

On 5 April 2022, the trial court—which made no findings of fact—denied Petitioner's petition and affirmed the Commission's denial of Petitioner's contested case hearing request, and concluded in its order:

> Petitioner is not an "adjacent riparian property owner" under 15A [N.C. Admin. Code] 7J.0204(b)(5), and accordingly was not entitled to notice of [Intervenor-Respondents'] intention to develop [Intervenor-Respondents'] property and apply for a CAMA minor development permit. Assuming arguendo that Petitioner is an adjacent riparian property owner, the only notice to which he would be entitled is of [Intervenor-Respondents'] intent to develop the property and apply for the CAMA permit.

Petitioner timely appealed.

II. Jurisdiction

Under North Carolina law for the administrative review of permit decisions,

> [a] determination that a person may not commence a contested case is a final agency decision and is subject to judicial review under Article 4 of Chapter 150B of the General Statutes. If, on judicial review, the court determines that the Commission erred in determining that a contested case would not be appropriate, the court shall remand the matter for a contested hearing under [N.C. Gen. Stat. §] 150B-23 and final decision on the permit pursuant to [N.C. Gen. Stat. §] 113A-122. Decisions in such cases shall be rendered pursuant to those rules, regulations, and other applicable laws in effect at the time of the commencement of the contested case.

N.C. Gen. Stat. § 113A-121.1(b) (2021); *see also Balance v. N.C. Res. Comm'n*, 108 N.C. App. 288, 291, 423 S.E.2d 815, 817 (1992) ("The provisions of N.C. Gen. Stat. § 113A-121.1 make it abundantly clear that [an] agency's denial of [a] petitioner[']s request for a contested case hearing is a final agency decision subject to judicial review.").

III. Analysis

Petitioner argues (1) the trial court erred in its interpretation of the regulations governing the Commission's decision to deny his request for a contested case hearing, and (2) the trial court acted arbitrarily and capriciously in affirming the Commission's decision.

A. Standard of Review

"An appellate court's standard of review of an agency's final decision . . . has been, and remains, whole record on the findings of fact and *de novo* on the conclusions of law." *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 102, 798 S.E.2d 127, 134 (2017). Under a *de novo* review, we consider "the matter anew and freely substitute[] [our] own judgment for the agency's judgment." *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 13, 365 S.E.2d 9, 17 (2002) (citation and internal quotation marks omitted).

When this Court applies the whole record test, we "may not substitute [our] judgment for the agency's as between two conflicting views, even though [we] could reasonably have reached a different result had [we] reviewed the matter *de novo*." *N.C. Dep't of Env. and Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004); *see Diaz v. Div. of Soc. Servs.*, 360 N.C. 386, 628 S.E.2d 1, 2 (2006) ("In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record[.]"). We must review all competent

evidence "to determine whether there is substantial evidence to justify the agency's decision." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

" 'Substantial evidence' is 'relevant evidence a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 660, 599 S.E.2d at 895 (quoting N.C. Gen. Stat. § 150B–2(8b) (2021)). Although our review is of the trial court's order affirming the Commission's decision, as the Commission is the only fact-finding body of this proceeding, we consider whether there was substantial evidence that supported the Commission's findings of fact. *See Watkins v. N.C. State Bd. of Dental Exam'r*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (applying the "whole record" test to determine whether an agency's decision was supported by substantial evidence, on appeal from the trial court's order reversing the agency's decision).

B. Correctness of the Commission's Decision

Petitioner argues the Application was incomplete as of 25 January 2021 and was not made complete until the late-July submission of the Underwood Survey. Therefore, according to Petitioner, the "trial court erred in affirming the Decision which held as fact that [the] Application was complete in January 2021." Respondent and Intervenor-Respondents contend Petitioner's claim that the Application was incomplete does not excuse the untimeliness of his contested case hearing request, and Petitioner's request is barred by N.C. Gen. Stat. § 113A-121.1(b). To address the timeliness of Petitioner's request, we must first consider whether the Application was complete as of 25 January 2021.

1. The Application's Completeness as of 25 January 2021

Because Petitioner's argument concerns an issue of fact, we conduct our review under the whole record test. *See Harris*, 252 N.C. App. at 102, 798 S.E.2d at 134. As our Supreme Court has provided:

> Under the whole record test, [an agency's] finding[s] must stand unless [they are] arbitrary and capricious. In determining whether an agency decision is arbitrary or capricious, the reviewing court does not have the authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law. The arbitrary and capricious standard is a difficult one to meet. Administrative agency decisions may be reserved as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment.

Mann, 356 N.C. at 16, 565 S.E.2d at 19 (citation and quotation marks omitted) (cleaned up).

Under 15A N.C. Admin. Code 07J.0204(b)(5)(B) (the "governing regulation"), for a CAMA minor permit application to be accepted as "complete," the following requirements must be met:

> [T]he applicant must give actual notice of his intention to develop his property and apply for a CAMA minor development permit to all adjacent riparian landowners. Actual notice can be given by sending a certified letter, informing the adjoining property owner in person or by telephone, or by using any other method which satisfies the Local Permit Officers that a good faith effort has been made to provide the required notice[.]

15A N.C. Admin. Code 07J.0204(b)(5)(B) (2021).

When this Court reviews a final decision of an administrative agency in a contested case, our review is "governed by [N.C. Gen. Stat. §] 150B-51(b)[,]" and "it is the responsibility of the administrative body, not a reviewing court, to determine the weight and sufficiency of the evidence[,] . . . to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *Watkins*, 358 N.C. at 199, 202, 593 S.E.2d at 769, 771 (2004). In *Watkins*, our Supreme Court reviewed the entire record on an appeal from a final agency decision concerning a contested case. 358 N.C. at 194, 593 S.E.2d at 766. The petitioner in *Watkins* alleged, *inter alia*, the agency's decision was arbitrary and capricious. *Id.* at 194, 593 S.E.2d at 766. Accordingly, the issue for review was whether the agency's decision was supported by substantial evidence in view of the entire record. *Id.* at 199, 593 S.E.2d at 769.

Prior to assessing the agency's findings of fact and conclusions of law in *Watkins*, our Supreme Court provided they must "examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Id.* at 199, 593 S.E.2d at 769. While there was evidence presented by the petitioner in *Watkins* that tended to detract from the agency's findings, there was also evidence that supported the agency's findings. *See id.* at 201–02, 593 S.E.2d at 770–71. Given the agency's role as the sole fact finder in *Watkins*, and based on the standard of review, the Court provided "[t]o the extent the evidence diverges, we defer to the [agency]'s resolution of any conflicts." *Id.* at 202, 593 S.E.2d at 771. As the agency's decision was supported by "relevant evidence a reasonable mind might

accept as adequate," despite the presence of detracting evidence, the Court affirmed the agency's findings as supported by substantial evidence in review of the whole record. *Id.* at 202, 204, 593 S.E.2d at 771–73.

Here, per the governing regulation, the requirements for a CAMA minor permit application to be complete are that the applicant give actual notice to all adjacent riparian landowners, and that said notice satisfy the LPO that a good faith effort has been made to provide the required notice. *See* 15A N.C. Admin. Code 07J.0204(b)(5)(B) (2021). The Commission found as fact that the Application was complete on 25 January 2021. This finding was supported by evidence that Intervenor-Respondents posted a placard on the Site on 22 January 2021, and that this method of notice satisfied the LPO that Intervenor-Respondents made a good faith effort to provide the required notice.

There is evidence here that detracts from the Commission's finding that the Application was complete: the Application lacked markings required by local permit application instructions, and the Underwood Survey filed in July 2021 provided additional information[1] that was not in the original application. As the Commission was presented with evidence the Application conformed to the requirements of the governing regulation, however, despite the presence of detracting evidence, the Commission's decision was supported by "relevant evidence a reasonable mind might accept as adequate" and was not arbitrary and capricious. *See Watkins*, 358 N.C. at 202, 593 S.E.2d at 771. As the Commission is the sole factfinder of this proceeding, to "the extent the evidence diverges, we defer to the [Commission's] resolution of any conflicts" in the evidence and affirm the Commission's finding that the Application was complete as of 25 January 2021. *Id.* at 202, 593 S.E.2d at 771.

2. Timeliness of Petitioner's Request

As Intervenor-Respondents' application was complete as of 25 January 2021, we now consider whether Petitioner's request is barred as untimely, as argued by Respondent and Intervenor-Respondents. Under N.C. Gen. Stat. § 113A-121.1(b),

> [a] person other than a permit applicant . . . who is dissatisfied with a decision to deny or grant a minor or major

1. We note that, as argued by Respondent, the Underwood Survey merely clarified that the Application did conform to the governing regulation's requirements of permit issuance, and did not "significantly alter the project proposal[.]" *See* N.C. Admin. Code 07J.0204(d) (2021) ("If the changes or additional information [to an application] significantly alters the project proposal, the application shall be considered new and the permit processing period will begin to run from that date.").

> development permit may file a petition for a contested case hearing only if the Commission determines that a hearing is appropriate. A request for a determination of the appropriateness of a contested case hearing shall be made in writing and received by the Commission within 20 days after the disputed permit decision is made.

N.C. Gen. Stat. § 113A-121.1(b) (2021). A petitioner's timely filing of a hearing request pursuant to N.C. Gen. Stat. § 113A-121.1(b) is a condition precedent to the exercise of the Commission's subject matter jurisdiction. *See Cunningham v. Goodyear Tire & Rubber Co.*, 381 N.C. 10, 2022-NCSC-46, ¶ 25 ("Under North Carolina law, satisfaction of the timely-filing requirement is a condition precedent to the exercise of [a] Commission's jurisdiction and, accordingly, implicates the subject-matter jurisdiction of [a] Commission.").

Here, the Application was deemed "complete" as of 25 January 2021, and the Permit was issued to Intervenor-Respondents on 5 February 2021. Accordingly, the statutory twenty-day window for a third party to file a contested case hearing request for the issuance of the Permit began on 5 February 2021. *See* N.C. Gen. Stat. § 113A-121.1(b) (2021). Petitioner, however, submitted his request for a contested case hearing on 3 August 2021. Any third-party petition for a contested case hearing was required to be filed within twenty days of 5 February 2021, and Petitioner's request was submitted well beyond the statutory deadline set forth in N.C. Gen. Stat. § 113A-121.1(b). As the timely-filing requirement is a condition precedent to the exercise of the Commission's jurisdiction, Petitioner's late filing deprived the Commission of subject matter jurisdiction to consider his request. *See Cunningham*, ¶ 25.

Petitioner argues, however, he is an adjacent riparian landowner under the governing regulation. Petitioner specifically contends Intervenor-Respondents, as part of their application for a CAMA minor permit, were required to provide him notice as an adjacent riparian landowner and failed to do so. According to Petitioner, because he did not receive the required notice, the Permit was issued before Intervenor-Respondents submitted a complete Application and Petitioner was therefore prevented from timely challenging the premature permit decision.

Under the governing regulation, a CAMA minor development permit may be deemed complete if an applicant gives to all adjacent riparian landowners actual notice of his intent to develop, and the applicant's method of notice "satisfies the Local Permit Officers that a good

faith effort has been made to provide the required notice[.]" 15A N.C. Admin. Code 07J.0204(b)(5)(B) (2021). As set forth above, however, the Commission properly found the Application was complete because their finding was supported by substantial evidence the Application conformed to the governing regulation: Intervenor-Respondents provided notice by means of a "placard" posted on the Site, and the LPO was satisfied Intervenor-Respondents made a good faith effort to provide the required notice. Our analysis need not go further because, regardless of whether Petitioner is an adjacent riparian landowner under the governing regulation, the Application was complete as of 25 January 2021. For Petitioner's request to be deemed timely, Petitioner must have submitted his request within the twenty days following the issuance of the Permit, and Petitioner failed to do so. The trial court did not err in affirming the Commission's determination that Petitioner's request was untimely.

IV. Conclusion

Petitioner failed to timely file his petition for a contested case hearing, and the Commission did not have subject matter jurisdiction to consider his request. Accordingly, the order of the trial court is affirmed.

AFFIRMED.

Judges GRIFFIN and RIGGS concur.

IN RE B.M.S.

No. COA22-701

Filed 18 April 2023

Termination of Parental Rights—best interests of the child—sufficiency of findings—weighing of dispositional factors—parent-child bond

The trial court did not abuse its discretion by determining that the termination of a mother's parental rights was in her minor daughter's best interests. Competent evidence supported all (except one) of the dispositional findings challenged on appeal, including that the child's permanent plan of adoption could only be accomplished by terminating the mother's parental rights, the parent-child bond had diminished due to the mother's infrequent visits, and the mother's conduct—particularly, her failure to correct the substance abuse issues that led to the child's removal—would not promote the child's physical or emotional well-being. Further, when addressing the dispositional factors listed in N.C.G.S. § 7B-1110(a), the court properly considered the bond between the mother and her daughter and any potential impact that severing their bond could have on the child.

Appeal by Respondent-Mother from order entered 9 June 2022 by Judge John K. Greenlee in Gaston County District Court. Heard in the Court of Appeals 22 March 2023.

Elizabeth Myrick Boone for Petitioner-Appellee Gaston County Department of Health and Human Services.

Michelle FormyDuval Lynch for Guardian ad Litem.

Kimberly Connor Benton for Respondent-Appellant Mother.

COLLINS, Judge.

Respondent-Mother appeals from the trial court's order terminating her parental rights to her minor child based upon neglect and willfully leaving the child in foster care or placement outside the home for more than 12 months without showing that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the child. Mother argues that the trial court reversibly

erred by concluding that it was in the child's best interests to terminate Mother's parental rights. We affirm.

I. Background

Mother is the biological parent of Bella,[1] who was born on 7 November 2019. The day after Bella's birth, while Mother and Bella were stilled hospitalized, Gaston County Department of Health and Human Services ("DSS") received a report from the hospital that Mother had been seen hiding drug paraphernalia at the hospital and was found unresponsive on the floor. Mother admitted that she was hiding a pill bottle, a cigarette, a vape pen, and a syringe without a needle, and stated that she had taken a Xanax. Mother also admitted to using heroin and other prescription drugs, and she tested positive for benzodiazepines, barbiturates, and opiates. Hospital staff observed that Bella was experiencing withdrawal symptoms, in the form of jitters and tremors, and Bella required morphine to control the withdrawal symptoms. The hospital staff reported that Mother did not show an interest in Bella, did not want to feed her, and threatened to leave Bella alone in the hospital if the staff tried to place Bella in another room. Following the hospital's report, DSS initiated a safety plan between Mother and Bella; DSS placed Bella in a temporary safety foster home and required that Mother have no unsupervised contact with Bella. Mother further agreed to engage in substance abuse treatment and mental health services.

On 26 February 2020, DSS filed a petition alleging that Bella was neglected based upon Mother's substance abuse. Despite agreeing to engage in substance abuse treatment and mental health services, Mother only went for one substance abuse assessment at Bridging the Gap, a treatment program. During that assessment, Mother admitted to continued use of illegal substances and admitted that she continued to use heroin while also taking prescription methadone. Bridging the Gap reported that they could not work with Mother until she completed a detoxification program and inpatient treatment, but Mother refused either treatment option. Mother also failed to comply with two requested drug screens and then tested positive for drugs during two other requested drug screens.

Bella was adjudicated neglected on 15 September 2020 based upon Mother's substance abuse. Mother was ordered to contact DSS to enter into a new case plan; comply with the terms of her case plan; refrain from using or abusing illegal or mindaltering substances; complete a mental

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1. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

health and substance abuse assessment and comply with the treatment recommendations; submit to drug testing as requested by DSS and have negative results; enroll in and complete parenting classes; obtain and maintain safe, appropriate, and stable housing; attend visits with Bella and demonstrate effective parenting skills; sign all necessary consents for DSS; refrain from criminal activity; and obtain and maintain employment and provide for Bella's needs.

From October 2020 through August 2021, Mother made some progress on her case plan as she enrolled in substance abuse treatment classes and attended a little over half of the recommended treatment hours. Mother also enrolled in and attended some parenting classes and attended some of the scheduled visitation with Bella. However, Mother failed to make progress on much of her case plan: she was unsuccessfully discharged from her substance abuse treatment program; attended only a few of the drug screens by DSS, and tested positive during the drug screens that she attended; did not engage in mental health treatment; and did not provide DSS with proof of employment or income.

On 25 August 2021, DSS filed a petition to terminate Mother's parental rights, alleging that Mother neglected Bella, that Bella would be neglected if returned to her care, and that Mother willfully left Bella in foster care for more than 12 months without showing to the trial court that reasonable progress had been made in correcting the conditions that led to Bella's removal from Mother's care. At a permanency planning hearing in September, the trial court found that Mother still had not complied with mental health treatment, substance abuse treatment, medication management, or requested drug screens. It also found that Mother had not re-engaged in substance abuse treatment after being unsuccessfully discharged from her first treatment program. At subsequent permanency planning hearings, the trial court found that Mother continued not to comply with mental health or substance abuse treatment, did not comply with drug screens, did not obtain or show proof of employment, and failed to provide DSS with updates on her case plan progress.

The matter came on for hearing on 9 May 2022. The trial court found that grounds existed to terminate Mother's rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), neglect, and N.C. Gen. Stat. § 7B-1111(a)(2), willfully leaving Bella in foster care or placement outside the home for more than 12 months while failing to make reasonable progress in correcting the conditions which led to Bella's removal. The trial court then concluded that it was in Bella's best interests for Mother's rights to be terminated. Mother filed a timely notice of appeal on 21 June 2022.

II. Discussion

Mother argues that the trial court committed reversible error by concluding that it was in Bella's best interests to terminate Mother's parental rights. Mother does not challenge the adjudicatory portion of the trial court's ruling and this issue is not before us. *See In re A.J.T.*, 374 N.C. 504, 508, 843 S.E.2d 192, 195 (2020).

A. Standard of Review

"Termination of parental rights involves a two-stage process." *In re L.H.*, 210 N.C. App. 355, 362, 708 S.E.2d 191, 196 (2011) (citation omitted). "At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under section 7B-1111(a) of our General Statutes." *In re D.C.*, 378 N.C. 556, 559, 862 S.E.2d 614, 616 (2021) (quotation marks and citation omitted). "If the petitioner meets its evidentiary burden with respect to a statutory ground and the trial court concludes that the parent's rights may be terminated, then the matter proceeds to the disposition phase, at which the trial court determines whether termination is in the best interests of the child." *In re H.N.D.*, 265 N.C. App. 10, 13, 827 S.E.2d 329, 332-33 (2019) (citation omitted). If, in its discretion, the trial court determines that it is in the child's best interests, the trial court may then terminate the parent's rights. *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 161 (2003).

This Court reviews the "trial court's dispositional findings of fact . . . under a 'competent evidence' standard." *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020) (citations omitted). A trial court's findings of fact are binding "where there is some evidence to support those findings, even though evidence might sustain findings to the contrary." *In re J.C.J.*, 381 N.C. 783, 795, 874 S.E.2d 888, 897 (2022) (citation omitted). We review a trial court's assessment of a juvenile's best interest at the dispositional stage for abuse of discretion, reversing only where the decision is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019) (quotation marks and citations omitted).

B. Disposition

Mother challenges the trial court's dispositional findings of fact 1, 6, 7, 8, 9, and 16 as being unsupported by competent evidence.

At the dispositional hearing, the trial court may consider

> written reports or other evidence concerning the needs of the juvenile. . . . The Court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, including testimony or evidence from any person who is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

N.C. Gen. Stat. § 7B-901(a) (2022). The trial court may also incorporate into its findings information from written reports, as well as findings made at adjudication. *In re K.W.*, 272 N.C. App. 487, 494, 846 S.E.2d 584, 589 (2020).

1. Dispositional Finding of Fact 1

The trial court incorporated all of its findings from the adjudication in the dispositional order's finding of fact 1, which provides: "The Court hereby restates and incorporates its Adjudicatory Findings of Fact as if fully set out in this portion of the Order." However, Mother specifically explains that she "only challenges findings of fact 31 and 34 from the adjudicatory portion of the order" as being unsupported by evidence. Adjudicatory finding of fact 31 states that "Respondent/mother has failed to obtain stable and appropriate housing" and the ajudicatory finding of fact 34 states that "Respondent/mother has failed to consistently stay in contact with the Department."

We agree with Mother that there does not appear to be record or testimonial support for finding of fact 31. Our review of the evidence shows that, on multiple occasions, DSS reports noted that Mother failed to provide them with proof of stable housing. Additionally, when asked if Mother had provided any proof of maintaining safe and appropriate housing for her and Bella throughout the entire process, Covington, a DSS social worker, responded, "She has not." However, the trial court's finding did not speak to whether Mother provided DSS with *proof* of stable housing; it found that Mother failed to obtain stable and appropriate housing. Mother testified that she lived with her mom at the same address for 3.5 years and a DSS report shows that DSS was aware that Mother was residing at that address. It is unclear whether or not DSS found the housing acceptable, but the testimonial evidence shows that both Mother and DSS knew that Mother was living at the maternal grandmother's home. The record and testimonial evidence thus do not support that Mother failed to obtain stable and appropriate housing.

Record and testimonial evidence supports finding of fact 34. A social worker testified at trial that Mother attended only approximately

40% of drug screenings requested by DSS and that her visitation with Bella was not consistent. Mother testified that she stopped attending the requested drug screens and stopped providing DSS with requested employment information in July 2021. Record evidence shows that DSS attempted multiple times to obtain an update on Mother's substance abuse issues, housing status, and employment status, and that Mother did not update DSS with that information. This competent evidence supports that Mother failed to consistently stay in contact with DSS. *In re K.N.K.*, 374 N.C. at 57, 839 S.E.2d at 740.

2. Dispositional Finding of Fact 6

Finding of fact 6 states: "A permanent plan of care can only be accomplished by the severing of the relationship between the juvenile and the Respondent/Mother by termination of parental rights of the Respondent/Mother."

The unchallenged findings of fact and testimony from a DSS social worker support finding of fact 6. The trial court found that "[t]he termination of the parental rights of [Mother] will aid in the accomplishment of the permanent plan [of adoption] for the juvenile" and that Bella "deserves safety, security, emotional support and a permanent home." Additionally, Covington testified that the permanent plan for Bella was adoption and that termination of Mother's parental rights would be both helpful and necessary in accomplishing that plan. This competent evidence supports that the permanent plan of Bella's adoption could only be accomplished by terminating Mother's rights. *In re K.N.K.*, 374 N.C. at 57, 839 S.E.2d at 740.

3. Dispositional Findings of Fact 7 & 8

Finding of fact 7 states that "the juvenile has a bond with Respondent/Mother. The bond has diminished, as Respondent/Mother has only been able to visit the juvenile once a month due to the lack of Respondent/Mother's progress on her case plan." Finding of fact 8 states that "[t]he juvenile knows who Respondent/mother is and is excited to visit Respondent/Mother; however, the juvenile does not get upset or emotional when visitation with Respondent/Mother is over or if Respondent/mother misses a visit."

Testimony from Covington supports findings of fact 7 and 8. Covington testified that: Bella had "a parental bond" with Mother; Bella saw Mother for only one hour per month during supervised visits; Mother was not consistent with her visits; and Mother was previously allowed more visitation time but her time was decreased due to her lack

of progress with her case plan. Covington further testified that while Bella gets excited to see her Mother during visits, she has gone more than a month without seeing Mother and that there were no issues of sadness or negative behaviors as a result of the missed visits; Bella just "continues on." Record evidence and the trial court's finding of fact 33 support that Mother missed visits with Bella. This competent evidence supports that Bella has a diminished bond with Mother and support the remainder of findings of fact 7 and 8. *See In re H.B.*, 877 S.E.2d 128, 139 (N.C. Ct. App. 2022) (affirming a finding that a bond did not exist between parent and child where the parent did not care for the child and failed to visit consistently).

4. Dispositional Finding of Fact 9

Finding of fact 9 states: "That the conduct of Respondent/Mother has been such as to demonstrate that she will not promote the juvenile's physical or emotional well-being."

The following unchallenged adjudicatory findings, incorporated into dispositional finding of fact 1, support that Mother will not promote Bella's physical and emotional well-being. The trial court found that:

> 17. The juvenile was adjudicated to be a "Neglected" juvenile within the meaning of G.S. 7B-101(15) by Order entered August 18, 2020. . . .
>
> . . . .
>
> 20. The juvenile [Bella] is thirty (30) months of age. The juvenile has been in the custody of the Department for approximately twenty-seven (27) months.
>
> 21. The Court has regularly reviewed Respondent Mother's case progress toward regaining custody of the juvenile, and the Court has never concluded at any hearing that Respondent/Mother has made reasonable progress to warrant returning custody to Respondent/Mother.
>
> 22. Respondent/Mother has failed to correct the conditions that led to the removal of the juvenile from her custody, such that the neglect would continue if the juvenile were returned to Respondent/Mother's care. The neglect has continued through the date of this hearing and is not due to the poverty of the Respondent/Mother.
>
> 23. Respondent/Mother entered into a case plan with the Department; however, failed to complete said case plan.

. . . .

25. Respondent/mother has submitted to drug screens and has tested positive for illegal substances on most of her drug screens. . . .

26. Respondent/mother provided sworn testimony that she has had a substance abuse addiction for eight (8) years with a $400.00 a day habit. Respondent/mother also testified that she did not test positive for heroin on her drug screens for Department; however, she used heroin when she relapsed in July 2021.

. . . .

28. Respondent/mother testified under oath that she last used heroin two and a half weeks ago.

29. Respondent/mother has obtained a dual assessment; however, has not completed the recommended services. Respondent/mother enrolled in treatment . . . in November 2020; however, did not complete treatment and was discharged from program. Respondent/mother enrolled in treatment at Beaty Recovery Services; however, did not complete the individual therapy and was discharged from the program in July of 2021.

. . . .

32. Respondent/Mother has found some employment while the juvenile has been in the custody of the Department; however, Respondent/Mother has failed to maintain employment or sufficient financial resources to support the juvenile.

33. Respondent/mother attended some visits with the juvenile.

. . . .

35. Respondent/Mother has failed to contribute to the financial support of the juvenile through regular child support contributions and has failed to provide for the basic needs of the juvenile.

36. Since the juvenile has been in foster care, Respondent/Mother has failed to demonstrate the ability to meet the juvenile's basic needs for food, shelter, clothing, education, and health care.

> 37. Respondent/Mother has failed to demonstrate the ability to parent and protect the juvenile.
>
> 38. The Court finds that there were multiple items on Respondent/Mother's case plan to be completed and she has completed parenting classes and completed several mental health and substance abuse assessments; however, never completed mental health or substance abuse treatment.
>
> 39. The Court further finds that there is a high likelihood of a repetition of neglect in that none of the conditions that brought the juvenile into the Department's custody has been corrected.
>
> . . . .
>
> 41. The Court finds that Respondent/Mother neglected the juvenile within the meaning of G.S. 7B-1111(a)(1) and G.S. 7B-101(15) in that the neglect has continued through the date of this hearing and is not due solely to the poverty of the Respondent/Mother. Respondent/Mother has failed to correct the conditions that led to the removal of the juvenile from her custody, specifically substance abuse, such that neglect would continue if the juvenile was returned to her care. The juvenile was previously adjudicated neglected and there is a high probability of the reptition of neglect if the juvenile was returned to the custody of Respondent/Mother.
>
> 42. The Court also finds that grounds exist based on G.S. 7B-1111(a)(2) in that Respondent/Mother has willfully, and not due solely to poverty, left the juvenile in foster care or placement outside of the home for more than twelve (12) months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to removal of the juvenile.

These unchallenged findings show that Mother failed to correct the substance abuse conditions which led to Bella's removal and support that a risk of future neglect is probable. Record evidence shows that Bella had drugs in her system at birth, suffered from withdrawal symptoms that had to be treated with morphine, and that Mother admitted at the hospital to using heroin. The findings show that Mother admitted to using heroin just two weeks prior to the hearing on the

termination of her parental rights. The competent record evidence and unchallenged findings of fact support the finding that Mother's conduct demonstrates "that she will not promote the juvenile's physical or emotional well-being." *In re K.N.K.*, 374 N.C. at 57, 839 S.E.2d at 740.

5. Dispositional Finding of Fact 16

Finding of fact 16 states: "The negative impact on the juvenile if Respondent/Mother's parental rights are terminated would be minimal and the juvenile would be more than capable of handling such an impact."

Covington's testimony provides support for finding of fact 16. Covington testified that Bella had gone more than a month without seeing Mother and did not have any behavioral issues from Mother missing the visits; she also testified that Bella has not expressed "any sadness or negative behaviors after long breaks between visits." Moreover, Covington was specifically asked about any potential negative impact on Bella:

> Q. What is the likelihood of [Bella] being adopted if both the Respondent parent's rights were terminated today?
>
> A. It would be highly likely.
>
> Q. And do you have any concerns with any negative impact on [Bella] if the parent's parental rights were terminated?
>
> A. Negative, like behaviorally, I mean simply because I haven't seen it. I mean she – it's hard to say like as far as like any cognitive. I mean of course not seeing her mom may play an impact to some degree but --
>
> Q. Do you think it will -- is it a long-term concern that you have?
>
> A. No.

This testimony provides support for the challenged finding of fact. *In re K.N.K.*, 374 N.C. at 57, 839 S.E.2d at 740.

6. Best Interests Determination

When making its best interests determination and dispositional findings,

> the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.

> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant considersation.

N.C. Gen. Stat. § 7B-1110(a) (2022). It is the province of the trial court to weigh these factors, and it may assign more weight to one or more factors over the others. *In re C.L.C.*, 171 N.C. App. 438, 448, 615 S.E.2d 704, 709-10 (2005). The best interests of the child is the "polar star" for the trial court to consider. *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984).

Here, the trial court made the requisite findings of fact as to all factors listed in N.C. Gen. Stat. § 7B-1110(a) and Mother does not contest that the trial court made findings as to all of these factors. Instead, Mother argues that the trial court failed to make a reasoned analysis and give sufficient weight to her maternal bond with Bella. However, the transcript shows that the trial court carefully considered Mother's bond with Bella:

> The Court: . . . This goes to [Mother], and, obviously, there is a mother-daughter bond there, obviously.
>
> It's evidenced by her excitement, what she calls her, the fact that they do interact well together during the visits. So there is a bond, and I'm not in any way naïve enough or blind to the fact that if those visits stopped there would be a potential negative reaction from [Bella]. I mean that's -- of course. You have a bond with someone. You have a relationship with someone. That relationship ends, and it can be hard. But for my purposes at this point in the hearing, my only concern of whether it's -- how hard it is and whether it's hard on [Bella]. I have no doubt that it's going to be exteremly hard on [Mother], but that legally speaking my polar star is [Bella], not [Mother], and how she's going to react to it or how it's going to make them feel.
>
> I'm sure it would be devastating, but legally speaking and practically speaking and in all intents what's best for

[Bella], I have to look at what it's going to do to [Bella], potentially do to [Bella].

. . . .

Frankly, this seems to be a child from the evidence I've heard that is extremely well-adjusted, very adaptive, a child that is flexible and a child that amazingly considering the situation, is open to bonding and forming these close relationships with people that care for her and she cares for.

I don't always see that. I see these things sometimes stunting children. I've got evidence that she's excited when she gets to see her mom and her grandmother, and she's excited when she gets to go back home to her foster home where she spends the majority of her time, honest -- I mean when you have one hour a month out of the amount of . . . hours in a month, the overwhelming majority of the time she spends with her foster family and foster siblings. She seems to be very adaptable and willing to form bonds and no problem forming bonds, loving bonds, bonds that excite her, bonds that make her happy. She has that with her mother. She has that with her grandmother. She has that with her foster family and her foster siblings.

So, ultimately, what I have to decide under all of the factors under 7B-1110, not just one, but all of the factors, what's in her best interest moving forward, today forward fully recognizing that terminating any type of bond could be upsetting to her. But she's certainly shown the ability and the developmental ability to adapt and overcome hardships in her life and the fact that she's in foster care very well. . . . [Bella] deserves a safe, stable, appropriate, loving, caring home, all of those things, not just one or two of them, but all of them.

I have no doubt that [Bella] is loved by her mother, her grandmother . . . but that also exists in her current placement where she's been for the majority of her life, over half of her life anyway. She came into custody, . . . approximately three months old, a three-month-old, who is starting to form memories, attachments, and remember things, and starting to build these things, she -- she has only known foster care. That's all she's ever known.

> . . . .
>
> Love is very important. I don't doubt that she gets that from [Mother], no doubt, but the reality is for almost two years, everything else, including the love that she gets from her foster family and her foster siblings, everything else she's gotten from her foster family, everything else . . . . So I certainly understand the social worker's opinion that that bond would be stronger because it's a daily bond that's reinforced daily. . . .
>
> . . . .
>
> But you've said it yourself, she deserves a fit mom that she deserves and you've – you've indicated and agreed that, in fact, you said today you take full responsibility for the fact that you aren't that today.
>
> . . . .
>
> Every day this child gets older. Every day this child has new experiences in her life, and she – she deserves that and she deserves to be somewhere she knows she's going to be and safe, stable, and appropriate.

The trial court thoughtfully considered and analyzed the bond between Bella and Mother in its dispositional ruling, and particularly considered any potential impact that severing the bond could have on Bella. After such consideration, the trial court determined that it was in Bella's best interests to terminate Mother's parental rights. The trial court did not abuse its discretion by terminating Mother's parental rights as its decision was well-reasoned and supported by the record evidence. *See In re A.J.T.*, 374 N.C. at 512, 843 S.E.2d at 197 ("The bond between parent and child is just one of the factors to be considered[.]" (brackets and citation omitted)); *In re Z.A.M.*, 374 N.C. 88, 101, 839 S.E.2d 792, 801 (2020) (concluding no abuse of discretion where trial court considered all N.C. Gen. Stat. § 7B-1110 factors, made proper findings on those factors, and analyzed the parental bond but gave more weight to other factors over the parental bond).

III. Conclusion

There is competent record and testimonial evidence to support the trial court's dispositional findings of fact, with the exception of adjudicatory finding of fact 31, as incorporated into dispositional finding of fact 1. *In re K.N.K.*, 374 N.C. at 57, 839 S.E.2d at 740. However, even

without adjudicatory finding of fact 31, the trial court's decision to terminate Mother's parental rights was not an abuse of discretion as it was not "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re A.R.A.*, 373 N.C. at 199, 835 S.E.2d at 423 (quotation marks and citations omitted).

AFFIRMED.

Judges DILLON and ARROWOOD concur.

IN THE MATTER OF: CUSTODIAL LAW ENFORCEMENT AGENCY RECORDING SOUGHT BY: CAPITOL BROADCASTING COMPANY, INCORPORATED, D/B/A WRAL-TV; NEXSTAR BROADCASTING, INC., D/B/A WNCN-TV; WTVD TELEVISION LLC, D/B/A WTVD-TV, THE MCCLATCHY COMPANY, D/B/A THE NEWS & OBSERVER, AND GANNETT NC, D/B/A WILMINGTON STARNEWS, PETITIONERS

No. COA22-399

Filed 18 April 2023

Public Records—law enforcement agency recordings—media request—filing requirements—standing

The trial court's order granting the release of law enforcement recordings, which were related to the arrest of two collegiate basketball players, to a group of media organizations (petitioners) was vacated where the petition was filed using an Administrative Office of the Courts form rather than being filed as a civil action in compliance with N.C.G.S. § 132-1.4A(g)—resulting in petitioners lacking standing and the trial court lacking subject matter jurisdiction.

Appeal by putative intervenor Michael Savarino from order entered 20 January 2022 by Judge R. Allen Baddour in Superior Court, Orange County. Heard in the Court of Appeals 15 November 2022.

Coleman, Gledhill, Hargrave, Merritt, & Rainsford, P.C., by Cyrus Griswold, for putative-intervenor-appellant Michael Savarino.

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

No brief filed by respondents-appellees.

STROUD, Chief Judge.

Putative Intervenor Michael Savarino appeals from an order granting the release of law enforcement recordings to Petitioners, a group of media organizations, of an incident in which he was arrested. Because the petition seeking the recordings was not filed as a civil action in compliance with the provisions of North Carolina General Statute § 132-1.4A(g) (eff. 1 Dec. 2021) ("Section 132-1.4A"), but instead was filed using an Administrative Office of the Courts ("AOC") form, the trial court did not have subject matter jurisdiction. Therefore, we vacate the trial court's order granting release of the recordings.

I. Background

According to the allegations in the petition that initiated this case, on 14 November 2021, two Duke University Men's Basketball Team players, one of whom was putative intervenor Savarino, were arrested. (Capitalization altered.) On 17 December 2021, Petitioners filed the petition seeking the "release of all body cam footage, dashboard camera recordings, cell phone recordings, or any other recordings related to this incident" pursuant to Section 132-1.4A(g). Petitioners used an AOC form, AOC-CV-270, to file their petition and checked the box on the form indicating they were proceeding under "G.S. 132-1.4A(g)."

Pursuant to the petition, on 6 January 2021, the trial court filed an initial order "to provide custodial law enforcement agency recording for in-camera review" and "to provide notice of hearing" to the relevant law enforcement agencies who had custody of the "recording[s] identified" in the petition. (Capitalization altered.) As part of this initial order, the trial court scheduled a hearing on the petition for 14 January 2022.

The case came for hearing as scheduled on 14 January 2022. At the hearing, Petitioners presented their arguments in favor of releasing the recordings of Savarino's arrest, and the District Attorney, a respondent, argued against release, with North Carolina State Highway Patrol, also a respondent, deferring to the District Attorney's arguments. Savarino's attorney also appeared at the hearing, after he had entered a notice of appearance the previous day, and argued, over Petitioners' objection, against the release of the recordings.[1]

1. The record does not clarify how Savarino's attorney came to learn of the hearing; he was not listed on the certificates of service for the petition or the trial court's initial order setting the matter for hearing.

On 20 January 2022, the trial court entered a written order granting the petition and ordering release of the recordings subject to certain conditions in the order. On the same day, Savarino filed notice of appeal from the order granting the petition.[2]

II. Analysis

We cannot address the arguments on appeal from Savarino and Petitioners because we conclude the trial court did not have subject matter jurisdiction in this case. Although no party argues the trial court lacked subject matter jurisdiction, "[i]t is the continuing duty of this Court to [e]nsure, even *sua sponte*, that the trial court had subject matter jurisdiction in every action it took." *Quevedo-Woolf v. Overholser*, 261 N.C. App. 387, 409, 820 S.E.2d 817, 832 (2018); *see also Revels v. Oxendine*, 263 N.C. 510, 511, 139 S.E.2d 737, 738 (1965) (explaining "it becomes our duty *ex mero motu* to take notice of" a jurisdictional defect even when it was "not discussed or alluded to by either party"). "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).

This Court's recent decision in *In re Custodial Law Enforcement Agency Recordings* requires us to hold the trial court here lacked subject matter jurisdiction.[3] *See generally In re Custodial Law Enforcement Agency Recordings*, 287 N.C. App. 566, ___, 884 S.E.2d 455, ___ No. COA22-446, slip op. at *6-15 (7 February 2023) (hereinafter "*In re Custodial*"). In that case, this Court was reviewing a trial court's ruling dismissing a petition, filed with form AOC-CV-270, the same form used here, requesting the release of law enforcement recordings under Section 132-1.4A(g), *see id.* at *4-6, which governs the release of "[r]ecordings in the custody of a law enforcement agency" to "any person[.]" N.C. Gen. Stat. § 132-1.4A(g); *see also In re Custodial*, slip op. at *7-8 (discussing the organization of Section 132-1.4A and the role of sub-section (g) in releasing recordings). The trial court dismissed the petition based on, *inter alia*, North Carolina Rule of Civil Procedure 12(b)(1) which covers lack of subject matter jurisdiction—because the

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2. While this case has subsequent procedural history in the trial court following the notice of appeal, we do not recount it because it does not impact the appeal.

3. Despite the similarity in case name, *In re Custodial Law Enforcement Recordings* is not related to this case. *See In re Custodial Law Enforcement Agency Recordings*, 287 N.C. App. 566, ___, 844 S.E.2d 455, ___, No. COA22-446, slip op. at *2 (7 February 2023) (hereinafter "*In re Custodial*") (explaining recordings sought were from a shooting in Elizabeth City and subsequent protests).

petitioners had "failed to file 'an action' in compliance with" Section 132-1.4A(g). *In re Custodial*, slip op. at *6.

This Court affirmed the trial court's ruling dismissing the petition for lack of subject matter jurisdiction under Rule 12(b)(1). *Id.* at *15-16 (explaining the trial court "did not err by dismissing [the] petition under Rule[] 12(b)(1)" and others sub-sections of Rule 12(b) before later affirming); *see also* N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). First, the *In re Custodial* Court clarified the "core" of the trial court's "decision turned on [the p]etitioners' failure to file and serve a proper action resulting in a lack of standing[,]" *In re Custodial*, slip op. at *6, which is a component of subject matter jurisdiction. *See id.* (grouping together review of "decisions regarding standing and jurisdiction"); *see also In re Menendez*, 259 N.C. App. 460, 462, 813 S.E.2d 680, 683 (2018) ("Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction. If a party does not have standing to bring a claim, a court has no subject matter jurisdiction." (citations, quotation marks, and brackets omitted)). Specifically, this Court explained the trial court determined Section 132-1.4A(g), in contrast to other sub-sections of Section 132-1.4A, "requires the party seeking the release to file an 'action,' but [the p]etitioners had filed only a petition using the AOC-CV-270 form." *In re Custodial*, slip op. at *7-10.

The *In re Custodial* Court then determined, based on its statutory interpretation, that the trial court correctly determined the petition via form AOC-CV-270 was not sufficient to confer standing, and thus subject matter jurisdiction. *See id.* at *6, *10-15 (explaining the trial court did not err in dismissing under 12(b)(1) after having previously explained the trial court's 12(b)(1) ruling was based on standing and jurisdiction). The petitioners instead needed to file "an ordinary civil action." *See id.* at *12. As part of this analysis, the *In re Custodial* Court noted Section 132-1.4A(g) specifically used the term "action" but subsection (f) allowed a person seeking release to use a "petition" approved by AOC. *Id.* at *13; *see* N.C. Gen. Stat. § 132-1.4A(f) (eff. 1 Dec. 2021) (indicating a petition under this subsection "shall be filed on a form approved by" AOC). Because the petitioners, proceeding under subsection (g), had only used an AOC form and had not filed an action, the trial court properly dismissed their petition for lack of subject matter jurisdiction. *See In re Custodial*, slip op. at *15-16 (explaining the trial court "did not err by dismissing [the] petition under Rule[] 12(b)(1)"); *see also* N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (enumerating defense of lack of subject matter jurisdiction).

As the *In re Custodial* Court alludes to in its analysis, *see In re Custodial*, slip op. at *7-9, *13 (discussing roles of different subsections

of Section 132-1.4A), Section 132-1.4A sets out different requirements for various types of petitioners and types of recordings in great detail, so the analysis of each case depends on who is requesting release of the recording and what is depicted in the recording. For example, subsections (b1) through (b4) set out specific requirements for disclosure of recordings "which depict[ ] a death or serious bodily injury" to specific enumerated parties. N.C. Gen. Stat. § 132-1.4A(b1)-(b4) (eff. 1 Dec. 2021). These requirements include submitting the request via a form developed by AOC. *See* N.C. Gen. Stat. § 132-1.4A(b2). Subsection (c) addresses disclosures of recordings which do not "depict[] a death or serious bodily injury" and allows disclosure to certain enumerated parties including "[a] person whose image or voice is in the recording" and various representatives of such a person. *See* N.C. Gen. Stat. § 132-1.4A(c)(1)-(5) (eff. 1 Dec. 2021) (listing people who can receive disclosures after stating (b1)-(b4) exclusively govern disclosure of "[r]ecordings depicting a death or serious bodily injury").

Here, Petitioners do not include any person depicted in the recording or a custodial law enforcement agency; Petitioners are media organizations. There is no allegation the recording depicts serious bodily injury or death. Saravino, who attempted to intervene, is a person who could petition for disclosure or release under Section 132-1.4A(c) and (f) since he was depicted in the recording, *see* N.C. Gen. Stat. § 132-1.4A(c) (permitting disclosure to a "person whose image or voice is in the recording"); N.C. Gen. Stat. § 132-1.4A(f) (providing procedure for anyone listed in (c) to seek release of a recording), but by attempting to intervene, he was seeking to prevent release to Petitioners, not to obtain disclosure or release himself.

Since Petitioners are not specifically identified parties who are granted an expedited disclosure or release process under other subsections of Section 132-1.4A, they are proceeding under subsection (g), as indicated on their petition filed using form AOC-CV-270. The petitioners in *In re Custodial*, were also media organizations seeking disclosure under Section 132-1.4A(g) and also used form AOC-CV-270. *See In re Custodial*, slip op. at *2, *10, *15. Since Petitioners used form AOC-CV-270 rather than file an "ordinary civil action[,]" they did not have standing, and, thus, the trial court did not have subject matter jurisdiction. *Id.* at *6, *10-12, *14-15; *see In re Menendez*, 259 N.C. App. at 462, 813 S.E.2d at 683 (explaining standing is a "prerequisite" for a court to have subject matter jurisdiction). Since the trial court—which did not have the benefit of this Court's opinion in *In re Custodial*, *see In re Custodial*, slip op. at *1 (indicating case was filed 7 February 2023)—lacked subject

matter jurisdiction, its proceedings in this case were "a nullity." *Burgess*, 262 N.C. at 465, 137 S.E.2d at 808.

III. Conclusion

Petitioners were required to proceed under the provisions of Section 132-1.4A(g), which provides that recordings "shall only be released pursuant to court order" and that the "person requesting release . . . 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). Because Petitioners used an AOC form, and did not file a civil action as provided by subsection (g), the trial court lacked subject matter jurisdiction over this case. Because the trial court lacked subject matter jurisdiction, we vacate its order granting the petition and releasing the recordings.

VACATED.

Judges DILLON and GORE concur.

IN THE MATTER OF D.H.

No. COA22-639

Filed 18 April 2023

Mental Illness—involuntary commitment—danger to self—sufficiency of findings

The trial court did not err by involuntarily committing respondent, who suffered from schizophrenia, for being mentally ill and dangerous to himself where the doctor who had examined him testified that respondent was in a current state of acute psychosis, suffered from severely impaired insight and judgment, was unable to care for himself adequately, and would become non-compliant with medication if he were released. The evidence and underlying findings supported the ultimate finding that defendant posed a danger to himself, and the trial court appropriately drew the requisite nexus between respondent's past conduct and future danger.

Judge TYSON dissenting.

Appeal by respondent from order entered 11 April 2022 by Judge Mark Stevens in Wake County District Court. Heard in the Court of Appeals 7 February 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert T. Broughton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for respondent-appellant.

ZACHARY, Judge.

D.H.[1] ("Respondent") appeals from an Involuntary Commitment Order entered against him. Respondent argues that the trial court's ultimate finding that he posed a danger to himself was not supported by its underlying findings regarding whether, absent inpatient mental health treatment, there was a reasonable probability that Respondent would suffer serious physical debilitation in the near future; in turn, Respondent contends, these findings were not supported by the evidence. After careful review, we affirm.

Background

On 28 March 2022, Respondent's father executed an Affidavit and Petition for Involuntary Commitment alleging, *inter alia*, that Respondent was "hearing voices[,]" hallucinating, "riding around the city of Raleigh displaying odd [b]ehaviors[,]" and refusing to participate in therapy or take his medication. The magistrate ordered that Respondent be taken into custody later that day.

The next day, Dr. Nancy Clayton of UNC Health Care Crisis and Assessment Services at WakeBrook, an inpatient 24-hour facility, examined Respondent and completed a "24 Hour Facility Exam for Involuntary Commitment" form. On the form, Dr. Clayton marked boxes indicating that Respondent was "[a]n individual with a mental illness[,]" "[d]angerous to" himself, and "[d]angerous to" others. To support her conclusions, Dr. Clayton included in the "Description of Findings" that Respondent

> was telling parents about being Emperor of Japan. [Respondent is] distractible and slow to respond.

1. Given the sensitive nature of this appeal, we use initials to protect Respondent's identity.

> [Respondent] appears to respond to internal stimuli and is thought blocking in interview. He reports being off meds [for] several months and denies need for meds or having a mental illness despite this being his 3rd psych admit[tance] since March 2021. 1st psychosis noted in March 2021 when [Respondent] hospitalized at Old Vineyard. [Respondent] had taken off and driven for long periods when unwell in the past and more recently. Family report he is having poor sleep. [Respondent] recently fired from job a week ago due to poor performance. [Respondent] needs inpatient hospitalization for safety/stabilization.

This matter came on for hearing on 7 April 2022 in Wake County District Court.[2] The trial court heard testimony from Respondent, Respondent's father, and Dr. Clayton, and on 11 April 2022, the court entered an Involuntary Commitment Order. In the order, the trial court marked boxes indicating that Respondent was mentally ill and dangerous to himself. To support those conclusions, the trial court marked another box that stated: "Based on the evidence presented, the Court . . . by clear, cogent, and convincing evidence finds . . . facts supporting involuntary commitment"; the court attached to the order and incorporated by reference a document titled "Findings of Fact in Support of Inpatient Commitment." The trial court found, in relevant part, the following additional facts in support of involuntary commitment:

> I. As to Mental Illness
>
> The Court finds by clear, cogent, and convincing evidence that . . . Respondent suffers from a mental illness — specifically, the mental illness of schizophrenia. . . .
>
> . . . .
>
> II. As to Dangerousness to Self
>
> The Court also finds by clear, cogent, and convincing evidence that . . . Respondent is dangerous to self because within the relevant past he has acted in such a way as to

2. A transcript of the commitment hearing, which was conducted via Webex, was unavailable due to a malfunction in the recording equipment. In lieu of a transcript, the parties requested that the hearing participants submit their notes and written recollections of the testimony in narrative form, pursuant to N.C. R. App. P. 9(c)(1). The participants' responses are included in the record on appeal, which was settled by the parties' stipulation and agreement. *See* N.C. R. App. P. 11(b).

show that he 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 his daily responsibilities and social relations, and there is a reasonable probability of Respondent suffering serious physical debilitation within the near future unless adequate inpatient treatment is given. In support of this finding of ultimate fact, this Court finds the following evidentiary facts based upon the competent evidence from the hearing:

. . . .

3. Respondent's psychiatric state was declining prior to his admission to Wake[B]rook as evidenced by the following events and behaviors occurring within the relevant past:

> i. In June 2021 Respondent believed himself to be involved with the FBI and drove to northern Virginia for this reason. Similarly, in August or September 2021 Respondent believed himself to be President of the United States and drove to Washington DC for this reason.
>
> ii. In January 2022 Respondent quit taking medication prescribed for the treatment of his mental illness. He did so because he did not like the medicine, and because he had secured a job driving for Amazon.
>
> iii. After becoming medication non-compliant, Respondent began talking and laughing to himself with increasing frequency and regularity. He also regularly paced throughout his home and his sleep habits changed. . . .
>
> . . . .
>
> vi. During this time Respondent lost his delivery job with Amazon, having held it for only approximately two weeks. He held his prior delivery job with UPS for more than one year, and Respondent's father attributed the loss of the Amazon job to Respondent's increasingly erratic behavior.
>
> . . . .

> ix. When Respondent arrived at Wake[B]rook['s] Crisis and Assessment unit on 28 March 2022 he displayed delusional and disorganized thought processes as well as thought blocking, endorsed auditory hallucinations, displayed a blunted affect, and was observed responding to internal stimuli.

4. Since being admitted to Wake[B]rook['s] Inpatient unit on 29 March 2022 Respondent has continued to display many of these same symptoms. . . . In addition, he has resisted cooperating with lab-work and his medication regimen.

5. It is the opinion of Dr. Clayton that when Respondent arrived at Wake[B]rook on 28 March 2022 he was acutely psychotic. Further, it is the opinion of Dr. Clayton that Respondent remains acutely psychotic as of the date of this hearing. This Court finds Dr. Clayton's opinions to be credible. If released from Wake[B]rook in this current condition, Respondent's state of acute psychosis makes it reasonably probable that he would suffer serious physical debilitation within the near future. Further inpatient treatment at Wake[B]rook is therefore required to prevent such a result.

6. It is the opinion of Dr. Clayton that Respondent has really poor insight [in]to his mental illness, and has no insight into the fact that he is currently acutely psychotic. This Court finds Dr. Clayton's opinions to be credible, and concludes that Respondent has severely impaired insight and judgment. As a result, this Court concludes Respondent is currently unable to care for himself. This conclusion is further supported by Respondent's testimony regarding his plans for discharge. If released from Wake[B]rook in this current condition, Respondent's inability to care for himself makes it reasonably probable that he would suffer serious physical debilitation within the near future. Further inpatient treatment at Wake[B]rook is therefore required to prevent such a result.

7. Respondent's delusional, disorganized, and irrational thought content continues to motivate his actions, and is inconsistent with a person who has the ability to care [for] himself. If released from Wake[B]rook in this

> current condition, Respondent's inability to care for himself makes it reasonably probable that he would suffer serious physical debilitation within the near future. Further inpatient treatment at Wake[B]rook is therefore required to prevent such a result.
>
> . . . .
>
> 9. Respondent does not believe that anything is wrong with him, does not believe that he needs any medication, and has testified that he will not take the medication once discharged from Wake[B]rook. He ceased voluntarily taking his medication while in the community prior to coming to Wake[B]rook, and at various times since arriving at Wake[B]rook has been resistive to voluntarily taking the medication. . . .
>
> 10. It is the opinion of Dr. Clayton that if discharged in his current condition Respondent would not comply with any treatment regimen and that an abrupt psychiatric decompensation would result. This Court finds Dr. Clayton['s] opinion to be credible.
>
> 11. The Court concludes based on these facts that Respondent — if released in his current condition — will immediately become medication non-compliant.
>
> 12. If released before an effective medication regimen can be established or if Respondent becomes non-compliant with an effective regimen, this Court finds that it is reasonably probable that a rapid decline in Respondent's psychiatric condition would occur in the near future, with a reemergence in the acutely psychotic symptoms that caused him to present to Wake[B]rook on 28 March 2022. A rapid decline in Respondent's psychiatric condition would make it reasonably probable that Respondent would suffer serious physical debilitation within the near future. Further inpatient treatment at Wake[B]rook is therefore required to prevent such a result.

The trial court ordered that Respondent be committed for 60 days to UNC Hospitals at WakeBrook. Respondent timely appealed.

Discussion

On appeal, Respondent argues that the trial court erred by involuntarily committing Respondent because the evidence did not support the court's finding that it was "reasonably probable that Respondent would suffer serious physical debilitation within the near future" absent inpatient mental health treatment, and thus there was no support for the court's determination that Respondent was "dangerous to himself[.]"

As a preliminary matter, we note that although Respondent's Involuntary Commitment Order has expired, the argument before us is not moot because "the challenged judgment may cause collateral legal consequences for the appellant." *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008); *see also*, *e.g.*, *In re C.G.*, 383 N.C. 224, 236, 881 S.E.2d 534, 543 (2022) ("Although the involuntary commitment order at issue in this case has long since expired, [the] respondent's appeal is not moot.").

When deciding whether to involuntarily commit an individual for inpatient treatment, the trial court must make two specific findings "by clear, cogent, and convincing evidence[.]" N.C. Gen. Stat. § 122C-268(j) (2021). The trial court must first find "that the respondent is mentally ill[.]" *Id.* The trial court must then find that the respondent is "dangerous to self . . . or dangerous to others[.]" *Id.* In its order, the trial court "shall record the facts that support its findings." *Id.*

Upon review of a commitment order, we "determine whether the ultimate finding[s] concerning the respondent's [mental illness and] danger to [him]self . . . [are] 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). The required findings "must actually be made by the trial court and cannot simply be inferred from the record." *C.G.*, 383 N.C. at 240, 881 S.E.2d at 546 (citation and internal quotation marks omitted). "However, it is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof, that is, whether the evidence of [the] respondent's mental illness and dangerousness was clear, cogent and convincing." *In re J.P.S.*, 264 N.C. App. 58, 61, 823 S.E.2d 917, 920 (2019) (citation and internal quotation marks omitted).

In the instant case, Respondent challenges whether there was evidentiary support for the trial court's determination that he was

"dangerous to himself." According to the definition set forth by our General Assembly, an individual is "dangerous to self" if the individual has done any of the following "[w]ithin the relevant past":

> 1. The individual has acted in such a way as to show all of 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 [Chapter 122C]. 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.
>
> 2. The individual has attempted suicide or threatened suicide and that there is a reasonable probability of suicide unless adequate treatment is given pursuant to [Chapter 122C].
>
> 3. The individual has mutilated himself or herself or has attempted to mutilate himself or herself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is given pursuant to [Chapter 122C].
>
> Previous episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical debilitation, suicide, or self-mutilation.

N.C. Gen. Stat. § 122C-3(11)(a).

"The trial court must find sufficient evidence to support one of the three prongs of this statute in order to conclude that an individual is a danger to himself." *J.P.S.*, 264 N.C. App. at 62, 823 S.E.2d at 920–21; *see also* N.C. Gen. Stat. § 122C-3(11)(a).

The "trial court's involuntary commitment of a person cannot be based solely on findings of the individual's history of mental illness or behavior prior to and leading up to the commitment hearing, but must include findings of a reasonable probability of some future harm absent treatment as required by" § 122C-3(11)(a). *J.P.S.*, 264 N.C. App. at 62, 823 S.E.2d at 921 (citation and internal quotation marks omitted). "Any commitment order that fails to include such findings is insufficient to support its conclusions that the respondent presented a danger to himself and others." *Id.* (citation and internal quotation marks omitted).

Here, Respondent does not challenge the trial court's ultimate finding that Respondent is mentally ill, as evinced by his schizophrenia diagnosis. Instead, Respondent argues that the trial court's ultimate finding that he posed a danger to himself was not supported by its underlying findings, which, in turn, were not supported by the evidence. We disagree.

As noted above, to establish dangerousness to self, N.C. Gen. Stat. § 122C-3(11)(a)(1) requires a showing of: (1) the individual's inability without assistance to either "exercise self-control, judgment, and discretion" when carrying out daily responsibilities, or "satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety"; *and* (2) "a reasonable probability of the individual's suffering serious physical debilitation within the near future unless adequate treatment is given[.]" N.C. Gen. Stat. § 122C-3(11)(a)(1).

Here, the trial court's underlying findings are supported by the evidence, and they are adequate to sustain the court's determination that Respondent was dangerous to himself. First, there was ample evidence by way of Dr. Clayton's testimony that in Respondent's current "state of acute psychosis" he suffers from "severely impaired insight and judgment" and is "unable to care for himself" adequately, making it "reasonably probable that he would suffer serious physical debilitation within the near future" in the absence of inpatient mental health treatment.

There was also substantial evidence that "Respondent — if released in his current condition [of acute psychosis] — will immediately become medication non-compliant[,]" rendering it even more likely that he will suffer serious physical debilitation in the near future in the absence of inpatient mental health treatment. Respondent's father testified that Respondent previously ceased taking his medication because he "did not like" the medication; Dr. Clayton testified that Respondent "had repeatedly stated [during his assessments] that he would stop medication and not follow up with any outpatient mental health treatment on

discharge"; and Respondent testified that he would not take his medication because he believed that he did not suffer from any mental illness.

Dr. Clayton explained that if Respondent were to become non-compliant with his medication, "she would expect Respondent to experience a worsening of his psychotic symptoms in the near future." She stated that during his commitment at WakeBrook, Respondent displayed symptoms of hearing voices, responding to internal stimuli, experiencing delusions and paranoia, having disorganized thinking with "thought blocking," and demonstrating poor concentration and memory issues. Respondent's father also testified that Respondent's mental condition had worsened previously when he stopped participating in his mental health treatment, which caused Respondent to "laugh[ ] to himself, talk[ ] to himself, and pac[e] around the home for 5-10 minutes at a time."

Based on this evidence, the trial court found that Respondent "has severely impaired insight and judgment[,]"and is unable to care for himself. *See id.* § 122C-3(11)(a)(1)(II). The trial court then directly linked Respondent's inability to care for himself based on his past behavior and current symptoms to a risk of future harm: "If released from Wake[B]rook in this current condition, Respondent's inability to care for himself makes it reasonably probable that he would suffer serious physical debilitation within the near future." In so finding, the trial court appropriately drew the requisite "nexus between [R]espondent's past conduct and future danger." *C.G.*, 383 N.C. at 249, 881 S.E.2d at 551 (citation omitted).

We conclude that the trial court made the "forward-looking findings of fact" necessary to support its ultimate finding of a reasonable probability that Respondent would suffer serious physical debilitation in the near future absent inpatient mental health treatment, and that these findings were supported by the evidence. *Id.* at 250, 881 S.E.2d at 552 (Newby, C.J., concurring in part and dissenting in part). Thus, the trial court's findings support the court's determination that Respondent suffers from mental illness and poses a danger to himself, warranting involuntary commitment for inpatient mental health treatment.

Conclusion

For the foregoing reasons, we affirm the Involuntary Commitment Order.

AFFIRMED.

Judge GORE concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The trial court failed to draw the requisite "nexus between the [R]espondent's past conduct and future danger" to reach the conclusion it was reasonably probable Respondent would suffer serious physical debilitation within the near future. *In re C.G.*, 383 N.C. 224, 249, 2022-NCSC-123, ¶ 41, 881 S.E.2d 534, 551 (2022) (citation, internal quotation marks, and alterations omitted). Even if Respondent reverted to his prior behaviors, petitioner's evidence and the record demonstrates his past psychotic symptoms and delusions were neither harmful to himself nor others to warrant involuntary commitment. Respondent's past symptoms alone cannot serve as a sufficient basis of future danger to support the trial court's conclusion. The trial court's order is properly vacated and remanded. I respectfully dissent.

I. Standard of Review

"The State's burden of proof to deprive Respondent of [his] liberty demands competent and relevant evidence and findings of fact to be based upon clear, cogent, and convincing evidence at the involuntary commitment hearing." *In re E.B. AAU/MPU Wards Granville Cnty.*, 287 N.C. App. 103, 108, 2022-NCCOA-839, ¶ 15, 882 S.E.2d 379, 383 (2022).

"The trial court's conclusions of law to involuntarily commit and deprive Respondent of [his] 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.* at 108, ¶ 17, 882 S.E.2d at 384. This Court reviews "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" meeting the required burden of proof. *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016). Here, they are not.

II. Analysis

Petitioner's showing and the trial court's findings are not supported by sufficient evidence to deny Respondent his liberties.

> To find danger to self in these circumstances, the trial court must find that Respondent "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 his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety" and that "there is a reasonable probability of his suffering serious physical debilitation within the near future" without involuntary commitment.

Id. (citing N.C. Gen. Stat. § 122C-3(11) (2021)). As the majority's opinion correctly notes, the lack of transcript makes this Court's review more difficult.

The trial court concluded it was "reasonably probable that Respondent would suffer serious physical debilitation within the near future," if Respondent were released. The trial court based its conclusion on the testimony from Dr. Nancy Clayton, who testified for the State and predicted "it [wa]s reasonably probable that a rapid decline in Respondent's psychiatric condition would occur in the near future, with a reemergence [sic] in the acutely psychotic symptoms that caused him to present to Wakebrook on 28 March 2022."

The trial court made several findings about Respondent's past symptoms and history of mental illness as well as Respondent's current state. Respondent suffered from a declining psychiatric state and delusions prior to his admission to Wakebrook. Respondent hallucinated and occasionally traveled because of his delusions. For example, Respondent drove to Northern Virginia because he believed he was in the FBI, and he drove to Washington D.C. because he believed he was the President. At one point, Respondent told his father he was the "Emperor of Japan."

After Respondent stopped taking his medication, he started laughing and talking to himself; his sleep habits changed; he lost his job as an Amazon driver; and, he left the scene as law enforcement approached his vehicle at a gas station. None of these findings demonstrate how Respondent's actions support a finding of future danger to himself or others when experiencing delusions or psychotic symptoms. No loss of liberty comes by one fantasizing or believing they are someone or something they are not. Others share or profess the same or similar, or even more bizarre delusions, as Respondent, who are not involuntarily committed.

Respondent's non-aggressive, non-violent history is insufficient to support finding Respondent will be a harm to himself or others in the future to warrant an involuntary commitment as opposed to home or provider-based treatments. A trial court finding that "Respondent's history of mental illness or her behavior prior to and leading up to the

commitment hearing[ ] . . . do[es] not indicate that these circumstances rendered Respondent a danger to herself or himself in the future." *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012).

The present case is distinguishable from *In re Moore*, wherein an individual displayed aggressive, harmful tendencies without medication, and the trial court had evidence such behavior would return if the individual was released from involuntary commitment without medical treatment. 234 N.C. App. 37, 39, 758 S.E.2d 33, 35 (2014).

Similarly, this Court affirmed an order for involuntary commitment where an individual suffered from schizophrenic delusions, which caused her to believe she had blockages in her bodily systems and, when unmedicated, would self-medicate with extreme amounts of laxatives and conduct internal self-examinations. *In re E.B.*, 287 N.C. App. at 106-07, ¶ 10-11, 33-35, 882 S.E.2d at 382-83, 386. The trial court supported its conclusion with evidence the individual was presently a danger to herself and releasing her would result in immediate physical debilitations. *Id.* at 111-12, ¶ 29-32, 882 S.E.2d at 386. Here, we have no such evidence or findings indicating Respondent would suffer immediate physical debilitations or engage in aggressive, harmful tendencies upon release. Sufficient evidence does not overcome the presumption of Respondent's sanity and right of liberty to support a finding or conclusion of future danger to self or others to involuntarily commit.

Additionally, the trial court's conclusion Respondent would be unable to care for himself is insufficient to support its finding that Respondent will "suffer serious physical debilitation in the near future." "[F]indings that an individual suffers from a mental illness, exhibits symptoms associated with that mental illness, and may not be able to take care of his or her needs are not sufficient to satisfy the second prong of the statutory test for the presence of a 'danger to self.' " *In re C.G.*, 383 N.C. at 246, ¶ 38, 881 S.E.2d at 549. The trial court "*must draw a nexus between past conduct and future danger*." *Id.* at 246, ¶ 37, 881 S.E.2d at 549 (emphasis original) (citation and quotation marks omitted).

The trial court's finding that "Respondent would not comply with any treatment regimen and that an abrupt psychiatric decompensation would result" is speculative, unsupported and not sufficient to order involuntary commitment. A finding that an individual does not plan to continue treatment, without evidence of future harm, does not support an ultimate finding of "dangerous to self." *See In re Whatley*, 224 N.C. App. at 273, 736 S.E.2d at 531 (citing N.C. Gen. Stat. § 122C-3(11)(a)(1)). Again, the evidence does not support a finding Respondent's state without treatment is or will be harmful to himself or others in the future.

A person's decision to reduce or discontinue prescribed medication is also not evidence or a basis to support an involuntary commitment. *In re N.U.*, 270 N.C. App. 427, 432-33, 840 S.E.2d 296, 300 (2020) ("[T]he findings that Respondent lacks 'insight into her mental illness' and is 'unable to care for herself for daily responsibilities and taking medications' are also insufficient to show that Respondent was a danger to herself as there is 'no evidence that Respondent's refusal to take [her] medication creates a serious health risk in the near future.' ") (citation omitted); *accord In re W.R.D.*, 248 N.C. App. at 516, 790 S.E.2d at 348 (explaining that findings indicating respondent "refus[ed] to acknowledge his mental illness, and refus[ed] to take his prescription medication" failed to demonstrate how a "health risk w[ould] occur in the near future") (citation and internal quotation marks omitted). The trial court's findings are insufficient to support a conclusion and order of involuntary commitment. *In re Whatley*, 224 N.C. App. at 273, 736 S.E.2d at 531.

III. Conclusion

This Court cannot affirm a conclusion and order of involuntary commitment without findings based upon clear, competent evidence supporting such findings and conclusion of future harm to himself or others. N.C. Gen. Stat. § 122C-3(11). While the trial court attempts to project a connection between Respondent's past and present conduct with a future risk of harm, it fails to do so, as a lawful order "*must draw a nexus between past conduct and future danger*." *In re C.G.*, 383 N.C. at 246, ¶ 37, 881 S.E.2d at 549 (emphasis original) (citation and quotation marks omitted). A person has a right to refuse treatment and medication without loss of freedom. *In re Whatley*, 224 N.C. App. at 273, 736 S.E.2d at 531; *In re N.U.*, 270 N.C. App. at 432-33, 840 S.E.2d at 300; *In re W.R.D.*, 248 N.C. App. at 516, 790 S.E.2d at 348. Respondent's past state, or even his present status, does not sufficiently prove he will harm himself or others in the future to support involuntarily depriving him of his liberty. *Id.*; *In re Whatley*, 224 N.C. App. at 273, 736 S.E.2d at 531. The trial court's order is properly vacated and remanded. I respectfully dissent.

IN THE MATTER OF K.J.E.

No. COA22-591

Filed 18 April 2023

1. Termination of Parental Rights—disposition—new order entered on remand—nunc pro tunc to date of original termination hearing—improper

After a father's parental rights in his son were terminated, the disposition portion of the termination order—which was entered on remand from a prior appeal—was vacated and remanded where, at the remand hearing, the trial court relied solely on the record from the original termination hearing held two years earlier (in 2020) and entered the order *nunc pro tunc* to 2020. The court's use of a *nunc pro tunc* order was inappropriate where (1) it suggested that the court did not understand its duty to determine the best interests of the child as of the date of the remand hearing; and (2) the court was not simply correcting the order to reflect findings that it had already made in 2020, but rather, it was adding new findings.

2. Termination of Parental Rights—disposition—hearing on remand—trial court's discretion—refusal to hear new evidence, allow offer of proof, and grant continuance

In a father's appeal of an order that was entered on remand from a prior appeal and that terminated his parental rights in his son, where the trial court's ruling that termination of the father's rights was in the child's best interests was vacated and remanded, the appellate court declined to rule on whether the trial court abused its discretion at the first remand hearing when it denied the father's motion to introduce new evidence and refused to continue the hearing so that the guardian ad litem could update her "best interests" report. Nevertheless, the appellate court held that it was error for the trial court not to allow the father to make an offer of proof of the new evidence that he would have offered. On remand, the trial court would have broad discretion to determine what evidence was "relevant, reliable, and necessary" to its best interests determination, and it could not abuse that discretion by denying a party the opportunity to present such evidence.

Appeal by respondent-father from order entered 18 April 2022 by Judge Frederick B. Wilkins, Jr., in Alamance County District Court. Heard in the Court of Appeals 8 March 2023.

Kelly Fairman for petitioner-appellee mother.

Sean P. Vitrano for respondent-appellant father.

DILLON, Judge.

This appeal is the second in this matter. In this appeal, Respondent ("Father") challenges the order entered on remand from the first appeal terminating his parental rights to K.J.E. (referred herein by the pseudonym "Keith"). We affirm the adjudication portion of the order in which the trial court determined that Father had willfully abandoned Keith. However, we also vacate the order's disposition portion terminating Father's parental rights, and we remand the matter to the trial court.

I. Background

In 2019, Keith's mother ("Mother") filed a petition seeking the termination of Father's parental rights to their son Keith, based, in part, on willful abandonment.

The procedure to terminate one's parental rights involves two distinct stages, namely, the adjudication stage (where the trial court determines whether one or more of the statutory grounds for termination exist), and the disposition stage (where the trial court determines whether termination of the parent's rights is in the child's best interest). *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984).

In 2020, after a hearing on the matter, the trial court entered its first order terminating Father's parental rights. In the adjudication portion of this 2020 order, the trial court determined that one of the statutory grounds for termination existed, specifically, that Father had willfully abandoned Keith in 2019 for more than six months immediately prior to the filing of the petition. *See* N.C. Gen. Stat. § 7B-1111(a)(7) (2019). In the order's disposition portion, the trial court determined it was in Keith's best interests that Father's parental rights be terminated. The trial court relied in part on a report from Keith's court-appointed guardian ad litem (the "GAL").

A year later, in 2021, our Supreme Court vacated the trial court's 2020 order and remanded the matter on the basis that there were insufficient findings to support its adjudication portion. *In re K.J.E.*, 378 N.C. 620, 624, 862 S.E.2d 620, 623 (2021).

In 2022, after the hearing on remand, the trial court entered its second order, making additional findings regarding adjudication and

terminating Father's parental rights. During that hearing, the trial court re-appointed the GAL to represent Keith's interests. However, the trial court denied Father's motion to receive new evidence. Rather, the trial court relied solely on the record from the 2020 hearing to enter its 2022 order. The trial court entered this new order "out of session *nunc pro tunc* [to] 16 September 2020." Father timely appealed.

II. Analysis

[1] In the 2022 order being appealed, the trial court addressed both the adjudication stage and the disposition stage. A trial court is allowed to consider both stages at the same hearing and to enter a single order addressing both stages. *See In re S.M.M.*, 374 N.C. 911, 915, 845 S.E.2d 8, 12 (2020) ("Although the dispositional evidence [is] intertwined with adjudicatory evidence, a trial court is not required to bifurcate the hearing into two distinct stages.").

In this appeal, Father only challenges the disposition portion of the 2022 order. He makes no challenge to the adjudication portion. Therefore, we affirm the order's adjudication portion, which again determining that Father had willfully abandoned Keith for the relevant period in 2019.

Turning to the disposition portion of the 2022 order, Father argues that the trial court was required to enter a new disposition order rather than simply re-adopting its disposition determination it made in its 2020 order.

We note that when our Supreme Court vacated the 2020 order, it necessarily vacated its disposition portion. We agree with Father that the trial court was required on remand during the disposition stage (assuming that the trial court determined in the adjudication stage that a statutory ground for termination existed) to determine the best interests of the child at or near the time of the 2022 hearing. The trial court has broad, but not unlimited, discretion to decide whether to hear new evidence at a remand hearing. *See In re R.D.*, 376 N.C. 244, 253, 852 S.E.2d 117, 126 (2020) ("[T]he trial court [has] broad discretion regarding the receipt of evidence in its quest to determine the best interests of the child . . . [a]lthough this reservoir of discretion is not limitless[.]"). That is, it is not *per se* error for a trial court to base its best-interest determination at a remand hearing on the record from an earlier hearing, for instance, where no one attempts to offer new evidence.

Here, however, the trial court entered its 2022 order *nunc pro tunc* to 2020, evidencing that the trial court did not believe it was required to

make the "best-interest" determination as of 2022. The trial court's belief is also reflected in many of its findings. For instance, the trial court found in its 2022 order that Keith was four years old, as it found in 2020.

Our Supreme Court has instructed that a trial court's authority to enter an order *nunc pro tunc* to an earlier date is limited. *See State v. Eley*, 326 N.C. 759, 765, 392 S.E.2d 394, 397 (1990). And we have held that a judge cannot use a *nunc pro tunc* "to accomplish something which ought to have been done but was not done":

> "[t]he power of the court to open, modify, or vacate the judgment rendered by it must be distinguished from the power of the court to amend records of its judgments by correcting mistakes or supplying omissions in it, and to apply such amendment retroactively by an entry nunc pro tunc."

Rockingham County v. Tate, 202 N.C. App. 747, 751-52, 689 S.E.2d 913, 917 (2010). We conclude that entering the 2022 order *nunc pro tunc* to 2020 was an inappropriate use of a *nunc pro tunc* order. The trial court was not simply correcting the order to reflect findings that it had, in fact, made in 2020. Rather, the trial court added findings it failed to make at the 2020 hearing. *See In re V.T.*, 269 N.C. App. 474, 837 S.E.2d 215 (2020) (noting that designating an adjudication and disposition order *nunc pro tunc* to the prior year was "not a proper *nunc pro tunc* order") (unpublished).

Accordingly, we vacate the disposition portion of the 2022 order and remand the matter for a new disposition hearing. At that hearing, the trial court must exercise its discretion to determine whether it is *then* in Keith's best interests that Father's parental rights be terminated. *See In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020) (trial court's best-interest determination is reviewed for abuse of discretion). In the remainder of this opinion, we address other issues raised by Father in this appeal, as they are likely to come up on remand.

[2] We first address Father's argument that the trial court abused its discretion by failing to allow Father to introduce certain evidence of matters that had arisen since the 2020 hearing, which he claims bears on Keith's best interest.

Unlike the adjudication stage, "the disposition stage of a termination proceeding is not adversarial." *In re R.D.*, 376 N.C. 244, 253, 352 S.E.2d 117, 125 (2020). Rather, the stage is "more inquisitorial[.]" *Id.* Accordingly, the trial court is not bound by the Rules of Evidence during this second stage, but it is vested with "broad discretion" to consider

"whatever evidence the trial court believes is most 'relevant, reliable, and necessary.' " *Id.* And a trial court has discretion concerning evidentiary matters in a remand hearing. *See, e.g., In re K.N.*, 373 N.C. 274, 285, 837 S.E.2d 861, 869 (2020) (stating that "[o]n remand, the trial court shall have the discretion to determine whether the receipt of additional evidence is appropriate"); *In re N.D.A.*, 373 N.C. 71, 84, 833 S.E.2d 768, 777 (2019) (stating in its an opinion vacating a termination order that "[t]he trial court may [on remand], in the exercise of discretion, receive additional evidence on remand if it elects to do so.").

Mother, though, notes our Supreme Court did not state in its 2021 mandate that the trial court had discretion to take new evidence, but rather, merely instructed the trial court to make additional findings. However, our Supreme Court has recently recognized that a trial court *does* have such discretion on remand in a termination case where the appellate court was silent in its mandate on receiving new evidence at the remand hearing. *See In re S.M.M.*, 374 N.C. at 914, 845 S.E.2d at 11-12 (noting the "opinion was silent as to whether the trial court should take new evidence on remand, and therefore, the [appellate court] left that decision to the trial court's sound discretion").

Our Supreme Court held in 1984 that a trial court *must* generally hear any evidence relevant to the best-interest determination if the evidence is not cumulative.

> "Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of the child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony."

In re Shue, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984).

In July 2020, citing *Shue*, our Supreme Court suggested that a trial court *might* abuse its discretion when it refuses to consider new evidence bearing on the trial court's best-interest determination, provided the motion forecasts more than mere speculation that facts may have changed since the original order was entered:

> "Mere speculation that some facts may have changed in the eighteen months since the court originally heard evidence is not sufficient to demonstrate that the trial court abused its discretion in denying respondent's motion to reopen the evidence on remand.

> Absent any forecast of relevant testimony or other evidence bearing upon the [trial court's] ultimate determination of the child's best interests, the trial court's decision to refrain from reopening the record is entirely consistent with [our Supreme Court's] general admonition that a trial court must always hear any relevant and competent evidence concerning the best interests of the child. In this case there was simply no evidence to be heard by the trial court on remand."

In re S.M.M., 374 N.C. at 915, 845 S.E.2d at 12 (citing *In re Shue*, 311 N.C. at 597, 319 S.E.2d at 576).

Later in 2020, our Supreme Court described a trial court's discretion on evidentiary questions to be broad, but not unlimited:

> "[T]he focus during the dispositional stage is entirely on ascertaining the best interests of the child by utilizing whatever evidence the trial court believes is most 'relevant, reliable, and necessary.' N.C.G.S. § 7B-1110(a). This statute gives the trial court broad discretion regarding the receipt of evidence in its quest to determine the best interests of the child under the particular circumstances of the case… the reservoir of discretion [however] is not limitless[.]"

R.D., 376 N.C. at 253, 852 S.E.2d at 125-26.

Almost a year later, in September 2021, our Supreme Court, citing its 2020 *R.D.*, found no abuse of discretion where the trial court had curtailed the respondent-parent's testimony during the disposition stage, emphasizing that N.C. Gen. Stat. § 7B-1110(a) states that a judge "*may* consider evidence . . . that the court finds *relevant*, *reliable*, *and necessary* to determine the best interests of the juvenile." *In re M.Y.P.*, 378 N.C. 667, 680, 863 S.E.2d 773, 782 (2021). Our Court has since cited *M.Y.P.* to recognize that a trial court has wide discretion to determine whether "to admit or deny evidence at the dispositional phase[.]" *In re M.T.*, 285 N.C. App. 305, 360, 877 S.E.2d 732, 768 (2022).

Father listed several matters in his motion to reopen evidence at the 2022 hearing, and his attorney represented to the trial court that Father has interacted with Keith since 2020. However, Father was not allowed to make an offer of proof concerning his evidence on these matters. Accordingly, we make no holding as to whether it was an abuse of discretion for the trial court not to allow the evidence. However, we conclude the trial court has a duty to hear any relevant evidence concerning

Keith's best interests, it has wide discretion to determine what evidence is "relevant, reliable, and necessary" on this question, and the trial court must not abuse its discretion by denying a party the ability to present such evidence.

We now address Father's contention that the trial court erred by failing to continue the hearing to allow the GAL to visit with Keith, Mother, and Father, and then make a new "best-interest" report to the trial court. Indeed, one of the functions of the GAL is to provide information to the trial court to aid the trial court's decision regarding the child's best interest. *See* N.C. Gen. Stat. § 7B-601(a) (2022).

At the 2022 hearing, the GAL told the trial court that since she had just been reappointed, she had nothing new to add from her 2020 report concerning Keith's best interest, and as a result, a 30-day continuance would be important to allow her to reassess the situation and report her findings to the trial court.

It could be argued that the trial court's refusal to allow the GAL to reassess the information was an abuse of discretion. A trial court, though, also has broad discretion to determine whether to grant a continuance. *See In re S.M.*, 375 N.C. 673, 681, 850 S.E.2d 292, 300 (2020) (trial court has discretion to determine whether good cause exists to grant a continuance of a termination hearing). While a trial court has the discretion to deny a party from developing evidence based on speculation that matters may have changed since the prior hearing, *S.M.M.*, 374 N.C. at 915, 845 S.E.2d at 12, our Supreme Court has suggested a trial court should not begin to make a determination before the GAL can perform her duties. *See In re W.K.*, 376 N.C. 269, 274, 852 S.E.2d 83, 88 (2020). We make no determination as to whether the trial court abused its discretion on this issue at the 2022 hearing. We, however, point out that when this matter comes back on for hearing, the trial court will be making a best-interest determination with information from 2020. It would seem to be an abuse of discretion if the trial court, on remand from our opinion today, made a best-interest determination based on 2020 information where the court could access newer information. If, however, the trial court determines in its discretion not to allow additional evidence at that hearing or an updated GAL report, we urge the court to make detailed findings concerning why it believes new evidence would not be relevant, reliable, and necessary to the child's best interest.

Finally, we address Father's argument that he should have been allowed to make an offer of proof of the evidence he would have offered at the 2022 hearing. Mother argues that offers of proof are not appropriate in termination proceedings. However, our Supreme Court has

recognized that a party to a termination proceeding should be allowed to make an offer of proof of the evidence he would have offered to protect the record. *See M.Y.P.*, 378 N.C. at 679-80, 862 S.E.2d at 782. Accordingly, we conclude that it was error for the trial court not to allow Father to make his offer of proof he was prepared to make at the 2022 hearing.

III. Conclusion

We affirm the adjudication portion of the trial court's 2022 order. However, we vacate the order's disposition portion and remand the matter for a new disposition hearing. On remand and as explained herein, the trial court has broad, but not unlimited, discretion to determine what new evidence to hear to aid in making its best-interest determination.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges TYSON and GORE concur.

IN THE MATTER OF K.J.M.

No. COA22-385

Filed 18 April 2023

1. Child Abuse, Dependency, and Neglect—neglect—findings of fact—appropriate caretaker

In an appeal from the trial court's order adjudicating respondent-mother's child to be a neglected juvenile, after determining that certain findings of fact were actually conclusions of law, the appellate court determined that the remaining challenged findings, which related to the child's lack of a caretaker, were supported by clear and convincing evidence where the mother was incarcerated, the father was deceased, and there was no evidence that other family members were available to be caretakers.

2. Child Abuse, Dependency, and Neglect—neglect—conclusions of law—substantial risk of impairment or harm—no caretaker

In an appeal from the trial court's order adjudicating respondent-mother's child to be a neglected juvenile, the appellate court rejected respondent-mother's challenges to the trial court's conclusions of law. As for the conclusion that the allegations in the juvenile petition had been proven by clear, cogent, and convincing evidence, the appellate court rejected the mother's hypertechnical

reading of the conclusion as meaning that every single word in the petition had been proven. As for the conclusion that the child was a neglected juvenile, there was ample support that the child was at a substantial risk of impairment or harm where he was six years old and left without a caretaker for an indefinite period of time because his mother was incarcerated, his father was deceased, and his caretaker had just been arrested for possession of methamphetamine.

Appeal by respondent mother from order entered 10 February 2022 by Judge William F. Brooks in District Court, Yadkin County. Heard in the Court of Appeals 21 March 2023.

James N. Freeman, Jr. for petitioner-appellee Yadkin County Human Services Agency.

J. Thomas Diepenbrock for respondent-appellant-mother.

Keith Karlsson for appellee guardian ad litem.

STROUD, Chief Judge.

Mother appeals from an order that (1) adjudicated her minor child Kevin[1] to be a neglected juvenile and (2) entered an initial disposition. On appeal, Mother only challenges the trial court's adjudication of Kevin as neglected. Because (1) clear and convincing evidence supports the trial court's findings of fact, (2) those findings of fact support the trial court's conclusions of law, and (3) the trial court did not err in its conclusions of law, we affirm.

I. Background

According to the unchallenged findings of fact, this case began on 3 August 2021 when the Yadkin County Human Services Agency ("the Agency") received a report that alleged neglect of Mother's minor child, Kevin, who was then age six. Specifically, the report alleged Mother was incarcerated and the child was in the care of Mr. S[2] who was being arrested for possession of methamphetamine. The record does not clearly establish Mr. S's relationship to Kevin, if any, beyond detailing when he was caring for Kevin. Mr. S is not Kevin's father. The trial court

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1. We use a pseudonym to protect the minor child's identity. This pseudonym was designated by the parties in accord with North Carolina Rule of Appellate Procedure 42(b).

2. We do not use Mr. S's full name to, again, protect Kevin's identity.

made an unchallenged finding that someone else, who "is deceased[,]" is Kevin's father and further found there was "no current dispute as to the child's paternity." Mr. S also does not share a last name with Mother or any other relative of Mother mentioned in the record. The only other place the record discusses Mr. S is in a summary of facts supporting the allegations in the initial juvenile petition. That factual summary indicates Mother knew Mr. S in some capacity because she knew Kevin "had been visiting with" Mr. S and knew Mr. S "use[d] substances but thought he had 'gotten clean.' "

After the Agency received the report of Kevin's neglect, a social worker went to Mr. S's home and found that the initial report was accurate; Mr. S was in the process of being arrested on the possession charge with Kevin present at the home. Further investigation revealed Mother had been incarcerated "for a few weeks" before this incident and had placed Kevin in the care of her mother, *i.e.* Kevin's grandmother, who subsequently placed Kevin in Mr. S's care. The investigating social worker then "recognized the need to seek an alternative arrangement for" Kevin's care and visited Mother in jail to inquire about potential alternative caregivers. Mother only suggested her brother and his wife, but they "indicated they would not be able to provide care for the child." Mother did not suggest Kevin's grandmother as an alternative placement, and, even if she had, the grandmother "was deemed not to be an appropriate option as caretaker for" Kevin because she had "already left him in the care of Mr. [S], leading to the situation at hand."

As a result of that situation, on 4 August 2021, the Agency filed a juvenile petition alleging Kevin was a neglected juvenile. The petition alleged Kevin was neglected in that he "does not receive proper care, supervision, or discipline" from his "parent, guardian, custodian, or caretaker" and he "lives in an environment injurious to [his] welfare." In the section of the petition where the Agency was supposed to "[s]tate facts supporting" the neglect "allegations[,]" the Agency referenced an attachment that primarily included the same factual basis recounted above. In addition to this information, the petition included the following relevant facts in support of the neglect allegation: (a) the initial report to the Agency alleged Kevin had eczema, "but it looked like open sores in the creases of his arms and legs[;]" (b) the social worker investigating the neglect report spoke to Mr. S in the back of a police car following his arrest and he made a number of statements about his drug use and where Kevin was during that time; and (c) Mother told the investigating social worker she thought Kevin was visiting Mr. S, but Mother said Kevin was supposed to have been returned to the grandmother's care a week before the incident.

In the factual attachment to the juvenile petition, the Agency also requested custody of Kevin with full placement authority and the ability to "seek medical attention" for Kevin for the "possible exposure to Methamphetamines" and for "his severe eczema that has gone untreated resulting in open sores on his legs and other parts of his body." Kevin later tested negative for "exposure to Methamphetamines." After he was in DSS care, Kevin was "assessed for significant Eczema and was diagnosed with Impetigo[,]" but he was given prescription treatment and he "healed well."

On the same day the Agency filed the juvenile petition, 4 August 2021, the trial court entered an "Order for Nonsecure Custody" based on a determination Kevin was "exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, custodian, or caretaker ha[d] created conditions likely to cause injury or abuse or ha[d] failed to provide, or [was] unable to provide, adequate supervision or protection." (Capitalization altered.) The trial court granted the Agency custody and directed it to place Kevin in a "licensed foster home" with a further hearing to take place on 5 August 2021. (Capitalization altered.)

The trial court held the hearing on nonsecure custody on 5 August 2021 and later entered a written order entitled "Nonsecure Custody Order and Pre-Adjudication Hearing" on 16 February 2022.[3] (Capitalization altered.) After entering findings of fact on the basis for removing Kevin that largely aligned with the facts supporting the allegation of neglect and on the Agency's "reasonable efforts" to prevent removal, the trial court concluded Kevin's "continuation in or return to" his own home was contrary to his "health, safety, and best interests." The trial court also entered conclusions on the "reasonable factual basis" for the allegations and the reasonable efforts made by the Agency. As a result, the trial court: granted the Agency "temporary legal and physical custody" of Kevin with the authority to place him "in a foster home or other appropriate placement[;]" set a schedule for visitation "contingent on the [M]other appearing in a sober state and not being incarcerated[;]" and scheduled a hearing for adjudication and disposition on 2 September 2021.[4]

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3. Our record does not indicate the reason the written order was filed later. We also do not have a transcript from the 5 August 2021 hearing indicating if the trial court also made an oral ruling on these matters.

4. While our record only contains this hearing date in a later-filed written order, the adjudication and disposition hearing took place in September 2021 with Mother and her counsel present, and the trial court made an unchallenged finding in the adjudication and disposition order that Mother was "properly served[.]"

After a continuance due to Mother's exposure to COVID-19, the trial court held the adjudication and disposition hearing on 16 September 2021; the Agency, Mother, and Kevin's guardian *ad litem* ("GAL") were all present and represented by counsel. At the hearing, the only two witnesses were a "child protective services supervisor" and a "foster care social worker" who was handling Kevin's case.

The child protective services supervisor testified, in relevant part, about the initial report the Agency received and its assessment in line with the factual summary from the unchallenged findings of fact recounted above. In addition, this witness testified the Agency sought non-secure custody because they could not "locate another relative or caretaker for" Kevin and that Mother "would be classified as the non-offending parent" in the situation because the "grandmother was the one that actually allowed the child into" Mr. S's care. Finally, this witness also attempted to testify about statements Mr. S made to the Agency social worker investigating the neglect report—which the Agency had included in its attachment to the juvenile petition providing facts in support of the neglect allegation—but the trial court sustained a hearsay objection to any testimony about Mr. S's statements.

The foster care social worker testified, in relevant part, about: Kevin's placement; the witness's interactions with Mother regarding her case plan with the Agency; Mother's release from jail by the time of the hearing, albeit with criminal charges still pending; and the lack of additional alternative placement suggestions from Mother, beyond the suggestion of her brother and his wife in the initial petition, in a pre-hearing meeting. The foster care social worker also testified the Agency was recommending a plan of reunification, with a secondary plan of custody, as well as "standard visitation[,]" which would be "biweekly" supervised visitation.

After attorneys for the parties and the GAL presented arguments on an adjudication of Kevin as a neglected juvenile, the trial court orally found, by clear, cogent, and convincing evidence, Kevin was a neglected juvenile. The trial court then moved onto disposition where the only additional evidence was the Agency's "Court Summary[.]" After hearing from attorneys for the parties and the GAL as to disposition, the trial court made an oral ruling that the plan would be reunification, the Agency would have "custody and placement authority[,]" and Mother would have "minimum biweekly" supervised visitation with discretion for the Agency to "increase, expand, or modify" that visitation as "merit[ed.]"

On 10 February 2022, the trial court entered a written "Adjudication and Disposition Order[.]" (Capitalization altered.) The trial court's initial

findings of fact discussed: Kevin's birthdate and the prior history of the Agency's involvement including Kevin's current placement in a foster home; Mother and her "recent[] release from incarceration[;]" Kevin's father being deceased and the lack of dispute as to paternity; and the witnesses for the Agency at the hearing. Then, in finding of fact 8, the trial court found, by "clear, cogent, and convincing evidence[,]" (1) the facts set out above and (2) additional facts that Kevin "was not in a safe environment with Mr. [S] . . . and upon [Mr. S's] arrest was left without a caretaker of any kind." The trial court then made further findings on: the accuracy of the Agency's court report and its ability to be used to enter a dispositional order; the "reasonable efforts" the Agency used to prevent Kevin's removal and find "relatives and 'nonrelative kin' " to provide care for Kevin; Mother's "interest in doing what is necessary to reunify with the child" following her release from jail; and a visitation plan "that would serve [Kevin's] best interests[.]" The trial court did not make findings in this order about Kevin's potential exposure to methamphetamine or Kevin's eczema or impetigo, beyond finding his skin condition "healed well" in a paragraph about his time in foster care.

The trial court then made a number of conclusions of law. First, the trial court concluded North Carolina is the home state and determined it had jurisdiction in the case. Second, the trial court concluded the "allegations in the Juvenile Petition have been proven by clear, cogent, and convincing evidence" and determined "[c]lear, cogent, and convincing evidence exists to support an adjudication of" Kevin "as neglected" because he "live[d] in an environment that [was] injurious to [his] welfare and did not receive appropriate care and supervision from [his] parent or caretaker." Further, Kevin "suffer[ed] from a physical, mental, or emotional impairment or [was] at a substantial risk of such impairment as a result of living in the injurious environment[.]" Finally, the trial court concluded it was in Kevin's best interest that the Agency have legal and physical custody with placement authority, and the Agency had made reasonable efforts to "prevent or eliminate the need for [Kevin's] placement outside of the home."

The trial court adjudicated Kevin "to be a neglected juvenile" and gave the Agency custody with placement authority. The trial court further ordered the Agency to "continue to make reasonable efforts to reunify" Kevin with Mother, including examining another person as a potential placement, and set supervised bi-weekly visitation. On 8 March 2022, Mother filed written notice of appeal from the trial court's adjudication and disposition order.

II. Analysis

On appeal, Mother argues "[t]he trial court erred when it concluded that Kevin was neglected[.]" Mother makes three specific contentions within this argument. First, Mother asserts "[c]ertain statements denominated as findings of fact are in fact conclusions of law and/or are not supported by clear and convincing evidence." Second, Mother argues "[t]he trial court's conclusion that the allegations in the juvenile petition have been proven by clear, cogent, and convincing evidence is not supported by the court's findings of fact." Third, Mother contends the trial court's "findings of fact do not support a conclusion that Kevin suffered from a physical, mental or emotional impairment or was at a substantial risk of such an impairment" as required to adjudicate a juvenile as neglected due to (1) the lack of proper care, supervision or discipline or due to (2) an environment injurious to the juvenile's welfare, which are the two relevant parts of the definition of "[n]eglected juvenile" for this appeal. *See* N.C. Gen. Stat. § 7B-101(15) (eff. 1 Dec. 2019 to 30 Sept. 2021) (defining "[n]eglected juvenile").

As an initial matter, because Mother only challenges the adjudicatory portion of the trial court's order, she has abandoned any challenge to the disposition portion of the order. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Thus, if we affirm the adjudicatory part of the order, we will also affirm the dispositional part of the order.

Returning to the issues with the adjudicatory part of the order on appeal, we first set out the standard of review. Then, we review Mother's argument as to the findings of fact. Finally, we address Mother's challenges to the conclusions of law.

A. Standard of Review

"The role of this Court in reviewing a trial court's adjudication of neglect . . . is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re D.S.*, 286 N.C. App. 1, 11, 879 S.E.2d 335, 343 (2022) (citations and quotation marks omitted). As to the first part of our review, "[c]lear and convincing evidence is evidence which should fully convince." *Id.* (citation and quotation marks omitted). "It is well settled that in a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re J.A.M.*, 371 N.C. 1, 8, 822 S.E.2d 693, 698 (2019) (citation, quotation marks, and brackets omitted). Further,

"[u]nchallenged findings of fact are deemed supported by the evidence and are binding on appeal." *In re K.W.*, 282 N.C. App. 283, 286, 871 S.E.2d 146, 149 (2022) (citation and quotation marks omitted).

Shifting to the second part of our review, we start by examining whether the findings of fact support the conclusions of law. *See In re D.S.*, 286 N.C. App. at 11, 879 S.E.2d at 343. Then, "we review [the] trial court's conclusions of law *de novo*." *See In re K.W.*, 282 N.C. App. at 286, 871 S.E.2d at 150 ("Whether a child is neglected . . . is a conclusion of law and we review a trial court's conclusions of law *de novo*."). "Under a *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation and quotation marks omitted).

B. Challenges to Findings of Fact

[1] We first address Mother's argument "[c]ertain statements denominated as findings of fact are in fact conclusions of law and/or are not supported by clear and convincing evidence." "As a general rule, the labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review" because "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*." *In re V.M.*, 273 N.C. App. 294, 298, 848 S.E.2d 530, 534 (2020) (citations, quotation marks, and brackets omitted).

When deciding whether to classify a determination as a finding of fact or conclusion of law, we use the following rules. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). "[A]ny determination requiring the exercise of judgment, *see Plott v. Plott*, 313 N.C. 63, [73-]74, 326 S.E.2d 863, [869-]70 (1985), or the application of legal principles, *see Quick v. Quick*, 305 N.C. 446, [451]-52, 290 S.E.2d 653, 657-58 (1982) [, *superseded by statute on other grounds as recognized in State v. Brice*, 370 N.C. 244, 251, 806 S.E.2d 32, 37 (2017)], is more properly classified as a conclusion of law." *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675. "Any determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact." *Id.* (quoting *Quick*, 305 N.C. at 451-52, 290 S.E.2d at 657-58). "[T]he determination of neglect requires the application of the legal principles set forth in . . . [North Carolina General Statute] § 7B-101(15) and is therefore a conclusion of law." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (brackets from original omitted and own brackets added).

Returning to Mother's arguments, all her challenges focus on a single finding of fact, finding 8. Finding 8 provides:

> Pursuant to the aforementioned Juvenile Petition, removal of the juvenile was necessary because the juvenile was exposed to a substantial risk of physical injury because his parent, guardian, custodian or caretakers have created conditions likely to cause injury or abuse and have failed to provide or are unable to provide adequate supervision and protection for the juvenile and lack an appropriate alternative child care arrangement. Furthermore, the juvenile did not receive proper care and supervision from a parent, guardian, custodian or caretaker and lives in an environment injurious to his welfare. In this regard, the Court finds by clear, cogent, and convincing evidence as follows:
>
> > The [Agency] received a report alleging neglect of [Kevin] on August 3, 2021. The report alleged that the child's mother was incarcerated and that the child was currently in the care of [Mr. S.] who was being arrested. Social worker [name omitted] immediately initiated the report and went to [Mr. S]'s home to find him sitting in the back of a Yadkin County Sheriff's Deputy's car, arrested for possession of methamphetamine, with the child on site. The [M]other was in fact incarcerated in the Yadkin County Jail at the time and had been for a few weeks prior to removal. Upon her incarceration, the [M]other left the child in the care of the grandmother, [name omitted]. [The grandmother] subsequently placed the child in the care of [Mr. S]. *The child was not in a safe environment with Mr. [S] at the time and upon his arrest was left without a caretaker of any kind.* [The social worker] assessed the situation and recognized the need to seek an alternative arrangement for the child's care. [Another social worker] then went to the detention center to see if the [M]other could offer an alternative arrangement for the child's care. The [M]other suggested [her brother and his wife] who had provided care for the child during previous episodes between the [Agency] and family. The [brother and his wife] indicated they would not be able to provide care for the child. The grandmother, [name omitted] was deemed not to be

> an appropriate option as caretaker for the child, having already left him in the care of [Mr. S], leading to the situation at hand.
>
> [A witness for the Agency] testified that the [M]other would be classified as a non-offending parent by the agency. The [M]other's incarceration lead to her placing the child in the care of the grandmother [name omitted] for at least a few weeks' time. *[The grandmother], in her capacity as the child's caretaker, placed the child in an injurious environment in the care of [Mr. S], who was arrested for possession of methamphetamine with the child on site. [The grandmother] failed in providing the child with proper care and supervision and absent intervention from the [Agency], the child was without proper care, supervision or a caretaker of any kind.* [The grandmother] was not made a party to this action.

(Emphasis added.) Within this finding, Mother challenges the entire first paragraph and the three italicized sentences from the remaining two paragraphs.

As to each of these four sections, Mother first alleges some or all of the statements are actually conclusions of law. Specifically, Mother asserts the entire first paragraph and the following portions of the three italicized sentences above are actually conclusions of law:

- "The child was not in a safe environment with [Mr. S] at the time[;]"
- "[The grandmother], in her capacity as the child's caretaker, placed the child in an injurious environment in the care of [Mr. S;]"
- "[The grandmother] failed in providing the child with proper care and supervision[.]"

We agree with Mother the entire first paragraph and those three statements are conclusions of law because they all relate to a "determination of neglect[.]" *See In re Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258 (explaining a "determination of neglect requires the application of legal principles . . . and is therefore a conclusion of law"). Under North Carolina General Statute § 7B-101(15), a "[n]eglected juvenile" is defined, in relevant part, as: "Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does not provide proper

care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15). For either of those two parts of the definition of neglect, there must be a "physical, mental, or emotional impairment[,]" some "harm to the child[,]" or a "substantial risk" of one of those things. *In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) (citations and quotation marks omitted). The first paragraph of finding 8 and the three sentences excerpted above involve determinations Kevin was not given "proper care, supervision, or discipline[,]" "live[d] in an environment injurious" to his welfare, or faced a "substantial risk" of harm from one of those two conditions. N.C. Gen. Stat. § 7B-101(15); *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518. Most of the challenged language directly mirrors the language from the statute and caselaw. The only place that does not use that precise language explains Kevin "was not in a safe environment[,]" which is another way of saying he was "in an environment injurious" to his welfare. N.C. Gen. Stat. § 7B-101(15). Because these challenged portions of finding 8 are actually conclusions of law, we review them as conclusions of law alongside Mother's arguments on the conclusions of law discussed below. *See In re V.M.*, 273 N.C. App. at 298, 848 S.E.2d at 534 ("[I]f 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*.").

The only other portions of finding 8 Mother challenges both relate to a determination Kevin did not have a caregiver after Mr. S's arrest. Specifically, Mother challenges the portions of the italicized sentences above finding "upon [Mr. S's] arrest [Kevin] was left without a caretaker of any kind[,]" and "the child was without proper care, supervision or a caretaker of any kind." Mother argues any statement Kevin did not have a caretaker of any kind was "not supported by clear and convincing evidence" because Mother had placed Kevin in grandmother's care upon her incarceration and the Agency had only determined grandmother was not "an *acceptable* caretaker" due to grandmother's role in placing Kevin with Mr. S; the Agency had not shown grandmother was unavailable to be a caretaker. (Emphasis added.)

But all the evidence, as well as the other undisputed findings of fact, show Kevin would have been left home alone—or at least at Mr. S's home alone—but for DSS's intervention. Neither of Kevin's parents were available to care for him upon the Agency's filing of the petition. Mother was incarcerated, and his father was deceased. Mother had left Kevin with her mother, but the grandmother had placed Kevin with Mr. S without informing Mother she was doing so. It is also undisputed Mr. S was arrested for possession of methamphetamine, leaving Kevin with no responsible adult to care for him. Mother was unable to identify anyone to care for

Kevin other than her brother and his wife, and it is undisputed they were unavailable to care for Kevin.

Whether the grandmother was an acceptable caretaker or not, there is no indication in the evidence the grandmother was available as a caretaker after the Agency became involved. While the grandmother was initially Kevin's caregiver upon Mother's incarceration, it is undisputed the grandmother "subsequently placed" Kevin "in the care of" Mr. S. The fact the grandmother gave up care of Kevin to Mr. S indicates she was no longer in the caregiver role in which Mother had placed her at the time the Agency got involved. The fact Mother did not suggest the grandmother as a placement option when the Agency spoke with her further indicates the grandmother was not an option as a caregiver. Finally, the only reason the grandmother came up is because the Agency reviewed agency information and interviewed her because Kevin had spent time with her before. The only testimony about the results from that inquiry was that the Agency "had concerns about" the grandmother "caring for" Kevin because of her past role in placing Kevin in Mr. S's care, who was subsequently arrested for possession of methamphetamine. Notably, that testimony did not indicate the Agency had determined the grandmother was available as a caretaker for Kevin before addressing her suitability; the testimony only established the Agency determined the grandmother was not an appropriate caregiver option regardless of availability.

Additionally, to the extent Mother now argues on appeal the grandmother was an available and appropriate caretaker, we reject that argument because she argued the opposite before the trial court. Mother did not present evidence at the hearing, and her counsel argued the grandmother's conduct had "led to the removal" of the child. Mother's counsel argued, "My client made an appropriate plan. The child was supposed to stay with her mother, not with Mr. [S], with her mother. She did not authorize her mother, at least as the testimony has been here today, for Mr.[S] to have any contact with her son." To the extent Mother contends on appeal that grandmother was an appropriate caretaker and she was actually available to care for Kevin, she is not permitted to "swap horses" on appeal to make an argument she did not make before the trial court. *See, e.g.*, *In re B.C.T.*, 265 N.C. App. 176, 193, 828 S.E.2d 50, 61 (2019) ("[T]his Court has previously held that parties are not allowed to make different arguments on appeal than before the trial court to swap horses between courts in order to get a better mount." (citation and quotation marks omitted)).

Related to this argument, Mother also challenges the findings Kevin "was not in a safe environment with Mr. [S] at the time and upon his

arrest was left without a caretaker of any kind." But the evidence supports this finding as well. There was testimony the environment Kevin was in with Mr. S was "unsafe" and Kevin "would not have a caretaker there[,]" so "another plan would need to be made." Further, the testimony at the hearing indicates the Agency went to speak with Mother, and the only placement she offered was with her brother and his wife, but they were not able to care for Kevin.

Because (1) there was undisputed testimony Mother's brother and his wife were not available as caretakers and (2) there was no evidence the grandmother was available as a caretaker after the Agency became involved, we conclude Mother's challenge to these portions of finding 8 are based on a flawed premise. Without evidence the grandmother was available as a caretaker, the only evidence was that Kevin could not stay in the environment he was in with Mr. S due to the lack of caretaker, and Mother's brother and his wife were not available. Based on this evidence, the trial court could "logical[ly] reason[]" no other caretaker was available for Kevin. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (explaining "[a]ny determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact"). We therefore reject Mother's challenge to the portions of finding 8 that state Kevin had no caretaker "of any kind" after Mr. S's arrest.

C. Challenges to Conclusions of Law

[2] Now that we have reviewed all Mother's challenges to the findings of fact, we address her challenges to the trial court's conclusions of law. Mother challenges two conclusions. First, Mother argues "[t]he trial court's conclusion that the allegations in the juvenile petition have been proven by clear, cogent, and convincing evidence is not supported by the court's findings of fact."

Second, Mother alleges the trial court's "findings of fact do not support a conclusion that Kevin suffered from a physical, mental or emotional impairment or was at a substantial risk of such an impairment[.]" Mother's challenge to this second conclusion relates to the trial court's conclusion Kevin was a neglected juvenile. Under both parts of the definition the Agency alleged, there must be a "physical, mental, or emotional impairment[,]" some "harm to the child[,]" or a "substantial risk" of one of those things. *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518; *see also* N.C. Gen. Stat. § 7B-101(15). As such, we discuss Mother's second challenge as a challenge to the conclusion Kevin was a neglected juvenile.

We examine each of these two challenged conclusions in turn to determine whether the findings of fact support them. *See In re D.S.*, 286

N.C. App. at 11, 879 S.E.2d at 343. We then review the conclusions *de novo*. *See In re K.W.*, 282 N.C. App. at 286, 871 S.E.2d at 150.

1. *Conclusion on Proof of Allegations by Clear, Cogent, and Convincing Evidence*

Mother first challenges the trial court's conclusion that "allegations in the Juvenile Petition have been proven by clear, cogent, and convincing evidence." Specifically, Mother argues "certain allegations in the juvenile petition were not proven" because the Agency's "petition includes statements [Mr. S] allegedly made to [a] social worker" when she interviewed him while he was in the back of the Yadkin County Sheriff's car upon his arrest. When the social worker found Mr. S in the process of being arrested, he made several statements regarding his use of methamphetamine. Those statements were mentioned in the attachment to the petition, but Mother argued before the trial court the statements Mr. S made to the social worker were hearsay, and the trial court excluded the statements on those grounds. Based on the trial court's exclusion of the statements as hearsay, Mother argues the trial court did not have evidence to support any finding about statements Mr. S made to the social worker, as were alleged in the petition, so the trial court could not have concluded *all* of the petition's allegations "have been proven by clear, cogent, and convincing evidence."

Reading this conclusion in context of the entire order, we do not consider the trial court's conclusion—"the allegations in the Juvenile Petition have been proven by clear, cogent, and convincing evidence"—as a conclusion that every single word in the juvenile petition had been proven. Mother's argument is based upon a hypertechnical reading of this conclusion. The trial court did not make any findings of fact based upon Mr. S's statements to the social worker upon his arrest as mentioned in the petition. The trial court's findings indicate only that the social worker went to Mr. S's home and found "him sitting in the back of a Yadkin County Sheriff's Deputy's car, arrested for possession of methamphetamine, with the child on site." The social worker also discovered Mother was incarcerated and "had been for a few weeks prior to removal." The social worker "assessed the situation and recognized the need to seek an alternative arrangement for the child's care." None of these findings are based upon the excluded hearsay evidence, and Mother did not challenge these portions of the findings are unsupported by the evidence.

Under North Carolina General Statute § 7B-807(a), the trial court is required to state it has made its findings by "clear and convincing" evidence:

> If the court finds from the evidence, including stipulations by a party, that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state.

N.C. Gen. Stat. § 7B-807(a) (2021). Indeed, the trial court's conclusion that the allegations had been proven by clear, cogent, and convincing evidence is simply confirming that the trial court properly applied the proper standard of proof as required by law. *See id.* This Court addressed the requirement for the trial court to "affirmatively state" it applied the correct standard of proof in *In re A.S.*:

> With respect to the merits of the trial court's adjudication of neglect, respondent first argues that the order was inadequate because the court failed to affirmatively state that the allegations in the petition had been proven by clear and convincing evidence as required by the Juvenile Code. Pursuant to N.C. Gen. Stat. § 7B–807 (2007), the court is required to recite the standard of proof the court relied on in its determination of neglect.
>
> Although the "[f]ailure by the trial court to state the standard of proof applied is reversible error[,] . . . *there is no requirement as to where or how such a recital of the standard should be included.*" *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (internal citation omitted) (holding that court sufficiently satisfied the requirement of statement of standard of proof by stating the court "CONCLUDES THROUGH CLEAR, COGENT AND CONVINCING EVIDENCE"). Here, the court's order contains the following language: "FROM THE FOREGOING, THE COURT CONCLUDES THROUGH CLEAR, COGENT AND CONVINCING EVIDENCE: . . . ." We find this language sufficient to meet the requirement of N.C. Gen. Stat. § 7B–807.

In re A.S., 190 N.C. App. 679, 688, 661 S.E.2d 313, 319 (2008) (capitalization in original) (emphasis added), *aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009). Reading the entire order in context, the trial court's conclusion that the "allegations in the Juvenile Petition have been proven by clear, cogent, and convincing evidence" is simply indicating the trial court applied the proper standard of proof in concluding the child was a neglected juvenile. The trial court obviously did not adopt as part of its findings every single word of the attachment to the petition describing the situation.

The only "allegations" in the juvenile petition that the trial court needed to make findings of fact to support were that Kevin was a "neglected juvenile" in that he did "not receive proper care, supervision, or discipline from [his] parent guardian, custodian, or caretaker" and "live[d] in an environment injurious to [his] welfare." Whether those allegations were "proven by clear, cogent, and convincing evidence[,]" as the conclusion states, relates to Mother's other challenge to the trial court's conclusion of law, to which we now turn.

2. Conclusion Kevin Was a Neglected Juvenile

Mother also challenges the trial court's conclusion Kevin was a neglected juvenile. As we have already briefly explained above in the section addressing whether parts of finding 8 were actually conclusions of law, a neglected juvenile is, in relevant part: "Any juvenile less than 18 years of age . . . [(1)] whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or [(2)] who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15).

Our Courts have added an additional requirement for both relevant parts of the definition of neglected juvenile because the State has "authority . . . to regulate the parent's constitutional right to rear their children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L. Ed. 1042 (1923), only when 'it appears that parental decisions will jeopardize the health or safety of the child.' " *See In re Safriet*, 112 N.C. App. 747, 752-53, 436 S.E.2d 898, 901-02 (1993) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233-34, 32 L. Ed. 2d 15, 35 (1972) (discussing additional requirement in relation to the "proper care, supervision, or discipline" part of the definition); *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518 (explaining there is a "[s]imilar[]" requirement for the injurious environment part of the definition). Specifically, there must be a "physical, mental, or emotional impairment[,]" some "harm to the child[,]" or a "substantial risk" of one of those things. *See In re Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258 (requiring a "physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline" (quoting *In re Safriet*, 112 N.C. App. at 752, 436 S.E.2d at 901-02)); *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518 ("Similarly, in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm.").

Mother's challenge to the conclusion Kevin was a neglected juvenile relates to this additional requirement. Mother contends the trial court's

findings did not support its conclusion Kevin suffered impairment, harm, or a substantial risk thereof as a result of (1) the lack of proper care, supervision, or discipline, and (2) living in an injurious environment.

We reject Mother's argument; the trial court's findings amply support the conclusion Kevin was at a substantial risk of impairment or harm because of the lack of proper care, supervision, or discipline and because of the injurious environment. The trial court found that following Mr. S's arrest, Kevin, who was only six years old at the time, "was left without a caretaker of any kind." The trial court did not put any timeframe on the period of time Kevin would have been without a caretaker "absent intervention" from the Agency, but the period of time Kevin stood to be without a caretaker appeared to be indefinite at the time of the Agency's intervention based on the circumstances recounted in the findings. First, the father was deceased and therefore could not serve as a caretaker. Second, Mother had been incarcerated from "a few weeks prior to removal" in August 2021 until at least September 2021. Third, the only other people offered as caretakers, Mother's brother and his wife, "indicated they would not be able to provide care for the child." Thus, Kevin faced, in early August 2021, the prospect of an indefinite period of time without any caregiver.

A six-year-old child without a caregiver for an indefinite period of time faces a substantial risk of impairment or harm due to that lack of proper care, supervision, or discipline or due to the injurious environment based on our prior caselaw. For example, in *In re D.C.*, this Court upheld the trial court's conclusion of law that a sixteen-month-old girl was neglected because she was "exposed to an injurious environment that put her in an unacceptable risk of harm and emotional distress" when she was left alone in a "motel room for more than thirty minutes at four o'clock in the morning." *In re D.C.*, 183 N.C. App. 344, 353, 644 S.E.2d 640, 645 (2007) (brackets omitted). Absent intervention by the Agency, Kevin faced a much longer time without a caregiver than the 30 minutes in *In re D.C.*, which also would necessarily have included many times at night. *See id.* Further, the differences in age and location do not distinguish this case from *In re D.C.* As this Court recently explained in *In re D.S.*, part of the problem with leaving a sixteen-month-old child, in contrast to a newborn, alone in a motel room was that the child "was capable of exploring and encountering various hazards[.]" *In re D.S.*, 286 N.C. App. at 17, 879 S.E.2d at 338, 346 (citing *In re D.C.*, 183 N.C. App. at 351, 644 S.E.2d at 644). Here, absent the Agency's intervention, Kevin would also have been "capable of exploring and encountering various hazards" if left alone without a caregiver, presumably at the house of Mr. S, who had just been arrested for possession of

methamphetamine, for an indefinite period of time. *In re D.S.*, 286 N.C. App. at 17, 879 S.E.2d at 346. Therefore, Kevin was also neglected like the child in *In re D.C. See In re D.C.*, 183 N.C. App. at 353, 644 S.E.2d at 645.

While the Agency's timely intervention prevented any harm from coming to Kevin from the lack of proper supervision, the substantial risk of harm alone is sufficient to show a child is neglected. "It is well-established that the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re T.S.*, *III*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006). As a result, the trial court's findings of fact support its conclusions of law Kevin "suffers from a physical, mental, or emotional impairment or is at a substantial risk of such impairment as a result of living in the injurious environment described above" and "[c]lear, cogent, and convincing evidence exists to support an adjudication of [Kevin] as neglected[.]" Since those two conclusions also cover the same ground as the allegations in the juvenile petition, as discussed above, the trial court's findings of fact also support its conclusion the allegations "have been proven by clear, cogent, and convincing evidence." Finally, after a *de novo* review, we conclude the trial court properly reached those conclusions. Mother's arguments do not convince us otherwise.

Mother argues "the trial court only found that Kevin had been placed with his grandmother, who placed him with Mr. [S], who then was arrested for possession of methamphetamine." Mother then find its "noteworthy that the trial court did not make a finding of fact that Mr. [S] was using illegal substances, much less that Kevin was harmed while in Mr. [S's] care or was at substantial risk of such harm." Finally, Mother contends even if there was a finding Mr. S was using illegal substances, "evidence of a parent's substance abuse is not in and of itself clear and convincing evidence sufficient to support a conclusion that a child is neglected."

Mother's arguments misidentify the source of the potential harm. The substantial risk of harm was not necessarily from Mr. S's care but rather from the total lack of care following Mr. S's arrest. Even if we assume Mr. S was an excellent caregiver, he was not available to care for Kevin after his arrest. While the trial court did not make findings about Kevin being harmed from Mr. S's care, it did find Kevin "was left without a caretaker of any kind" following Mr. S's arrest, absent the Agency's intervention. Mother's focus on potential harm from Mr. S's care is misplaced because the substantial risk of harm supported by the trial court's findings of fact, with which we agree following our *de novo*

review, is that Kevin faced the prospect of an indefinite time without a caregiver.

After our review, we determine the trial court's findings of fact support its conclusion of law Kevin was a neglected juvenile. Further, after our *de novo* review of the relevant conclusions of law, the trial court did not err.

III. Conclusion

The trial court did not err in adjudicating Kevin to be a neglected juvenile. After determining certain findings of fact were actually conclusions of law that needed to be reviewed as such, we determine all the remaining findings of fact were supported by clear and convincing evidence. Further, the trial court's findings of fact supported its conclusions of law; Kevin was a neglected juvenile and suffered a substantial risk of impairment or harm because of the lack of proper care, supervision, or discipline and because of the injurious environment he faced. Under our *de novo* review of the conclusions of law we further find the trial court did not err in adjudicating Kevin a neglected juvenile. Finally, Mother did not challenge the dispositional portion of the trial court's order. Therefore, we affirm the trial court's adjudication and disposition order.

AFFIRMED.

Judges HAMPSON and GORE concur.

IN THE MATTER OF M.B.

No. COA22-462

Filed 18 April 2023

Child Custody and Support—jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—home state—initial custody determination

In a child neglect case, the trial court did not have jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to enter two orders (the first regarding guardianship and the second regarding custody) determining the custody of a child, where: Maryland was the child's home state; a Maryland court had previously made an initial child custody determination regarding the legal and physical custody of the child; Maryland had not terminated jurisdiction and therefore had exclusive, continuing jurisdiction over the parties; and, even though North Carolina properly exercised temporary emergency jurisdiction when the child's mother was arrested on multiple charges (including child abuse) while she and the child were in North Carolina, there was no statutory basis for the court to extend its temporary jurisdiction.

Appeal by respondent-mother from two orders entered by Judge J.H. Corpening, II in New Hanover County District Court—the first entered on 16 February 2022 and the second entered on 14 March 2022. Heard in the Court of Appeals 22 March 2023.

Karen F. Richards for New Hanover County Department of Social Services, petitioner-appellee.

Parker Poe Adams & Bernstein LLP by Ashley A. Edwards for Guardian ad Litem.

Jason R. Page for respondent-appellant-mother.

FLOOD, Judge.

Velanza Batts ("Respondent-Mother") appeals from two orders; the first order (the "First Order") awarded guardianship of her minor child, Michael,[1] to her sister Leticia Batts ("Ms. Batts"), while the second order

1. A pseudonym has been used to protect the identity of the minor child.

(the "Second Order") awarded legal custody to Ms. Batts and included findings regarding Respondent-Mother's progress in her case plan. After thorough review, we conclude that North Carolina was at no time Michael's home state, and thus the district court lacked the jurisdiction to enter both the First Order and the Second Order.

I. Background and Procedural History

This case involves two separate and distinct child abuse and neglect cases involving Respondent-Mother and Michael—one in Maryland and the other in North Carolina. In the interest of cohesion and clarity, we will recount the facts of each case separately and in chronological order.

A. The Maryland Case

On 8 November 2013, Michael was born to Respondent-Mother and father Tommie Moore, Jr., who died on 4 December 2014. For years, Michael and Respondent-Mother lived together in the Washington, D.C. area. On 2 September 2018, Respondent-Mother was arrested in Washington, D.C. for driving under the influence, resulting in Prince George's County, Maryland's Department of Social Services ("Maryland DSS") filing a Child in Need of Assistance petition. A hearing was held, and on 30 November 2018 a Maryland court entered an order in which it found the following:

> Prince George's County Police responded to a DUI driver on New Hampshire Avenue; when pulled over, the mother was abrasive and appeared under the influence. A cigarette that appeared to be dipped in PCP and half smoked was found under her car seat, as well as 6-7 grams of marijuana. The child was riding in the front passenger seat even though there was a car seat in the back. The mother was unable to answer any questions and just kept repeating what was asked of her. She was arrested and taken to Laurel Regional Hospital. The child had no known injuries, and appeared to be fine. As there was no information available on family or anyone to care for the child, he was placed in foster care.

Based on these facts, the court concluded that, as a matter of law, Michael was a Child in Need of Assistance, that being in Respondent-Mother's care would be contrary to his welfare, and that it was not possible to return Michael to the custody of Respondent-Mother. The court ordered that Michael be placed in the care and custody of Maryland DSS and that Respondent-Mother enter into a service agreement with Maryland DSS.

Michael remained in the custody of Maryland DSS from 30 November 2018 until 8 January 2020, when, during a Permanency Planning hearing, the court found that Respondent-Mother had "done everything asked of her, is stable, and has been safely caring for [Michael] for the past 3+ months and the case should be closed." In light of those factual findings, the court ordered Michael be placed in the care and custody of Respondent-Mother. Importantly, the court included the following in its order:

> ORDERED, that the interest of the court and the Prince George's County Department of Social Services in the above-captioned Child in Need of Assistance matter is terminated; and it is further . . .
>
> ORDERED, that the above-captioned Child in Need of Assistance matter is closed statistically.

The order concluded by stating that it would remain "in effect until the minor respondent child reached the age of 18, unless revised or superseded by a court of competent jurisdiction."

On 8 January 2020, the court entered its order (the "Maryland Custody Order"), which terminated the matter, and Michael was reunited with Respondent-Mother.

B. The North Carolina Case

On 14 October 2020, Respondent-Mother was seen intoxicated at a gas station in Kure Beach, North Carolina. Later that evening, Kure Beach police officers responded to a call and found that Respondent-Mother, who was highly intoxicated, had run her truck into a fence at a beach access. Michael was sitting unsecured in the front passenger seat, despite having an appropriate car seat available. The officers located in the car a partially empty fifth of Crown Royal, THC, and drug paraphernalia. Respondent-Mother was arrested for DWI, resisting arrest, possession of marijuana, possession of drug paraphernalia, and child abuse. The following day, on 15 October 2020, an order for nonsecure custody was entered by Judge Corpening in New Hanover County, North Carolina. This order placed Michael in the temporary emergency custody of New Hanover County Department of Social Services ("North Carolina DSS").

From 15 October 2020 until 1 December 2020, Michael was placed in a foster home in Wilmington, North Carolina. Respondent-Mother testified that during this time, she was staying at a hotel and would bring a scooter to get around Wilmington. North Carolina DSS worked on finding a kinship placement for Michael and eventually approved

placement with Michael's maternal cousins, Keith and Darlene Leake in Greensboro, North Carolina. On 1 December 2020, Michael was moved to Greensboro and, around that time, Respondent-Mother reports that she moved back to Washington, D.C.

On 8 March 2021, a dispositional hearing was held in New Hanover County with Judge Corpening presiding. At the hearing, both the Guardian ad Litem (the "GAL") and the social worker presented their reports to the court. The GAL's report stated that Respondent-Mother "attended all of the scheduled visits when they were in Wilmington and continues to make a weekly drive to Guilford County from Washington, DC to spend time with [Michael]. She visits [Michael] each day of her two to three day visits." The social worker's report stated, "[Respondent-Mother] is currently residing in Washington, D.C. If [Michael] is placed in Maryland, this will present [Respondent-Mother] with the opportunity to engage in more frequent visitations with [Michael]." Additionally, the social worker noted in her report that Respondent-Mother "has a North Carolina Driver's License and her car is currently registered in North Carolina."

Following the hearing, Judge Corpening entered an Order on Adjudication and Disposition which contained the following findings of fact by clear and convincing evidence:

> 13. That Respondent-Mother has made building a rapport with her difficult due to presenting as manipulative, confrontational, and dishonest with the Department, Guardian ad Litem, and collateral contacts. There has been some confusion as to where Respondent-Mother resides. Respondent-Mother has reported that while the Juvenile was placed in Wilmington, N.C. she was residing in Halifax County, N.C. Now that the Juvenile is placed with family in Greensboro, N.C., she has moved back to Washington, D.C. Respondent-Mother reported that she obtained her previous full-time position back at the fitness center, but has not provided the Department with the name of her employer. The Department has been unable to verify her employment and income.

On 19 May 2021, Mr. and Mrs. Leake reported to North Carolina DSS that they were no longer willing to supervise visitation with Respondent-Mother because she continued to show up unannounced, was disrespectful, would tell Michael he did not have to listen to them, and would not accept when they said they were not available for a visit or phone call. Due to the tenuous relations between Respondent-Mother

and the Leake family, North Carolina DSS began exploring alternative kinship placements.

During the 9 June 2021 hearing, Judge Corpening made the following findings of fact by sufficient and competent evidence:

> 15. That Respondent-Mother's permanent address is in Washington, D.C. and she reports that she stays with a relative when she visits the Juvenile in Guilford County, North Carolina.
>
> 19. That the Department is requesting placement with the Maternal Aunt. It would put [Michael] *closer to home*, allow family placement that he already has a relationship with, and would allow Respondent-Mother to enroll and continue to participate in her services once the Department is no longer involved with the family. (emphasis added).
>
> 22. That the current placement is appropriate and in the Juvenile's best interest but placement with Maternal Aunt is more appropriate at this time due to the conflict between the Leakes and Respondent-Mother as well as the distance between [Michael's] placement and his *permanent home*. (emphasis added).

Based upon those findings of fact, the court concluded that "[North Carolina DSS] has authorization to place [Michael] in Maryland with Maternal Aunt, Ms. Batts, immediately." On 10 June 2021, Michael was moved from the kinship placement with the Leakes in Guilford County, North Carolina to a different kinship placement with Ms. Batts in Prince George's County, Maryland.

Once back in Maryland, Michael continued to have visitations with Respondent-Mother, supervised by Ms. Batts. After an incident on 3 July 2021, however, the relationship between Respondent-Mother and Ms. Batts deteriorated, and Ms. Batts told North Carolina DSS that she was no longer willing to supervise visitations.

Social worker Samantha Muse described this incident in a report to the court filed on 30 August 2021, stating:

> On July 3, 2021, [Ms. Batts] reported that [Respondent-Mother] came over to her home to have a visitation with [Michael]. [Respondent-Mother] reported she was leaving for the day and said her goodbyes to [Michael]. It is reported that at approximately 10:00 PM, [Respondent-Mother] could be heard screaming for

> [Michael] from outside. [Respondent-Mother] was climbing the building to [Ms. Batts'] balcony and was able to make it to the balcony and inside the apartment. [Respondent-Mother] was escorted out of the door by Mr. Pinkey and was informed that she could no longer have visitations at their home.
>
> On July 4, 2021, [Ms. Batts] reported that [Respondent-Mother] came back to her house. Mr. Pinkey and [Respondent-Mother] got into a physical altercation because he would not let her come into his home. It was reported that they were fighting with a hammer. [Ms. Batts] reported that she intervened and was able to get the hammer. [Ms. Batts] reported that her sister appeared to be under the influence.

On 3 February 2022, New Hanover County District Court held a permanency planning hearing to evaluate the placement of Michael with Ms. Batts in Prince George's County, Maryland. That hearing resulted in two orders—the First Order, entered on 16 February 2022, awarded Ms. Batts guardianship of Michael, and the Second Order, entered 14 March 2022, made further findings of fact regarding Respondent-Mother's progress in her case plan. Following the permanency planning hearing, Judge Corpening entered the Second Order, which was filed on 14 March 2022. In it the court made the following finding of fact by clear, cogent and convincing evidence:

> 16. . . . [Respondent-Mother] has lived in Washington, D.C., for the last three years and currently resides in a two-bedroom apartment. Respondent-Mother has been having unsupervised visits and overnights since the Juvenile was placed in Maryland with Maternal Aunt. Respondent-Mother is employed at U.S. Fitness as a lifeguard. She has been employed there since August of 2018 and is paid twelve dollars an hour.

The court expressed great concern with the frequency of the unsupervised visits between Respondent-Mother and Michael. North Carolina DSS learned of these visits in January 2022 and "immediately educated [Ms. Batts] about why this could not occur and asked for the unsupervised visits and overnights to stop." The court noted in its findings of fact,

> 51. That due to the distance, the denied ICPC, and the lack of information provided by the Maternal Aunt and

> Respondent-Mother about visitations, [North Carolina DSS] is conflicted. If this had occurred in North Carolina, [North Carolina DSS] would have requested that the Juvenile return to a foster care placement to resolve the issues. To do so at this time though, would remove the Juvenile from a relative placement with consistent visitation, . . . and [North Carolina DSS] does not find that in the best interest of the child, *in a state where no one continues to reside.*

(emphasis added).

Following the entry of the Second Order on 14 March 2022, Respondent-Mother timely filed a notice of appeal that referred only to the Second Order. Subsequently, Respondent-Mother was appointed Appellate Counsel. Counsel for Respondent-Mother filed a petition for writ of certiorari on 11 July 2022, asking this Court to review the First Order in addition to the Second Order under a theory that both orders were based on the same underlying facts.

II. Jurisdiction

As an initial matter, this Court will address Respondent-Mother's petition for a writ of certiorari to review the First Order. In a juvenile matter, final orders of a lower court may be appealed directly to this Court when that order changes the legal custody of a juvenile. N.C. Gen. Stat. § 7B-1001(a)(4) (2021). Further, the North Carolina Rules of Appellate Procedure permit a writ of certiorari to be issued in this Court's discretion "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). Finally, this Court has previously noted the "importance of issues involving the relations between parents and their children" as a factor when considering a petition for writ of certiorari in juvenile cases. *In re K.C.*, 199 N.C. App. 557, 558, 681 S.E.2d 559, 561 (2009) (in which this Court permitted the review of an adjudication order and disposition order, despite the initial notice of appeal failing to reference the disposition order).

Here, the First Order and the Second Order both resulted from the same 3 February 2022 permanency planning hearing. In the First Order, which was entered one month prior to the Second Order, Judge Corpening noted that "due to the confidential nature of the files and proceedings of the Juvenile Court this separate order is necessary to authorize [Ms. Batts] to act on behalf of the above-named Juvenile and as such, has the full force and effect of the original Court Order upon which it is based." Respondent-Mother timely filed an appeal from the

Second Order and requested an appointment of counsel for her appeal. While Respondent-Mother's notice of appeal failed to include mention of the First Order, the facts in the Record clearly show that both orders were based on the same underlying facts. Because the legal custody of a juvenile hangs in the balance, this Court grants Respondent-Mother's petition for writ of certiorari and proceeds on the merits. *See K.C.*, 199 N.C. App. At 558, 681 S.E.2d at 561.

III. Issues

The issues before this Court are whether the district court: (1) had the requisite subject matter jurisdiction to enter the First Order and Second Order, (2) reached conclusions that were supported by competent evidence, and (3) erred when it granted guardianship to Ms. Batts. We find the jurisdictional issue is dispositive of all three.

IV. Analysis

On appeal, Respondent-Mother argues the First and Second Orders should be vacated because the district court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), as Maryland is Michael's home state, and the Maryland Custody Order was a previous child-custody determination. Conversely, North Carolina DSS argues that North Carolina became Michael's home state when its temporary emergency jurisdiction " 'morphed' into a final determination on continued subject matter jurisdiction" under N.C. Gen. Stat. § 50A-204(b). We agree with Respondent-Mother.

A. Standard of Review

"Whether the trial court has jurisdiction under the UCCJEA is a question of law subject to *de novo* review." *In re J.H.*, 244 N.C. App. 255, 260, 780 S.E.2d 228, 233 (2015).

B. The UCCJEA

Article Two of the UCCJEA has been adopted into North Carolina's General Statutes in an attempt to "avoid jurisdictional competition and conflict with the courts of other States in matters of child custody. . . ." N.C. Gen. Stat. § 50A-101(1) cmt. (2021). The jurisdictional requirements of the UCCJEA, therefore, must be met before a court of this State takes any action pertaining to custody determinations. N.C. Gen. Stat. §§ 50A-201, 203, 204. If a court of this State lacks the jurisdiction to decide on a matter, "then the whole proceeding is null and void, *i.e.*, as if it had never happened." *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702

S.E.2d 103, 105 (2010) (quoting *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970)).

C. Home State Jurisdiction

The UCCJEA defines home state as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7). N.C. Gen. Stat. Section 50A-102(5) defines "commencement" for purposes of the UCCJEA as "the filing of the first pleading in a proceeding." *Id.* § 50A-102(5); *In re J.H.*, 244 N.C. App. 255, 264, 780 S.E.2d 228, 236 (2015).

In the instant case, a *de novo* review of the record shows that Maryland was the home state of both Respondent-Mother and Michael. *See id.* at 260, 780 S.E.2d at 233. The uncontroverted evidence in the Record shows that from his birth on 8 November 2013 until 14 October 2020, Michael lived his entire life in Washington, D.C. and the surrounding suburbs of Maryland. Michael and Respondent-Mother lived in Maryland for at least six months prior to North Carolina DSS taking Michael into temporary emergency custody; further, Michael and Respondent-Mother lived in Maryland for at least six months prior to Maryland DSS taking Michael into custody in September 2018. Perhaps most pointedly, there are several instances throughout the Record where the district court refers to Maryland as Michael's home. For example, the district court stated that placement with Ms. Batts in Maryland would "put [Michael] closer to home" and that placement with Ms. Batts would be more appropriate due to "the distance between [Michael's] placement and his *permanent home*." (emphasis added). These facts tend to show that, regardless of whether the Maryland Custody Order should be considered an initial custody determination under N.C. Gen. Stat. Section 201, Michael and Respondent-Mother lived in Maryland for at least six months prior to the commencement of either the Maryland or North Carolina cases. For those reasons, we hold Maryland is Michael's home state under the UCCJEA.

D. Initial Child-Custody Determination

The UCCJEA defines an "initial determination" as "the first child-custody determination concerning a particular child." N.C. Gen. Stat. § 50A-102(8). A child-custody determination is defined as "a judgment, decree or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." N.C. Gen. Stat. § 50A-102(3); *see also id.* cmt. (noting that a child-custody determination under the UCCJEA "encompasses *any* judgment, decree, or other order

which provides for the custody of, or visitation with, a child[.]") (emphasis added). If there exists a home state, then that state is entitled to make initial child-custody determinations. N.C. Gen. Stat. § 50A-201(a)(1).

As concluded above, Maryland is Michael's home state and therefore possessed the jurisdiction to make an initial child-custody determination. Further, the Maryland Custody Order is properly considered an initial child-custody determination because it provided that Michael be returned to the full legal and physical custody of Respondent-Mother. *See* N.C. Gen. Stat. § 50A-201(a)(1).

E. Maryland's Exclusive, Continuing Jurisdiction

North Carolina DSS argues that the Maryland Custody Order cannot properly be considered an initial child-custody determination because the clear language of the order stated the matter was "terminated" which, in turn, "terminated" Maryland's jurisdiction over Michael and Respondent-Mother. We disagree.

A child's home state retains

> 'exclusive, continuing jurisdiction over the determination' until either (1) there is no longer a significant relationship between any of the parties and the state, and there is no longer any substantial evidence available in the state 'concerning the child's care, protection, training, and personal relationships,' or (2) none of the parties reside in the state.

Hamdan v. Freitekh, 271 N.C. App. 383, 387, 844 S.E.2d 338, 341 (2020) (citing N.C. Gen. Stat. § 50A-202(a)(1)–(2)).

According to North Carolina DSS's own brief, "the Maryland Courts were clear that the [Maryland Custody Order] remained in effect until the minor respondent child reached the age of eighteen[.]" The Record also clearly shows that both Michael and Respondent-Mother have a significant relationship with Maryland and that substantial evidence relating to their custody matter can be found within the state. Michael has lived all but nine months of his life in Maryland. The district court made findings of fact supported by clear, cogent, and convincing evidence that Michael currently lives in a kinship placement in Maryland; for the past three years Respondent-Mother has lived in a two-bedroom apartment in Washington, D.C.; and Respondent-Mother has worked as a lifeguard at a fitness center in Washington, D.C. since August 2018. All of these facts, taken together, point to the same conclusion: Maryland has exclusive, continuing jurisdiction over the parties because Michael and Respondent-Mother have lived there, continue to live there, and significant evidence about their case exists there.

F. North Carolina's Temporary Emergency Jurisdiction

North Carolina DSS argues that the conditions set out in N.C. Gen. Stat. § 50A-204(b) were met and thus, North Carolina's temporary emergency jurisdiction "morphed" into a final determination of jurisdiction, making North Carolina Michael's new home state. We disagree.

North Carolina may exercise "temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a). Once in temporary emergency custody, a determination as to whether a previous child-custody determination exists must be made. *See generally* N.C. Gen. Stat. § 50A-204. Under section 50A-204(b), if no previous child-custody determination had been made, then a child-custody determination made under temporary emergency jurisdiction "becomes a final determination . . . and this State becomes the home state of the child." N.C. Gen. Stat. § 50A-204(b). If, however, a previous child-custody determination *had* been made, then sections 50A-204(c)–(d) instruct North Carolina courts to specify the duration of its jurisdiction in its order and communicate with the court of the child's home state to resolve the emergency. N.C. Gen. Stat. § 50A-204(c)–(d).

There is no disputing the emergent circumstances under which Michael came into the temporary emergency custody of North Carolina DSS. Respondent-Mother's belligerence in Kure Beach on 14 October 2020 undoubtedly warranted intervention to protect Michael, and North Carolina DSS appropriately exercised temporary emergency jurisdiction. *See* N.C. Gen. Stat. § 50A-204. It is North Carolina DSS's contention, however, that the Maryland Custody Order was *not* a previous child-custody determination and therefore Maryland did not have jurisdiction over the parties. North Carolina DSS further argues that, in the absence of a previous child-custody determination, this State's temporary emergency jurisdiction "morphed" into a final determination and North Carolina became Michael's home state. *See* N.C. Gen. Stat. § 50A-204(b). As we concluded above, the Maryland Custody Order is a previous child-custody determination, and therefore section 50A-204(b) is neither controlling nor relevant to Michael's case. Instead, under sections 50A-204(c)–(d), the district court had an affirmative duty to follow the parameters set forth for addressing further custody determinations when a child is taken into temporary emergency jurisdiction in our state and a previous custody determination had been made by another state. *See* N.C. Gen. Stat. § 50A-204(c)–(d); *see also In re Brode*, 151 N.C. App. 690, 695–96, 566 S.E.2d 858, 862 (2002) (holding that, after being noticed

of a prior custody order and upon entry of a temporary custody order, the trial court should have immediately contacted the state in which the prior custody order was entered to determine their willingness to assume jurisdiction.).

There is no evidence in the Record showing North Carolina and Maryland courts communicated to resolve the emergency, or to determine a period of the duration of the temporary order. *See* N.C. Gen. Stat. § 50A-204(c)–(d). The facts do show, however, that the district court knew North Carolina DSS had been in contact with Maryland DSS on several occasions. Additionally, both the Maryland Custody Order and history of Maryland DSS's case was admitted into evidence by the district court. These facts lead this Court to conclude that the district court over-extended its temporary emergency jurisdiction, despite knowledge of a previous child-custody determination having been made.

V. Conclusion

The district court lacked the jurisdiction to enter both the First Order and the Second Order, as Maryland has jurisdiction over both Respondent-Mother and Michael; therefore, we vacate both the First Order and Second Order and remand to the district court for proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges TYSON and GRIFFIN concur.

PENNYMAC LOAN SERVICES, LLC, Plaintiff/Counterclaim Defendant
v.
BRAD JOHNSON and ELCI WIJAYANINGSIH, Defendants/Counterclaim Plaintiffs and Third-Party Plaintiffs
v.
STANDARD GUARANTY INSURANCE COMPANY, ERIKA L. SANCHEZ, EFREN SALDIVAR, and ASSURANT, INC., Third-Party Defendants

No. COA22-629

Filed 18 April 2023

1. Pleadings—amended counterclaims—untimely—leave to amend would have been granted—no prejudice to parties

In a deed reformation action arising from an insurance-related dispute between a residential mortgage provider (plaintiff) and a property owner (defendant), where defendant filed counterclaims with the trial court and then, after filing a notice of removal to federal court, untimely filed an amended set of counterclaims with that court, the amended pleading was deemed properly introduced because it was apparent that the federal court would have allowed the amendment had it been timely sought and that none of the parties would have been prejudiced by the change. Therefore, when the federal court remanded the case back to the trial court (where defendant moved to amend his counterclaims a second time), the trial court properly treated defendant's first amended pleading as containing the operative counterclaims in the case. Further, because defendant relied on the first amended pleading when litigating in federal court, he was judicially estopped from arguing before the trial court that the first amended pleading was "void and a legal nullity."

2. Mortgages and Deeds of Trust—force-placed hazard insurance—reasonable basis—no breach of mortgage loan contract

In a deed reformation action arising from an insurance-related dispute, where a residential mortgage provider (plaintiff) purchased a mortgage loan that a landowner (defendant) had obtained on his property, which consisted of three undeveloped lots and two developed lots on which a house was built, the trial court properly dismissed defendant's counterclaim alleging that plaintiff breached the mortgage loan contract by force-placing hazard insurance on the property after defendant refused to purchase home insurance. Plaintiff properly force-placed insurance under the applicable federal regulation (12 C.F.R. § 1024.37(b)) where, although the property deed did not list the two developed lots containing the house,

plaintiff still had a reasonable basis to believe that the mortgage loan contract required defendant to obtain home insurance (among other things, defendant sought the mortgage loan to refinance another loan encumbering the house on the developed lots, and defendant had previously paid home and flood insurance on the property for years).

3. Pleadings—motion to amend—counterclaims—futility—mortgage loan contract—force-placed insurance dispute

In a deed reformation action arising from an insurance-related dispute, where a residential mortgage provider (plaintiff) purchased a mortgage loan that a landowner (defendant) had obtained on his property—which consisted of three undeveloped lots and two developed lots on which a house was built—and then force-placed hazard insurance on the property after defendant refused to purchase home insurance, the trial court properly denied defendant's motion to amend his counterclaims—alleging breach of contract, breach of contract accompanied by fraudulent acts, and violations of the Racketeering Influence and Corruption Organization Act (RICO) and the Fair Debt Collection Practices Act (FDCPA)—on futility grounds. Specifically, (1) defendant failed to state the essential elements of a RICO claim, (2) defendant failed to show that plaintiff was a "debt collector" for FDCPA purposes, (3) North Carolina law does not recognize a claim for breach of contract with fraudulent act, and (4) plaintiff did not breach the mortgage loan contract by force-placing hazard insurance on the property where it had a reasonable basis for believing that the contract required home insurance on the property. Additionally, defendant had already amended his counterclaims once before by right under state law and was not entitled to amend the pleading by right a second time.

Appeal by defendant-counterclaim plaintiff and third-party plaintiff from order entered 27 May 2021 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 22 March 2023.

Brad R. Johnson, pro se defendant-appellant.

Womble Bond Dickinson (US) LLP, by B. Chad Ewing, for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt, and Drinker Biddle & Reath, LLP, by W. Glenn Merten, for third-party defendants-appellees.

FLOOD, Judge.

Brad R. Johnson ("Johnson") appeals from the 27 May 2021 Order dismissing his counterclaim.[1] On appeal, Johnson argues the trial court: (1) erred in concluding Johnson's Verified First Amended Counterclaim contained the operative counterclaim in this case; (2) erred in dismissing Johnson's breach of contract claim by concluding PennyMac Loan Services, LLC ("PennyMac") was allowed to assess Johnson a fee related to force-placed insurance;[2] and (3) abused its discretion in denying Johnson's Motion for Leave to Amend his counterclaim. After careful review, we discern no error or abuse of discretion by the trial court.

I. Factual and Procedural Background

On 7 November 2008, Johnson purchased two developed lots ("Lots 16 and 18") in Oak Island, North Carolina. Johnson subsequently obtained home and flood insurance to protect the home situated on Lots 16 and 18. On 25 August 2012, Johnson purchased three undeveloped lots ("Lots 13, 15, and 17") adjacent to Lots 16 and 18. To avoid paying the required sewer fees on the undeveloped lots, Johnson combined all five lots into a single developed parcel of land (the "Property").

On 9 June 2013, Johnson submitted a Uniform Residential Loan Application (the "Mortgage Loan") to Weststar Mortgage, Inc. ("Weststar") for the purpose of refinancing the Property. In addition to the Mortgage Loan, Johnson continued purchasing home and flood insurance for the Property and instructed Weststar to establish an escrow account so Johnson could pay the insurance and property taxes on a monthly basis. After the Mortgage Loan was submitted, Weststar ordered an appraisal of the Property. The appraisal invoice sent to Johnson specifically noted the appraisal was of "Lots 13, 15, 16, 17, and 18." Following the appraisal, Johnson's Mortgage Loan was approved, and Johnson was sent a Deed of Trust (the "Deed"). The Deed described the Property as "all of Lots 13, 15, and 17 . . ."; notably, it omitted Lots 16 and 18.

On 6 August 2013, PennyMac purchased the Mortgage Loan from Weststar. PennyMac maintained the escrow account established by

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1. Elci Wijayaningsih, Johnson's wife, was a named defendant in the original suit filed by PennyMac. Johnson filed this appeal seemingly on behalf of solely himself. Johnson refers only to himself throughout his brief, and PennyMac and Standard Guaranty likewise refer to Johnson as a singular person. This opinion will treat Johnson as the sole appellant.

2. "Force-Placed insurance" is "hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan that insures the property securing such loan." 12 C.F.R. § 1-24.37(a)(1).

Weststar and used it to pay the insurance coverage for the house. On 20 September 2017, Johnson requested PennyMac stop paying for home and flood insurance, claiming PennyMac had a lien on the vacant Lots 13, 15, and 17, not Lots 16 and 18, and therefore did not have an insurable interest in Lots 16 and 18. PennyMac approved Johnson's request to close the escrow account but explained the terms of the Mortgage Loan required Johnson to pay home and flood insurance for the Property. The relevant portion of the loan states:

> **Property Insurance.** Borrower shall keep the improvements now existing or hereby erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to earthquakes and floods, for which Lender requires insurance.

In September 2018, a representative for PennyMac allegedly told Johnson via telephone he would not be required to pay home insurance if he separated the Property back into the original parcels. On 22 March 2019, Johnson recorded an Instrument of Separation separating Lots 13, 15, and 17 from Lots 16 and 18.

On 10 May 2019, PennyMac sent Johnson a notice that his home insurance expired. PennyMac reminded Johnson that home insurance was required on the Property and requested Johnson provide proof of insurance. PennyMac further explained if Johnson did not provide proof of insurance, PennyMac would purchase insurance for the Property and charge Johnson. On 14 June 2019, PennyMac sent Johnson a second reminder to purchase home insurance. Once again, PennyMac explained to Johnson that failure to insure the Property would result in PennyMac purchasing force-placed insurance for the Property, which could be more expensive than an insurance policy Johnson purchased himself. Johnson refused to purchase insurance.

On 16 June 2019, PennyMac sent Johnson a certificate of coverage placement detailing the force-placed insurance coverage PennyMac purchased for the Property. The insurance was purchased through Standard Guaranty Insurance Company ("Standard Guaranty").

On 20 August 2019, Johnson filed an insurance complaint with the North Carolina Commissioner of Banks (the "Commissioner of Banks") and the North Carolina Department of Insurance alleging PennyMac's force-placed insurance was improper because PennyMac did not have an insurable interest in Lots 16 and 18. In response to this complaint, PennyMac sent a letter to the Commissioner of Banks explaining that,

even though the Deed described only Lots 13, 15, and 17, the Mortgage Loan application submitted by Johnson indicated that the purpose of the Mortgage Loan was to refinance the then-existing loan encumbering the house on Lots 16 and 18.[3] PennyMac further noted it made a title insurance claim to resolve the alleged drafting error in the Deed. PennyMac represented to the Commissioner of Banks that the force-placed insurance would remain in effect, but PennyMac would not seek insurance premium payments from Johnson until the issue was resolved. PennyMac continued insuring the Property at its own expense.

On 23 January 2020, PennyMac filed a Complaint against Johnson in Forsyth County District Court to reform the Deed to include all property and improvements described in the appraisal report.[4] PennyMac alleged the Deed's omittance of Lots 16 and 18 was a "mutual mistake, inadvertence[,] or mistake of the draftsman."

On 21 February 2020, Johnson filed a *pro se* answer with counterclaim[5] against PennyMac for common law breach of contract alleging PennyMac breached the Mortgage Loan by force-placing home insurance on Lots 13, 15, and 17. Johnson filed claims against PennyMac and Standard Guaranty for violations of the Racketeering Influence and Corruption Organization Act ("RICO") under 18 U.S.C. §§ 1961–68. Johnson filed additional claims against PennyMac for violations of the Fair Debt Collection Practices Act ("FDCPA") under 15 U.S.C. § 1692, and breach of contract accompanied by fraudulent acts.

Also on 21 February 2020, Johnson filed a Notice of Removal to the United States District Court for the Middle District of North Carolina based on federal question and diversity jurisdiction. On 6 April 2020, Johnson filed a Verified First Amended Counterclaim ("FAC") in the middle district.

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3. The Record did not include Johnson's Mortgage Loan application. The letter PennyMac sent Johnson on 19 September 2019 is the best evidence we have of the contents of the Mortgage Loan application. According to PennyMac, a copy of the Mortgage Loan application was included with the letter PennyMac sent the Commissioner of Banks.

4. We note for clarity purposes, PennyMac's Complaint, Johnson's second Motion to Amend, and Standard Guaranty's Motion to Dismiss were filed in Forsyth County District Court whereas Standard Guaranty's Opposition to Motion for Leave to Amend, PennyMac's Motion to Dismiss, and the Order were filed in Forsyth County Superior Court.

5. The original answer with counterclaim filed by Johnson was omitted from the Record. Because we do not have any evidence to the contrary, we assume the claims asserted in the First Amended Counterclaim were the same claims asserted in the original answer with counterclaim.

On 21 September 2020, Johnson filed for Leave to File a Verified Second Amended Counterclaim. On 3 March 2021, Judge Osteen remanded the case to the Forsyth County District Court for lack of subject matter jurisdiction. Judge Osteen further denied all other outstanding motions, including the motion to amend, as moot.

On 2 April 2021, Standard Guaranty filed a Motion to Dismiss Johnson's counterclaim in Forsyth County District Court. On 5 April 2021, PennyMac likewise filed a Motion to Dismiss Johnson's counterclaim. In response to the motions to dismiss, Johnson filed a Motion for Leave to Amend his original counterclaim. A hearing was held on the matter on 26 April 2021. On 27 May 2021, Judge Hall entered the Order on the Motions to Dismiss and the Motion to Amend, granting the motions to dismiss and denying Johnson's Motion to Amend based on futility.

On 10 March 2022, PennyMac voluntarily dismissed its Complaint to reform the deed. On 5 April 2022, Johnson filed timely notice of appeal to this Court.

II. Jurisdiction

This Court has jurisdiction to hear this appeal as a final order from a superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Analysis

A. Amended Pleading Pursuant to Fed. R. Civ. P. 15

[1] First, Johnson challenges Conclusion of Law 1, which states the FAC contains the operative counterclaim in this case. Specifically, Johnson argues the FAC is "void and a legal nullity" because he failed to meet the requirements for amended and supplemental pleadings set forth in Rule 15 of the Federal Rules of Civil Procedure. We disagree.

This Court reviews a trial court's conclusions of law *de novo*. *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019). "[W]e do not defer to the conclusions of [the trial c]ourt but conduct our own independent inquiry . . . ." *Id.* at 332, 828 S.E.2d at 471.

The Federal Rules of Civil Procedure allow a party to amend its pleading "once as a matter of course within 21 days after serving it, or . . . [i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15. "[U]ntimely amended pleading[s] served without judicial permission may be considered as properly introduced when leave to amend would

have been granted had it been sought, and when it does not appear that any of the parties [would have been] prejudiced by allowing the change." *Straub v. Desa Indus., Inc.*, 88 F.R.D. 6, 8 (M.D. Pa. 1980); *see also Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 351 F. Supp. 2d 436, 448 (M.D.N.C. 2005) (allowing the defendant to amend its complaint where the court would have granted leave to amend the counterclaim and the plaintiff was not prejudiced).

Here, Johnson did not file the FAC within twenty-one days of the filing of the original complaint, nor did he obtain leave from the court or written consent from the parties prior to filing. *See* Fed. R. Civ. P. 15(a). Based on the liberalness with which this rule is generally applied and the reliance on the FAC in the order remanding the case, however, there is no reason for us to presume the middle district would have denied a motion to amend had it been properly filed. *See SGK Props., L.L.C. v. U.S. Bank Nat'l Assoc.*, 881 F.3d 933, 944 (5th Cir. 2018) ("[T]he language of this rule evinces a bias in favor of granting leave to amend[.]" (citation and internal quotation marks omitted)); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires."). Further, there is no indication PennyMac or Standard Guaranty would have been prejudiced because both filed individual motions for extension of time to file answers to the amended counterclaim, neither party objected to the FAC, and both have treated the FAC as the operative pleading throughout the life of this case.

Moreover, Johnson is judicially estopped from asserting a legal position inconsistent with one taken previously in the litigation. The doctrine of judicial estoppel prevents a litigant from "intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (citation and internal quotation marks omitted). Johnson cannot rely on the FAC while litigating in federal court and then claim the FAC is "void and a legal nullity" when it becomes more convenient while litigating in the state court. *See id.* at 191, 609 S.E.2d at 452.

We therefore find the FAC was properly introduced and contains the operative counterclaim because leave to amend would have likely been granted by the middle district, it did not cause prejudice to PennyMac or Standard Guaranty, and the doctrine of judicial estoppel prevents Johnson's argument. *See Straub*, 88 F.R.D. at 8; *see also Price*, 169 N.C. App. at 191, 609 S.E.2d at 452.

B. Breach of Contract

[2] Next, Johnson argues the trial court erred in Conclusion of Law 12 by dismissing his breach of contract claim. Specifically, Johnson argues the force-placed hazard insurance was not reasonable, and therefore breached the property insurance term set forth in the Mortgage Loan. We disagree.

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

For a *prima facie* breach of contract claim, a party must show: "(1) existence of a valid contract and (2) a breach of the terms of [the] contract." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 276, 827 S.E.2d 458, 472 (citation omitted) (alteration in original).

Here, it is undisputed the Mortgage Loan is a valid contract between Johnson and PennyMac. Instead, Johnson seemingly argues Penny Mac breached the Mortgage Loan contract by imposing charges related to force-placed insurance when the terms of the Mortgage Loan required insurance only on improvements on the Property, of which there are none on Lots 13, 15, and 17. PennyMac argued, and the trial court agreed, that the force-placed insurance was reasonable under C.F.R. § 1024.37(b) because PennyMac had a reasonable basis for believing insurance was required under the terms of the Mortgage Loan. Initially, we note Johnson confusingly argues the regulation was misapplied by the trial court, but then subsequently argues the regulation is not applicable to this case because PennyMac did not have an insurable interest in Lots 13, 15 and 17.

Under federal regulations, "[a] servicer may not assess on a borrower a premium charge or fee related to force-placed insurance unless the servicer *has a reasonable basis* to believe that the borrower has failed to comply with the mortgage loan contract's requirement to maintain hazard insurance." 12 C.F.R. § 1024.37(b) (2021) (emphasis added). The regulation specifies when a servicer may assess force-placed insurance. Contrary to Johnson's argument, it is not a question of whether PennyMac had an insurable interest; rather, it is a question of whether it had a reasonable basis to believe Johnson was not complying with the terms of the Mortgage Loan contract. *See id.*

Conclusion of Law 12 states:

> To the extent that they are characterized as a breach of contract claim, Johnson's allegations still fail to state a

> claim. Pursuant to 12 C.F.R. [§] 1024.37(b), PennyMac was allowed to assess Johnson a fee related to force-placed insurance because it had a reasonable basis to believe that Johnson failed to comply with his mortgage loan contract's requirement to maintain hazard insurance. In making this ruling, this [c]ourt does not prejudge the outcome of the underlying deed reformation action.

PennyMac had a reasonable basis to believe home insurance was required for the Property because: (1) Johnson applied for a *residential* loan through Weststar; (2) Weststar conducted an appraisal of "Lots 13, 15, 16, 17, and 18"; (3) Johnson instructed Weststar to create an escrow account to pay taxes and *home* insurance on the Property; (4) the terms of the Mortgage Loan required insurance on the Property; and (5) Johnson paid *home* and flood insurance on the Property until 2017. Based on these facts, it is reasonable that PennyMac believed the Mortgage Loan required home insurance on the Property and that Johnson was not in compliance with this requirement. *See* C.F.R. § 1024.37(b).

Moreover, after Johnson filed his insurance complaint with the Commissioner of Banks, PennyMac refunded Johnson the money it had charged him for the force-placed insurance. As of the date of the hearing, PennyMac continued to pay for insurance on the Property at its own expense. It is unlikely PennyMac would continue to purchase home insurance for Johnson at its own expense if it did not reasonably believe the Property required insurance.

Thus, we find PennyMac had a reasonable basis to believe the terms of the Mortgage Loan contract required home insurance on the Property, and the trial court's dismissal of the breach of contract claim was, therefore, correct. *See* C.F.R. § 1024.37(b); *see also Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4.

C. Denial of Johnson's Motion to Amend the Counterclaim

[3] Finally, Johnson argues the trial court abused its discretion by denying his Motion for Leave to Amend the counterclaim. Johnson attempts to style this Motion as his *first* amended counterclaim even though he had already filed the original FAC in the middle district. Having previously concluded the FAC is the operative counterclaim in this case, Johnson's Motion to Amend filed in Forsyth County Superior Court was Johnson's second, not first, Motion to Amend.

1. Amendment by Right

First, Johnson argues the trial court abused its discretion in denying his second Motion to Amend because the North Carolina removal

statute allowed him to file a first amended counterclaim by right. As previously discussed, Johnson was permitted to file the FAC in the middle district as he would have been permitted to do in the state court had the case not been removed to the middle district, and this argument is, therefore, without merit. *See* N.C. R. Civ. P. 12(a)(2) (on remand from a federal court a party may amend a pleading in the state court if they "would have been permitted . . . to file" such pleadings had the case not been removed).

2. Futility of Amendment

Next, Johnson argues the trial court abused its discretion in Conclusion of Law 13 by concluding Johnson's second Motion for Leave to Amend the counterclaim was futile. Additionally, Johnson argues the trial court abused its discretion in conclusions of law 2, 10, 11, and 12 which concluded Johnson's RICO, FDCPA, breach of contract with fraudulent act, and breach of contract claims were futile. We find no abuse of discretion.

Where a party has already amended their pleading once as a matter of course, as Johnson did here, the North Carolina Rules of Civil Procedure allow a party to amend their pleading "only by leave of court or by written consent of the adverse part[ies]; and leave shall be freely granted when justice so requires." N.C. R. Civ. P. 15(a).

Here, PennyMac and Standard Guaranty did not consent to the second amended counterclaim; thus, Johnson could file the second amended counterclaim only by leave of the court.

> [O]ur standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion. Denying a motion to amend without any justifying reason appearing for the denial is an abuse of discretion. However, proper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party. Other reasons that would justify a denial are bad faith, futility of amendment, and repeated failure to cure defects by previous amendments.

Williams v. Owens, 211 N.C. App. 393, 394, 712 S.E.2d 359, 360 (2011) (citation omitted). "The trial court's ruling is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Brown v. N.C. Div. of Motor Vehicles*, 155 N.C. App. 436, 438–39, 573 S.E.2d 246, 248 (2002) (citation and internal quotation marks omitted); *see also Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am.*, 245 N.C. App. 25,

31, 781 S.E.2d 840, 844 (2016) ("A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.") (citation omitted); *Bailey v. Handee Hugo's, Inc.*, 173 N.C. App. 723, 727, 620 S.E.2d 312, 315 (2005) (holding a trial court's denial of a motion to amend was not an abuse of discretion where it stated proper reasons for denying the motion).

a. RICO Claim

Here, the trial court denied Johnson's Motion to Amend his RICO claim based on the futility of the amendment. Conclusion of Law 2 provides:

> [Johnson's] RICO claim fails to state a claim upon which relief can be granted pursuant to N.C. R. Civ. P. 12(b)(6) and is not pled with the particularity required by N.C. R. Civ. P. 9(b). To state a claim for a violation of RICO, 18 § 1962(c), [Johnson] must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). As outlined below, the FAC as well as the proposed amended counterclaims and third party claims fail to state essential elements of a RICO claim, and in fact contain allegations that affirmatively show that the required elements of a RICO claim are not present in this case and cannot be alleged.

The trial court, in conclusions of law 3–9, meticulously explained why each element of Johnson's RICO claim fails, and why those failings could not be cured by an amended pleading. Therefore, it cannot be said, and Johnson does not adequately argue, the trial court's decision was not reasoned or was an abuse of discretion; accordingly, our review of Johnson's RICO claim ends. *See Brown*, 155 N.C. App. at 438–39, 573 S.E.2d at 248.

b. FDCPA

Johnson also challenges Conclusion of Law 10, which dismissed his FDCPA claim against PennyMac.

The purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors[.]" 15 U.S.C. § 1692(e) (2021). A "debt collector" is any person who regularly collects or attempts to collect debts owed another. *See* 15 U.S.C. § 1692a(6) (2021). The United States Supreme Court held a debt purchaser "may indeed collect debts for its own account without triggering the statutory definition" set forth in

15 U.S.C. § 1962a(6). *Henson v. Santander Cons. USA Inc.*, 582 U.S. 79, 83, 137 S. Ct. 1718, 1721–22, 198 L. Ed. 2d 177, 181 (2017).

Conclusion of Law 10 states:

> To plead a FDCPA claim against PennyMac, Johnson "must allege facts sufficient to show that PennyMac is a debt collector." The FDCPA claim fails because Johnson has pled facts sufficient to show that PennyMac is not a debt collector. Johnson has specifically alleged that PennyMac is the holder of the debt that he alleges it is attempting to collect, and, therefore, it cannot be a debt collector. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721–22 (2017), *quoting* 15 U.S.C. 1692a(6).

Here, PennyMac is considered a debt purchaser because they purchased Johnson's Mortgage Loan from Weststar. Accordingly, PennyMac collected on a debt Johnson owed it for the cost of the force-placed insurance. PennyMac did not collect a debt owed to another, and is not, therefore, a debt collector as defined by the FDCPA. *See id.* at 83, 137 S. Ct. at 1721–22, 198 L. Ed. 2d at 181.

Thus, we conclude the trial court did not abuse its discretion by concluding Johnson's claim for FDCPA was futile. *See Brown*, 155 N.C. App. at 438–39, 573 S.E.2d at 248.

c. Breach of Contract with Fraudulent Act

Next, Johnson argues the trial court abused its discretion when it concluded he failed to plead breach of contract with fraudulent act. Johnson argues he adequately plead the elements of a unilateral contract and breach of said unilateral contract with a fraudulent act. We disagree.

Conclusion of Law 11 states:

> The breach of contact with fraudulent act claim fails because North Carolina law governs Johnson's claim and does not recognize a claim for breach of contract with fraudulent act. *Curtis v. Cafe Enterprises, Inc.*, 2016 WL 6916786 *10 (W.D.N.C. Nov. 11, 2016). To the extent that South Carolina law governed Johnson's breach of contract with fraudulent act claim, that claim would still fail because the FAC fails to plead a fraudulent act.

As the trial court points out, breach of contract accompanied by fraudulent acts arises under South Carolina law and is not recognized by North

Carolina law. *See Curtis v. Café Enterprises, Inc.*, 2016 WL 6916786 *10 (W.D.N.C. Nov. 11, 2016). Even if we were to recognize this claim, it still fails because Johnson did not adequately plead a fraudulent act. It is unclear from Johnson's FAC or his brief what fraudulent act he alleges PennyMac committed. Assuming, *arguendo*, that the fraudulent act was the force-placed insurance, we have already concluded PennyMac had a reasonable basis for instituting the force-placed insurance; therefore, it was not fraudulent. *See* C.F.R. § 1024.37(b).

Thus, we conclude the trial court did not abuse its discretion by concluding Johnson's claim for breach of contract with fraudulent act was futile. *See Brown*, 155 N.C. App. at 438–39, 573 S.E.2d at 248.

d. Breach of Contract

Finally, Johnson argues the trial court abused its discretion in dismissing the breach of contract claim as futile. For the reasons explained above, PennyMac had a reasonable basis to believe home insurance was required under the terms of the Mortgage Loan. *See* C.F.R. § 1024.37(b).

Therefore, the trial court did not abuse its discretion by concluding Johnson's claim for breach of contract was futile. *See Brown*, 155 N.C. App. at 438–39, 573 S.E.2d at 248.

IV. Conclusion

We hold the trial court did not err in granting PennyMac and Standard Guaranty's Motion to Dismiss or abuse its discretion in denying Johnson's Motion to Amend.

AFFIRMED.

Judges TYSON and GRIFFIN concur.

READ v. READ

[288 N.C. App. 376 (2023)]

ELIZABETH GOURLEY READ, Plaintiff
v.
BRENDEN MICHAEL READ, Defendant

No. COA22-782

Filed 18 April 2023

1. Divorce—equitable distribution—delay in filing claim—compliance with statute

Plaintiff-wife's claim for equitable distribution was filed in a timely manner in accordance with the N.C. General Statutes where she filed her complaint for absolute divorce and equitable distribution seventeen years after the parties had separated. The relevant statute provided that a claim of equitable distribution may be filed at any time after a husband and wife begin to live separate and apart, and that such a claim is extinguished upon decree of absolute divorce unless the right is asserted prior to judgment. In addition, the three-year and ten-year statutes of limitation in N.C.G.S. §§ 1-52 and 1-56 do not apply to claims for equitable distribution.

2. Divorce—equitable distribution—unequal distribution—abuse of discretion review

In an action for absolute divorce and equitable distribution, the trial court did not abuse its discretion in ordering defendant-husband to pay thirty percent of the couple's student loan balance, which consisted of the student loans incurred while plaintiff-wife was attending chiropractic school, and the remainder of the balance of an IRS debt from the year prior to separation. The trial court found that twenty-four percent of the student loan debt was used for plaintiff's tuition, seventy-six percent was used for the family's living expenses, plaintiff supported the family with the income from her chiropractic business, plaintiff employed defendant at the business, and plaintiff had paid $4,351 of the $6,774 balance on the IRS debt. The trial court's findings supported its conclusions and complied with the procedure for equitable distribution.

3. Divorce—equitable distribution—monthly payments—ability to pay—ascertained from the record

In an action for absolute divorce and equitable distribution, the trial court did not abuse its discretion in ordering defendant-husband to pay one thousand dollars per month toward the couple's marital debt. Although defendant argued that the trial court failed to make any findings in support of his ability to make the thousand-dollar

monthly payment, defendant's liquid assets could be ascertained from the record where the trial court found that defendant was employed full-time as a general manager of a restaurant making ninety thousand dollars per year and had no child support or alimony obligations arising out of the marriage.

Appeal by Defendant from final Order and Judgment entered 8 February 2022 by Judge Robin W. Robinson in New Hanover County District Court. Heard in the Court of Appeals 21 February 2023.

The Lea/Schultz Law Firm, P.C., by Ryan B. Schultz, for Defendant-Appellant.

No brief filed by Plaintiff-Appellee.

RIGGS, Judge.

Defendant-Appellant Brenden Michael Read appeals the final order and judgment of equitable distribution entered by the Honorable Robin W. Robinson in New Hanover County District Court. After careful consideration, we affirm.

I. Facts & Procedural History

Defendant-Appellant married Plaintiff-Appellee Elizabeth Gourley Read on 16 June 1990 in Raleigh, North Carolina. A year after they married, in May 1991, Plaintiff-Appellee decided to attend Parker Chiropractic School in Dallas, TX and the couple relocated to Dallas while she attended school. When she applied to school, the parties were working at restaurants and like many college students could not afford college tuition without student loans. Therefore, they decided to take out loans to cover both the cost of tuition and their living expenses.

While Plaintiff-Appellee was attending chiropractic school, Defendant-Appellant took a job opening a new restaurant in Oklahoma City and he temporarily relocated to Oklahoma. During this time, the couple had their first child, a son, born in mid-1992. After two years in Oklahoma, Defendant-Appellant returned to Dallas where he worked at a restaurant and a carpet cleaning business while Plaintiff-Appellee completed chiropractic school. The couple also had a second son born in 1994. To pay for school and to support their growing family, the parties took out loans exceeding the cost of tuition every trimester between March 1991 and May 1995.

Overall, the couple took out $193,981.40 in loans. The total cost of tuition and books for Plaintiff-Appellee to attend chiropractic school was $49,173. According to Plaintiff-Appellee's testimony, the couple used the balance of the funds for living expenses such as room and board, daycare for the children, diapers, and long-distance telephone bills between Dallas and Oklahoma. The majority of the loans were taken out in Plaintiff-Appellee's name; however, Defendant-Appellant co-signed for a few loans.

After Plaintiff-Appellee's graduation in 1995, the family returned to Raleigh, where both Plaintiff-Appellee and Defendant-Appellant took jobs as waiters in restaurants while Plaintiff-Appellee was taking her boards to become a licensed chiropractor in North Carolina. During this time, the parties applied for forbearance to delay the repayment of these loans. After passing her boards in 1996, Plaintiff-Appellee bought North Hill Chiropractic and began running a single-person chiropractic business. Plaintiff-Appellee used the chiropractic business to support the family, but the business only netted between $16,000 and $25,000 annually. The couple also had a third child in 1996.

In 1999, Defendant-Appellant began working in the chiropractic business as the office manager. Plaintiff-Appellee testified that Defendant-Appellant did not take a paycheck, but he did take draws from the business bank account. The parties continued to take hardship forbearance on the student loans based on their family income.

In September 2001, the parties separated. At the time of separation, the student loan balance was $198,237. When they separated, Defendant-Appellant says the parties each took "tangible and intangible property in their own name and went their separate ways." The record does not include any written agreement on the distribution of marital assets and debts. After the separation, Plaintiff-Appellee consolidated the student loans into one loan. In the seventeen years between the date of separation and the equitable distribution hearing, Plaintiff-Appellee made $61,331 in payments on the loan. Defendant-Appellant did not make any payments on the loan. Due to the terms of the loan and the amount of owed, Plaintiff-Appellee was unable to make payments on the principal and the payments were only applied to loan interest. The student loan was in delinquency status for many years, and at the time of the equitable distribution hearing, the balance of the loan had grown to $281,051.

In the year prior to their separation, the parties also had an unpaid tax bill. The bill remained unpaid post separation and grew to $6,774.39

due to penalties. In 2004, the IRS applied $4,351.16 of Plaintiff-Appellee's overpayment of taxes against this tax bill.

Although the parties separated in 2001, neither party filed for absolute divorce after the statutory one-year waiting period. However, they regularly engaged in child custody and child support litigation related to medical expenses for their three children. On 21 November 2018, seventeen years after the parties separated, Plaintiff-Appellee filed a complaint seeking absolute divorce and equitable distribution of the marital estate, which only consisted of marital debt. Defendant-Appellant was served on 8 December 2018. On 8 February 2019, the trial court entered a divorce judgment, while preserving Plaintiff-Appellee's pending claim for equitable distribution.

Seven months later, on 25 July 2019, Defendant-Appellant filed a motion to dismiss, an answer, and affirmative defenses. Defendant-Appellant's motion to dismiss was heard on 3 March 2020. In an order entered 22 June 2020, the trial court denied the motion to dismiss. Prior to the equitable distribution hearing, Defendant-Appellant failed to respond to discovery requests for several months and Plaintiff-Appellee had to file a motion to compel discovery which was granted in part on 11 February 2021.

Plaintiff-Appellee's equitable distribution claim was heard in a bench trial during the 20 April 2021 family court session in New Hanover County. The trial court entered an order for equitable distribution on 8 February 2022, and the order was served on Defendant-Appellant's attorney by mail the same day.

Defendant-Appellant filed a timely written notice of appeal on 7 March 2022.

II. Timeliness of Equitable Distribution Claim

[1] On appeal Defendant-Appellant argues that the trial court erred in entering judgment for Plaintiff-Appellee at the close of evidence because Plaintiff-Appellee's delay in asserting the equitable distribution claim violated the legislative intent of fairness and timeliness in North Carolina's Equitable Distribution statute. We disagree.

A. Standard of Review

This Court reviews issues of statutory construction *de novo*. *In re Ivey*, 257 N.C. App. 622, 627, 810 S.E.2d 740, 744 (2018).

B. Analysis

The North Carolina Supreme Court has said that the question of divorce is a matter exclusively of legislative cognizance, and where the legislature has formally and clearly expressed its will, this Court is not at liberty to interpolate or superimpose conditions and limitations which the statutes do not contain. *Cooke v. Cooke*, 164 N.C. 272, 275, 80 S.E. 178, 179 (1913). In 1981, the North Carolina General Assembly created statutes to address the equitable distribution of marital property and the procedures for courts to follow when making an order for equitable distribution. N.C. Gen Stat. §§ 50-20, -21 (2021). Section 50-21(a) sets out the time at which a claim of equitable distribution accrues:

> *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, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f).

N.C. Gen. Stat. § 50-21(a) (emphasis added).

The legislature placed a clear time limit on a claim for equitable distribution in Section 50-11(e); a spouse's right to equitable distribution under Section 50-20 is extinguished upon decree of absolute divorce unless the right is asserted prior to judgment. N.C. Gen. Stat. § 50-11(e) (2021). An absolute divorce may be granted on application from either party if the parties have lived separate and apart for one year . . . and "a divorce under this section shall not be barred to *either party*. . . ." N.C. Gen. Stat. § 50-6 (2021) (emphasis added). Once a spouse requests equitable distribution, the legislature provided procedures, time limits, and remedies within Section 50-21 and ensures the court rules "upon any matters reasonably necessary to effect a fair and prompt disposition of the case in the interests of justice." N.C. Gen. Stat. § 50-21. The statutes allow the court to impose appropriate sanctions on a party for unreasonable delay; however, delays to which the parties consent are not grounds for sanctions. N.C. Gen. Stat. § 50-21(e).

In construing statutes, this Court first ascertains the legislative purpose from the plain words of the statute. *McKinney v. Richitelli*, 357 N.C. 483, 487, 586 S.E.2d 258, 262 (2003). Where the language of the statute is clear and unambiguous, there is no room for judicial interpretation, and the court must construe the statute using its plain meaning. *Id.* In applying the language of a statute, the actual words of the legislature are the clearest manifestation of its intent; therefore, we give

every word of the statute effect, "presuming that the legislature carefully chose each word used." *In re Ivey*, 257 N.C. App. at 627, 810 S.E.2d at 744. Moreover, according to the canon of *in pari materia*, all parts of a statute should be reconciled with each other when possible and any irreconcilable ambiguity resolved in a manner that fully effectuates the legislative intent. *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009). Accordingly, we construe Section 50-21 together with Section 50-11(e) to establish when an equitable distribution claim accrues and when the equitable distribution claim expires.

The equitable distribution statutes provide both parties to a divorce with multiple paths to bring the issue of equitable distribution to a timely and binding resolution. First, Section 50-20(d) allows the parties to craft their own equitable distribution in a written agreement, duly executed and acknowledged on the distribution of the marital property or divisible property in a manner they deem to be equitable, and that agreement *shall be binding on the parties*. N.C. Gen. Stat. § 50-20(d) (emphasis added). Second, when the parties cannot agree on equitable distribution, as is common in divorce, Section 50-21(a) gives *either party* the right to bring a claim for equitable distribution, as soon as the parties separate, either as a separate civil action or together with any other action brought pursuant to Chapter 50 or as a motion under Section 50-11(e) or (f). N.C. Gen. Stat. § 50-21(a). Finally, after one year of separation, either party can bring a claim for absolute divorce which cannot be barred by either party. N.C. Gen. Stat. § 50-6. An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under Section 50-20 unless the right is asserted prior to judgment. N.C. Gen. Stat. § 50-11(e). While a divorce proceeding is a civil action, it is unlike any other civil action. *Bruce v. Bruce*, 79 N.C. App. 579, 583-84, 339 S.E.2d 855, 859 (1986). Parties are held to strict compliance with statutory requirements and judgment by default is not permitted except as defined in Section 50-6. *Id.* at 584, 339 S.E.2d at 859. The legislative approach allows divorcing parties the flexibility to file for divorce and equitable distribution on a timeline that is appropriate for their unique situation.

Here, Defendant-Appellant argues that the law allowed Plaintiff-Appellee an indefinite amount of time to file a claim for equitable distribution which "unnecessarily disrupts [his] settled expectation of marital property distribution between the spouses." However, the law afforded Defendant-Appellant multiple paths to bring binding resolution to responsibility for the marital debt. First, when the parties separated, Defendant-Appellant could have drawn up a written and

executed agreement for how the parties divided the property and debts. A written, executed, and acknowledged agreement would have been enforceable against a future claim for equitable distribution. Second, Defendant-Appellant had the right to bring a claim for equitable distribution as soon as the parties separated in September of 2001 or as a motion in any of their Chapter 50 litigation. Finally, Defendant-Appellant had the right to bring a claim for absolute divorce as early as 5 September 2002; once the judgment of absolute divorce was entered, any future claim for equitable distribution would have been untimely.

During this seventeen-year period, in which the parties lived separate and apart but had not filed for absolute divorce, neither party was released from the bonds of matrimony, nor had they executed a written agreement for equitable distribution. Accordingly, on the facts of this case, neither party should have a reasonable expectation that the distribution of their marital debt was settled. Further, by their conduct in failing to make a claim for absolute divorce or equitable distribution, both parties consented to the delay. Therefore, the claim is not time barred, and does not violate the legislative intent of the Equitable Distribution Statutes.

Accordingly, we affirm the order of the lower court.

III. Motion to Dismiss and Statute of Limitations

In the second and third assignment of error, Defendant-Appellant argues the trial court erred when it denied his motion to dismiss. As part of his motion to dismiss and here Defendant-Appellant argues that N.C. Gen. Stat. §§ 1-52 and 56, the three-year statute of limitations and the ten-year statute of limitations, respectively, should apply to claims for equitable distribution. We disagree.

Notably, Defendant-Appellant did not notice appeal of the denial of the motion to dismiss; however, since the motion to dismiss is an interlocutory order involving the merits that necessarily affect the judgment, according to Rule 46 of the Rules of Civil Procedure we have jurisdiction to consider the issue. N.C. R. Civ. P. 46(b) (2022).

A. Standard of Review

A motion to dismiss under N.C. R. Civ. P. 12 (b)(6) tests the legal sufficiency of the complaint. *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted). In ruling on the motion, the allegations of the complaint must be viewed as admitted, and on that basis, the court must determine as a matter of law whether the allegations state a claim for which relief may be granted. *Id.*

This Court considers the pleadings *de novo* "to determine their legal sufficiency and whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). When there is no dispute over the relevant facts, a lower court's interpretation of a statute of limitation is a conclusion of law that is reviewed *de novo* on appeal. *Goetz v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 421, 425, 692 S.E.2d 395, 398 (2010).

B. Analysis

North Carolina General Statutes §§ 50-20 and 21 govern claims for equitable distribution, and do not provide a statute of limitation for absolute divorce or equitable distribution claims. N.C. Gen. Stat. §§ 50-20, -21. Defendant-Appellant conceded that the equitable distribution statutes are silent on a statute of limitation for an equitable distribution claim. Further, there are no North Carolina cases barring a claim of equitable distribution due to a statute of limitations. Defendant-Appellant argues that in the absence of a specific statute, this Court should apply statutes of limitation from N.C. Gen. Stat. §§ 1-52(2) and 1-56, which establish a three-year statute of limitation for liabilities created by statute or a ten-year statute of limitations for all other actions, respectively, to an equitable distribution claim. N.C. Gen. Stat. §§ 1-52(2), -56.

However, N.C. Gen. Stat. § 50-11(e) provides the statutory limitation on bringing a claim for equitable distribution, requiring that the equitable distribution claim be asserted before the entry of the absolute divorce judgment. N.C. Gen. Stat. § 50-11(e). The statutory language is clear: as long as the claim for equitable distribution is pending at the time of the absolute divorce, then the court has jurisdiction over the claim for equitable distribution. *Bradford v. Bradford*, 279 N.C. App. 109, 120-21, 864 S.E.2d 783, 791 (2021). The North Carolina General Assembly, by the plain language of Section 50-11(e), linked the allowable time frame for equitable distribution to the timing of a claim for absolute divorce; an absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under Section 50-20 unless the right is asserted prior to the judgment of absolute divorce. N.C. Gen. Stat. § 50-11(e).

In the order from the motion to dismiss hearing, the trial court found that *Bruce v. Bruce* was controlling, and the ten-year statute of limitation outlined in Section 1-56 for "all other actions" does not apply to actions for absolute divorce or equitable distribution. *Bruce v. Bruce*,

79 N.C. App. 579, 583, 339 S.E.2d 855, 858 (1986). In *Bruce v. Bruce*, that defendant argued that an eleven-year gap between the date of separation and the filing of the complaint for absolute divorce and equitable distribution violated the ten-year statute of limitation in Section 1-56. *Id.* at 579, 339 S.E.2d at 856. This Court said that separation as grounds for divorce is a continuing offense. *Id.* at 582, 339 S.E.2d at 858. It begins when the parties physically separate with the requisite intention for the separation to remain permanent and continues to accrue so long as the parties remain separate and apart within the meaning of the statute. *Id.* The Court balanced the reasons for having statute of limitations against the State's public policies of endeavoring to maintain the marital state and the need to allow divorce for parties that have demonstrated a ground for divorce, concluding that the residuary statute of limitations in Section 1–56 does not apply to actions for divorce. *Id.* at 583, 339 S.E.2d at 858-59. Since the allowable time frame for equitable distribution and divorce are linked, and a claim for divorce is not barred by a statute of limitations, a claim for equitable distribution also cannot be barred by a statute of limitations.

Defendant-Appellant cites *Lawing v. Lawing* to support his contention that a statutory goal of N.C. Gen. Stat. § 50-20 is to wrap up marital affairs fairly with as much certainty and finality as possible and therefore a statute of limitations should apply to a claim for equitable distribution. *Lawing v. Lawing*, 81 N.C. App. 159, 183, 344 S.E.2d 100, 115 (1986) (highlighting that a policy consideration underlying the Equitable Distribution Act is to distribute marital property fairly and with as much certainty and finality as possible). However, in *Lawing* this Court was interpreting the language of Section 50-20(b)(3) as authorizing the court to make distributive award for periods of "not more than six years after the date on which the marriage ceases." *Id.*, at 184, 344 S.E.2d at 116. The holding was providing a limit *on the court* to avoid extending payment more than six years beyond the date of the equitable distribution order. *Id.* (emphasis added). The facts here are distinguishable because Defendant-Appellant is asking this Court to find that the legislature wanted to limit the time the *parties* have after the date of separation to make the claim for equitable distribution. Our case law does not support such an interpretation.

Additionally, Defendant-Appellant argues a three-year statute of limitation should apply to equitable distribution because, in his view of the equitable distribution statute, it creates a liability by state statute which is covered by N.C. Gen. Stat. § 1-52(2). However, Defendant-Appellant does not cite case law supporting his argument that Section 1-52 applies to equitable distribution. Further, the argument is not persuasive

because the liabilities were not created by the equitable distribution statute; the parties themselves created the liabilities during the marriage. The equitable distribution order simply apportioned responsibilities for those liabilities.

Accordingly, we affirm the order of the trial court denying the motion to dismiss. Additionally, we hold that a claim for equitable distribution was not barred by a statute of limitations under N.C. Gen. Stat. §§ 1-52 or 1-56.

IV. Distribution of Marital Debt

[2] In the fourth assignment of error, Defendant-Appellant argues that the trial court erred when it ordered him to pay thirty percent of the marital debt. We disagree.

A. Standard of Review

The General Assembly has committed the distribution of marital property to the discretion of the trial courts, and the exercise of that discretion will not be disturbed in the absence of clear abuse of that discretion. *Lawing v. Lawing*, 81 N.C. App. at 162, 344 S.E.2d at 104. Accordingly, the trial court's ruling in equitable distribution cases receives great deference and may only be upset if it was so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). The trial court's findings of fact are conclusive if supported by any competent evidence, even when there is evidence to the contrary. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

B. Analysis

An equal division of the marital property is mandatory unless the court determines in the exercise of its discretion that such a distribution is inequitable. *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350 (1988); N.C. Gen. Stat. § 50-20(c). When the court determines that an equal division is not equitable, the court shall divide the marital and divisible property equitably and consider all twelve factors found in Section 50-20(c). N.C. Gen. Stat. § 50-20(c).

To equitably distribute marital property, the trial judge must conduct a three-step analysis: (1) determine what is marital property; (2) determine the net market value of the marital property as of the date of separation; and (3) make an equitable distribution between the parties. *Willis v. Willis*, 86 N.C. App. 546, 550, 358 S.E.2d 571, 573 (1987). This Court has held that in an equitable distribution, the trial court must consider all debts of the parties, whether the debt is one for which the

parties are jointly liable or whether a party is individually liable. *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987). For the purpose of an equitable distribution, marital debt is debt that was incurred for the joint benefit of the parties without regard for who is legally obligated for the debt. *Id.* Divisible property includes all passive increases in marital debt, financing charges, and interest related to marital debt. N.C. Gen. Stat. § 50-20(b)(4). North Carolina's equitable distribution statute expressly provides that professional licenses are separate property; however, the court is required to consider a direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse. N.C. Gen. Stat. § 50-20(b)(2), -20(c)(7).

Here, the marital property at issue is marital debt from the student loans incurred while Plaintiff-Appellee was attending chiropractic school and an IRS debt from the year prior to separation. The debts were itemized on Schedule A of the pretrial order for equitable distribution. As to the student loans, the trial court valued them as of the date of separation on 4 September 2001 to be $198,237. Even though Plaintiff-Appellee made payments of $61,331 on the loans after the date of separation, those payments were only applied to interest and the balance of the loans since separation increased to $281,051 due to unpaid interest. The trial court received evidence at trial that the total cost of tuition and supplies for Plaintiff-Appellee to attend chiropractic school was $49,173, and the balance of the loan was used for living expenses for the parties and their family while Plaintiff-Appellee attended school. The court found that twenty-four percent of the loan was for tuition and seventy-six percent was for the living expenses of the family.

The trial court considered all the factors identified in Section 50-20 in the final order for equitable distribution. The court considered the fact that after Plaintiff-Appellee graduated from chiropractic school, she purchased a chiropractic business in 1996 and the income from that business supported the family until the date of separation in 2001. Additionally, the chiropractic business employed Defendant-Appellant from 1999 until the date of separation. Because the business supported the family and employed Defendant-Appellant for several years, there is evidence to support a conclusion that Defendant-Appellant benefited from Plaintiff-Appellee's education.

After considering all the factors required in Section 50-20, the trial court determined that an equal distribution would not be equitable. The trial court assigned the cost associated with tuition to Plaintiff-Appellee and divided the balance of the loan between the parties. This approach resulted in an assignment of thirty percent of the current loan balance to

Defendant-Appellant and seventy percent of the current loan balance to Plaintiff-Appellee. The trial court did not provide Plaintiff-Appellee with a credit for the $61,331 in interest that she had paid on the student loans since the date of separation.

As to the IRS loan, the court found that the value of the debt as of the date of separation was $6,774.00. The trial court found that Plaintiff-Appellee had paid $4,351 of the outstanding balance and charged Defendant-Appellant with the balance of the debt.

After review of the trial court's order, the findings of fact support the conclusions of law and comply with the procedure established for equitable distribution. The trial court did not abuse its discretion by making an unequal division of the marital debt and assigning thirty percent of the student loan balance and the outstanding IRS bill to Defendant-Appellant. We affirm the order of the trial court.

V. Order of Monthly Payment

[3] In the final assignment of error, Defendant-Appellant argues that the trial court erred when it ordered him to pay one thousand dollars a month towards the marital debt because it failed to make a finding of fact as to his ability to make the payment. We disagree.

A. Standard of Review

When reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009). A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. *Id*. (citations and quotation marks omitted).

B. Analysis

Defendant-Appellant argues that the trial court's order does not contain findings of fact that support his ability to make a thousand-dollar monthly payment on the marital loan. This Court has held where a party's ability to pay an award with liquid assets can be ascertained from the record, then the award must be affirmed. *Pellom v. Pellom*, 194 N.C. App. 57, 69, 669 S.E.2d 323, 330 (2008).

Here, at the close of evidence, the trial court asked Defendant-Appellant for input on the distribution associated with the judgment. Defendant-Appellant did not take any position on the record as to the distribution of his portion of the student loans other than to say that he was unable to make a lump sum payment for his portion of

the loan. The trial court made a finding of fact that Defendant-Appellant is employed full-time as a general manager of a restaurant making ninety thousand dollars per year. Additionally, the court found that Defendant-Appellant does not have any child or alimony support obligations arising out of this marriage. We conclude that these findings of fact support the award of monthly payments of one thousand dollars on the loan. We hold that the trial court did not abuse its discretion and affirm the order.

VI. Conclusion

After a review of the issues, this Court holds that the claims for absolute divorce and equitable distribution were filed in a timely manner in accordance with North Carolina General Statutes. Additionally, we hold that the trial court did not abuse its discretion when it ordered that Defendant-Appellant be responsible for the balance of the tax bill and for thirty percent of the balance of the student loan. Finally, we hold the court did not abuse its discretion when it ordered Defendant-Appellant to make monthly payments on the loan.

AFFIRMED.

Judges ZACHARY and FLOOD concur.

STATE OF NORTH CAROLINA
v.
TORIE EUGENE CUTHBERTSON, Defendant

No. COA22-92

Filed 18 April 2023

1. Jury—selection—Batson challenge—consideration of evidence presented—weighing of all relevant factors—remand unnecessary

In defendant's *Batson* challenge to the prosecutor's use of peremptory strikes to remove two potential Black jurors from the jury, the trial court sufficiently demonstrated its consideration and weighing of all the relevant factors in the third step of the three-part *Batson* analysis, where the court not only based its determination on the evidence and arguments presented by both sides, but it also inquired about and took into account additional factors not argued by defendant's counsel. Therefore, there was no need to remand the

case to the trial court for further findings and conclusions prior to appellate review.

2. Jury—selection—Batson challenge—third step of inquiry—finding of no discriminatory intent

In defendant's *Batson* challenge to the prosecutor's use of peremptory strikes to remove two potential Black jurors from the jury in defendant's prosecution for assault on a government official, the trial court did not clearly err by determining that the prosecutor was not motivated by discriminatory intent. While the factors regarding statistical evidence of strike and acceptance rates (here, two of the remaining three Black jurors were peremptorily struck, for a rate of 67%) and susceptibility of the case to racial discrimination (where defendant, a Black man, was accused of assaulting a White police officer) leaned in favor of a finding of purposeful discrimination, when viewed with the remaining factors of lack of disparate questioning and investigation and race-neutral specific reasons for striking the prospective jurors (that they had criminal history, and/or they failed to disclose that history, along with the prosecutor's concern that they could be fair and impartial)—particularly in the absence of evidence of pretextual reasons for striking the two jurors—all the factors together supported the trial court's determination that discriminatory intent was not a motivator for the strike decisions.

Appeal by defendant from judgment entered on or about 9 June 2021 by Judge William A. Wood II in Superior Court, Rowan County. Heard in the Court of Appeals 15 November 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Daniel M. Blau Attorney at Law, P.C., by Daniel M. Blau, for defendant-appellant.

STROUD, Chief Judge.

Defendant Torie Eugene Cuthbertson appeals from a judgment, entered following a jury trial, for assault on a government official/employee. On appeal, Defendant argues the trial court erred in overruling his objection, under *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986), to the prosecutor peremptorily striking two Black jurors. Specifically, Defendant contends: (1) the trial court did not sufficiently

explain its ruling so we must remand, and (2) the trial court erred in concluding the prosecutor's strikes were not motivated by discriminatory intent so we should grant him a new trial. Because the trial court adequately considered all the relevant factors presented by the parties when ruling on Defendant's objection, we do not need to remand the case. Further, because the trial court did not clearly err, based on all the relevant factors and circumstances, in determining the prosecutor's strikes of the two Black jurors were not motivated in substantial part by discriminatory intent, we find no error.

I. Background

Although the sole issue on appeal relates to Defendant's *Batson* objection during jury selection, we recount the facts of the case because the role of race in the case is a pertinent factor in our *Batson* analysis. *See State v. Bennett*, 282 N.C. App. 585, 609, 871 S.E.2d 831, 849 (2022) [hereinafter *Bennett III*], *appeal dismissed and disc. rev. denied*, 383 N.C. 694, 881 S.E.2d 305 (2022). At trial, the State's evidence tended to show on the night of 20 July 2019, Defendant, who is Black, pulled into the parking lot of a bar on his motorcycle, which was playing "loud" music. After their captain alerted them to the loud music coming from the motorcycle, two police officers on patrol behind the bar—at least one of whom was White[1]—approached Defendant and gave "numerous commands" to turn off the music. Defendant ignored the officers' commands. Instead, Defendant got off his motorcycle and "jumped up on" a three-to-four-foot retaining wall that separated the bar's patio from the parking lot. The officers made "numerous attempts" to have Defendant get off the wall and speak with them about a noise ordinance violation, but Defendant "continued to chill out by talking over" the officers. At that time, the officers decided to arrest Defendant "for resist, obstruct, delay due to him not providing any type of identification" and not speaking with them about the motorcycle and its loud music.

To initiate the arrest, one of the officers—the one whom the record reveals is White—tried to grab Defendant's arm "to pull him off the wall[,]" but Defendant jumped off the top of the wall to the other side from the officers. The officer followed Defendant to the other side of the wall and continued to try to grab Defendant's arms to handcuff him. At that point, Defendant took his motorcycle helmet, which he was still holding in his hand, and "swung up" towards the officer "slightly striking

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1. The record only contains information about the race of the police officer who was the alleged victim of the assault that led to the charge here.

[him] in the face on the lower jaw." A later check-up by emergency medical services revealed "[n]o major injuries[;]" the officer only had a "sore lip" and lacked "obvious signs of any injuries."

After the officer was hit, Defendant and the officer continued "to tussle" until the second officer came around the wall, pulled out his taser, and radioed for backup. During this tussle, the motorcycle helmet "fell on the ground[.]" As the second officer arrived at the tussle, the officer who was hit "push[ed] away" from Defendant, and Defendant "backed away" to sit down in a patio chair. Defendant then asked the officers "what was going on" before he returned to conversing with other patrons at the bar. A "few moments" later, the officers' backup arrived, and they arrested Defendant without further incident.

The same day as the incident, Defendant was charged, in relevant part, with misdemeanor assault on a government official/employee ("assault").[2] On or about 25 July 2019, Defendant was found guilty of the assault in District Court. Defendant then appealed the District Court judgment to Superior Court. *See* N.C. Gen. Stat. § 15A-1431(b) (2019) ("A defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law.").

The case came for trial in Superior Court starting on 7 June 2021. Because this appeal involves an issue arising out of jury selection, we recount that process before discussing the trial.[3] The initial jury pool, which included all the jurors the prosecutor peremptorily struck, included 25 prospective jurors; four were Black, and the remaining 21 were White. After 2 prospective jurors, 1 of whom was Black, were struck for cause, the 12 prospective jurors in the box included 10 White

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2. Defendant was also charged with misdemeanor possession of drug paraphernalia, but he was found not guilty on that charge in District Court before the Superior Court trial that led to the instant appeal. Because the drug paraphernalia charge does not relate to the instant appeal, we do not further discuss it.

3. The *Batson* hearing before the trial court was the only relevant part of jury selection that was transcribed; *voir dire* of the jurors was not transcribed. In place of a transcript of the jury selection, the record contains a document entitled "Statement Regarding Jury Selection" that provides a narrative about jury selection. (Capitalization altered.) This narrative of jury *voir dire* is permissible under Rule of Appellate Procedure 9(c)(1). *See* N.C. R. App. P. 9(c)(1) (requiring *voir dire* to "be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received"); N.C. R. App. P. 9(c)(2) (allowing an appellant to use a transcript of *voir dire* "in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1)" when *voir dire* "proceedings are the basis for one or more issues presented on appeal"). As a result, we use the "Statement Regarding Jury Selection" to supplement the transcribed *Batson* hearing.

people and 2 Black people, H.M. and D.N.[4] The prosecutor then used peremptory strikes against only H.M. and D.N., and Defendant's attorney made a *Batson* challenge to those strikes. As a result, the trial court held a *Batson* hearing.

The trial court began the *Batson* hearing by confirming both H.M. and D.N. were Black. Then, the trial court confirmed on the record Defendant is Black and the police officer in the case, who was set to be the State's only witness, is White. The trial court also determined Defendant's attorney did not have historical evidence of discrimination by either the county district attorney's office or the specific prosecutor in the case. The trial court next asked Defendant's attorney if there had been any disparate questioning or a pattern of striking Black jurors. While Defendant's attorney said there was no disparate questioning, he argued there was a pattern because the prosecutor struck the only two Black jurors in the jury box during his first chance to exercise peremptory strikes. Finally at this initial part of the *Batson* hearing, the trial court asked if Defendant's attorney had "any other relevant circumstances" to place on the record, and Defendant's attorney only added his "client has a constitutional right to a jury of his peers." Based on this evidence, the trial court found "there [was] an inference from the totality of relevant facts that impermissible discrimination ha[d] occurred" and asked the prosecutor to give "race-neutral justifications" for the peremptory strikes.

The prosecutor gave similar reasons for striking H.M. and D.N. As to H.M., the prosecutor first said H.M. had failed to disclose a "very lengthy criminal history" when the prosecutor asked if anyone had ever been convicted of a crime. The prosecutor also said he did not think H.M. could "apply the law to the facts at the end of this case and make a fair and impartial decision" because H.M. said he "just really didn't want to do it" when asked "about his ability to be fair and impartial[.]" Similarly, the prosecutor first said he struck D.N. because she failed to disclose a "Class 1 driving charge" in response to his question about if anyone had been charged with a crime. Additionally, the prosecutor recalled D.N. said she "didn't know if she could be fair and impartial[,]" and he "believe[d] based on that answer she could not be[.]"

After the prosecutor gave his reasons, the trial court asked if the prosecutor checked the criminal records "for both the White and Black

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4. We use the jurors' initials throughout to protect their identity because they were struck in part due to criminal charges and convictions. *See Bennett III*, 282 N.C. App. at 586 n.1, 871 S.E.2d at 836 n.1 (also using prospective jurors' initials in *Batson* appeal because they were struck due to past criminal activity).

jurors[,]" and the prosecutor responded he had checked the record for "every single person in this jury pool[.]" Defendant's attorney initially declined to present additional argument after hearing the prosecutor's reasons, but he then disputed the prosecutor's characterization of H.M.'s statements and argued the prosecutor had successfully rehabilitated both H.M. and D.N. on the issue of whether they could be fair and impartial. Defendant's attorney did not present any argument on the criminal histories of either H.M. or D.N.

Following the arguments by the parties, the trial court denied the *Batson* challenges and allowed the prosecutor's peremptory strikes of H.M. and D.N. to stand. As to H.M., the trial court explained:

> Well, the court with regard to [H.M.] has weighed the questions and answers, comparisons between the other jurors, and finds that the prosecutor's asked the same questions of each of the jurors and the questions given -- excuse me, the answers given by [H.M.] can be distinguished from the answers of the other jurors, and that [H.M.] had, in fact, been convicted of a crime and done eight months where the other jurors, none of which the ones that the prosecutor accepted and did not exercise a challenge on indicated they'd been convicted of a crime to the best of my knowledge.
>
> Also, [H.M.], according to the prosecutor which is uncontroverted, has a lengthy criminal history going back years including a felony conviction. So with regard to [H.M.], the court is going to find that the prosecutor's exercise of his preemptory challenge was not motivated by discriminatory intent.

As to D.N., the trial court ruled:

> With regard to [D.N.], she was not forthcoming about the driving charge. Once again, the prosecutor has run the records of all the jurors. There was no other juror other than perhaps [H.M.], who was not forthcoming to our knowledge about criminal history. Additionally, it is the court's recollection that she indicated she probably couldn't be fair or she didn't know if she could be fair is a more accurate way of putting what she said on the record.
>
> The court's going to find with regard to [D.N.] in light of all the relevant facts and circumstances that the court has before it, that the prosecutor's exercise of that

> preemptory challenge was not motivated by discriminatory intent.

Throughout the remainder of jury selection, the prosecutor did not use any additional peremptory strikes. The jury seated for trial ultimately contained 11 White jurors and 1 Black juror;[5] the Black juror was the only Black prospective juror from the initial pool not excused for cause or struck by the prosecution.

At trial, the State's sole witness was the officer who was struck by the motorcycle helmet. The officer testified about the incident with Defendant at the bar. As part of the testimony, the State admitted into evidence footage of the incident from the body cameras of both the officer who was struck and the second officer who was present for the whole incident. The defense also called the officer as a witness to have him further testify about a portion of the other officer's body camera footage.

Defendant was the only other witness at trial. Beyond testifying he turned down the music from his motorcycle, Defendant explained his actions during the incident. First, Defendant, who is Black, testified when the officers, at least one of whom is White, approached him he stood on the retaining wall so people in the patio area could "see what was going on up there[;]" he wanted to "have witnesses in case anything did happen." Defendant then explained he did not follow the officers' commands to come closer because they were standing on the other side of the wall from the patio area and he was concerned they were trying to "lure" him "behind that wall so nobody could see" them. Specifically, Defendant was concerned the officers "were going to harm" him based on language they had used like " 'Get you're A down' " and " 'If you don't get off of there, I'm going to take you off of that[.]' " Further, Defendant testified he did not know why the officer tried to grab him because he "didn't do anything wrong[.]" Finally, Defendant denied swinging his helmet at the officer or resisting arrest. Defendant said his helmet did not make contact with the officer that he "kn[e]w of" and any contact "was not intentional if it did" happen.

The jury convicted Defendant on the assault charge. On or about 9 June 2021, the trial court sentenced Defendant to 120 days imprisonment. Defendant entered notice of appeal in open court.

II. Analysis

On appeal, Defendant's sole argument is that "the trial court erred by allowing the State to use peremptory challenges against prospective

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5. No alternate jurors were selected.

jurors [H.M.] and [D.N.], in violation of the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 26 of the North Carolina Constitution." (Capitalization altered.) "The use of peremptory challenges for racially discriminatory reasons violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *State v. Locklear*, 349 N.C. 118, 136, 505 S.E.2d 277, 287 (1998) (citing *Batson*, 476 U.S. at 86, 90 L.Ed.2d at 80). "The North Carolina Constitution, Article I, Section 26, also prohibits the exercise of peremptory strikes solely on the basis of race." *Id.* Finally, Article I, Section 19 of our Constitution also includes a guarantee of "equal protection of the laws[.]" N.C. Const., Art. I, Section 19 ("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.").

For all three of the constitutional grounds Defendant raises, our Courts use the same test laid out by the Supreme Court of the United States in *Batson* to "analyze claims of racially motivated peremptory strikes[.]" *See State v. Clegg*, 380 N.C. 127, 142-45, 867 S.E.2d 885, 898-900 (2022) (discussing the history of *Batson* before stating our Courts have "adopted the Batson test for review of peremptory challenges under the North Carolina Constitution"); *State v. Waring*, 364 N.C. 443, 474-75, 701 S.E.2d 615, 635-36 (2010) (explaining the *Batson* test after stating, "Our review of race-based . . . discrimination during petit jury selection has been the same under both the Fourteenth Amendment to the United States Constitution and Article 1, Section 26 of the North Carolina Constitution"); *State v. Davis*, 325 N.C. 607, 617-20, 386 S.E.2d 418, 422-24 (1989) (analyzing under *Batson*'s test when the defendant argued the prosecution used its peremptory strikes in a racially discriminatory manner in violation of, *inter alia*, the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 19 and 26 of our Constitution). Under *Batson*, a court determines whether a prosecutor improperly exercised a peremptory challenge based on race with a three-step inquiry:

> First, the party raising the claim must make a prima facie showing of intentional discrimination under the totality of the relevant facts in the case. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination.

State v. Bennett, 374 N.C. 579, 592, 843 S.E.2d 222, 231 (2020) [hereinafter *Bennett II*].

Within *Batson*'s three-step inquiry, Defendant only challenges the trial court's ruling at the third step that the prosecution's peremptory strikes of H.M. and D.N. were "not motivated by discriminatory intent" and argues we should grant him a new trial as a result. In the alternative, Defendant contends "the Trial Court did not sufficiently explain how it weighed the relevant factors" at the third step, so we should remand for the trial court to "reconsider its analysis" and "make further findings of fact and conclusions of law." After explaining the standard of review, we first discuss the remand issue because if the trial court failed to sufficiently explain its ruling, we cannot fully review its ruling.

A. Standard of Review

This Court has recently explained the standard of review for *Batson* as follows:

> When reviewing a trial court's *Batson* analysis, "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1207, 170 L.Ed.2d 175[, 181] (2008); *State v. Clegg*, [380 N.C. 127, 145], 867 S.E.2d 885[, 900 (2022)] (quoting same language from *Snyder*). "Such 'clear error' is deemed to exist when, on the entire evidence[,] the Court is left with the definite and firm conviction that a mistake has been committed." *Clegg*, [380 N.C. at 141, 867 S.E.2d at 897] (quoting *Bennett II*, 374 N.C. at 592, 843 S.E.2d at 231) (alteration in original). This deferential standard reflects that "[a] trial court's rulings regarding race-neutrality and purposeful discrimination are largely based on evaluations of credibility . . . ." *State v. King*, 353 N.C. 457, 469–70, 546 S.E.2d 575, 586–87 (2001). As our courts have recognized before, trial courts are "in the best position to assess the prosecutor's credibility . . . ." *State v. Cummings*, 346 N.C. 291, 309, 488 S.E.2d 550, 561 (1997); *see also Hernandez v. New York*, 500 U.S. 352, 365, 111 S. Ct. 1859, 1869, 114 L.Ed.2d 395[, 409] (1991) (explaining "evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province" (quotations and citation omitted)).
>
> Under the clearly erroneous standard, "[t]he trial court's findings will be upheld on appeal unless the 'reviewing court on the entire evidence [would be] left with the definite and firm conviction that a mistake ha[d]

> been committed.' " *State v. Chapman*, 359 N.C. 328, 339, 611 S.E.2d 794, 806 (2005) (quoting *Hernandez*, 500 U.S. at 369, 111 S. Ct. at 1871[, 114 L.Ed.2d at 412]) (alterations in original). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *King*, 353 N.C. at 470, 546 S.E.2d at 587 (quotations and citations omitted); *see also Hernandez*, 500 U.S. at 369, 111 S. Ct. at 1871[, 114 L.Ed.2d at 412] (including identical language). This deference, however, "does not by definition preclude relief." *Bennett II*, 374 N.C. at 592, 843 S.E.2d at 231 (quoting *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240, 125 S. Ct. 2317, 2325, 162 L.Ed.2d 196[, 214] (2005)).

Bennett III, 282 N.C. App. at 600-01, 871 S.E.2d at 843-44 (brackets relating to citation information added) (ellipses and all other brackets in original).

B. Remand Issue

[1] Examining the remand issue first, Defendant contends "the Trial Court did not sufficiently explain how it weighed the relevant factors" at *Batson*'s third step, so we should remand for the trial court to "reconsider its analysis" and "make further findings of fact and conclusions of law." At *Batson*'s third step, the trial court must "determine whether the defendant has met the burden of proving purposeful discrimination" is what motivated the prosecutor's peremptory strike. *Id.* at 607, 871 S.E.2d at 848 (quoting *Bennett II*, 374 N.C. at 592, 843 S.E.2d at 231). In making this determination, the trial court acts like a scale. *See Clegg*, 380 N.C. at 149-50, 867 S.E.2d at 903 (explaining "a common judicial analogy" that "conceptualiz[es]" *Batson* using a scale). After both the defendant and the prosecutor have placed their reasons on the scale as part of *Batson*'s first two steps, the trial court "carefully weighs all of the reasoning from both sides to ultimately decide whether it was more likely than not that the challenge was improperly motivated." *Id.* (citation, quotation marks, and brackets omitted).

To help weigh the reasoning from both sides, trial courts "employ an open-ended list of factors." *Bennett III*, 282 N.C. App. at 607, 871 S.E.2d at 848. The open-ended list of relevant factors includes:

- statistical evidence about the prosecutor's use of peremptory strikes against Black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of Black and white prospective jurors in the case;

- side-by-side comparisons of Black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- [the susceptibility of the particular case to racial discrimination;[6]]
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

Bennett III, 282 N.C. App. at 608-609, 871 S.E.2d at 848-49 (quoting *State v. Hobbs*, 374 N.C. 345, 356, 841 S.E.2d 492, 501 (2020) (in turn citing *Flowers v. Mississippi*, ___ U.S. ___, ___, 204 L.Ed.2d 638, 655-56 (2019))) (brackets from original omitted and own information in brackets added); *see also State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 150 (1990).

Defendant argues the trial court failed to properly weigh all of these factors at *Batson*'s third step. Specifically, Defendant contends the trial court only mentioned the prosecutor's reasons for striking H.M. and D.N. and failed to discuss "how it had weighed the other myriad relevant factors[.]" In support of this argument, Defendant cites three cases: *Hobbs; State v. Alexander*, 274 N.C. App. 31, 851 S.E.2d 411 (2020); and *State v. Hood*, 273 N.C. App. 348, 848 S.E.2d 515 (2020).

In *Hobbs*, our Supreme Court remanded because the trial court "misapplied the *Batson* analysis" in relevant part by failing to properly take into account all the third stage factors the defendant had presented to it. *Hobbs*, 374 N.C. at 358-59, 841 S.E.2d at 502-03. In particular, our Supreme Court noted "the trial court did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges, *including the historical evidence that [the defendant] brought to the trial court's attention.*" *Id.* at 358, 841 S.E.2d at 502 (emphasis added). Additionally, the Supreme Court did not know "how or whether" the trial court evaluated comparisons between the answers of struck Black prospective jurors and White prospective

6. This factor comes from *State v. Porter* and is included in the list from *Bennett III* to be concise. *See State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 150 (1990) (including "the susceptibility of the particular case to racial discrimination" as a factor for courts to consider (citations and quotation marks omitted)).

jurors acceptable to the State that the defendant "*sought to bring to the court's attention.*" *Id.* at 358-59, 841 S.E.2d at 502-03 (emphasis added). The Supreme Court's discussion of this Court's error in *Hobbs* further emphasizes the importance of taking into account all the evidence presented by a defendant. *See id.* at 359, 841 S.E.2d at 503. Specifically, the Supreme Court said this Court committed a "[s]imilar legal error" as the trial court and then explained this Court "failed to weigh all the evidence put on by [the defendant.]" *Id.* Finally, in responding to a dissenting opinion, the Supreme Court explained its ruling was animated by a preexisting requirement for "a court to consider all of the evidence before it when determining whether to sustain or overrule a *Batson* challenge." *Id.* at 358, 841 S.E.2d at 502. Thus, the error that required remand in *Hobbs* was the trial court's failure to weigh all the evidence presented by the defendant at *Batson*'s third step. *See id.* at 358-59, 841 S.E.2d at 502-03.

Both *Alexander* and *Hood* similarly required remand because the trial court failed to explain how it weighed all the evidence the defendant presented. *See Alexander*, 274 N.C. App. at 43-44, 851 S.E.2d at 419-20; *Hood*, 273 N.C. App. at 357, 848 S.E.2d at 522. In *Alexander*, this Court noted the trial court erred by failing to address one of the defendant's arguments and not making clear if it took into account a comparison between White and Black prospective jurors raised by the defendant. *See Alexander*, 274 N.C. App. at 43-44, 851 S.E.2d at 419-20. The *Alexander* Court's remand instructions further reinforced the need to address the defendant's argument when they directed the trial court to "make specific findings as to all the pertinent evidence and arguments" and then explain how it "weighed the totality of the circumstances." *Id.* at 47, 851 S.E.2d at 422 (citation and quotation marks omitted). Similarly in *Hood*, this Court found the trial court erred "in failing to make the requisite findings of fact and conclusions of law *addressing the evidence presented by counsel*" when it "summarily denied" the defendant's *Batson* challenge. *Hood*, 273 N.C. App. at 357, 848 S.E.2d at 522. Thus, *Hobbs*, *Alexander*, and *Hood* all stand for the proposition that an appellate court must remand when, at step three of the *Batson* inquiry, the trial court has failed to consider and address all the evidence and arguments raised by a defendant's attorney. *See Hobbs*, 374 N.C. at 358-59, 841 S.E.2d at 502-03; *Alexander*, 274 N.C. App. at 43-44, 851 S.E.2d at 419-20; *Hood*, 273 N.C. App. at 375, 848 S.E.2d at 522.

Returning to the scale analogy, *see Clegg*, 380 N.C. at 149-50, 867 S.E.2d at 903, an appellate court must remand when the trial court failed to include on the scale all the arguments presented to it by the parties.

If the trial court failed to include all the presented factors on the scale, the reviewing court necessarily cannot determine if the trial court properly weighed all the factors. *See id.* at 144, 867 S.E.2d at 900 (explaining a reviewing court determines if "all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of one [B]lack prospective juror was not motivated in substantial part by discriminatory intent" (quoting *Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 664) (ellipses and brackets omitted)).

Here, unlike in *Hobbs*, *Alexander*, and *Hood*, the trial court placed all the factors presented to it by the parties on the scale, and thus we do not need to remand. *See Hobbs*, 374 N.C. at 358-59, 841 S.E.2d at 502-03; *Alexander*, 274 N.C. App. at 43-44, 851 S.E.2d at 419-20; *Hood*, 273 N.C. App. at 375, 848 S.E.2d at 522. We first recount all the factors the parties placed on the scale before explaining how the trial court addressed all of them.

At the start of the *Batson* hearing, Defendant's attorney said he was making the *Batson* challenge because the prosecutor had struck the only 2 Black jurors during the first chance he had to use peremptory strikes. In other words, Defendant's attorney raised the fact that the prosecutor had struck all the Black prospective jurors and none of the White prospective jurors. When the trial court subsequently asked Defendant's attorney if there were "any other relevant circumstances [he]'d like to get on the record[,]" Defendant's attorney just responded that his "client has a constitutional right to a jury of his peers[,]" which is the motivation behind *Batson* rather than a factor in the *Batson* analysis. *See Batson*, 476 U.S. at 85, 90 L.Ed.2d at 80-81 (explaining the impetus for "eradicat[ing] racial discrimination" in jury selection comes from the idea "that the State denies a [B]lack defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded").

The prosecutor then gave his two reasons for excluding each juror: (1) their failures to disclose their "criminal history" and (2) the prosecutor's concerns about the prospective jurors' abilities to be "fair and impartial[.]" After the prosecutor gave his reasons for the strikes, the trial court asked Defendant's attorney again if he had "[a]ny other argument[,]" and Defendant's attorney raised two additional points relevant to those reasons. First, in regard only to H.M., Defendant's attorney said he would "characterize [H.M.]'s statements" about the ability to be fair and impartial "differently[.]" Second, with respect to both H.M. and D.N., Defendant's attorney argued the prosecutor successfully rehabilitated

the jurors on the issue of whether they could be fair and impartial. The parties did not present any other arguments, so those arguments represent everything the trial court needed to weigh on the scales. *See Hobbs*, 374 N.C. at 358-59, 841 S.E.2d at 502-03; *Alexander*, 274 N.C. App. at 43-44, 851 S.E.2d at 419-20; *Hood*, 273 N.C. App. at 375, 848 S.E.2d at 522.

The trial court properly reviewed and weighed all of those factors and relevant pieces of evidence. Defendant does not dispute the trial court properly accounted for the prosecutor's reasons. On the other side of the scale, Defendant's attorney presented the following for weighing by the trial court: statistics about strike rate; a challenge to the prosecutor's "characteriz[ation]" of H.M.'s statements on being fair and impartial; and an argument the prosecutor had successfully rehabilitated the jurors on the issue of whether they could be fair and impartial.

From the record before us, we can determine the trial court weighed each of those factors in reaching its decision. As to the statistics on strike rate, the trial court took them into account at *Batson*'s first step, which is where they were initially presented, because it found a *prima facie* case of discrimination based on that fact and after determining the race of all the relevant people. Having considered the strike rate evidence at the first step, we see no reason, and Defendant presents none, why the trial court would not have considered the strike rate at the third step when it said it was ruling "in light of all the relevant facts and circumstances that the court has before it[.]" As to the characterization of H.M.'s answers to the question about whether he could be fair and impartial and Defendant's argument the prosecutor rehabilitated H.M. on the subject, the trial court did not mention H.M.'s ability to be fair and impartial when analyzing H.M.'s strike after Defendant's attorney raised the mischaracterization argument. The trial court's lack of reliance on that reason implies the trial court agreed with Defendant's overarching point that the strike could not be justified based on H.M.'s answer, whether for the reasons Defendant put forth or another reason. Either way, because the trial court did not rely on that part of the prosecutor's reasoning in making its final ruling, it did not need to address Defendant's rebuttal against that reasoning. Finally, as to Defendant's argument the prosecutor rehabilitated D.N. on the subject of whether she could be fair or impartial, we first note that dispute is ultimately a question of fact rather than a legal factor that needs to be weighed. More importantly, the trial court addressed Defendant's argument when it gave its own recollection of D.N.'s answers that aligned with the prosecutor's explanation because that recollection showed the trial court was convinced by the prosecutor's reasoning and not by Defendant's

rehabilitation argument. Thus, the trial court weighed all the relevant factors presented by the parties in its *Batson* step three ruling.

The trial court's decision to inquire about and take into account additional factors not argued by Defendant's trial counsel further reinforces our conclusion that the trial court adequately weighed the relevant factors at *Batson*'s third step. First, beyond inquiring about the races of H.M. and D.N., the trial court asked about the race of Defendant and the law enforcement officer who was a witness in this case, which is relevant to the factor based on "the susceptibility of the particular case to racial discrimination[.]" *See Bennett III*, 282 N.C. App. at 621, 871 S.E.2d at 856 (explaining this factor looks at whether the race of "the defendant, the victims, and the key witnesses" cross "racial lines" (citation and quotation marks omitted)). The trial court also inquired about historical evidence of discrimination by the district attorney's office in general or the prosecutor conducting *voir dire* in particular, but there was none. *See id.* at 608-09, 871 S.E.2d at 848-49 (stating "relevant history of the State's peremptory strikes in past cases" can be considered at *Batson*'s third step).

Turning to the trial court's ruling, it found the prosecutor "asked the same questions of each of the jurors and . . . the answers given by [H.M] can be distinguished from the answers of the other jurors[.]" The trial court similarly concluded D.N.'s undisclosed criminal record set her apart from other prospective jurors. In making those determinations, it is clear the trial court independently decided to consider two other relevant factors, evidence of a disparate investigation or lack thereof in the trial court's determination and side-by-side comparisons of jurors. *See id.* (listing those two factors as considerations at the third step of *Batson*). The trial court's independent decision to assess these factors, even though they were not presented by either party, is further proof it understood it needed to and did in fact weigh all the relevant factors in the *Batson* step three analysis.

Since the trial court adequately accounted for all the factors presented to it at *Batson*'s third step, we do not need to remand. We therefore reject Defendant's argument about the need to remand and proceed to review Defendant's argument about whether the trial court erred in ruling against him on *Batson*'s third step.

C. *Batson* Step Three

[2] Defendant primarily argues on appeal that the trial court "commit[ted] clear error" at *Batson*'s third step "by finding that the prosecutor's strikes were not racially motivated." As explained above,

at the third step, the trial court uses the following open-ended list of factors to "determine whether the defendant has met the burden of proving purposeful discrimination" is what motivated the prosecutor's peremptory strike:

- statistical evidence about the prosecutor's use of peremptory strikes against Black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of Black and white prospective jurors in the case;
- side-by-side comparisons of Black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- [the susceptibility of the particular case to racial discrimination;]
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

Bennett III, 282 N.C. App. at 607-09, 871 S.E.2d at 848-49; *see also Porter*, 326 N.C. at 498, 391 S.E.2d at 150 (including "the susceptibility of the particular case to racial discrimination" as a factor for courts to consider).

On appeal, the reviewing court examines the relevant factors from the open-ended list to determine if "all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of one [B]lack prospective juror was not motivated in substantial part by discriminatory intent." *Clegg*, 380 N.C. at 144, 867 S.E.2d at 900 (quoting *Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 664) (ellipses and brackets from original omitted and own brackets added). We review each of the relevant circumstances in this case.

1. Statistical Evidence of Strike and Acceptance Rates

First, we consider "statistical evidence about the prosecutor's use of peremptory strikes against Black prospective jurors as compared to white prospective jurors in the case[.]" *Bennett III*, 282 N.C. App. at 608, 871 S.E.2d at 848-49. Here, the relevant part of the jury pool included 25 prospective jurors, and 4 of the prospective jurors were Black while

the remaining 21 prospective jurors were White.[7] After 1 of the Black prospective jurors was excused for cause, the State used 2 peremptory strikes on H.M. and D.N., which led to the *Batson* objection, hearing, and ruling at issue in this appeal. Once the trial court allowed the strikes of H.M. and D.N., the fourth Black prospective juror was sat in the jury box, and the prosecutor did not use a peremptory challenge against him or any other juror for the remainder of jury selection. Notably, the prosecutor did not ever use a peremptory strike against a White prospective juror.

As a result, in line with Defendant's argument, the relevant statistics of the prosecutor's use of peremptory strikes are as follows: The State used 100% of its peremptory strikes against Black jurors. Because the State used all of its peremptory strikes against Black jurors, it correspondingly struck 0% of White prospective jurors. The State also peremptorily struck 67% of the Black jurors who could have been peremptorily struck. Further, the 1 Black prospective juror the State did not peremptorily strike only came into the jury box *after* the *Batson* objection and hearing. Traditionally a decision to accept a single Black juror in the face of otherwise one-sided statistics is viewed "skeptically[.]" *See Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 659 (explaining a decision to allow one Black juror when five others were struck was evidence in favor of a determination "the State was motivated in substantial part by discriminatory intent" because the Supreme Court of the United States has "skeptically viewed the State's decision to accept one [B]lack juror" when striking others); *Miller-El II*, 545 U.S. at 250, 162 L.Ed.2d at 220 (explaining a "late-stage decision to accept a [B]lack panel member" did not "neutralize the early-stage decision to challenge a comparable venireman").

This statistical evidence favors a finding of purposeful discrimination. *See, e.g., Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 659 (explaining the decision to strike five of six Black prospective jurors was evidence in favor of a determination "the State was motivated in substantial part by discriminatory intent"). But we note "bare statistics" are not as powerful as some of the other factors we examine at this step. *See Miller-El II*, 545 U.S. at 241, 162 L.Ed.2d at 214 (explaining "side-by-side

7. All of the State's peremptory strikes were used on members of this initial pool of 25 prospective jurors, so it is this initial pool of prospective jurors on which we focus when considering statistical evidence on strike rates. *See Bennett III*, 282 N.C. App. at 608, 871 S.E.2d at 848-49 (explaining the statistical evidence is about "the *prosecutor's* use of peremptory strikes" (emphasis added)). Later in jury selection, 30 additional prospective jurors were brought in, but no Black prospective juror from this pool made it into the jury box, and the State did not use any peremptory strikes on this pool. As a result, those additional prospective jurors do not impact the strike and acceptance rates.

comparisons" of struck Black prospective jurors to White prospective jurors "allowed to serve" are "[m]ore powerful than the[] bare statistics"). Thus, while the statistical evidence weighs in Defendant's favor, it is only part of our inquiry.

The State makes two arguments about why we should reject the evidence of strike and acceptance rates, but neither argument changes how we weigh the statistical evidence. First, the State contends, without supporting authority, Defendant "never argued such calculations to the trial court." This argument does not comport with the record. While Defendant's attorney did not give specific percentages, he told the trial court there was a "pattern" of striking Black jurors because the prosecutor struck H.M. and D.N. at the first opportunity and no other Black jurors were in the jury box at the time. With this discussion, Defendant's attorney made clear that, at the time of the *Batson* hearing, the prosecution had struck 100% of Black jurors.

In its second argument about rejecting the evidence of strike and acceptance rates, the State asserts the rates "arise from the numerical happenstance common to small sample sizes." This argument does not persuade us to outright reject the strike and acceptance rates evidence because our Supreme Court has considered such strike and acceptance rate evidence before in a case with a similarly small sample size. This case has a typical "sample size" as compared to other *Batson* cases. In *Clegg*, our Supreme Court explained the trial court "acted properly in considering [the] defendant's statistical evidence regarding the disproportionate use of peremptory strikes against Black potential jurors" where the initial pool included 22 potential jurors and 2 of the 3 people of color in that pool were ultimately struck by the prosecutor. *Clegg*, 380 N.C. at 151-52, 156, 867 S.E.2d at 904-05, 907. Those statistics are remarkably similar to the statistics here where the initial juror pool that contained all of the prosecutor's peremptory strikes was a group of 25 people with 4 Black prospective jurors, of whom 1 was excused for cause and 2 of the 3 remaining were peremptorily struck. Since the statistical evidence was properly considered in *Clegg*, *see id.*, it is properly considered here with a similarly small sample size. But, to the extent a small sample size could skew the strike and acceptance rate data, we reiterate precedent already indicates "bare statistics" are not as powerful as some of the other factors we examine at this stage. *See Miller-El II*, 545 U.S. at 241, 162 L.Ed.2d at 214.

2. Susceptibility of the Case to Racial Discrimination

Turning to the next factor in our inquiry, we consider the "susceptibility of the particular case to racial discrimination." *Bennett III*, 282

N.C. App. at 621, 871 S.E.2d at 856 (quoting *Porter*, 326 N.C. at 498, 391 S.E.2d at 150). "The race of the defendant, the victims, and the key witnesses bears upon this determination." *Id.* (quoting *Porter*, 326 N.C. at 498, 391 S.E.2d at 150-51). Specifically, "our courts have focused on whether the case crosses racial lines among those key figures." *Id.* (citing *State v. Fair*, 354 N.C. 131, 142, 557 S.E.2d 500, 511 (2001); *State v. Golphin*, 352 N.C. 364, 432, 533 S.E.2d 168, 214 (2000); *Porter*, 326 N.C. at 500, 391 S.E.2d at 152).

Here, as Defendant highlights, Defendant is Black and the police officer who was allegedly assaulted and was the sole witness for the State at trial is White. Further, at trial the jury primarily had to make a credibility determination between the Black Defendant and the White police officer. The police officer testified Defendant swung his motorcycle helmet at the officer, striking him in the jaw. Conversely, Defendant testified he did not swing his motorcycle helmet at the officer and his helmet did not touch the police officer that he "kn[e]w of." The only other evidence the jury had was body camera footage, but it is not clear if this footage showed the precise moment at issue. Since the two key, and only, witnesses in this case are of different races and the jury had to make a credibility determination between them, this case is susceptible to racial discrimination in jury selection, which also favors a finding of purposeful discrimination. *See Golphin*, 352 N.C. at 432-33, 533 S.E.2d at 214-15 (discussing the susceptibility of the case to racial discrimination before stating, "[h]owever" and determining other factors that led to the conclusion the prosecution had not used its peremptory strikes in a racially discriminatory way).

3. Lack of Disparate Questioning and Investigation

A third factor in our inquiry is whether the prosecutor engaged in "disparate questioning and investigation of Black and white prospective jurors[.]" *Bennett III*, 282 N.C. App. at 608-609, 871 S.E.2d at 848-49. "[D]isparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race." *Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 660-61. While neither party argues based on this factor, we review "all of the relevant facts and circumstances[,]" *Clegg*, 380 N.C. at 144, 867 S.E.2d at 900, and the trial court inquired about and ruled in part based on this factor.

The trial court found no disparate questioning or disparate investigation. Specifically, when questioned by the trial court, Defendant's attorney agreed the prosecutor asked the same questions of the Black and White prospective jurors and also examined them in the same

"manner or style[.]" As to the prosecutor's investigation, after the prosecutor explained he struck both H.M. and D.N. in part because they did not mention past criminal charges or convictions, the trial court asked the prosecutor if he had "run criminal record checks for both the White and Black jurors," and the prosecutor responded, "Yes . . . as far as I'm aware, every single person in this jury pool has had a record check." Thus, the record does not contain any evidence of disparate questioning or disparate investigation, which weighs against a finding of purposeful discrimination. *See Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 660-61 (explaining how disparate questioning or investigation can obscure racially discriminatory reasons for strikes).

4. Specific Reasons Prosecutor Gave for Striking Prospective Jurors

Finally, we directly examine the reasons the prosecutor gave for his strikes and the arguments Defendant makes about each of the reasons. This part of the inquiry will involve multiple factors including whether the prosecutor "misrepresent[ed] . . . the record when defending the strikes during the *Batson* hearing" and comparisons between the struck Black jurors and White jurors who were not struck. *Bennett III*, 282 N.C. App. at 608-609, 871 S.E.2d at 848-49.

During the *Batson* hearing before the trial court, the prosecutor gave the same two reasons for striking both H.M. and D.N. First, the prosecutor said each prospective juror had failed to disclose their "criminal history[.]" Second, the prosecutor explained he had concerns about the prospective jurors' abilities to be "fair and impartial[.]" We review the prosecutor's reasoning for striking each individual juror in turn because the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster v. Chatman*, 578 U.S. 488, 499, 195 L.Ed.2d 1, 12 (2016) (quoting *Snyder*, 552 U.S. at 478, 170 L.Ed.2d at 181).

a. Prospective Juror H.M.

As to prospective juror H.M., the prosecutor struck him first because he failed to disclose "a very lengthy criminal history" when the prosecutor asked if anyone had "ever been convicted of a crime." This reason is facially race neutral. Further, our record contains no evidence any other prospective juror who the State did not strike similarly failed to disclose a criminal history, which would be evidence of pretext if it were to exist. *See Miller-El II*, 545 U.S. at 241, 162 L.Ed.2d at 214 ("If a prosecutor's proffered reason for striking a [B]lack panelist applies just as well to an otherwise-similar non[B]lack [person] who is permitted to serve, that is

evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

As to this first reason from the prosecutor, Defendant argues the prosecutor failed to ask "any follow-up questions to determine why [H.M.] had not disclosed the convictions, or whether he was even the same person reflected in the prosecutor's documents." Initially, we note the record does not contain any information suggesting H.M. was not the same person reflected in the prosecutor's documents and Defendant does not provide any such information or support for that contention. Turning to the failure to ask follow-up questions about the lack of disclosure, we first note the failure to follow-up can contribute to a *Batson* violation as evidence of disparate investigation. *See Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 662 ("A State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (citation and quotation marks omitted)); *Bennett III*, 282 N.C. App. at 613, 871 S.E.2d at 851 (citing *Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 660-63) ("Disparate investigation and a failure to meaningfully voir dire a potential juror on a subject used later to justify a strike could be evidence an explanation is pretextual."). For example, in *Flowers*, the Supreme Court of the United States analyzed the relevance of the failure to meaningfully *voir dire* when it was discussing how the prosecution asked a Black prospective juror numerous follow-up questions about her connections to people involved in the case but did not ask three similarly connected White jurors any follow-up questions on the subject. *See Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 662. The *Flowers* Court reasoned "[i]f the State were concerned about prospective jurors' connections to witnesses in the case, the State presumably would have used individual questioning to ask those potential white jurors whether they could remain impartial despite their relationships." *Id.* "Still, 'disparate questioning or investigation alone does not constitute a *Batson* violation.' " *Bennett III*, 282 N.C. App. at 613, 871 S.E.2d at 851 (citing *Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 661).

Here, while the prosecutor failed to follow-up on H.M.'s nondisclosure of his criminal history, there is no evidence this failure reflected disparate investigation or questioning. As discussed above, when the trial court inquired about the prosecutor's investigation of jurors' criminal records after he gave this reason for striking H.M, the prosecutor said he ran criminal history checks for every potential juror. Further, the record includes no indication any White juror comparably had an undisclosed criminal record. This lack of comparable juror blunts the impact of the failure to follow-up because the failure to follow-up

could have been universal. This case does not have the same situation as in *Flowers* where the prosecutor's decision on whether to follow-up broke down on racial lines. *See Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 662. Here, the *voir dire* was not recorded, and we must rely upon the narrative summary of the questioning. *See supra* note 3. Since the record does not contain enough information to ascertain if the failure to question broke down on racial lines, it is plausible the prosecutor's failure to follow-up "reflect[ed] ordinary race-neutral considerations." *See Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 661-63 (explaining disparate questioning or investigation can "reflect ordinary race-neutral considerations" before turning to a comparative juror analysis that focused on the failure follow-up with White prospective jurors on the same reasons that animated a strike of a Black prospective juror).

Faced with this plausible explanation for the prosecutor's failure to follow-up, we fall back on the nature of appellate review of *Batson* decisions. When conducting a *Batson* review, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Bennett III*, 282 N.C. App. at 601, 871 S.E.2d at 844 (citations and quotation marks omitted). The plausible view that the prosecutor's failure to follow-up was race neutral can be reconciled with the trial court's ultimate determination that the prosecutor's strike was not substantially motivated by discriminatory intent, so the failure to follow-up does not support a determination the trial court clearly erred.

Beyond H.M.'s undisclosed criminal history, the prosecutor had another valid reason for the strike. The prosecutor also struck H.M. because the prosecutor had concerns about H.M.'s ability to be "fair and impartial[.]"[8] Specifically, the prosecutor explained:

> when asked about his ability to be fair and impartial, he said he just really didn't want to do it. He just really didn't want to do it, didn't think he could be fair and impartial, tried to kind of pin him down that -- and I think from his answers that I don't think he could judge this, or I won't say judge, but apply the law to the facts at the end of this case and make a fair and impartial decision.

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8. Although—as discussed above in the section on whether we needed to remand the case—the trial court appears to have rejected this argument, we can still review the reason on appeal. *See Clegg*, 380 N.C. at 154-55, 867 S.E.2d at 906 (explaining as part of its review that the trial court "properly rejected" two of the prosecutor's arguments below because of lack of support in the record).

This reason is facially race neutral, but Defendant argues we should find the trial court clearly erred because "the prosecutor mischaracterized [H.M.]'s answers" on this question. *Batson* precedent recognizes a prosecutor's misrepresentation of the record can be evidence of pretext. *See Clegg*, 380 N.C. at 154, 867 S.E.2d at 906 (citing *Foster*, 578 U.S. at 505, 195 L.Ed.2d at 15-16) ("[P]roffered reasons that are contradicted by the record are unacceptable in supporting a challenged peremptory strike."). But the prosecutor did not mischaracterize H.M.'s answers here.

At the outset, we note we do not have a complete transcript of the jury selection *voir dire*, so we cannot look at H.M.'s precise answers to the questions and compare them to the prosecutor's representations of H.M.'s answers. Instead, we are left with the parties' North Carolina Rule of Appellate Procedure 9(c)(1) supplement that narrates the events of jury selection. *See supra* note 3. Per that supplement, H.M. "initially said he did not want to serve as a juror and did not know if he could be fair and impartial, but after further discussion, he said he thought that he probably could be fair."

Comparing that answer to the prosecutor's representation, the prosecutor did not mischaracterize H.M.'s answers. The only time the prosecutor represented H.M.'s answers, the prosecutor said H.M. said he did not want to "do it" and "didn't think he could be fair and impartial[.]" That corresponds closely to the supplement's narration where H.M. initially said he did not want to be a juror and "did not know if he could be fair and impartial[.]" The rest of the prosecutor's reasoning for why he struck H.M. relied not on any discussion of H.M.'s answers but rather the prosecutor's own sense that the prosecutor could not "pin [H.M.] down" on the topic and did not think H.M. could "apply the law to the facts at the end of this case and make a fair and impartial decision." While the prosecutor did not explicitly acknowledge H.M.'s statement that H.M. "thought that he probably could be fair[,]" the prosecutor's discussion of his continued concerns can easily be reconciled with H.M.'s later, still slightly equivocal answer about his ability to be fair.

At most, the differences here represent two different ways of interpreting the relevance and strength of H.M.'s second answer that he thought he could be fair and impartial. The prosecutor, based on the statement above, does not appear to have been fully convinced by that answer because he still had doubts about H.M., which could be animated by the initial answer. By contrast, Defendant's argument on appeal, which appears to be based on the same argument Defendant's trial counsel made, is premised on the idea H.M.'s second answer rehabilitated H.M. on the issue. On appeal, Defendant argues, "Defense counsel

found the prosecutor's mischaracterization significant enough to bring to the Trial Court's attention during the Batson hearing[] (T p.21)[.]" At that portion of the transcript, Defendant's trial counsel said he "would characterize [H.M.'s] statements differently" because "[i]t seemed to me that the prosecutor had rehabilitated him and he said that he probably could apply the law to -- apply the facts to the law as instructed." Thus, Defendant's argument on appeal is animated by a belief H.M.'s second answer rehabilitated the juror on the question.

A difference in belief about the quality of the prosecutor's rehabilitation of H.M. does not rise to the level of a *Batson* violation. *See Bennett III*, 282 N.C. App. at 601, 871 S.E.2d at 844. "Where there are two permissible views of the evidence," such as here, "the factfinder's choice between them cannot be clearly erroneous." *Id.* Moreover, the trial court is better-situated than this Court to evaluate the prosecutor's credibility in explaining his concerns about whether H.M. could be fair based on H.M.'s answers. *See id.* at 600, 871 S.E.2d at 844 ("As our courts have recognized before, trial courts are 'in the best position to assess the prosecutor's credibility[.]' " (quoting *Cummings*, 346 N.C. at 309, 488 S.E.2d at 561)). The trial court ultimately sided with the prosecutor by denying the *Batson* challenge. As a result, we reject Defendant's argument and do not discount the prosecutor's explanation he struck H.M. as a result of concerns over whether H.M. could be fair and impartial due to the prosecutor's alleged mischaracterization of the record.

b. *Prospective Juror D.N.*

Turning to prospective juror D.N., the prosecutor first struck D.N. on the grounds she "was not forthcoming" about a "Class 1 driving charge that she was charged with" when he asked if "anyone had ever been charged with a crime[.]" Our record does not contain any additional information on the "Class 1 driving charge[.]" But our statutes have separate numerical "Class[es]" only for misdemeanor charges, *see generally* N.C. Gen. Stat. § 15A-1340.23 (2019) (setting out misdemeanor classes with numbers); N.C. Gen. Stat. § 15A-1340.17 (2019) (setting out felony classes with letters), and some driving offenses are Class 1 misdemeanors. *See, e.g.*, N.C. Gen. Stat. § 20-141.6(c) (2019) ("A person convicted of aggressive driving is guilty of a Class 1 misdemeanor."). As a result, it appears the prosecutor was referring to a charge for a Class 1 misdemeanor.

As Defendant concedes, the prosecutor's proffered reason for striking D.N. based on her failure to disclose this past charge is facially race neutral. Defendant presents three contentions that the prosecutor's reason was actually pretextual, but none of them convince us the trial

court clearly erred in accepting this reason. First, Defendant argues the prosecutor "had asked the jurors if any of them had ever been charged with a *crime*, not a traffic offense" and "there are many Class 1 traffic misdemeanors that ordinary citizens might view as 'compliance' tickets or minor offenses, rather than as 'criminal' charges that they would need to disclose in response to such a question." (Emphasis added by Defendant.) But a Class 1 misdemeanor, or any misdemeanor, is a crime. *See* N.C. Gen. Stat. § 14-1 (2019) (defining felonies and then stating, "Any other *crime* is a misdemeanor" (emphasis added)). Whether ordinary citizens may not recognize the charge as a misdemeanor crime does not undermine the prosecutor's reasoning on its own. While the failure to disclose can have an innocent explanation of failing to realize a charge was a crime, it can also be the result of a willful failure to disclose. Without additional information, the prosecutor cannot know which of the two options explains a failure to disclose.

We reject Defendant's second argument for similar reasons. Defendant contends the prosecutor was focused on charges in this question and that "fairly suggests that [D.N.] was not actually *convicted* of the offense, which would make it even less likely that she would realize that she needed to disclose it[.]" (Emphasis in original.) Even accepting Defendant's contention D.N. was likely not convicted of the offense, the prosecutor still explained that he struck D.N. because she failed to disclose the charge when the prospective jurors were asked "if any of them had ever been *charged* with a crime." (Emphasis added.) The prosecutor had also previously asked if anyone had been convicted of a crime. Since the prosecutor asked about both convictions and charges separately, D.N. could, and arguably should, have realized the need to disclose a misdemeanor charge. Even if D.N. did not realize the need to disclose the charge, the prosecutor would not necessarily know that the failure to disclose had an innocent explanation, as already discussed.

As Defendant's third contention recognizes, one way to try to cure the uncertainty around the reason for the failure to disclose would be for the prosecutor to ask follow-up questions to determine if D.N.'s "failure to disclose" the Class 1 misdemeanor charge "was a simple misunderstanding." While in other situations the failure to follow-up can contribute to a *Batson* violation in conjunction with other factors, here the same factors that mitigated the prosecutor's failure to follow-up above with respect to H.M. exist with D.N. as well. *See Flowers*, ___ U.S. at ___, 204 L.Ed.2d at 662 (stating a failure to "meaningful[ly] voir dire" on a subject is evidence suggesting an explanation "is a sham and a pretext for discrimination"); *Bennett III*, 282 N.C. App. at 613, 871 S.E.2d at 851 (explaining disparate investigation and a lack of meaningful *voir dire*

"on a subject used later to justify a strike" can be evidence "an explanation is pretextual" before stating "disparate questioning or investigation alone does not constitute a *Batson* violation"). The prosecutor checked all jurors' criminal histories. No other White juror was similarly situated, so the failure to follow-up could have been universal rather than the result of racially disparate investigation.

Moreover, as with H.M. above, the prosecutor had another valid reason to strike D.N. Specifically, the prosecutor also struck her because of a concern about whether she could be fair or impartial:

> [W]hen I got into the same questions about can you be fair and impartial, she said probably. I kind of tried to flesh that out with her a little. I can't remember her exact words, but she didn't know if she could do that to another person, didn't know if she could be fair and impartial. I did try to ask that a few different ways, and I believe based on her answers that she could not be, Your Honor.

This reasoning is facially race neutral. Further, the prosecutor's explanation aligns with D.N.'s answers when asked if she could be fair and impartial. Specifically, D.N.

> responded that she probably could be fair and impartial. The prosecutor asked her to explain further, and she stated that she did not know if she could "do that to another person." The prosecutor told [D.N.] that, as a juror, she would only be deciding whether the State had met its burden of proof in the case, and would not be deciding any issue related to punishment. [D.N.] said she might be able to be fair and impartial, but did not know if she could.

Defendant does not even contest the accuracy of the prosecutor's representations of D.N.'s answers. Thus, the prosecutor's facially race neutral reason also accurately represented D.N.'s answers.

Defendant acknowledges D.N. said "at one point" that "she did not know if she could be fair" but contends "she also initially stated that she could probably be fair." Defendant then argues D.N. "never said that she could *not* be fair, and defense counsel believed that the prosecutor had sufficiently rehabilitated her." As with the arguments about H.M. above, at most Defendant's arguments here represent a difference in opinion about how well the prosecutor rehabilitated D.N. With D.N., the case is even stronger against rehabilitation because her later answers revealed more equivocality than her earlier answers, which was the opposite of H.M. Put another way, D.N. seemed less likely to be able to

be fair or impartial the more the prosecutor asked, which is the opposite of how a rehabilitation of a juror would work. Regardless of the relative strength of the rehabilitation, similar to the discussion of H.M.'s answers above, this difference in opinion about how well the prosecutor rehabilitated D.N. does not amount to a clear error in the trial court's rejection of Defendant's *Batson* challenge.

5. Weighing All of the Relevant Factors

Now that we have reviewed "all of the relevant facts and circumstances[,]" we determine that, "taken together[,]" the trial court did not commit clear error in concluding the State's peremptory strikes of H.M. and D.N. were not "motivated in substantial part by discriminatory intent." *Clegg*, 380 N.C. at 144, 867 S.E.2d at 900. The statistics of strike rates and susceptibility of the case to racial discrimination both weigh on the side of discriminatory intent, but those two factors alone are not as powerful as other factors. *See Miller-El II*, 545 U.S. at 241, 162 L.Ed.2d at 214 (explaining "bare statistics" are not as "powerful" as "side-by-side comparisons" of struck Black prospective jurors and White prospective jurors "allowed to serve"); *Golphin*, 352 N.C. at 432-33, 533 S.E.2d at 214-15 (explaining the case was "susceptible to racial discrimination" before determining the other factors meant the reviewing court was "convinced the State did not discriminate on the basis of race in exercising its peremptory challenges").

On the other side of the scale, the prosecutor did not engage in disparate questioning or investigation. Additionally, the prosecutor gave two race-neutral reasons—(1) failure to disclose criminal history and (2) concerns about the ability to be fair and impartial—for striking each juror that withstand scrutiny. While the prosecutor did not follow-up on the prospective jurors' failure to disclose their criminal history, that lack of follow-up is mitigated by the lack of any evidence in our record indicating it was due to disparate treatment. Further, the prosecutor's concerns about H.M. and D.N.'s ability to be fair and impartial had no such caveats.

Based on this evidence, we are not "left with the definite and firm conviction that a mistake ha[s] been committed." *Bennett III*, 282 N.C. App. at 600, 871 S.E.2d at 844. As a result, we hold the trial court did not clearly err in denying Defendant's *Batson* objections. *See id.*

III. Conclusion

The trial court did not err in denying Defendant's *Batson* challenge to the prosecutor's peremptory strikes of two Black jurors. The trial court properly considered all the relevant factors presented by the

parties when it weighed the circumstances at *Batson*'s third step, so we do not need to remand this case. Turning to the trial court's ruling itself, after reviewing all the relevant factors and circumstances, the trial court did not clearly err in determining the prosecutor's peremptory strikes were not motivated in substantial part by discriminatory intent.

NO ERROR.

Judges DILLON and GORE concur.

STATE OF NORTH CAROLINA
v.
CHRIS ALLISON DEMICK, Defendant

No. COA22-415

Filed 18 April 2023

1. Sentencing—aggravating factor—evidence necessary to prove element of offense—child abuse offenses—position of trust or confidence

Defendant's convictions for multiple child abuse offenses were remanded for resentencing because the trial court erred in sentencing him in the aggravated range based on the aggravating factor that he took advantage of a position of trust or confidence, where both misdemeanor and felony child abuse require a showing that the defendant is a parent or other person providing care to or supervision of a child. Evidence necessary to prove an element of an offense may not be used to prove any factor in aggravation.

2. Sentencing—ambiguous verdict—as to date of offenses—statutory reclassification of offenses

In defendant's trial for multiple child abuse offenses, where the statutory felony classification for each crime was elevated effective December 2013 and the victim alleged that the crimes occurred between January 2009 and March 2014, because the jury made no specific finding as to the date of each offense, the trial court erred in sentencing defendant at the higher felony levels. The jury's verdict was ambiguous as to the dates for sentencing purposes, so the trial court was required to sentence defendant under the lower statutory classification.

3. Child Abuse, Dependency, and Neglect—intentional child abuse inflicting serious bodily injury—permanent or protracted condition—permanent loss of tissue

The trial court properly denied defendant's motion to dismiss the charge of intentional child abuse inflicting serious bodily injury (ICAISBI) where the evidence unequivocally established that the victim's injuries—necrosis that left her with permanent large holes and divots on her backside caused by the loss of muscle and fat tissue—were "permanent or protracted" pursuant to the ICAISBI statute; in addition, the injuries caused long-term pain and substantially interfered with her school attendance. The fact that her injuries could be concealed by clothing had no bearing on whether the injuries amounted to serious bodily injuries.

4. Child Abuse, Dependency, and Neglect—intentional child abuse inflicting serious bodily injury—verdict sheet—consistency with indictment and jury instructions

In defendant's trial for multiple child abuse charges, there was no plain error in the way the verdict sheet framed the intentional child abuse inflicting serious bodily injury (ICAISBI) offense—where defendant argued that, by framing the allegation as whether he inflicted permanent scarring, the trial court prevented the jury from considering whether the injury met the definition of serious bodily injury—because the indictment and jury instructions were proper and the verdict sheet was consistent with them. In addition, even assuming error, defendant could not show prejudice, given the extensive and uncontradicted evidence of his guilt.

5. Child Abuse, Dependency, and Neglect—intentional child abuse inflicting serious bodily injury—jury instructions—lesser-included offense omitted—plain error analysis

In defendant's trial for multiple child abuse charges, assuming the trial court erred when it did not submit intentional child abuse inflicting serious physical injury (ICAISPI) as a lesser-included offense of intentional child abuse inflicting serious bodily injury (ICAISBI) in its jury instructions, there was no plain error because defendant could not show the requisite prejudice where substantial and uncontradicted evidence in the record established that the victim's injuries met the statutory requirement for ICAISBI, as "a serious permanent disfigurement" or "a permanent or protracted condition that caused extreme pain."

6. Child Abuse, Dependency, and Neglect—intentional child abuse inflicting serious physical injury—jury instructions—lesser-included offense omitted—plain error analysis

In defendant's trial for multiple child abuse charges, there was no plain error in the trial court's failure to instruct the jury on misdemeanor child abuse as a lesser-included offense of intentional child abuse inflicting serious physical injury because defendant could not demonstrate the requisite prejudice where the State's evidence showed that each incident of abuse caused serious physical injury and defendant produced no conflicting evidence as to the severity of the victims' injuries.

7. Child Abuse, Dependency, and Neglect—intentional child abuse inflicting serious physical injury—jury instructions—lawful corporal punishment—plain error analysis

In defendant's trial for multiple child abuse charges, even assuming the trial court erred when it failed to instruct the jury on lawful corporal punishment for two counts of intentional child abuse inflicting serious physical injury, there was no plain error because defendant could not demonstrate the requisite prejudice where overwhelming evidence showed that defendant's abusive acts were not within the bounds of lawful corporal punishment but rather under the pretext of duty, for the purpose of gratifying malice.

8. Constitutional Law—effective assistance of counsel—direct appeal—dismissal without prejudice

Defendant's claim for ineffective assistance of counsel on direct appeal from his convictions for multiple child abuse offenses was dismissed without prejudice to his right to file a motion for appropriate relief with the trial court where an evidentiary hearing would be needed to resolve questions of fact regarding his attorney's decisions.

9. Child Abuse, Dependency, and Neglect—criminal trial—sealed juvenile records—review by appellate court

On appeal from defendant's convictions for multiple child abuse offenses, pursuant to defendant's request, the Court of Appeals reviewed the victim's sealed juvenile records to determine whether the trial court erred in preventing their disclosure to defendant. The appellate court concluded that none of the sealed records had any relevance to the victim's testimony or to defendant's case and therefore contained nothing favorable to defendant or material to his case.

Appeal by Defendant from Judgments entered 3 November 2017 by Judge Marvin P. Pope, Jr., in Haywood County Superior Court. Heard in the Court of Appeals 7 February 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Catherine R. Laney, for the State.

Office of the Appellate Defender, by Assistant Appellate Defender Michele A. Goldman and Appellate Defender Glenn Gerding, for Defendant-Appellant.

RIGGS, Judge.

Defendant Chris Allison Demick appeals from several criminal judgments entered after a jury convicted him of multiple felony and misdemeanor child abuse offenses. On appeal, Mr. Demick contends the trial court: (1) erred in sentencing him based on aggravating factors that were necessary elements of the underlying crimes; (2) erred in sentencing him at higher statutory felony classifications that went into effect during the period alleged in the indictment absent a special verdict establishing the date of the offenses; (3) erred in denying his motion to dismiss a charge of intentional child abuse inflicting serious bodily injury ("ICAISBI"); (4) plainly erred in its verdict sheet on ICAISBI and in failing to submit intentional child abuse inflicting serious physical injury ("ICAISPI") as a lesser-included offense of ICAISBI; (5) plainly erred in failing to submit misdemeanor child abuse to the jury as a lesser included offense on four counts of ICAISPI; (6) plainly erred in failing to give a jury instruction on lawful corporal punishment; and (7) may have erred in withholding juvenile delinquency records of one of the victims. Finally, Mr. Demick presents an eighth, alternative argument that errors (1) through (6) collectively establish ineffective assistance of counsel ("IAC"). After careful review, we hold that: (1) Mr. Demick is entitled to resentencing without consideration of the aggravating factor found by the jury and at the lesser felony classifications; (2) the record is otherwise free of reversible error; and (3) this panel is unable to resolve Mr. Demick's IAC claim on the cold record. For these reasons, we remand the matter for resentencing only and dismiss Mr. Demick's IAC claim without prejudice to filing a motion for appropriate relief ("MAR") with the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

Mr. Demick began residing with his future spouse and her several children in 2009. Over time, the family grew to two adults and seven

children as a result of changes in the children's custody arrangements. The family moved several times, transitioning from a camper to a single-wide trailer before eventually settling into a three-bedroom doublewide mobile home near a junkyard in Bethel, North Carolina.

One of the children, M.B. ("Margot"), was eight years old when Mr. Demick moved in. She was tasked with numerous chores around the home; beginning at 4 a.m. every morning, Margot had to feed the 17 dogs and more than 60 cats that lived on the property, take them for walks, and wash all the clothes and dishes for the family in the bathtub due to the absence of a kitchen sink. Margot's chores kept her up very late at night, interfering with her sleep. When she did sleep, she was consigned to a spot on the floor of the mobile home. She attended elementary school but was otherwise generally prohibited from going outside.

On one December 2010 afternoon, Margot returned home from school after getting in trouble for teasing other children. Margot's mother began hitting her with a switch as punishment when Mr. Demick approached with a wooden paddle. Mr. Demick took Margot to a trailer at the junkyard, had her pull down her pants, and struck her with the paddle on her backside. This was the first time Mr. Demick ever hit Margot.

Mr. Demick beat Margot on an almost daily basis over the following four years, and she was kept home from school on several occasions due to her visible bruises. In one such instance, Mr. Demick struck Margot in the face with a belt, causing her eye to bruise and swell; Margot was not permitted to go to school while the injury was visible and experienced permanent partial vision loss as a result of the injury. On another occasion, Mr. Demick beat Margot with a paddle until she lost consciousness; she awoke to a one-inch laceration on the back of her head that required pediatric medical treatment and several staples to close. Margot was permitted to return to school with this injury but was restricted from participating in extracurricular activities. Beyond the beatings, Mr. Demick also made Margot eat mealworms, grub worms, and crickets as "punishments." Mr. Demick also forced cat feces in Margot's mouth after waking her up at 3 a.m., purportedly for falling asleep while doing the dishes and allowing a cat to relieve itself in the bathtub.

The daily paddlings generally followed a standard pattern. Mr. Demick would use the same paddle and strike Margot on her legs and backside repeatedly. The beatings usually took place inside their home, and Mr. Demick would hit Margot with her pants up or down depending on his degree of anger. He would strike her hard enough to shake the entire home, sometimes laughing at her when she would squirm or grow nauseous from the pain. The beatings left severe bruising and bleeding

sores on Margot's legs and buttocks that interfered with her ability to walk and kept her home from school. Mr. Demick would hit Margot for the slightest reason, including showing emotion at home.

Mr. Demick was also alleged to have physically abused Margot in other ways.[1] In lieu of paddling her, Mr. Demick would grab, pinch, and twist the skin on Margot's stomach, causing it to bruise, bleed, and scab over. These wounds eventually left scars on Margot's stomach. Mr. Demick would tell Margot not to tell anyone about the beatings and threatened to kill her if she did; he also instructed her to lie about her injuries when receiving medical treatment. The pinching and paddling continued through late 2013 and early 2014, leaving scars and bruises. Margot recorded the following school absences over the years of abuse: 20 in 2009-2010; 12 in 2010-2011; 24 in 2011-2012; 22 in 2012-2013; and 20 in 2013-2014.[2]

Other children in the household received physical beatings as well. In January 2011, Mr. Demick beat 12-year-old S.D. ("Scott")[3] for the first time for yelling at a sibling. Mr. Demick flew into a furious rage, bent Scott over a trunk, and shouted and hit him for 20 to 25 minutes across his hips, back, and thighs with a stick Mr. Demick called a "Mother of Rose." The beating left a black and purple bruise, six-to-eight inches wide, on Scott's right hip. The area was bruised and sore for two weeks, and left Scott unable to fully participate in physical education class.

In a second instance, in 2012, Mr. Demick was angry with Scott for getting into a fight at school and neglecting some of his chores. Mr. Demick took Scott to the primary bedroom and hit him across the back and knees 115 times—until Mr. Demick was winded with exhaustion—with a wooden axe handle. Mr. Demick grew increasingly angry as the beating continued, turning from silently furious to outright cursing over the course of 30 to 40 minutes. Scott's legs were left black and blue for two weeks, while his hips and legs hurt severely for about a week. Mr. Demick beat Scott on other occasions, though they did not rise to the severity of the two events described above.

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1. Mr. Demick was charged with and tried for one act of sexual abuse against Margot, and the jury acquitted him of this offense. As a result, we omit discussion of those allegations from this opinion.

2. As relevant background, 15 absences was considered excessive by the local school system.

3. Though of majority age at the time of trial, we refer to S.D. by pseudonym to protect his privacy as a minor victim.

Scott eventually built up the courage to report Mr. Demick's abuse to his school principal on 4 March 2014. By the time Scott returned home that day, law enforcement had arrived at the home and the local Department of Social Services had begun arranging alternative care placements for Margot and Scott. Scott and Margot never returned to Mr. Demick's custody.

Margot started receiving medical care from Dr. Sarah Monahan-Estes, a pediatric hospitalist and child abuse pediatrician with Mission Hospital. Dr. Monahan-Estes observed small permanent scars on Margot's stomach and "extensive scarring on [Margot's] butt and the back of her legs" as a result of Mr. Demick's paddlings. She would later describe Margot's injuries with the following trial testimony:

> [Margot] actually had pieces of her butt missing. . . . [S]he was actually missing pieces of her fat and her muscle that had been so significantly damaged that it was permanently gone. So she actually had two rather large holes in—one on each side of her butt where she had what we call necrosis, which means that tissue had died and was never going to come back.
>
> . . . .
>
> . . . [S]he had part of her muscle and fat just gone, just wasn't present.
>
> . . . .
>
> . . . [Y]ou can see these little hyperpigmented scars. Hyperpigmented is a very fancy word for saying dark. So she had these dark scars on her abdomen, and she said those were from where she had been pinched and that it had actually caused her to bleed.
>
> . . . .
>
> . . . [Y]ou can see . . . the di[vo]t or the hole that is in both sides.
>
> . . . .
>
> . . . [S]he still has all of these large sort of di[vo]ts or scarring on her butt and on her lower leg. . . . [T]hat is actually a hole. So she is actually permanently missing a piece of her buttocks that will never be back.

> So she—again, just sort of permanently disfigured on this side.

The abuse also left Margot with a below-average height and weight due to an endocrinological condition called "psychological dwarfism," which inhibited her physical growth and development until she left Mr. Demick's care and the mistreatment ceased.

Mr. Demick was indicted on 7 July 2014 for: (1) one count each of assault inflicting serious bodily injury, ICAISBI, and assault with a deadly weapon inflicting serious injury for the injuries to Margot's buttocks and legs; (2) one count each of assault with a deadly weapon inflicting serious injury and ICAISPI for the injuries to Margot's scalp; (3) one count of ICAISPI for the injuries to Margot's stomach; (4) one count of misdemeanor child abuse for forcing Margot to ingest cat feces; and (5) two counts of ICAISPI for the injuries to Scott.

The State obtained superseding and new indictments on 12 June 2017 for the following offenses: (1) one count of ICAISBI for the injuries to Margot's buttocks; (2) one count each of ICAISPI for the injuries to Margot's stomach, head, and eye; and (3) one count of rape of a child for the alleged sexual abuse of Margot. The State later dismissed the two assault with a deadly weapon charges and the initial ICAISBI charge as duplicative. In its dismissal, the State noted that the ICAISBI offense charged by superseding indictment would be "a class C or B2 felony (depending on a factual finding of the date of offense because the punishment changed during the alleged date range)."

The trial court ordered production of Margot's "mental health, counseling and juvenile records" to conduct an *in camera* review for any impeachment, exculpatory, or otherwise relevant evidence. The trial court reviewed the materials and ordered them sealed without disclosure to Mr. Demick, finding that they contain "no evidence which would impeach the credibility of the witness or in any way bear[] any relevance to the alleged dates of offense."

Mr. Demick's trial began on 30 October 2017. Margot, Scott, and Dr. Monahan-Estes testified consistent with the above recitation of the facts, as did several social workers and school employees. Mr. Demick moved to dismiss all charges at the close of both the State's and Mr. Demick's evidence. The trial court denied the motions both times.

The jury was instructed on each charge and given the verdict sheets, which generally asked the jury to make a finding of guilt or innocence "as to the allegation of Mr. Demick [committing the alleged crime.]"

However, the verdict sheet for the ICAISBI charge deviated from the other charges by asking the jury to find the following:

As to the allegation of [Mr. Demick] inflicting permanent scarring to the buttocks and/or legs of [Margot], we the jury unanimously return as our verdict that [Mr. Demick] is:

1. ____________ **GUILTY of Felonious Child Abuse Inflicting Serious Bodily Injury; OR**

2. ____________ NOT GUILTY.

The jury found Mr. Demick guilty on all counts except rape. The jury also found that Mr. Demick took advantage of a position of trust or confidence as an aggravating factor as to each guilty verdict. The trial court sentenced Mr. Demick to a total of 400 to 550 months' imprisonment based on six consecutive aggravated sentences. This included sentencing Mr. Demick on one count each of ICAISBI and ICAISPI at the higher classification levels. Written judgements were entered 3 November 2017, and Mr. Demick filed a written notice of appeal on 9 November 2017.

II. ANALYSIS

Mr. Demick identifies eight different issues on appeal under different standards of review. We first address Mr. Demick's meritorious sentencing arguments before reaching his remaining prejudicial and plain error claims. Finally, we dismiss his IAC claim without prejudice to filing an MAR with the trial court.

A. The Trial Court Impermissibly Considered the Aggravating Factor Found by the Jury

[1] Mr. Demick first argues that the trial court erred in sentencing him in the aggravated range based on the aggravating factor that he "took advantage of a position of trust or confidence, including a domestic relationship." He rightly notes that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation," N.C. Gen. Stat. § 15A-1340.16(d) (2021), and both misdemeanor and felony child abuse require showing the defendant is a "parent . . . or . . . other person providing care to or supervision of [a] child," N.C. Gen. Stat. §§ 14-318.2 & -318.4 (2021). Thus, "the trust or confidence factor" may not "be used to aggravate a sentence for felony child abuse." *State v. Darby*, 102 N.C. App. 297, 299, 401 S.E.2d 791, 792 (1991) (citation omitted). The State concedes error in this regard and agrees with Mr. Demick that every conviction must be remanded for resentencing without consideration of the trust or confidence factor found by the jury.

See id. at 301, 401 S.E.2d at 793. Consistent with Mr. Demick's argument, the State's concessions, and the binding statutory and caselaw, we order just such relief.

B. The Ambiguous Verdict Requires Resentencing at Lower Felony Classifications on Remand

[2] The indictments for the ICAISPI and ICAISBI offenses against Margot in file nos. 14CRS000736 and 14CRS051293 alleged the crimes occurred between January 2009 and March 2014. Effective 1 December 2013, the General Assembly changed the felony classification for each crime: ICAISPI was elevated from Class E to Class D, while ICAISBI was elevated from Class C to Class B2. 2013 N.C. Sess. Laws 98, 98-99, ch. 35 § 1. At trial, Margot testified that the pinchings (ICAISPI) and paddlings (ICAISBI) occurred both before and after these reclassifications. No special verdict form was presented to the jury requiring a determination of a date or date range of the offenses; therefore, the jury made no specific finding as to the date of the offenses, and the trial court sentenced Mr. Demick at the higher felony levels.

Mr. Demick argues that the jury's verdict was ambiguous for sentencing purposes and, on *de novo* review, must be construed in his favor as occurring under the earlier, lower sentencing regime. *See, e.g.*, *State v. Mosley*, 256 N.C. App. 148, 153, 806 S.E.2d 365, 368-69 (2017) (holding, on *de novo* review, that a second-degree murder verdict was ambiguous as to malice—which elevates second-degree murder to a Class B1 felony—and must be construed in the defendant's favor as a Class B2 second-degree murder conviction). The State disagrees, arguing the issue is controlled by *State v. Poston*, which held that a sentence at the higher classification as between two potentially applicable sentencing statutes is proper so long as it is supported by the evidence introduced at trial and sentencing. 162 N.C. App. 642, 650-51, 591 S.E.2d 898, 904 (2004). We address the parties' dispute despite requiring resentencing under Mr. Demick's first argument "because it may recur on remand." *State v. Poore*, 172 N.C. App 839, 842, 616 S.E.2d 639, 641 (2005).

Whether the circumstances presented here falls within cases like *Mosley* or *Poston* appears to be a matter of first impression; we have not found, and the parties have not provided, a published case resolving whether a general verdict is rendered ambiguous by evidence showing the completed offense may have been committed on either temporal side of a statutory reclassification of the crime.[4] As explained below, we

4. In an unpublished decision, this Court did consider a defendant's "nuanced argument that where the date of an offense is uncertain, and the evidence shows it may have

hold that the general verdict is ambiguous under these circumstances and a defendant, absent a determination by the jury by special verdict form as to the specific date of or date range of offense sufficient to determine which sentencing regime is applicable, must be sentenced under whichever statutory classification is lower.

1. Ambiguous Verdicts Generally

Our caselaw has generally addressed ambiguous verdicts in two contexts. The first—and more serious—category involves *fatal* ambiguities that call into question the unanimity of the verdict such that a defendant's constitutional rights are violated. For example, "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991).

This same kind of infirmity does not arise, however, when a general verdict is rendered on evidence supporting multiple theories of the same offense. *State v. Hartness*, 326 N.C. 561, 564-65, 391 S.E.2d 177, 179 (1990). For example, and as explained by our Supreme Court in the context of indecent liberties:

> The risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive . . . . [The statute] proscribes simply "any immoral, improper, or indecent liberties." Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." Such a finding would be sufficient to establish the first element of the crime charged.

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fallen under more than one sentencing regime, the trial court should sentence the defendant under the most lenient regime." *State v. Amore*, 275 N.C. App. 980, 852 S.E.2d 738, 2020 WL 7974419, at *3 (unpublished). We ultimately did not need to squarely resolve the question because "the factual basis for the [guilty] plea in this case showed [the offense occurred] *well before* the new sentencing regime took effect. Therefore, there was not *ambiguity as to the dates of the offenses* . . . . The trial court had a sufficient factual basis to sentence [the] [d]efendant under the [harsher] 2008 regime." *Id.* (second emphasis added).

Id. at 564-65, 391 S.E.2d at 179. Such general verdicts—even if nonspecific as to the theories upon which each juror found the defendant guilty of all elements of the crime—are thus not fatally ambiguous on unanimity grounds. *Lyons*, 330 N.C. at 302-03, 412 S.E.2d at 312. After all, "[c]riminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 561 (1989).

While a general verdict does not require a jury, as a constitutional unanimity matter, to specifically identify which of several alternative alleged acts or theories satisfy the elements of the crime charged, such verdicts may nonetheless be ambiguous *for sentencing purposes only* if the different acts or theories change the classification of the offense. *Cf. State v. Sargeant*, 206 N.C. App. 1, 10, 696 S.E.2d 786, 793 (2010) ("[A] jury's specification of its theory does not constitute a conviction of a crime, *but is for purposes of sentencing proceedings*." (emphasis added)), *aff'd as modified*, 365 N.C. 58, 707 S.E.2d 192 (2011). This Court has frequently addressed this issue in the context of second-degree murder: the crime requires the State to prove malice, but different theories of malice result in different felony classifications. N.C. Gen. Stat. § 14-17(b) (2021). Thus, "a general verdict would be ambiguous *for sentencing purposes* where the jury is charged on second-degree murder and presented with evidence that may allow them to find that either B2 depraved-heart malice or another B1 malice theory existed." *State v. Lail*, 251 N.C. App. 463, 475, 795 S.E.2d 401, 411 (2016) (emphasis added). When a general verdict is sufficient to support a unanimous conviction but ambiguous for sentencing purposes, "neither we nor the trial court is free to speculate as to the basis of a jury's verdict, and the verdict should be construed in favor of the defendant." *Mosley*, 256 N.C. App. at 153, 806 S.E.2d at 369 (citations omitted). Trial courts may avoid the issue altogether by requiring a special verdict that resolves any sentencing ambiguity in the first instance. *See Lail*, 251 N.C. App. at 476, 795 S.E.2d at 411 (noting in the context of second-degree murder that "where a general verdict would be ambiguous for sentencing purposes, trial courts should frame a special verdict requiring the jury to specify under which available malice theory it found the defendant guilty" (citations omitted)).

2. The Verdict Is Ambiguous for Sentencing Purposes

We hold that the verdicts in this case present the same ambiguity discussed in *Mosley* and *Lail*, albeit under different facts. As in those cases, there is no question that the jury unanimously found Mr. Demick committed all elements of the two felony child abuse crimes alleged in file

nos. 14CRS000736 and 14CRS051293. This case therefore does not raise any constitutional unanimity concerns, *Hartness*, 326 N.C. at 564-65, 391 S.E.2d at 179, and Mr. Demick raises none on appeal. However, there was evidence presented at trial establishing that the offenses charged in those indictments occurred before and/or after the statutory reclassifications. Because "trial courts are limited to whatever punishment the jury's verdict authorizes," *State v. Norris*, 360 N.C. 507, 516, 630 S.E.2d 915, 921 (2006), and the verdicts fail to resolve which classifications apply by omitting the operative dates or range of dates of offense, the jury's verdicts are ambiguous for sentencing purposes. Further, because an ambiguous verdict is "construed in favor of a defendant[,] [as] [t]his Court is not free to speculate as to the basis of a jury's verdict," *State v. Whittington*, 318 N.C. 114, 123, 347 S.E.2d 403, 408 (1986) (citation omitted), we are compelled to resolve this ambiguity in favor of Mr. Demick.

In reaching this holding, we distinguish the principal cases relied upon by the State, *Poston* and *State v. Lawrence*, 193 N.C. App. 220, 667 S.E.2d 262 (2008). The defendant in *Poston* did not challenge the verdict as ambiguous for sentencing purposes; instead, the defendant argued that the adoption of the Structured Sentencing Act during the timeframe alleged in the indictment "rendered the date of the offense *material*" to the commission of the crime. 162 N.C. App. at 650, 591 S.E.2d at 904 (emphasis added).[5] Nor could the defendant have successfully argued any ambiguity in that case—as we went on to explain, the evidence introduced at trial was insufficient to show that the offense in question occurred at any time other than before the Structured Sentencing Act's effective date. *Poston*, 164 N.C. App. at 651, 591 S.E.2d at 904. We ultimately held that the trial court erred in sentencing the defendant under the Fair Sentencing Act because all the evidence showed the offenses occurred after the Structured Sentencing Act went into effect. *Id.* Both of the above dissimilarities from the instant case are present in *Lawrence*, which likewise did not present an ambiguity argument and only involved evidence establishing guilt on one side of the statutory reclassification. 193 N.C. App. at 224-25, 667 S.E.2d at 265.

In sum, sentencing Mr. Demick at the higher classifications would require the trial court and this Court to speculate as to which dates

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5. This is an important distinction; failure to prove a material fact requires setting aside a conviction rather than merely remanding for resentencing. *See, e.g.*, *State v. Whittemore*, 255 N.C. 583, 593, 122 S.E.2d 396, 403-04 (1961) (holding the trial court prejudicially erred in instructing the jury it could convict defendants for conduct occurring after the dates alleged in the indictment when defendants' presented alibis and thus made "the time charged in the bill . . . material").

the jury "used to support its conviction[s]." *Lail*, 251 N.C. App. at 475, 795 S.E.2d at 411. *Cf. Mosley*, 256 N.C. App. at 153, 806 S.E.2d at 369 ("Because there was evidence presented which would have supported a verdict on second degree murder on more than one theory of malice, and because those theories support different levels of punishment . . . , the verdict rendered in this cause was ambiguous."). We are prohibited from undertaking such an exercise and must instead instruct the trial court to address these offenses under the lower classifications on resentencing. *Mosley*, 256 N.C. App. at 153, 806 S.E.2d at 369. We therefore direct the trial court to resentence Mr. Demick on remand under the lower Class E for ICAISPI in file no. 14CRS000736 and Class C for ICAISBI in file no. 14CRS051293.

C. Mr. Demick's Motion to Dismiss

[3] Mr. Demick next asserts that the trial court erred in denying his motion to dismiss the ICAISBI charge involving Margot, claiming there was insufficient evidence to support a finding that the injuries she suffered amounted to "serious bodily injury" as defined by N.C. Gen. Stat. § 14-318.4(d)(1) (2021). Per that statute, "serious bodily injury" is:

> Bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

Id. Mr. Demick asserts that because Margot's injuries were limited to scarring that is easily concealed by clothing, they could not amount to "serious bodily injury." We disagree.

1. Standard of Review

Trial court rulings on motions to dismiss are reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A motion to dismiss requires the court to discern "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) (citations omitted). We answer these questions taking the evidence "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). Said evidence is substantial if it is "such 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 and quotation marks omitted).

2. The Motion to Dismiss Was Properly Denied

In arguing that Margot's injuries did not amount to "serious bodily injury," Mr. Demick minimizes Margot's injuries to simple, minor scarring that, as a matter of law, does not constitute "serious bodily injury" under our precedents. *See State v. Williams*, 255 N.C. App. 168, 182, 804 S.E.2d 570, 579 (2017) ("[T]he presence of a minor scar or other mild disfigurement alone cannot be sufficient to support a finding of 'serious bodily injury.' " (citation omitted)); *State v. Dixon*, 258 N.C. App. 78, 85, 811 S.E.2d 705, 710 (2018) (applying this rule to ICAISBI specifically). In *Williams*, we held that a visible scar that did not permanently impact the victim's health or otherwise physically impair him was insufficient evidence to survive a motion to dismiss a charge of assault on a law enforcement officer inflicting serious bodily injury. 255 N.C. App. at 182-83, 804 S.E.2d at 579. Similarly, in *Dixon*, we held that an ICAISBI charge should not have gone to the jury where the scars at issue: (1) were caused by surgery on the victim's leg rather than the injury itself; (2) had healed without any lasting restrictions on the victim's physical activities; (3) were fading; and (4) did not result in "permanent disfiguration, or any loss or impairment of function of the leg," according to expert physician testimony. 258 N.C. App. at 86, 811 S.E.2d at 710.[6] These cases collectively establish that a small, purely aesthetic scar, with no other lasting physical impact on the victim, does not amount to a "serious bodily injury," as it is not a "*serious* permanent disfigurement, . . . a permanent or protracted condition that causes extreme pain, or [a] permanent or protracted loss or impairment of the function of any bodily member or organ." N.C. Gen. Stat. § 14-318.4(d)(1) (emphasis added).

The above cases are meaningfully distinct from the one before us, however. Critically, "[w]hether a 'serious bodily injury' has occurred . . . depends upon the facts of each case[.]" *Williams*, 255 N.C. App. at 179, 804 S.E.2d at 577 (quoting *State v. Williams*, 150 N.C. App. 497, 502, 563 S.E.2d 616, 619 (2002)). This case includes substantial distinguishing

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6. *Dixon* also involved a femur fracture that was successfully treated with surgery and, while extremely painful for some time, did not result in any permanent pain or ill-effects beyond the small surgery scar. *Id.* at 81, 811 S.E.2d at 707. Because there was no evidence that the femur fracture resulted in any permanent injury or pain, we held that it was insufficient evidence to support the ICAISBI charge. *Id.* at 86, 811 S.E.2d at 710. For the same reasons explained *infra*, Margot's injuries are distinguishable from the femur break discussed in *Dixon* in that they are large, permanent, and resulted in the irrevocable loss of fat and muscle tissue.

facts, namely that Margot suffered from necrosis *in addition to* the scarring, leaving her with permanent "holes" and "di[vo]ts" on her backside caused by the permanent and irrevocable loss of muscle and fat tissue. Dr. Monahan-Estes testified that Margot "was actually *missing pieces of her fat and her muscle* that had been so *significantly damaged that it was permanently gone*. So she actually had two rather large holes . . . on each side of her butt where she had what we call necrosis, which means that tissue had died and was *never going to come back*." (Emphasis added). She repeatedly noted that these "holes" were "large," and left Margot "permanently disfigured." Beyond the permanent loss of muscle and other tissue, the scars themselves were still causing Margot pain two months after leaving Mr. Demick's custody. The scars were likewise the result of beatings that left open, bleeding sores on Margot's legs for years, and which substantially interfered with her attendance at school. All of this distinguishing evidence establishes that the injuries to Margot were not purely aesthetic; rather, their substantial size and permanency, alongside their long-term pain and accompanying irreversible loss of underlying muscle and fat tissue due to necrosis, all suffice to show "serious bodily injury" in the form of "serious permanent disfigurement" and "a . . . protracted condition that causes extreme pain" as described in the statute. N.C. Gen. Stat. § 14-318.4(d)(1).

Other cases demonstrate this distinction equally well. For example, in *State v. Fields*, 265 N.C. App. 69, 827 S.E.2d 120 (2019), *aff'd as modified*, 374 N.C. 629, 843 S.E.2d 186 (2020), we held that "a significant, jagged scar" on the victim's genitals was sufficient at the motion to dismiss stage to "support a finding of 'serious permanent disfigurement.' " 265 N.C. App. at 73, 827 S.E.2d at 123. We reached a similar conclusion in *State v. Downs*, 179 N.C. App. 860, 635 S.E.2d 518 (2006), holding that evidence of a permanently lost tooth was sufficient to send an assault inflicting serious bodily injury charge to the jury:

> Defendant's assault caused [the victim] to forever lose a natural tooth, and therefore "marred and spoiled" his appearance. Notwithstanding the prospect of a dental implant, the fact remains that [the victim] suffered the permanent loss of his own live, natural tooth. Because there is substantial record evidence of a serious permanent disfigurement, the assignment of error is overruled.

179 N.C. App. at 862, 635 S.E.2d at 520. In both cases, and contrary to Mr. Demick's argument here, the fact that the genital and dental injuries could be concealed by clothing or an implant had no bearing on whether the large genital scar or lost tooth amounted to serious bodily injuries.

And while it is true that we have held "serious bodily injury" in the specific context of ICAISBI offenses is intended to apply to "those more egregious cases where a child suffers permanent or protracted injuries or is placed at substantial risk of death," *Dixon*, 258 N.C. App. at 85, 811 S.E.2d at 709-10 (citation and quotation marks omitted), the evidence in this case unequivocally establishes Margot's injuries as "permanent or protracted."[7] We therefore hold that the trial court did not err in denying Mr. Demick's motion to dismiss the ICAISBI charge.

D. ICAISBI Verdict Sheet and Absence of ICAISPI Lesser-Included Instruction

Mr. Demick next assigns plain error to the verdict sheet for ICAISBI and the failure of the trial court to submit ICAISPI as a lesser-included offense of that charge to the jury. We hold that Mr. Demick has not shown plain error in either respect.

1. Standard of Review

Under the plain error standard of review, "a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). To establish the requisite prejudice, a defendant must show that, "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citations and quotation marks omitted). The standard "is to be applied cautiously and only in the exceptional case, [and] the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (cleaned up) (citation and quotation marks omitted).

2. ICAISBI Verdict Sheet

[4] The trial court submitted the ICAISBI offense to the jury through the following verdict sheet:

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7. Mr. Demick cites several child abuse cases for the proposition that Margot's injuries are more equivalent to some lesser degree of injury. *See generally State v. Williams*, 184 N.C. App. 351, 646 S.E.2d 613 (2007) (holding a single hour-and-45-minute beating with a belt on the victim's backside that left scarring but no permanent injury amounted to ICAISPI); *State v. Williams*, 154 N.C. App. 176, 571 S.E.2d 619 (2002) (beating daughter on buttocks with a board multiple times resulting in temporary bleeding, a large bruise, limping, and the mere possibility of scarring amounted to misdemeanor assault); *State v. Varner*, 252 N.C. App. 226, 796 S.E.2d 834 (2017) (striking the victim with a paddle resulting in a large bruise and a few days of pain and limping amounted to misdemeanor child abuse). All of these cases are distinguishable on their facts for the same reasons set forth above.

As to the allegation of [Mr. Demick] inflicting permanent scarring to the buttocks and/or legs of [Margot], we the jury unanimously return as our verdict that [Mr. Demick] is:

1. ____________ **GUILTY of Felonious Child Abuse Inflicting Serious Bodily Injury; OR**

2. ____________ NOT GUILTY.

Mr. Demick argues plain error under the theory that, "[b]y framing the allegation as whether Mr. Demick inflicted permanent scarring, the jury did not have to consider whether that injury met the definition of serious bodily injury." Mr. Demick's argument fails, as the indictment, verdict sheet, and instructions collectively tasked the jury with making this finding in order to find Mr. Demick guilty, and his conclusory assertion that "the jury probably would have reached a different result" if given a different verdict sheet is insufficient to demonstrate the requisite prejudice.

When analyzing a verdict sheet for error, the form itself should be analyzed together with the indictments and the actual instructions given to the jury, as the verdict sheet "is intended to aid the trial court in avoiding the taking of verdicts which are flawed by the inadvertent omission of some essential element of the verdict itself *when given orally*." *State v. Sanderson*, 62 N.C. App. 520, 524, 302 S.E.2d 899, 902 (1983) (citation omitted) (emphasis added). Thus, where the indictments and instructions are proper, there is no error in the verdict sheet if it "sufficiently identified the offenses found by the jury to enable the court to pass judgment on the verdict and sentence defendant appropriately." *Id.*

The ICAISBI indictment in this case clearly set forth all elements of the crime charged, and the trial court properly instructed the jury that it could only convict Mr. Demick of the offense if it found that the injuries to Margot's legs and backside rose to the level of serious bodily injury after defining the term consistent with the law:

> For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> . . . .
>
> And third, that the defendant without justification or excuse *intentionally inflicted a serious bodily injury* to the child, and/or intentionally assaulted the child which proximately resulted in serious bodily injury to the child. *A serious bodily injury is defined as a bodily injury that creates a substantial risk of death or that causes*

> *serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.*
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant . . . intentionally inflicted a serious bodily injury to the child, and/or intentionally assaulted the child which proximately resulted in serious bodily injury to the child, it would be your duty to return a verdict of guilty. *If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.*

(Emphasis added). Nothing else appearing, "[w]e assume the jury followed the court's instructions," *State v. Best*, 342 N.C. 502, 516, 467 S.E.2d 45, 54 (1996), and it is clear from the indictment and evidence that the ICAISBI charge involved the injuries to Margot's legs and buttocks. In claiming that the jury would probably have reached a different result "had [it] been correctly instructed that it must determine whether the buttocks scars met the definition of serious bodily injury," Mr. Demick overlooks that the trial court did just that. Mr. Demick cannot show plain error because "the verdict can be properly understood by reference to the indictment, evidence and jury instructions." *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986) (citations omitted).

We distinguish our holding from *State v. Floyd*, where we held that there was error—albeit non-prejudicial—in verdict sheets that allowed the jury to find a defendant guilty of attaining violent habitual felon status on a finding of a single recent underlying felony rather than the requisite two prior violent felony convictions. 148 N.C. App. 290, 296, 558 S.E.2d 237, 241 (2002). There, the verdict sheets themselves allowed for a conviction on facts that were inadequate to establish the crime. *Id.* The verdict sheet here, however, is different; as explained above, and consistent with the indictments, evidence, and instructions, Mr. Demick *could* be found guilty of ICAISBI for the injuries inflicted on Margot's legs and backside if the jury determined they rose to the level of serious bodily injury. And, as in *Floyd*, Mr. Demick has not shown the requisite prejudice—that the jury *probably* would have reached a different result, *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016)—given the extensive and uncontradicted photographic and testimonial evidence detailing the severity of Margot's injuries.

3. ICAISPI Instruction as a Lesser-Included Offense

[5] The trial court did not submit ICAISPI as a lesser-included offense of ICAISBI to the jury, an omission Mr. Demick asserts also amounts to plain error. Assuming, *arguendo*, that this was error, we hold that Mr. Demick cannot show the requisite prejudice because the substantial and uncontradicted evidence in the record concerning Margot's injuries does not suggest it "probable, not just possible, that absent the instructional error the jury would have returned a different verdict." *Id.* (citation omitted).

In the present case, and as explained *supra*, the State's evidence established that Margot's injuries rose to the level of "serious bodily injury." None of this evidence as to severity was contradicted; while Mr. Demick's counsel cross-examined Margot, his questioning focused on disproving the sexual assault allegation and suggesting that something other than Mr. Demick's acts caused her injuries. Further, Margot's testimony was corroborated for the jury through photographs and additional testimony from other witnesses. Having established the existence of every element of the greater crime, and without contradicting evidence that Margot's injuries were collectively anything less than "a serious permanent disfigurement" or "a permanent or protracted condition that cause[d] extreme pain," N.C. Gen. Stat. § 14-318.4(d)(1), we do not believe it *probable* that the jury would have convicted Mr. Demick of ICAISPI had it been given a lesser-included instruction.

E. Absence of Lesser-Included Offense Instruction on Misdemeanor Child Abuse

[6] Mr. Demick next asserts that the trial court committed plain error in failing to instruct the jury on misdemeanor child abuse as a lesser-included offense of ICAISPI. The State offers no counterargument on the merits but asserts instead that misdemeanor child abuse is not a lesser-included offense under our precedents. We disagree with the State, but ultimately hold that Mr. Demick has not shown sufficient prejudice to establish plain error.

1. Misdemeanor Child Abuse Is a Lesser-Included Offense of ICAISPI

Generally, "the test [to determine if a crime is a lesser-included offense] is whether the essential elements of the lesser crime are essential elements of the greater crime." *State v. Nickerson*, 365 N.C. 279, 282, 715 S.E.2d 845, 847 (2011). Both parties agree that misdemeanor child abuse would ordinarily be a lesser-included offense of ICAISPI based on this test. But N.C. Gen. Stat. § 14-318.2(b) (2021) provides

that misdemeanor child abuse is "an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies." The State relies on this language to assert that misdemeanor child abuse cannot be considered a lesser-included offense of ICAISPI despite our trial and appellate courts' repeated treatment of the crime as such. *See*, *e.g.*, *State v. Phillips*, 328 N.C. 1, 19-20, 399 S.E.2d 293, 302 (1991) (holding no instruction on misdemeanor child abuse was warranted during trial for felony child abuse because the instruction was unsupported by the evidence); *State v. Chapman*, 154 N.C. App. 441, 446, 572 S.E.2d 243, 247 (2002) (observing on appeal from an ICAISPI conviction that "[t]he trial court did instruct on the State's burden of proving defendant's identity as the perpetrator of the crime, circumstantial evidence, accident, and the lesser included offense of misdemeanor child abuse. We find that the trial court's instructions, taken as a whole, were correct.").

As the State rightly notes, this Court has stated that N.C. Gen. Stat. § 14-318.2(b) exempts misdemeanor child abuse from consideration as a lesser-included offense of other crimes, but only in *dicta* or in an unpublished decision. *See State v. Mapp*, 45 N.C. App. 574, 585, 264 S.E.2d 348, 356 (1980) (noting that "[t]he General Assembly apparently did not intend child abuse to be a lesser included offense or to merge with any other offense" before holding that double jeopardy did not require misdemeanor child abuse be merged with second-degree murder); *State v. Martin*, 268 N.C. App. 153, 833 S.E.2d 263, 2019 WL 5219970, at *4 (unpublished) (relying on *Mapp* for this proposition). Neither *Mapp* nor *Martin* is binding. *See Kanipe v. Lane Upholstery*, 151 N.C. App. 478, 485, 566 S.E.2d 167, 171 (2002) ("[M]ere *dicta* . . . [is] not binding on this Court."); *Long v. Harris*, 137 N.C. App. 461, 470, 528 S.E.2d 633, 639 (2000) ("An unpublished opinion establishes no precedent and is not binding authority." (cleaned up) (citations and quotation marks omitted)).

Unlike in *Mapp* and *Martin*, this Court did directly address the question of whether misdemeanor child abuse under N.C. Gen. Stat. § 14-318.2 is a lesser-included offense of ICAISPI in a published decision in *State v. Young*, 67 N.C. App. 139, 312 S.E.2d 665 (1984), *overruled on separate grounds by State v. Campbell*, 316 N.C. 168, 340 S.E.2d 474 (1986). There, in determining whether the trial court erred in denying the defendant's request to submit misdemeanor child abuse as a lesser-included offense of felony child abuse, we reviewed "[t]he parts of [N.C. Gen. Stat. §] 14-318.4 that are pertinent to this case" before expressly holding that misdemeanor child abuse is a lesser-included offense under the statute. *Id.* at 141-42, 312 S.E.2d at 668. Misdemeanor

child abuse has since been treated and analyzed as a lesser-included offense of ICAISPI at every level of the judiciary since *Young*. *See Phillips*, 328 N.C. at 19-20, 399 S.E.2d at 302; *State v. Plemmons*, 149 N.C. App. 974, 563 S.E.2d 99, 2002 WL 553811, at *4 (2002) (unpublished) (holding the trial court did not err in instructing on misdemeanor child abuse as a lesser-included offense of felony child abuse where instruction on the lesser-included offense was warranted by the evidence).

We are bound by *Young* because its holding as to misdemeanor child abuse as a lesser-included offense has not been overruled; neither *Mapp*'s earlier *dicta* nor *Martin*'s unpublished decision to the contrary are binding, and we are not free to disregard binding precedent even in an unpublished opinion. *See In re Civil Penalty*, 324 N.C. 373, 378, 384, 379 S.E.2d 30, 33, 37 (1989) (recognizing that *dicta* is not binding before holding that "a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court").

2. Mr. Demick Cannot Show Prejudice

Mr. Demick argues that the trial court plainly erred in failing to give misdemeanor child abuse instructions for the ICAISPI charges related to: (1) Margot's head injury; (2) Margot's stomach scars; and (3) both of Scott's beatings. As to each, he asserts that the evidence was equivocal on whether those injuries were "serious physical injuries" or simply "physical injuries." The former is defined as "[p]hysical injury that causes great pain and suffering. The term includes serious mental injury." N.C. Gen. Stat. § 14-318.4(d)(2) (2021). Factors establishing "whether an injury is serious . . . include, but are not limited to: hospitalization, pain, loss of blood, and time lost from work." *State v. Romero*, 164 N.C. App. 169, 172, 595 S.E.2d 208, 210 (2004) (citation omitted).

These arguments fail for the same reasons as Mr. Demick's earlier plain error claims. Here, Margot testified that her head injury: (1) was incurred during a beating that was so painful she "blacked out;" (2) included bleeding from an inch-long incision on the back of her head; (3) necessitated medical treatment and staples to close; and (4) caused her to miss extracurricular activities. Margot further testified that her stomach injuries bled, caused her "lots of pain about all the time," scarred, and that her visible injuries would cause her to be kept home from school. The scarring and bleeding caused by the stomach wounds was further corroborated by Dr. Monahan-Estes and photographic evidence. Mr. Demick's counsel did not cross-examine Margot on the severity of these injuries, and instead elicited testimony suggesting Mr. Demick did

not cause the head wound. And while Dr. Monahan-Estes testified on cross-examination that Margot's bruises and scars had faded in months after removal from Mr. Demick's custody, that evidence does not substantially undercut both the immediate and lasting severity of the pain incurred over the years of abuse testified to by Margot.

Scott likewise testified that his first beating: (1) "hurt greatly," to the point he could not think of anything else; (2) caused bruising for several weeks; and (3) left him unable to run or participate fully in physical education classes. As for his second beating, Scott told the jury that: (1) his "legs were black and blue [for two weeks], and my hips hurt severely for the next week or so[;]" and (2) it hurt so much that it was "mind-numbing" and he couldn't "think about anything besides it happening." He further testified that the injuries left scars. Again, Mr. Demick did not elicit any evidence on cross-examination that brought the severity of the injuries into question. Because the State's evidence showed that each incident caused "serious physical injury," and Mr. Demick failed to introduce any conflicting evidence as to severity, we do not believe it probable that the jury would have reached a different result had it received instruction on misdemeanor child abuse as a lesser-included offense.

F. Corporal Punishment Instruction

[7] Mr. Demick also asserts plain error in the trial court's failure to give an instruction on lawful corporal punishment for two counts of ICAISPI involving Scott. Again assuming error, we hold that Mr. Demick cannot show the requisite prejudice amounting to plain error.

Parents have a constitutional right to raise their children as they see fit, including, in this State, using corporal punishment within certain limits. Thus, "as a general rule, a parent (or one acting *in loco parentis*) is *not* criminally liable for inflicting physical injury on a child in the course of lawfully administering corporal punishment." *Varner*, 252 N.C. App. at 228, 796 S.E.2d at 836 (citation omitted). As for the rule's limitations, it does not apply:

> (1) where the parent administers punishment which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other *permanent* injury; (2) where the parent does not administer the punishment honestly but rather to gratify his own evil passions, irrespective of the physical injury inflicted; or (3) where the parent uses cruel or grossly inappropriate procedures or devices to modify a child's behavior.

Id. (cleaned up) (citations and quotation marks omitted).

Here, there was overwhelming, uncontradicted evidence that Mr. Demick inflicted the injuries on Scott with malice. On each occasion, Mr. Demick beat Scott for a lengthy period of time, stopping only when Mr. Demick grew exhausted. Mr. Demick cursed at Scott while he beat him, threatened to beat him if he disclosed the abuse, and would actively try to goad Scott into physical conflict by cursing, hitting, and shoving him on a daily basis. Every day, Mr. Demick told Scott that he did not care if he failed school and starved, that he hated Scott, and that he wanted Scott gone. The State introduced overwhelming evidence that Mr. Demick's acts were not within the bounds of lawful corporal punishment because he "did not act honestly in the performance of duty, according to a sense of right, but rather under the pretext of duty, for the purpose of gratifying malice," *id.* at 229 796 S.E.2d at 836 (cleaned up) (citation and quotation marks omitted), and Mr. Demick therefore cannot show the requisite prejudice on plain error review. *See, e.g.*, *State v. Jones*, 280 N.C. App. 241, 262, 869 S.E.2d 509, 524 (2021) ("Overwhelming evidence of guilt can defeat a plain error claim on prejudice grounds." (citation omitted)).

G. IAC Claim

[8] By alternative argument, Mr. Demick contends that all the errors alleged above, if not prejudicial, amounted to IAC. We dismiss this argument without prejudice to Mr. Demick filing an MAR in the trial court.

1. Standard of Review

We review IAC claims *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). They are addressable on the merits only if the claim can be resolved on the cold record. *State v. McNeil*, 371 N.C. 198, 216-17, 813 S.E.2d 797, 811 (2018). Under a valid IAC claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). There is a strong presumption that counsel's conduct amounted to sound trial strategy and did not fall under an objective standard of reasonableness. *Id.* at 689, 80 L. Ed. 2d at 694. When the IAC claim cannot be resolved on the appellate record, the proper disposition is to dismiss the IAC claim without prejudice to the defendant filing an MAR. *McNeil*, 371 N.C. at 216-17, 813 S.E.2d at 811.

2. Dismissal is Required

Having afforded Mr. Demick relief on his sentencing arguments, and in light of our holdings that his motion to dismiss and verdict sheet arguments fail to demonstrate error, any IAC claim must rise or fall on the alleged instructional errors related to lesser-included offenses and corporal punishment. However, this Court has observed that:

> strategic and tactical decisions such as whether to request an instruction or submit a defense are "within the exclusive province of the attorney." *State v. Rhue*, 150 N.C. App. 280, 290, 563 S.E.2d 72, 79 (2002), *appeal dismissed and disc. review denied*, 356 N.C. 689, 578 S.E.2d 589 (2003). Trial counsel are thereby given wide latitude in their decisions to develop a defense, and "[s]uch decisions are generally not second-guessed by our courts." *State v. Lesnane*, 137 N.C. App. 234, 246, 528 S.E.2d 37, 45, *appeal dismissed and disc. review denied*, 352 N.C. 154, 544 S.E.2d 236 (2000).

State v. Phifer, 165 N.C. App. 123, 130, 598 S.E.2d 172, 177 (2004).

"[T]he determination of whether a defendant's . . . counsel made a particular strategic decision remains a question of fact, and is not something which can be hypothesized." *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017). When the record is silent on that question of fact—as in this case—the appropriate action is to allow an evidentiary hearing by MAR. *Id.* We therefore dismiss Mr. Demick's IAC claim without prejudice to filing an MAR with the trial court.

H. *In Camera* Review of Juvenile Records

[9] In his final argument, Mr. Demick requests we review Margot's sealed juvenile records to determine whether the trial court erred in precluding their disclosure to Mr. Demick. A defendant accused of the sexual abuse of a minor may appeal a trial court's decision not to produce sealed juvenile or social services records after *in camera* review on constitutional grounds. *State v. Tadeja*, 191 N.C. App. 439, 449-50, 664

S.E.2d 402, 410-11 (2008). We review the trial court's decision to withhold and seal the records under the *de novo* standard. *Id.*

Release of such documents are required after *de novo* review if they are "both favorable to the accused and material to either his guilt or punishment." *Id.* (citations omitted). Having examined the sealed documents, we conclude that none of them have any relevance to or bearing on Margot's testimony specifically or Mr. Demick's case generally; as such, they contain nothing "favorable to the accused and material to either his guilt or punishment." *Id.* We therefore hold that the trial court appropriately withheld and sealed the documents in question.

III. CONCLUSION

For the foregoing reasons, we: (1) remand the judgments for resentencing without consideration of the aggravating factor found by the jury and at the lower classification levels for the offenses contained in file nos. 14CRS000736 and 14CRS051293; (2) hold no error, no prejudicial error, or no plain error as to Mr. Demick's remaining arguments; and (3) dismiss his IAC claim without prejudice to filing an MAR with the trial court.

REMANDED FOR RESENTENCING; NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART; NO PLAIN ERROR IN PART; IAC CLAIM DISMISSED WITHOUT PREJUDICE.

Chief Judge STROUD and Judge CARPENTER concur.

STATE OF NORTH CAROLINA
v.
KEYLAN JOHNSON

No. COA22-363

Filed 18 April 2023

1. Appeal and Error—jurisdictional issue—first raised in reply brief—based on references in appellee brief—issue properly raised

In a drug prosecution in which the State appealed from the trial court's decision to grant defendant's motion to suppress (which the court initially rendered in a standard AOC judgment form without findings and conclusions), where the trial court entered an additional suppression order containing findings and conclusions eleven months later—after the State had already entered notice of appeal from the initial order, settled the record on appeal, and filed its principal appellate brief—the State's challenge to the validity of the additional order for the first time in its reply brief was allowable under Appellate Rule 28(h) as a rebuttal to defendant's repeated references to the second order in his appellee brief.

2. Jurisdiction—notice of appeal filed—trial court divested of jurisdiction—subsequent order vacated

In a drug prosecution, the trial court was divested of jurisdiction—pursuant to statute and the Rules of Appellate Procedure—fourteen days after the State entered notice of appeal from the trial court's order granting defendant's motion to suppress (which the court initially rendered in a standard AOC judgment form without findings and conclusions). Therefore, the trial court's subsequently-entered additional suppression order that contained findings and conclusions (entered eleven months after the initial order) was vacated. Finally, since the subsequent order was a nullity, there was no basis for allowing defendant's motion to amend the record on appeal to include that order in the record.

3. Search and Seizure—warrantless search—probable cause—reasonable suspicion—officer safety measures—plain view doctrine

In the State's appeal from an order granting defendant's motion to suppress drugs that were seized from his person, the trial court erred in concluding that there was no probable cause to detain or search defendant. Law enforcement officers had specific and

articulable facts from which to form a reasonable belief that defendant could be armed, thus necessitating a frisk for officer safety, where: officers possessed a valid arrest warrant for another individual who was known to be a member of a gang and who was wanted for a violent crime involving a weapon, officers followed that individual to a house where defendant and two others were also located, and one individual came out of the house wearing a ballistic vest after the police announced their presence. Further, the seizure of the drugs was lawful under the plain view doctrine where the officer who frisked defendant saw white plastic baggies in defendant's pocket that were consistent with packaging for heroin.

4. Search and Seizure—warrantless entry of residence—protective sweep of premises—officer safety measures—exigent circumstances

In the State's appeal from an order granting defendant's motion to suppress, the trial court erred by concluding that law enforcement officers conducted an unreasonable and unlawful entry of a residence, where there were specific and articulable facts to support a reasonable belief that a warrantless protective sweep of the house was necessary for officer safety and that exigent circumstances existed. Officers possessed a valid arrest warrant for another individual who was known to be a member of a gang and who was wanted for a violent crime involving a weapon, officers followed that individual to a house where defendant and two others were also located, all four individuals were known to be gang members, one individual came out of the house wearing a ballistic vest after police announced their presence, and the officers were unsure whether any other individuals remained in the house following their request for everyone to come outside.

5. Search and Seizure—search warrant—residence—probable cause—smell of marijuana—drugs found during frisk

In the State's appeal from an order granting defendant's motion to suppress, the trial court erred by determining that there was no probable cause to issue a search warrant of a residence, where officers had, in the course of following an individual for whom they had a valid arrest warrant, arrived at a residence where defendant and other individuals were present and where the officers thereafter conducted a lawful frisk of defendant's person—during which officers discovered drugs through a pat-down and plain view observations—and conducted a protective sweep of the residence—during which they observed digital scales and other drug paraphernalia.

Despite defendant's argument that probable cause could not be supported by the officers' detection of an odor of marijuana, the totality of the circumstances was sufficient to provide probable cause.

Appeal by the State from order entered 9 November 2021 by Judge Josephine Kerr-Davis in Vance County Superior Court. Heard in the Court of Appeals 22 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Mayes, for defendant-appellee.

TYSON, Judge.

The State appeals from an order granting Keylan Johnson's ("Defendant") motion to suppress. We reverse and remand.

I. Background

Jose Martinez was wanted by the Henderson Police Department with an outstanding warrant for disobeying a court order and for assault with a deadly weapon with intent to kill inflicting serious injury. Detective Jeremy Wells and Lieutenant Graham Woodlief observed Martinez seated in the passenger seat of a black Honda Accord traveling on North Chestnut Street in Henderson. Det. Wells had previously arrested Martinez. The officers knew Martinez was a member of "West End," a "hybrid organization that commits criminal acts." Det. Wells and Lt. Woodlief attempted to follow the black Honda, but lost sight of the vehicle in traffic.

Det. Wells and Lt. Woodlief drove to 555 High Street, the address Martinez had given when he was granted pretrial release. Upon arrival at 555 High Street, Det. Wells and Lt. Woodlief identified a black Honda Accord and another vehicle parked behind the house. The officers also observed Martinez standing in the backyard.

Lt. Woodlief parked near 555 High Street and called the Henderson Police Department Special Response Team ("SRT") for assistance to arrest Martinez. The SRT officers arrived upon the scene fifteen minutes later. By the time the SRT officers were briefed, Martinez was no longer standing outside. The SRT officers set up a perimeter around the house, while Det. Wells approached the door to the residence.

Defendant walked to the door and announced: “It’s the police.” Defendant turned around and went back into the house. Det. Wells smelled the odor of marijuana coming from inside the residence. Lt. Woodlief also smelled the odor of marijuana coming from the area of the house. The SRT officers ordered everyone to come outside of the house.

Martinez, Defendant, Taylor Bryant, and Kemarus Bryant exited the house within a few seconds of each other. A different officer detained each individual, placed them in handcuffs, and frisked them for weapons. Kemarus was wearing a “ballistic bulletproof vest.” Lt. Woodlief recognized Defendant by his street name “KeeWee.” Lt. Woodlief knew all four individuals to be members of West End.

Detective David Ward was assigned to detain Defendant. Defendant walked to where Det. Ward was located, showed his hands were empty, turned around, and put his hands behind his back as instructed. Det. Ward smelled a “[s]trong odor of marijuana” coming from Defendant. Det. Ward then conducted a *Terry* frisk of Defendant. While conducting the *Terry* frisk for officer’s safety, Det. Ward was able to see inside of Defendant’s open coat pocket, where he observed small, thin, and square white baggies in a folded-over wrapper sitting on top of several other items.

Det. Ward immediately recognized these baggies as consistent with those used in heroin packaging due to his training and experience. Det. Ward did not seize the heroin for safety purposes, but completed the *Terry* frisk, found no weapons, and kept control of Defendant until Lt. Woodlief could take custody of him.

Once Martinez, Defendant, Tyler, and Kemarus were detained and secured, Det. Ward and other SRT officers conducted a protective sweep of the house for officer’s safety. The officers entered the house and looked at places “big enough for a person to hide.” The sweep was described as being accomplished “very quick.” The SRT officers did not locate any other persons inside the house, but observed digital scales and other drug paraphernalia inside the house. These observations were reported to Lt. Woodlief and Det. Wells.

Before entering for the protective sweep Det. Ward informed Lt. Woodlief of what he believed to be heroin present inside of Defendant’s pocket. Lt. Woodlief approached Defendant and also noticed he “smelled like marijuana.” Lt. Woodlief searched Defendant and seized: seven dosage units of heroin; three baggies of marijuana; and, almost $2,000 in U.S. currency in denominations of fives, tens, and twenties.

Lt. Woodlief directed Det. Wells to procure a search warrant. Det. Wells drove to his office to draft the search warrant application and affidavit, while Lt. Woodlief and the other officers remained on-site to "freeze" the scene. Det. Wells presented the search warrant and affidavit to a superior court judge, who found probable cause and issued the search warrant for the premises. Det. Wells returned within an hour with the issued warrant.

The officers seized 9.6 grams of raw heroin, 1291 dosage units of heroin, 650 dosage units of heroin, approximately 115.6 grams of marijuana, 40 individual packaged baggies of marijuana, digital scales, plastic baggies, various rounds of ammunition, a Glock handgun box, a Glock magazine, a Springfield 9mm handgun, and a RAS47 semi-automatic rifle.

Defendant was indicted for: (1) five counts of trafficking in more than 28 grams of heroin, a Schedule I controlled substance; (2) two counts of possession with intent to manufacture, sell, or deliver a controlled substance; (3) two counts of manufacturing a controlled substance; (4) two counts of keeping or maintaining a dwelling or vehicle to keep or sell controlled substances; (5) two counts of possession of a controlled substance; (6) two counts of possession of drug paraphernalia; (7) engaging in a continuing criminal enterprise; and, (8) two counts of possession of a firearm by a felon.

Defendant filed pretrial motions to suppress the evidence seized from his person and from inside the house. Following a hearing, the trial court granted Defendant's motion to suppress in open court and made oral findings and conclusions:

> Court having had the opportunity to hear the arguments of counsel and review the case law as submitted by the defense and the State of North Carolina, the Court is going to grant the defendant's motion. And I will charge the defense with presenting an order for the --the [sic] Court so the Court can sign off on the order.
>
> . . .
>
> [T]hat there was no probable cause as presented by the State or the arresting officers in this case to detain [Defendant]; and that [Defendant] willingly left the residence; that he was searched; that based upon his search, there was no indication that there was - - or there was no concrete evidence that there was drugs on his person. In addition to that, after all four individuals were outside of the residence,

> there was no information or no indication that there was a need to search the residence, nor was there any information that was presented that there were any information that was presented that [sic] there were additional - - additional persons inside the residence. Based upon those reasons, the Court is going to grant defense counsel's motion.

The trial court made oral findings of fact and conclusions of law as reflected in the transcript, but did not enter a written order that included the findings of fact and conclusions of law. The next day the trial court entered a Judgment/Order or Other Disposition on an AOC-CR-305 form stating:

> Defendants motion to suppress is granted by the Court. The State gives notice of appeal.
>
> Defendants motion to set bond is allowed by the Court. The Court will set bond in the amount of $250,000 unsecured. As a condition of bond the Defendant is to be placed on electronic house arrest before released [sic]. As a further condition of bond[,] the Defendant is ordered to only leave his residence for medical emergencies for himself or his children and court appearances.
>
> Pending further orders from the Court of Appeals this Court will retain jurisdiction over this case.

The State timely entered notice of appeal. The record on appeal was settled and filed with this Court on 5 May 2022. The State filed its principal brief with this Court on 6 September 2022. On 8 September 2022 Defendant's trial counsel noticed an order originally drafted by him and approved by the State was neither included in the case file nor filed with the Vance County Clerk of Superior Clerk. The trial court signed a copy of this order and filed it with the Vance County Clerk of Superior Court on 3 October 2022.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 15A-979(c) and 15A-1445(b) (2021) from the State's appeal of the superior court's order granting Defendant's motion to suppress.

III. Issue

The State argues the trial court erred in granting Defendant's motion to suppress.

IV. Standard of Review

"The standard of review for a motion to suppress is 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. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (citation and internal quotation marks omitted). "[I]n evaluating a trial court's ruling on a motion to suppress . . . the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Allen*, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009) (citation and internal quotation marks omitted). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010) (citation and internal quotation marks omitted).

Findings of fact not challenged on appeal are deemed supported by competent evidence and are binding upon this Court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). "The trial court's conclusions of law [ ] are fully reviewable on appeal" *de novo*. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

V. Jurisdiction of the Trial Court

[1] The State argues in their reply brief the written and entered 3 October 2022 suppression order is a nullity and void because the trial court was divested of jurisdiction upon the State's appeal. The record before this Court shows the State gave oral notice of appeal in open court on 8 November 2021 and filed a written notice of appeal on 16 November 2021. The record was settled and filed with this Court on 5 May 2022. The State filed their principal appellant brief on 6 September 2022. Defendant's appellee brief was filed on 20 January 2023 making extensive references to the purported 3 October 2022 order. The State challenged the jurisdiction of the trial court to enter the 3 October 2022 order in their reply brief.

Defendant asserts "appellants may not raise new arguments for the first time in their reply briefs." *In re Est. of Giddens*, 270 N.C. App. 282, 286, 841 S.E.2d 302, 305 (2020) (citation omitted). Defendant repeatedly referenced the 3 October 2022 suppression order in his appellee brief. The 3 October 2022 suppression order was not entered and filed prior to the record on appeal being settled and filed with this Court on 5 May 2022 or prior to the State filing its principal appellant brief on 6 September 2022.

Rule of Appellate Procedure 28 provides, in relevant part: "Any reply brief which an appellant elects to file *shall be limited to a concise rebuttal of arguments set out in the appellee's brief* and shall not reiterate arguments set forth in the appellant's principal brief." N.C. R. App. P. 28(h) (emphasis supplied). The State can properly challenge the validity of the 3 October 2022 suppression order argued in Defendant's brief in their reply brief. *Id.*

VI. Jurisdiction of the Court of Appeals

[2] Our General Statutes provide: "The jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given and the period described in [subsections] (1) and (2) has expired." N.C. Gen. Stat. § 15A-1448(a)(3) (2021). Subsection (1) refers to "the period provided in the rules of appellate procedure for giving notice of appeal," which is 14 days after the entry of the judgment. N.C. Gen. Stat. § 15A-1448(a)(1) (2021); N.C. R. App. P. 4(a)(2). "Therefore, under the plain language of N.C. Gen. Stat. § 15A-1148(a)(3), the trial court has jurisdiction until notice of appeal has been given and 14 days have passed." *State v. Lebeau*, 271 N.C. App. 111, 114, 843 S.E.2d 317, 319-20 (2020).

The trial court was divested of jurisdiction after the State timely gave notice of appeal and fourteen days elapsed. *Id.* By the State invoking and pending this appeal, the trial judge was divested of jurisdiction and is *functus officio* after the time allowed in the statute has elapsed. *See State v. Davis*, 123 N.C. App. 240, 242, 472 S.E.2d 392, 393 (1996).

Defendant asserts the trial court retains jurisdiction over the record. "[T]he trial court retains jurisdiction [over] matters ancillary to the appeal, including settling the record on appeal." *Id.* (citations omitted). A trial court "has the inherent power and duty to make its records speak the truth[,] . . . to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record[.]" *State v. Old*, 271 N.C. 341, 343, 156 S.E.2d 756, 757-58 (1967) (citations omitted).

Our Court has held:

> It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to its effect upon the rights of parties, or of third persons; and neither is it open to any

> other tribunal to call in question the propriety of its action or the verity of its records, as made.

State v. Cannon, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956) (citation omitted).

The State maintains the trial court did not purport to merely "amend its record," but the purported 3 October 2022 order contains wholly new and additional findings of fact and conclusions of law, which were not argued at the hearing and are not reflected in its oral rendition reflected in the transcript. This purported order was not entered and filed until months after the State had filed the settled record on appeal and a month after the State's brief was filed.

It is unnecessary for this Court to square the 3 October order with any prior order to determine if it was to "amend its record" or contains additional findings of fact and conclusions of law. "[O]nce the case has been docketed in the appellate court, the appellate court acquires jurisdiction over the record." *State v. Dixon*, 139 N.C. App. 332, 338, 533 S.E.2d 297, 302 (2000) (citing *Lawing v. Lawing*, 81 N.C. App. 159, 171, 344 S.E.2d 100, 109 (1986)).

The settled record on appeal was filed on 5 May 2022. The trial court did not possess and had long been divested of jurisdiction to "correct the record" on 3 October 2022. The State was prejudiced by the trial court's lack of jurisdiction and error. As appellant, the State was unable to brief all grounds later asserted to allow Defendant's motion.

The trial court did not have jurisdiction to enter the 3 October 2022 suppression order. In light of lack of jurisdiction to enter and in the exercise of our discretion, we deny Defendant's motion to amend the record on appeal to include the 3 October 2022 suppression order, which is a nullity. N.C. Gen. Stat. § 15A-1448(a)(1); N.C. R. App. P. 4(a)(2); *Lebeau*, 271 N.C. App. at 114, 843 S.E.2d at 319-20; *Davis*, 123 N.C. App. at 242, 472 S.E.2d at 393. The purported 3 October 2022 suppression order is vacated.

VII. Defendant's Motion to Suppress

The State argues the trial court erred in allowing Defendant's motion to suppress and in suppressing evidence found and gathered from Defendant's person and from inside the residence. The State further asserts the trial court erred in concluding the search of the residence was unreasonable.

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

"The Fourth Amendment protects against governmental invasions into a person's legitimate expectation of privacy, which has two components: (1) the person must have an actual expectation of privacy, and (2) the person's subjective expectation must be one that society deems to be reasonable." *State v. Wiley*, 355 N.C. 592, 602, 565 S.E.2d 22, 32 (2002) (citing *Smith v. Maryland*, 442 U.S. 735, 740, 61 L. Ed. 2d 220, 226-27 (1979)).

The Supreme Court of the United States stated: "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *United States v. Ross*, 456 U.S. 798, 825, 72 L. Ed. 2d 572, 594 (1982) (citations and internal quotation marks omitted).

The Supreme Court of the United States also stated: "Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause, for the Constitution requires that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police[.]" *Katz v. United States*, 389 U.S. 347, 357, 19 L.Ed.2d 576, 585 (1967) (citations and internal quotation marks omitted).

"Generally, a warrant is required for every search and seizure, with particular exceptions." *State v. Armstrong*, 236 N.C. App. 130, 132, 762 S.E.2d 641, 643 (2014) (citation omitted).

A. Evidence on Defendant's Person

[3] A law enforcement officer in possession of an arrest warrant may arrest the named-individual therein "at any time and at any place within the officer's territorial jurisdiction." N.C. Gen. Stat. § 15A-401(a)(1) (2021). Our General Statutes permit a law enforcement officer with authority to enter a residence when:

> **a.** The officer has in his possession a warrant or order or a copy of the warrant or order for the arrest of a person, provided that an officer may utilize a copy of a warrant or order only if the original warrant or order is in the possession of a member of a law enforcement agency located in the county where the officer is employed and the officer verifies with the agency that the warrant is current and valid; or the officer is authorized to arrest a person without a warrant or order having been issued,
>
> **b.** The officer has reasonable cause to believe the person to be arrested is present, and
>
> **c.** The officer has given, or made reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life.

N.C. Gen. Stat. § 15A-401(e)(1)(a)-(c) (2021).

In *Terry v. Ohio*, the Supreme Court of the United States held the brief stop and frisk of an individual did not violate the Fourth Amendment when a "reasonably prudent" law enforcement officer would reasonably suspect the individual was "armed and thus presented a threat to the officer's safety while [they were] investigating suspicious behavior." *Terry v. Ohio*, 392 U.S. 1, 28, 20 L. Ed. 2d 889, 910 (1968). "The reasonable suspicion standard is a less demanding standard than probable cause and a considerably less [demanding standard] than preponderance of the evidence." *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (quoting *Illinois v. Wardlow*, 528 U.S. 19, 123, 145 L. Ed. 2d 570, 576 (2000)).

Reasonable suspicion requires "at least a minimal level of objective justification for making the stop." *Wardlow*, 528 U.S. at 123-24, 145 L. Ed. 2d at 576 (citation and internal quotation marks omitted). The law enforcement officer must articulate more than "inchoate and unparticularized suspicion or 'hunch' " of criminal activity to stop the individual. *Id.* (citation omitted). "To meet this standard an officer must be able to point to specific and articulable facts and to rational inferences from those facts justifying the search or seizure at issue." *State v. Wilson*, 371 N.C. 920, 926, 821 S.E.2d 811, 816 (2018) (citation and quotation marks omitted).

Here, officers were in possession of a valid arrest warrant for Martinez for a violent crime involving a weapon, knew Martinez was

a member of West End gang, observed him enter the residence, and had observed Kemarus exit the residence wearing a ballistic vest. The officers detained all individuals to protect themselves while securing Martinez and their safety at the scene. In viewing the "totality of the circumstances," Det. Ward relied upon specific and articulable facts, based upon his training, experience, and available information, to form a reasonable belief that Defendant could be armed. *See State v. Butler*, 331 N.C. 227, 233-34, 415 S.E.2d 719, 722-23 (1992) (Police could form reasonable suspicion to stop a suspect of suspected drug possession and then frisk the suspect based on belief he could be armed).

During the *Terry* frisk for weapons, Det. Ward observed white baggies that were small, thin, and square in a folded-over wrapper sitting on top of other items inside Defendant's pocket. Based on his training and experience Det. Ward believed what he had observed was consistent with packaging for heroin.

Our Supreme Court recently examined a *Terry* frisk of a suspect involved in narcotics distribution, while officers were executing a search warrant of a residence nearby. *State v. Tripp*, 381 N.C. 617, 619-20, 2022-NCSC-78, ¶¶ 3-8, 873 S.E.2d 298, 302-03 (2022). During the *Terry* frisk the officer observed a plastic bag inside the defendant's pocket and "felt a large lump associated with that" bag. *Id.* at 634, 2022-NCSC-78, ¶44, 873 S.E.2d at 311. The Supreme Court held the search of the defendant and seizure of the narcotics were permitted under the "plain view" doctrine. *Id.*

In *State v. Grice*, 367 N.C. 753, 756-57, 767 S.E.2d 312, 316 (2015), our Supreme Court reviewed and articulated when a warrantless seizure of contraband is reasonable under the Fourth Amendment, applying the "plain-view" doctrine as an exception to the Fourth Amendment's general prohibition against warrantless seizures:

> [A] warrantless seizure of an item may be justified as reasonable under the plain view doctrine, so long as three elements are met: First that the officer did not violate the Fourth amendment in arriving at the place from which the evidence could be plainly viewed; second, that the evidence's incriminating character . . . [was] immediately apparent; and third, that the officer had a lawful right of access to the object itself. The North Carolina General Assembly has additionally required that the discovery of evidence in plain view be inadvertent.

State v. Grice, 367 N.C. 753, 756-57, 767 S.E.2d 312, 316 (2015) (citations and internal quotation marks omitted).

Det. Ward reasonably and immediately concluded the plastic baggies he inadvertently and "plainly viewed" in Defendant's open pocket may contain illegal narcotics based upon his training and experience. *Id.* The search of Defendant was constitutional and the resulting seizure of the plastic baggies was lawful. The trial court erred in concluding no probable cause existed to detain or search Defendant. The order of the trial court suppressing the items found on Defendant's person is affected by error and is reversed.

B. Entry Into Residence

[4] The State argues the trial court erred in concluding the warrantless entry of the officers into the residence was unreasonable and violated the Fourth Amendment. The State asserts the officer's actions were a lawful protective sweep of the residence. The Supreme Court of the United States, the Supreme Court of North Carolina, and this Court have all recognized and affirmed a law enforcement officer's ability to conduct a protective sweep both as an exigent circumstance and for officer's safety when incident to arrest.

In *Maryland v. Buie*, 494 U.S. 325, 328, 108 L. Ed. 2d 276, 282 (1990) the Supreme Court of the United States examined a protective sweep of a house by police executing an arrest warrant. Police investigating an armed robbery of a pizza restaurant obtained arrest warrants for two suspects and placed one of their houses under surveillance. *Id.* One of the robbers was described as wearing a red running suit. *Id.*

The officers attempted to arrest the defendant at his house. *Id.* The officers executing the arrest warrant went into the residence. An officer was assigned to "freeze" the basement. *Id.* The officer called into the basement for any occupants to come out. After the officer identified himself as a law enforcement officer, the defendant came out from the basement. *Id.* The defendant "was arrested, searched, and handcuffed[.]" *Id.* Another officer entered the basement to make sure no other person was present in the basement. *Id.* Once inside the basement, the officer found a red running suit on the floor and seized it. *Id.*

The Supreme Court in *Buie* articulated requirements for when and how extensive a search police can conduct during a protective sweep. *Id.* at 334, 108 L. Ed. 2d at 286. In the first instance: "as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.*

The Supreme Court further held for the second instance: "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* In this situation officers can search more of the dwelling beyond "space[s] immediately adjoining the place of arrest." *Id.*

However, a protective sweep is not a license for an extensive search of the premises. The Supreme Court also placed limits on the ability of police to conduct a protective sweep holding:

> We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

Id. at 335-36, 108 L. Ed. 2d at 287.

In *State v. Dial*, this Court examined a protective sweep following deputies serving an arrest warrant on a defendant, who came outside the residence as soon as the arresting officers approached. *State v. Dial*, 228 N.C. App. 83, 88, 744 S.E.2d 144, 148 (2013). The deputies feared weapons and possibly another individual may be present inside the residence. *Id.* As soon as the "defendant stepped out, and walked down the front steps with his hands raised" a deputy arrested him, and "the other two deputies entered the residence and performed a protective sweep, which lasted approximately thirty seconds." *Id.* This Court upheld the protective sweep based on the officers' "reasonable belief based on specific and articulable facts, that the residence harbored an individual who posed a danger to the safety of the deputies." *Id.* at 89, 744 S.E.2d at 148.

In *State v. Wallace*, 111 N.C. App. 581, 588, 433 S.E.2d 238, 242 (1993), this Court applied *Buie* and upheld a trial court's conclusion that officers did not possess reasonable suspicion to justify a protective sweep of a residence. *Buie*, 494 U.S. at 588, 433 S.E.2d at 242-43. The officers did not approach the residence to make an arrest, but only to gain information for an investigation. The defendant voluntarily answered the officers' questions outside of the residence and shut the door behind him when he exited the residence. The door to the residence remained shut during the entire interaction. *Id.* at 583, 433 S.E.2d at 239-40. The

officers testified they never were afraid of nor believed they were in a dangerous situation at any time during the questioning. *Id.* at 588, 433 S.E.2d at 243. The officers performed the protective sweep after hearing footsteps behind the door. This Court held the search was an unreasonable inspection of the residence because "the officers candidly admitted they did not feel they were in danger at any time." *Id.*

Prior to *Buie*, our Supreme Court examined a similar issue where officers made a protective sweep of a structure after arresting a suspect located outside in *State v. Taylor*, 298 N.C. 405, 417, 259 S.E.2d 502, 509 (1979). Law enforcement officers were seeking to apprehend a violent offender for "murder in North Carolina and robbery and maiming in Virginia[.]" *Id.* After arresting the suspect outside of a "shot house," officers remained fearful for their safety, particularly from an ambush from inside the shot house, while they attempted to remove the suspect. *Id.* Our Supreme Court allowed the protective sweep holding: "The immediate need to ensure that no one remains in the dwelling preparing to fire a yet unfound weapon . . . constitutes an exigent circumstance which makes it reasonable for the officer to conduct a limited, warrantless, protective sweep of the dwelling." *Id.*

Here, the State presented uncontroverted evidence to support both bases for the protective sweep. The officers searched beyond the immediate area of the arrest in their sweep. To support such a protective sweep the officers were required to show a reasonable belief based on specific and articulatable facts that the area to be swept might harbor an individual posing danger to the officers on the arrest scene. *Buie*, 494 U.S. at 334, 108 L. Ed. 2d at 286.

The officers' belief here was reasonable given: Martinez's known reputation for violence involving weapons, the individuals were known members of West End gang, an individual emerged from the residence wearing a ballistic vest, and the fact they were unsure whether other individuals remained inside the house following their request for all individuals inside to exit. Once inside, the officers' protective sweep was very brief in duration, and they looked only in places where a person could be hiding. *Id.* at 335-36, 108 L. Ed. 2d at 287.

The trial court misapprehended the law and erred in finding the officers entry into the residence was unreasonable and in finding the officers had no need to search the house. The protective sweep is allowable because the officers' reasonable belief was based upon specific and articulable facts as a protective sweep and occurred under exigent circumstances. *Id.* Once inside the residence the officers also

observed digital scales and other drug paraphernalia in plain view inside the house.

C. Search Warrant

[5] The trial court found the subsequent search warrant sought by Det. Wells to be devoid of probable cause because the officers had no need to protectively sweep the residence. Defendant maintains the officers' assertion they smelled marijuana outside the residence is insufficient to establish probable cause.

"The Fourth Amendment to the United States Constitution protects individuals 'against unreasonable searches and seizures' and provides that search warrants may only be issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.' " *State v. McKinney*, 361 N.C. 53, 57, 637 S.E.2d 868, 871-72 (2006) (quoting U.S. Const. amend. IV).

The trial court found the search warrant to search the residence was not supported by probable cause. The State asserts the search warrant was supported and issued based on probable cause from evidence found during the *Terry* frisk of Defendant, items found in plain view during the protective sweep of the residence, and by the smell of marijuana.

To determine whether probable cause existed to issue a search warrant, a reviewing and an appellate court looks to the "totality of the circumstances." *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984); *see Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983). Under the "totality of the circumstances" test, an affidavit submitted to obtain a search warrant provides sufficient probable cause if it provides:

> reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty.

Arrington, 311 N.C. at 636, 319 S.E.2d 256 (citations omitted).

"When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably present." *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 567, 600 (2002) (citations omitted).

An application for a search warrant must include: (1) a statement of probable cause indicating the items specified in the application will be found in the place described; and, (2) "one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[.]" N.C. Gen. Stat. § 15A-244 (2021).

Our Supreme Court has held:

> A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than commonsense, manner. [T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Riggs, 328 N.C. 213, 222, 400 S.E.2d 429, 434-35 (1991) (citations and quotation marks omitted).

Before the trial court and this Court, Defendant asserted the scent of marijuana cannot form the basis of reasonable suspicion and argues the smell is indistinguishable from hemp, which possession thereof has been legal in North Carolina since 2015. *See* An Act to Recognize the Importance and Legitimacy of Industrial Hemp Research, to Provide for Compliance with Portions of the Federal Agricultural Act of 2014, and to Promote Increased Agricultural Employment, S.L. 2015-299, 2015 N.C. Sess. Laws 1483 ("Industrial Hemp Act"). This Court stated the Industrial Hemp Act "legalized the cultivation, processing, and sale of industrial hemp within the state, subject to the oversight of the North Carolina Industrial Hemp Commission." *State v. Parker*, 277 N.C. App. 531, 539, 860 S.E.2d 21, 28, 2021-NCCOA-217, ¶ 27, *disc. review denied*, 378 N.C. 366, 860 S.E.2d 917 (2021).

While industrial hemp may be the same cannabis plant species as marijuana, the "difference between the two substances is that industrial hemp contains very low levels of tetrahydrocannabinol ("THC"), which is the psychoactive ingredient in marijuana." *Id.* at 540, 860 S.E.2d at 28, 2021-NCCOA-217, ¶ 27 (citation omitted).

Federal courts in North Carolina have also examined the impact of the legalization of industrial hemp and the determination of probable cause. The smell of marijuana "alone . . . supports a determination of probable cause, even if some use of industrial hemp products is legal

under North Carolina law. This is because *only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.*" *United States v. Harris*, No. 4:18-CR-57-FL-1, 2019 U.S. Dist. LEXIS 211633, 2019 WL 6704996, at *3 (E.D.N.C. Dec. 9, 2019) (citation and quotation marks omitted) (emphasis supplied).

The United States District Court for the Western District of North Carolina in *United States v. Brooks* also examined a defendant's arguments that the alleged smell of marijuana cannot supply probable cause because it could have been from a legal source, reasoning:

> [Pre]suming, *arguendo*, hemp and marijuana smell "identical," then the presence of hemp does not make all police probable cause searches based on the odor unreasonable. *The law, and the legal landscape on marijuana as a whole, is ever changing but one thing is still true: marijuana is illegal.* To date, even with the social acceptance of marijuana seeming to grow daily, precedent on the plain odor of marijuana giving law enforcement probable cause to search has not been overturned.

United States v. Brooks, No.3:19-cr-00211-FDW-DCK, 2021 U.S. Dist. LEXIS 81027, 2021 WL 1668048, at *4 (W.D.N.C. Apr. 28, 2021) (emphasis supplied) (footnotes omitted).

In *State v. Teague*, 286 N.C. App. 160, 179, 2022-NCCOA-600, ¶ 58, 879 S.E.2d 881, 896 (2022), this Court found the reasoning of both *Brooks* and *Harris* persuasive and held: "The passage of the Industrial Hemp Act, in and of itself, did not modify the State's burden of proof at the various stages of our criminal proceedings."

Here, as in *Teague*, the smell of marijuana was not the only basis to provide the officers with probable cause. *Id.* at 179 n.6, 2022-NCCOA-600, ¶ 58 n.6 , 879 S.E.2d at 896 n.6 ("Finally, we note that this is not a case where the detectable odor of marijuana was the only suspicious fact concerning the package. The trial court's findings of fact include, *inter alia*, that the seams of the package were sealed, the phone number listed for the recipient on the target package was fictitious, the sender's address and phone number listed on the target package were fictitious, and the actual city from which the target package was sent differed from the city of origin stated on the package. We therefore need not address in this case whether the odor of marijuana alone may give rise to probable cause for the issuance of a search warrant, as the totality of the circumstances here was sufficient to give rise to probable cause. Accordingly, this argument is overruled.").

As held above, drugs were found upon Defendant's person during a lawful *Terry* frisk, and officers saw scales and drug paraphernalia in plain view during the protective sweep inside the residence. The search warrant was issued by a superior court judge based on probable cause in the affidavit and application after the officers' lawful conduct during the arrest of Defendant and immediately after the arrest. The trial court misapprehended the law in concluding the search warrant was facially invalid and erred in excluding items lawfully seized in the residence.

VIII. Conclusion

The trial court erred and prejudiced the State in suppressing the evidence seized from Defendant's person. The trial court further erred in concluding the entry into the residence during the protective sweep was unreasonable and unlawful and excluding evidence from the officers' search of the residence pursuant to a lawful search warrant.

The trial court's ordered suppression is erroneous, prejudicial, and is reversed. This cause is remanded for trial. *It is so ordered.*

REVERSED AND REMANDED.

Judges GRIFFIN and FLOOD concur.

STATE OF NORTH CAROLINA
v.
JASON WILLIAM KING

No. COA22-469

Filed 18 April 2023

1. Criminal Law—motion to dismiss—flagrant constitutional violation—irreparable prejudice to preparation of defense —speculative

In a prosecution for driving while impaired and reckless driving, where, due to an oversight, defendant remained in detention for six additional days during which he was not provided his medication, suffered a seizure followed by a concussion, and did not receive medical treatment afterwards, the trial court did not err in denying defendant's motion to dismiss under N.C.G.S. § 15A-954(a)(4). Defendant failed to meet his burden of showing that he suffered a flagrant constitutional violation that caused irreparable prejudice

to the preparation of his defense where, although defense counsel argued that defendant's injuries damaged his memory and hindered his ability to testify at trial, defendant never indicated an intent to testify at trial, and therefore any prejudice was merely speculative.

2. Sentencing—driving while impaired—aggravating factors—province of the jury

A criminal defendant was entitled to a new sentencing hearing on his conviction for driving while impaired (DWI) because the trial court erred in considering aggravating factors at sentencing where, under the most recent version of the DWI sentencing statute (N.C.G.S. § 20-179(a1)(2)), only a jury could determine if those aggravating factors were present.

3. Sentencing—reckless driving—community punishment with probation exceeding eighteen months—specific findings required

A criminal defendant was entitled to a new sentencing hearing on his conviction for reckless driving where the trial court sentenced him to a suspended community punishment with supervised probation for thirty-six months without entering specific findings of fact explaining why a probation period exceeding eighteen months was necessary (as required under N.C.G.S. § 15A-1343.2(d)(1)).

Judge GORE dissenting.

Appeal by defendant from judgments entered 18 November 2021 by Judge Karen Eady-Williams in Buncombe County Superior Court. Heard in the Court of Appeals 10 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryne E. Hathcock, for the State.

Caryn Strickland for defendant-appellant.

ARROWOOD, Judge.

Jason William King ("defendant") appeals from judgments entered upon his convictions of impaired driving and reckless driving. On appeal, defendant contends the trial court erred by: (1) denying his motion to dismiss; (2) sentencing him for the impaired driving conviction following a finding of three aggravating factors that were invalid; and (3) imposing a sentence for his reckless driving conviction that was not authorized by

law. Alternatively, defendant asserts an ineffective assistance of counsel claim based on the sentencing errors. Recognizing that his notice of appeal was insufficient to convey jurisdiction to this Court for the final judgment, defendant has also filed a petition for *writ of certiorari* ("PWC"). In the exercise of our discretion, we grant defendant's petition, and upon review, we vacate and remand for new sentencing hearings on the reckless driving and driving while impaired convictions, but affirm in all other respects.

I. Background

On 30 August 2021, following a trial in Buncombe County District Court, defendant was found guilty of driving while impaired, reckless driving, possession of marijuana, and possession of marijuana paraphernalia. The charges were consolidated, and defendant was sentenced at a Level IV to 120-day suspended imprisonment upon completion of seven days active imprisonment and twelve months of supervised probation. Following his conviction, defendant timely appealed his conviction to superior court, as allowed by law.

Thereafter, the appeal, which should have led to defendant's release, was misplaced, and was never entered into the court's system. Due to this oversight, defendant remained in detention for six additional days. While in custody, defendant was not provided his medication, suffered a seizure, and struck his head. Defendant was not provided medical treatment while in custody. Following his release, defendant sought treatment and was diagnosed with a concussion.

Following these events, defendant filed a motion to dismiss on 4 October 2021, arguing the "flagrant violation of [his] constitutional rights result[ed] in irreparable prejudice to the" preparation of his case requiring dismissal. Defendant filed an additional motion to reconsider or dismiss supported by additional evidence on 9 November 2021. Prior to trial in superior court, the State filed notice that they would be seeking one aggravating factor.

The matter came on for trial in Buncombe County Superior Court on 15 November 2021, Judge Eady-Williams presiding. As an initial matter, the court heard arguments on defendant's motion to dismiss. Specifically, defendant's counsel argued defendant's in-custody seizure resulted in a head injury that damaged his memory and hindered his ability to assist with his defense. Defendant's motion to dismiss was denied, and the trial continued.

On 18 November 2021, a jury found defendant guilty of driving while impaired and reckless driving, but not guilty on all remaining

charges. Following the verdicts, the court moved on to sentencing. When sentencing defendant for the driving while impaired conviction, the trial court found no mitigating factors, and three aggravating factors. Specifically, the court found the three aggravating factors to be: (1) defendant's driving was especially reckless; (2) defendant's driving was especially dangerous; and (3) defendant was convicted of death by motor vehicle in August 2015. Therefore, because "the aggravators outweigh[ed] any mitigators[,]" defendant was sentenced at a Level III. Defendant was sentenced to six months imprisonment, suspended for thirty-six months supervised probation with an active three-day prison term on the impaired driving conviction, and for forty-five days imprisonment suspended for thirty-six months supervised probation on the reckless driving conviction.

On 29 November 2021, defendant filed a notice of appeal from the order denying his motion to dismiss. Understanding this notice of appeal was insufficient to convey jurisdiction to this Court for the final judgment, defendant has also filed a PWC. In our discretion, we allow the PWC and address defendant's appeal on its merits.

II. Discussion

On appeal, defendant contends the trial court erred by: (1) denying his motion to dismiss; (2) sentencing him for the impaired driving conviction following a finding of three aggravating factors that were invalid; and (3) imposing a sentence for his reckless driving conviction that was not authorized by law. Alternatively, defendant asserts an ineffective assistance of counsel claim based on the sentencing error.

As we grant defendant's PWC and address the merits of his sentencing claims, we do not address his alternative argument of ineffective assistance of counsel. We address each issue in turn.

A. Motion to Dismiss

[1] Defendant's first argument on appeal is that the trial court erred by denying his motion to dismiss under N.C. Gen. Stat. § 15A-954(a)(4), since there was a "flagrant violation of his constitutional rights" that resulted in "irreparable prejudice to his case." We disagree.

A trial court's decision on whether a defendant has met the statutory requirements of N.C. Gen. Stat. § 15A-954(a)(4) are conclusions of law, reviewed *de novo*. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation omitted). Under section 15A-954(a)(4), "[t]he court . . . must dismiss the charges stated in a criminal pleading if it determines that: . . . defendant's constitutional rights have been flagrantly violated

and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2022). "As the movant, defendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision 'contemplates drastic relief,' such that 'a motion to dismiss under its terms should be granted sparingly.' " *Williams*, 362 N.C. at 634, 669 S.E.2d at 295 (citation omitted).

Here, defendant argues that the trial court erred in determining any harm was not "irreparable" since his "constitutional rights to participate in his own defense and to decide whether to testify at his trial are absolute, and the denial of such rights [were] [a] structural error." Although defendant argues his rights to be free from "unlawful seizures" and "cruel and unusual punishment" were also violated, he does not explain how these violations have irreparably prejudiced the preparation of his case, and therefore, we do not consider these arguments and only address his argument regarding the alleged structural error.

"The Supreme Court of the United States has previously defined structural error as 'defects which affect the framework within which the trial proceeds, rather than simply an error in the trial process itself.' " *State v. Hamer*, 377 N.C. 502, 506, 858 S.E.2d 777, 780-81 (citation and brackets omitted). Accordingly, the defect must be one which affects " '[t]he entire conduct of the trial from beginning to end[.]' " *Id.* at 506, 858 S.E.2d at 781 (citation omitted) (alterations in original).

> The Supreme Court has noted six instances where structural error had been found: (1) "total deprivation of the right to counsel"; (2) "lack of an impartial trial judge"; (3) "unlawful exclusion of grand jurors of defendant's race"; (4) violation of "the right to self-representation at trial"; (5) violation of "the right to a public trial"; and (6) "erroneous reasonable-doubt instruction to jury."

Id. (citations omitted). "The 'highly exceptional' category of structural errors includes, for example, the 'denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt.' " *Greer v. United States*, ___ U.S. ___, ___, 210 L. Ed. 2d 121, 131 (2021) (citation omitted).

Here, defendant did not suffer a constitutional violation that affected the framework of the trial, his entire trial, or his trial at all, as he was not denied the right to testify or participate in his own defense.

Defendant was represented by his counsel of choice at all stages of the trial and throughout his appeals. Furthermore, despite defendant's claims that "he was unable to meaningfully participate in his defense or decide whether to testify in his defense at trial" due to his memory loss, defendant did not testify at his first trial and defense counsel did not argue he planned on testifying at the subsequent trial in superior court. When questioned, defense counsel admitted their argument was "proffered . . . more as 'even if [defendant] wanted to [testify].' " We agree with the trial court that this argument did not rise to the extreme level of irreparable prejudice. Rather, this argument is speculative at best, since defendant did not say he planned to testify, nor did he articulate what his testimony would have shown. *See State v. Salem*, 50 N.C. App. 419, 428, 274 S.E.2d 501, 507 (finding defendant's Fifth Amendment right to due process was not violated because defendant's argument that he was "prejudiced" by the delay in his trial since his memories "faded to the extent that" he was not "capable of clearly recalling the events of the evening[,]" was "hypothetical" as the defendant could not "demonstrate that any evidence lost as a result of faded memories would have been significant or helpful to his defense"), *disc. review denied*, 302 N.C. 401, 279 S.E.2d 355 (mem.) (1981).

Besides this speculative claim, defendant presented no other argument or evidence that he could not assist in his defense. Therefore, defendant did not meet his burden of showing the "flagrant constitutional violation" resulted in "irreparable prejudice to the preparation of his case[,]" such that the drastic measure of dismissal was the only possible relief. *Williams*, 362 N.C. at 634, 669 S.E.2d at 295 (citation omitted).

Additionally, we note that within defendant's appeal and rehearing for the superior court jury trial, defendant was successfully acquitted of two of the charges he was convicted of at the district court level. These acquittals suggest defendant brought forth a solid defense. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

B. Sentencing on the Driving While Impaired Conviction

[2] Defendant next argues the trial court erred in considering aggravating factors not authorized by law and in violating the statutory requirements that the State must provide notice of aggravating factors and that such factors must be decided by a jury. We agree that the aggravating factors for driving while impaired sentencing must be decided by a jury and therefore vacate and remand for a new sentencing hearing on the DWI conviction. Accordingly, we do not consider defendant's notice argument.

Prior to December 2006, the trial judge was responsible for holding the sentencing hearing "to determine whether there [were] aggravating or mitigating factors[.]" 1998 N.C. Sess. Laws 592, 618, ch. 182, § 20-179(a). This statute was amended on 1 December 2006, and took the determination of aggravating factors out of the hands of the trial judge and placed it with the jury. 2006 N.C. Sess. Laws 1178, 1207, ch. 253, § 20-179(a1)(2). Under our current DWI sentencing statute, "only a jury may determine if an aggravating factor is present[,]" and "[t]he State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists[.]" N.C. Gen. Stat. § 20-179(a1)(2) (2022) (emphasis added). Understanding the significance of the timing of these changes in relation to the relevant caselaw is crucial, accordingly we provide a brief history.

In *Blakely v. Washington*, 542 U.S. 296, 304, 159 L. Ed. 2d 403, 414 (2004), the Supreme Court of the United States held that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." The Supreme Court of the United States later found that "[f]ailure to submit a sentencing factor to the jury . . . [wa]s not a structural error." *Washington v. Recuenco*, 548 U.S. 212, 222, 165 L. Ed. 2d 466, 477 (2006). "Pursuant to *Recuenco*, our Supreme Court has held that the Sixth Amendment error committed in North Carolina when a judge, rather than a jury, finds an aggravating factor is subject to harmless error review." *State v. Speight*, 186 N.C. App. 93, 96, 650 S.E.2d 452, 455 (2007) (citation omitted). In *State v. Blackwell*, our Supreme Court held "[t]here is no meaningful difference between having a procedural mechanism and not using it, and not having a procedural mechanism at all[,]" and applied the harmless error analysis for failure to submit an aggravating factor to the jury under Chapter 15A of our statutes. *State v. Blackwell*, 361 N.C. 41, 46-49, 638 S.E.2d 452, 456-58 (2006), *cert. denied*, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007).

The harmless error rule was thereafter applied in the context of DWI sentencing by this Court in *State v. McQueen*. *State v. McQueen*, 181 N.C. App. 417, 423, 639 S.E.2d 131, 135, *writ denied*, *disc. review denied*, *appeal dismissed*, 361 N.C. 365, 646 S.E.2d 535 (mem.) (2007). There, we held that "despite the exclusion of a procedural mechanism in the North Carolina General Statutes for the submission of aggravating factors in a charge of driving while impaired, a common law procedural mechanism existed through the use of a special verdict[,]" and based on the *Blackwell* holding that the presence or absence of a procedural

mechanism was irrelevant, harmless error was applicable. *Id.* at 423, 639 S.E.2d at 135.

Interestingly, we noted in *McQueen* that the "procedure for aggravating factors to be proven to a jury under" Chapter 15A of our statutes, the relevant statute in *Blackwell*, was enacted by our legislature, "[i]n response to the ruling in *Blakely*," but that change did "not apply to cases involving a charge of driving while impaired" and was therefore inapplicable. *Id.* at 422, 639 S.E.2d at 134. Significantly, *McQueen* was decided prior to the 1 December 2006 amendment to N.C. Gen. Stat. § 20-179(a1)(2).

Thereafter, in a case decided after the statute was amended, this Court agreed with the defendant in *State v. Geisslercrain* that "the trial court committed reversible error by determining, *itself*, that an aggravating factor existed, rather than submitting the aggravating factor to the jury for determination, citing" *Blakely*. *State v. Geisslercrain*, 233 N.C. App. 186, 190, 756 S.E.2d 92, 95 (2014) (emphasis in original). In *Geisslercrain*, the trial court found one aggravating factor without submitting the issue to the jury as statutorily required and found one mitigating factor. *Id.* at 188, 756 S.E.2d at 93. In its analysis, this Court did not apply harmless error and evaluate whether evidence to support such a factor existed but decided the finding of that factor placed the defendant at another DWI Level punishment, violating *Blakely*, and therefore vacated the sentence. *Id.* at 191, 756 S.E.2d at 95.

While prior cases like *Blackwell* and *McQueen* have comported with the constitutional standard set out in *Recuenco*, it is well-settled that "the United States Constitution is the floor of constitutional protections in North Carolina, not the ceiling." *Mole' v. City of Durham*, 279 N.C. App. 583, 598, 866 S.E.2d 773, 785, (citing *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988)), *review allowed sub nom. Mole v. City of Durham*, 381 N.C. 283, 868 S.E.2d 851 (mem.) (2022). As such, our legislature is free to provide more protection than constitutionally required and their decision to do so by amending the relevant statute cannot be ignored.

"The best indicia of legislative intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *M.E. v. T.J.*, 275 N.C. App. 528, 547, 854 S.E.2d 74, 94 (2020) (brackets, internal quotation marks, and citation omitted), *aff'd as modified*, 380 N.C. 539, 869 S.E.2d 624 (2022). The statute here unequivocally states that "*only a jury* may determine if an aggravating factor is present." N.C. Gen. Stat. § 20-179(a1)(2) (emphasis added). It is without question based on the previous version of the statute that the intent of this

modification was to take the decision of aggravating factors out of the judge's hands and place it solely with the jury, likely to provide defendants the protections articulated in *Blakely*. *See McQueen*, 181 N.C. App. at 422, 639 S.E.2d at 134.

Since the relevant federal cases provide the bare minimum, and all relevant state cases are distinguishable because they were decided prior to the modification of the statute where it is clear from the timing and language of the statute that the legislature intended to change the standards adopted by our courts, we hold aggravating factors must be decided by the jury or the case must be remanded for a new sentencing hearing. Accordingly, we vacate the trial court's judgment and remand for a new sentencing hearing.

C. Sentencing on the Reckless Driving Conviction

[3] Lastly, defendant argues, and the State concedes, that defendant is entitled to a new sentencing hearing on the reckless driving conviction. The relevant statute states, in pertinent part:

> Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B shall be as follows:
>
> (1) For misdemeanants sentenced to community punishment, not less than six nor more than 18 months.

N.C. Gen. Stat. § 15A-1343.2(d)(1) (2022). Thus, the trial court is required to make specific findings if they sentence a defendant to a community punishment for more than 18 months. *Id.*

Here, the court did not include any specific findings when it sentenced defendant to a suspended community punishment with supervised probation for 36 months. Accordingly, we must vacate the judgment and remand for a new sentencing hearing on defendant's reckless driving conviction. *See State v. Branch*, 194 N.C. App. 173, 178-79, 669 S.E.2d 18, 22 (2008) (remanding for resentencing since the trial court "made no findings as to why the probationary period imposed was in excess of the statutory framework laid out in section 15A-1343.2(d)(1)").

III. Conclusion

For the foregoing reasons, we vacate the judgments on the driving while impaired and reckless driving convictions, and remand for new sentencing hearings on these issues, but affirm in all other respects.

VACATED AND REMANDED IN PART; AFFIRMED IN PART.

Judge WOOD concurs.

Judge GORE dissents by separate opinion.

GORE, Judge, dissenting.

I respectfully dissent in part from the majority's holding to vacate and remand for a new sentencing hearing for the driving while impaired ("DWI") conviction. Accordingly, I review the facts of this case and the overwhelming evidence as one that questions whether the harmless error analysis is applicable since the 2006 amendment of N.C. Gen. Stat. § 20-179 (2006).

The majority accurately restates the chronology within Section II. B. as it relates to the amendment to Section 20-179 and the history of *Blakely v. Washington*. However, I disagree with their conclusion harmless error no longer applies. The question that escapes review is whether harmless error is still applicable in cases with overwhelming evidence that would allow a jury to find aggravating factors beyond a reasonable doubt.

The majority agrees with defendant that the codification of *Blakely* in Section 20-179(a1)(2) has the effect of reversible error and eliminates the consideration of harmless error review. In relying on this interpretation of the statute, the majority notes the language in *McQueen* in which we discussed it was notable the statutory procedure requiring "only a jury . . . determine if an aggravating factor is present in an offense" in Chapter 15A was inapplicable to DWI cases. N.C. Gen. Stat. § 15A-1340.16(a1) (2006); *McQueen*, 181 N.C. App. at 422, 639 S.E.2d at 134. Notably, the exact language used to codify *Blakely* in Chapter 15A, is also used in the amendment of Section 20-179(a1)(2). *Cf.* N.C. Gen. Stat. § 15A-1340.16(a1). The majority then states the timing of the amendment to section 20-179(a1)(2) occurring after both *Blackwell* and *McQueen*, indicates the legislature intended to increase the protections afforded to defendants through its plain language "only a jury" and in so doing remove this decision completely from the judge.

Yet in *Blackwell*, our Supreme Court addressed this similar time frame and this exact language after the legislature amended Chapter 15A to codify *Blakely*. In *Blackwell*, the defendant relied on dicta from *Recuenco* to argue the lack of a statutory procedural mechanism should limit harmless error review. *Blackwell*, 361 N.C. at 45–46, 638 S.E.2d at

456. In response to this argument, the Court recognized that despite the missing amendment at the time of defendant's trial, common law procedural mechanisms in the form of special verdicts were available in North Carolina courts and dispelled any argument to "transform otherwise harmless error into reversible error." *Id.* at 46–48, 638 S.E.2d at 456–57.

We also expounded on this concept in *McQueen*, when the defendant once again attempted to argue a lack of procedural mechanism since there was no language within section 20-179 at the time to require only a jury to determine the aggravating factors. *McQueen*, 181 N.C. App. at 422–23, 639 S.E.2d at 134–35. We determined in *McQueen*, though section 20-179 lacked the statutory procedural mechanism at the time, we could rely upon the "common law procedural mechanism" to then proceed to harmless error review. *Id.* at 423, 639 S.E.2d at 135.

While *Blackwell* and *McQueen* were cases decided prior to the amendment to section 20-179(a1)(2), they still provide a direction for this Court to apply the amended section 20-179(a1)(2) given the exact language was used to amend section 15A-1340.16(a1). I interpret the amendment as a provision to address the missing statutory procedural mechanism and eliminate the Court's reliance on a common law procedural mechanism. Accordingly, I believe the majority's reasoning interprets section 20-179(a1)(2) beyond what the legislature intended when it codified *Blakely*, as it previously had done in Chapter 15A. The trial court's failure to abide by this statutory mechanism leads to harmless error review, not reversible error.

Since section 20-179 now provides a statutory procedural mechanism to satisfy the suggested requirements under *Blakely*, *Recuenco*, and *Blackwell*, the harmless error standard should be applied because such error is not considered structural error when there is a procedural mechanism in place, whether common law or statutory. Under harmless error review, I review the record evidence of the present case to determine if it "was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Blackwell*, 362 N.C. at 49, 638 S.E.2d at 458 (quotation marks and citations omitted). The following evidence was presented: defendant's car crossed the center line multiple times, his car crossed the fog line multiple times, his car caused oncoming vehicles to swerve to avoid collision, he stopped at a green light, he slammed on his brakes to avoid collision with a school bus, his car collided with a construction barrel and he continued to drive, his car swerved and almost hit a construction worker who was directing traffic, he slammed on his brakes with each stop, and he drove at "erratic speeds."

Accordingly, the trial court's error was harmless beyond a reasonable doubt, since the evidence was "uncontroverted and overwhelming," thus, "[t]here can be no serious question that if the instant case were remanded to the trial court for a jury determination of the [especially reckless] aggravating factor presented, the [S]tate would offer identical evidence in support of that aggravator . . . ." *Id.* at 51, 638 S.E.2d at 459. Further, the existence of the especially reckless aggravating factor was enough to allow the trial judge to find a level three sentence, since there was no mitigating factor. *See* N.C. Gen. Stat. § 20-179(f)(1) (2021).

For the foregoing reasons, I would hold the error as harmless on the issue of sentencing for the DWI conviction. Thus, I respectfully dissent in part.

MARTIN B. STURDIVANT, Employee, Plaintiff
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Employer,
SELF-INSURED (CCMSI, Third-Party Administrator), Defendant

No. COA22-421

Filed 18 April 2023

1. Workers' Compensation—extended disability benefits— "total loss of wage-earning capacity"—definition—synonymous with "total disability"

In plaintiff's action for extended disability benefits after he had exhausted the statutory maximum of 500 weeks of temporary total disability benefits, the Industrial Commission erred in its interpretation of "total loss of wage-earning capacity" under N.C.G.S. § 97-29(c), which, based on the plain language of the statute and controlling caselaw, is synonymous with "total disability" under section 97-29(b)—such that an employee may be deemed totally disabled if he or she has the capability of performing some type of work but cannot find a job compatible with his or her limited capability after reasonable efforts, or that it would be futile to try to find such a job.

2. Workers' Compensation—extended disability benefits—burden of proof—no presumption from prior determination of total disability

In plaintiff's action for extended disability benefits after he had exhausted the statutory maximum of 500 weeks of temporary

total disability benefits, plaintiff was not entitled, when first applying for extended benefits, to the same presumption that applies to employees who have been granted an initial award of weekly disability benefits (whether partial or total) for continued benefits (unless and until certain disqualifying events occur). The plain language of N.C.G.S. § 97-29(c) provides that an employee seeking extended benefits "shall prove" he or she "has sustained a total loss of wage-earning capacity" in order to qualify and there was no indication that the legislature intended for employees seeking extended benefits to rely on a prior determination of total disability.

3. Workers' Compensation—extended disability benefits—burden of proof—total loss of wage-earning capacity

In plaintiff's action for extended disability benefits after he had exhausted the statutory maximum of 500 weeks of temporary total disability benefits—for a back injury which resulted in chronic pain and which limited plaintiff's work capability to sedentary positions—the Industrial Commission did not err in determining that plaintiff failed to meet his burden of showing that he had sustained a total loss of wage-earning capacity as required by N.C.G.S. § 97-29(c).

Chief Judge STROUD concurring in result only.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by Plaintiff from Decision and Order entered 28 February 2022 by Vice-Chair Myra L. Griffin for the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 2022.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson, for the Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General J.D. Prather, for the Defendant-Appellee.

Lennon Camak & Bertics, PLLC, by Michael W. Bertics, and The Harper Law Firm, PLLC, by Richard B. Harper and Joshua O. Harper, for Amicus Curae North Carolina Advocates for Justice.

Brewer Defense Group, by Joy H. Brewer and Ginny P. Lanier, and Wilson & Ratledge, PLLC by Frances M. Clement and Kristine

L. Prati, and Teague Campbell by Tracey L. Jones, Logan Shipman & Lindsay Underwood, for Amicus Curae North Carolina Association of Defense Attorneys, et al.

DILLON, Judge.

This appeal involves an issue of first impression, namely the proper interpretation of a subsection added to our Workers' Compensation Act ("Act") in 2011, codified in Section 97-29(c), which provides for "extended" benefits beyond the 500-week cap in benefits for a temporary, total disability provided in Section 97-29(b).

Here, Plaintiff Martin B. Sturdivant seeks extended disability benefits for a back injury he suffered in 2011, after exhausting the maximum 500 weeks of disability benefits allowable Section 97-29(b). After considering the evidence offered at the hearing before a Deputy Commissioner, the Full Commission denied Plaintiff's claim for extended benefits. Plaintiff appeals from that denial. We affirm.

I. Background

In 2006, Plaintiff suffered a compensatory back injury while working for a private company.

In 2007, after Plaintiff left the private company, Plaintiff began working as a corrections officer for Defendant Department of Public Safety. On 31 August 2011, Plaintiff experienced back pain while transporting an inmate. Plaintiff immediately sought disability benefits under the Act for his back issues.

In October 2013, the parties entered a Consent Order, which was approved by the Full Commission, whereby Defendant accepted compensability and agreed to begin paying temporary, total disability benefits pursuant to Section 97-29(b).

In 2020, after receiving temporary, total disability benefits for over 425 weeks, Plaintiff filed a Form 33, seeking to qualify for "extended benefits" pursuant to Section 97-29(c) beyond the maximum 500 weeks of benefits allowed under Section 97-29(b). Defendant responded by filing a Form 33R, alleging that Plaintiff could not carry his burden to show he was entitled to extended benefits.

In May 2021, after a hearing on the matter, a Deputy Commissioner entered an order denying Plaintiff's claim requesting an extension of benefits. Plaintiff appealed to the Full Commission. In February 2022, the Full Commission affirmed the Deputy Commissioner's order, making

its own findings and concluding Plaintiff failed to establish that he had suffered a total loss of wage-earning capacity. Plaintiff appeals this 2022 order of the Full Commission to our Court.

II. Analysis

Under the Act, an employee who suffers a compensable injury generally qualifies to receive "disability" benefits for the weeks he is not able to earn at least the same wage he was earning at the time he suffered his injury. As explained by our Supreme Court, in the context of workers' compensation, the term "disability" concerns "not the physical infirmity" suffered by the employee, but rather the employee's "diminished capacity to earn wages" resulting from the injury. *Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997). *See also Medlin v. Weaver*, 367 N.C. 414, 420, 760 S.E.2d 732, 736 (2014). Indeed, the term "disability" has long been defined under the Act as the "*incapacity* because of injury to *earn the wages* which the employee was receiving at the time of the injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2011) (emphasis added).

A disability is "total" during a particular week where the employee has no wage-earning capacity that week. However, an employee is considered only "partially" disabled if he has the ability to earn some wage that week, though less than what he was earning. In the present case, the 2013 Consent Order, approved by the Full Commission, deemed Plaintiff's injury to be total.

A total disability is considered "temporary" if the disability is not caused by an injury described in Section 97-29(d), which provides that "[a]n injured employee may qualify for permanent total disability only if the employee has one of the [physical limitations enumerated in that subsection] resulting from the injury[.]" Here, neither party contends that Plaintiff's back injury constituted a "permanent" injury under the Act. Accordingly, Plaintiff's back injury resulted in a temporary, total disability.

In any event, until 1973, an employee suffering a temporary, total disability was entitled to receive benefits under Section 97-29 for a maximum of 400 weeks. *Whitley v. Columbia*, 318 N.C. 89, 98, 348 S.E.2d 336, 341 (1986). However, in 1973, the General Assembly removed this 400-week cap, such that an employee could receive benefits indefinitely while he remained totally disabled. *Id.*

But in 2011, our General Assembly reinstated a cap on eligibility for temporary, total disability benefits of 500 weeks "unless the employee qualifies for extended compensation under subsection (c)[.]" N.C. Gen. Stat. § 97-29(b). An employee qualifies for extended temporary, total

disability benefits, beyond the 500-week cap, if "pursuant to the provisions of G.S. 97-84, . . . the employee shall prove by a preponderance of the evidence that the employee has sustained a *total loss of wage-earning capacity.*" N.C. Gen. Stat. § 97-29(c) (emphasis added).

Under the 2011 amendment, benefits for a *partial* disability have also been capped at 500 weeks. However, no provision was included to allow for extended benefits for a partial disability beyond 500 weeks. N.C. Gen. Stat. § 97-30.

Here, Plaintiff appeals the Full Commission's denial of his application for extended benefits under Section 97-29(c) for his 2011 back injury. He argues that the Commission misconstrued the meaning of Section 97-29(c).

A. Meaning of "total loss of wage-earning capacity"

[1] To qualify for total disability benefits for up to 500 weeks under Section 97-29(b), an employee must prove that he has suffered a "total disability." To qualify for *extended* benefits under Section 97-29(c) for a total disability (beyond the 500 weeks allowed under Section 97-29(b)), an employee must prove that he has suffered the "total loss of wage-earning capacity". For the reasoning below, we conclude that an employee's burden of showing a "total loss of wage-earning capacity" for extended benefits under Section 97-29(c) is different from his burden of showing a "total disability" under Section 97-29(b) for the initial 500 weeks.

Our Supreme Court has described that "total disability" is present where an employee's "capacity to earn [has been] totally obliterated" by a compensable injury. *Gupton v. Builders Transport*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987). Even if an employee has the capability to perform *some* type of work, he may still be deemed "totally disabled" *if* he shows that he cannot find a job compatible with his limited capability after reasonable efforts or that it would be futile for him to try. Specifically, our Supreme Court has held that an employee can meet his burden of showing a total disability "through any of the four methods articulated in [our Court's decision in] *Russell*," which includes situations where an employee has the ability to perform some work, but is otherwise unhirable. *Medlin*, 367 N.C. at 422, 760 S.E.2d at 737. The *Russell* opinion – *Russell v. Lowes*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) – is discussed below in Section C of this opinion.

Here, the Commission concluded that an employee who has some work capabilities but cannot find a compatible job, though "totally disabled," has not suffered a "total loss of wage-earning capacity" to qualify

for extended benefits under Section 97-29(c). Defendant agrees with the Commission's conclusion.

Plaintiff, though, contends the Commission erred. We agree. We are persuaded by Supreme Court opinions from *both prior to and after* the 2011 amendment where that Court uses the phrase "loss of wage-earning capacity" synonymously with "disability." *See, e.g.*, *Wilkes v. City of Greenville*, 369 N.C. 730, 745, 799 S.E.2d 838, 849 (2017); *Harrell v. Harriet*, 314 N.C. 566, 575, 336 S.E.2d 47, 53 (1985). It reasonably follows that "*total* disability" (under Section 97-29(b)) and "*total* loss of wage-earning capacity" (under Section 97-29(c)) are synonymous.

More importantly, our General Assembly expressly defines "disability" in the Act as the "incapacity . . . to earn wages[.]" N.C. Gen. Stat. § 97-2(9). Applying the plain language of this statutory definition, it reasonably follows that "*total* disability" means "*total* incapacity to earn wages." The phrase "total incapacity to earn wages" conveys the same idea as the phrase "total loss of wage-earning capacity."

B. Plaintiff's burden of proof for extended benefits under Section 97-29(c)

[2] An employee seeking temporary, total disability benefits has the burden to show his disability *for each week* he seeks benefits. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005) (holding that the burden is on the employee to prove "the existence of [his] disability and its extent"). However, in 1971, our Supreme Court held that an initial award by the Commission of weekly disability benefits (whether partial or total) creates a presumption in favor of the employee. This presumption, known as the *Watkins* presumption, states that the disability continues each week until "the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watkins v. Central Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971). That is, until an employee who has been awarded total disability benefits under Section 97-29(b) returns to work, it is *presumed* that (1) he has no wage-earning capacity *and* (2) his compensable injury continues to be the cause of his incapacity to earn a wage.

Of course, the *Watkins* presumption is just that, a rebuttable presumption. *Stone v. G&G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997). Therefore, an employee who has been awarded benefits for a total disability continues to qualify for benefits in subsequent weeks without needing to offer evidence of his continued disability "unless and until the employer . . . comes forward with evidence to show, not only suitable jobs are available, but also that the plaintiff is capable of getting

one, taking into account both physical and vocational limitations." *Saums*, 346 N.C. at 763, 487 S.E.2d at 749.

Our Supreme Court has never determined whether this *Watkins* presumption, available for continued benefits under Section 97-29(b), applies beyond the 500-week cap. Based on the language of Section 97-29, we conclude an employee who seeks *extended* benefits under Section 97-29(c) is not entitled to a presumption that he has suffered a total loss of wage-earning capacity merely because it was previously determined that he had suffered a disability under Section 97-29(b). Section 97-29(c) plainly states that to qualify for extended benefits, the employee "shall prove" that he "has sustained a total loss of wage-earning capacity." There is no indication that our General Assembly intended an injured employee to rely on a prior determination of total disability beyond the 500-week cap.[1]

C. Plaintiff has failed to meet his burden

[3] As explained above, Plaintiff is correct that the Commission erred by concluding that his burden to show a "total loss of wage-earning capacity" under Section 97-29(c) for extended benefits is higher than was his burden to show "total disability" to qualify for the initial 500 weeks of benefits. However, in other parts of its order, the Commission seems to apply the correct analysis and does make findings of fact which support its ultimate decision based on our interpretation of Section 97-29(c). We, therefore, need not remand to correct any erroneous conclusions of law, as the "Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

In *Russell*, our Court held that an employee meets his burden of showing a disability, that is a loss of wage-earning capacity, in one of four ways:

> (1) by showing he is incapable of performing any work;
>
> (2) by showing that he is capable of work *but that* "after a reasonable effort on his part, been unsuccessful" in finding employment;
>
> (3) by showing that he is capable of work *but that* "it would be futile" to seek other employment "because of

1. This is not to say that an employee is not entitled to a presumption for *continued* extended benefits once he shows that he qualifies for *extended* benefits. Indeed, Section 97-29(c) suggests that once an employee meets his initial burden of showing he is entitled to extended benefits, the burden then shifts to the employer to prove "by a preponderance of the evidence that the employee no longer has a total loss of wage-earning capacity" for the extended benefits to cease.

preexisting conditions; i.e., age, inexperience, lack of education";

(4) by showing he has obtained employment, but at a lower wage than he was earning before the accident.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457. Only the first three ways are relevant here, as the fourth concerns *partial* loss wage-earning capacity.

In its order, the Commission made findings as to the three ways Plaintiff could have proved a total loss of wage-earning capacity. The Commission weighed the evidence and found that (1) "Plaintiff has some transferable skills from his several decades of prior employment in various fields"; (2) there were jobs in Plaintiff's home county that were compatible with his skill; and (3) "[c]onsidering Plaintiff's work history [and] his educational level," he "would be able to obtain some employment, at a minimum, part-time work in a sedentary position." The Commission determined Plaintiff had not met his burden, in part, based on its determination that Plaintiff failed to show a loss of wage-earning capacity in the ways described in *Russell*:

> Here, the Full Commission concludes that Plaintiff has failed to meet his burden to establish by a preponderance of the evidence that he has experienced a total loss of wage-earning capacity. . . . [C]onsidering all the circumstances related to Plaintiff's wage-earning capacity, the Full Commission notes that Plaintiff is not medically restricted from all work, Plaintiff is a high school graduate with some community college experience; Plaintiff has some transferable skills; and there are sedentary positions within Plaintiff's self-reported restrictions in nearby counties.
>
> With respect to Plaintiff's assertion that he is unable to work in any capacity due to his chronic pain related to his compensable injury, [expert witnesses] all testified that at least some of their patients with conditions similar to Plaintiff's condition have been able to return to work; and Plaintiff's most severe pain occurs only approximately once per week, tending to show that he retains some wage-earning capacity on days where his pain is less severe. Despite Plaintiff's work restrictions and reports of chronic pain, in light of the remaining factors noted previously, the Full Commission concludes that Plaintiff has the capacity to earn wages.

As to the first *Russell* way of proof, the Commission assigned greater weight to Defendant's evidence and found that Plaintiff could perform some work. As to the second *Russell* way of proof, Plaintiff does not point us to any evidence that he made any effort to find a job. Further, the Commission found that it appeared at least two employers who indicated that they had employment for which it "appeared [they could make] accommodat[ion]" for Plaintiff's specific limitations. The Commission considered the third *Russell* way of proof by considering Plaintiff's specific situation, *e.g.*, his experience ("transferable skills"), his education ("high school with some community college experience"), his physical limitations ("chronic back pain"), etc., and essentially found that it would not be futile for Plaintiff to seek work.

The Commission's findings are supported by evidence in the record from the hearing before the Deputy Commissioner, including the testimonies of Defendant's medical and vocational experts.

Plaintiff, though, argues the Commission erred in relying on the testimony of Defendant's vocational expert by failing to determine whether the testimony was admissible under Rule 702 of our Rules of Evidence. However, as found by the Commission in its order, Plaintiff did not object to the testimony at that hearing before the Deputy Commissioner. Accordingly, even if the testimony of Defendant's vocational expert was incompetent under our Rules of Evidence, we conclude it would not have been reversible error for the Full Commissioner, as the fact-finder, to consider said testimony and to assign whatever weight to it the Commission deemed appropriate. Indeed, our Supreme Court has held that any objections to evidence in a worker's compensation case must be made when first offered in the hearing before the Deputy Commissioner. *Maley v. Thomasville*, 214 N.C. 589, 593, 200 S.E.2d 438, 441 (1939) (wherein our Supreme Court stated that "a subsequent formal objection to the evidence filed before the Full Commission, accompanied by a motion to strike, comes too late."). And "where testimony sufficient to establish a fact at issue has been received in evidence without objection, a nonsuit cannot be sustained even if the only evidence tending to establish the disputed fact is incompetent." *Reeves v. Hill*, 272 N.C. 352, 362, 158 S.E.2d 529, 537 (1968). Of course, the Commission was not required to consider the testimony of Defendant's experts offered before the Deputy Commissioner; however, it was not error for the Commission to do so, as Plaintiff failed to object to it when initially offered.

Plaintiff further argues that the Commission erred in "relying on evidence that Plaintiff is not medically restricted from all work," contending that the Commission's order "implies that Plaintiff would need

to be medically restricted from all work in order to meet the standard of 'total loss of wage-earning capacity'." As stated above, Plaintiff could still qualify for extended benefits, even if he was not medically restricted from all work, *if* there were no available jobs for him. However, the Commission did not rely solely on this finding in making its decision. The Commission also found that there were suitable jobs in the market based on the testimony of Defendant's vocational expert. And Plaintiff otherwise failed to meet his burden to offer evidence that he made reasonable efforts to find a job suitable to the capabilities the Commission found him to have.

In sum, based on the findings of the Commission supported by the evidence in the record, we conclude that Plaintiff failed to meet his burden of showing that he qualifies for extended benefits under Section 97-29(c).

III. Conclusion

Section 97-29(c) states that an employee receiving total disability benefits under Section 97-29(b) may qualify for "extended benefits" if he proves he "has sustained a total loss of wage-earning capacity." N.C. Gen. Stat. § 97-29(c). We agree with Plaintiff that his burden of showing a "total loss of wage-earning capacity" under Section 97-29(c) is the same as his burden of showing a "total disability" to receive benefits under Section 97-29(b). For instance, one who can perform some work may still qualify for extended benefits if no one would hire him.

However, we agree with Defendant that Plaintiff, when seeking extended benefits under Section 97-29(c), is not entitled to a presumption that he continues to suffer from a total loss of wage-earning capacity based on a prior determination that he was totally disabled under Section 97-29(b).

Accordingly, we conclude the Commission's findings support its denial of extended benefits based on our conclusions regarding the proper interpretation of Section 97-29(c). Although Plaintiff offered evidence that he cannot work, the Commissioner did not err in finding that Plaintiff has the ability to perform some work based on conflicting evidence offered by Defendant. Further, Plaintiff did not meet his burden of presenting evidence that he had searched for jobs or that it would have been futile for him to do so.

Ultimately, Plaintiff had the burden of showing "total loss of wage-earning capacity", and the Commission did not err in finding that Plaintiff failed to meet his burden of showing he qualifies for extended

benefits under Section 97-29(c). Therefore, we affirm the Commission's order denying Plaintiff extended benefits.

AFFIRMED.

Chief Judge STROUD concurs in result only.

Judge HAMPSON concurs in part and dissents in part by separate opinion.

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

I am in full agreement with Part II, Subpart A of the Opinion of the Court that the Full Commission erred in the standard it applied to determine whether Plaintiff had suffered a total loss of wage-earning capacity for purposes of determining whether Plaintiff was entitled to receive extended temporary total disability benefits under N.C. Gen. Stat. § 97-29(c). I also agree with Part II, Subpart B of the Opinion of the Court that in meeting his burden of proof to qualify for extended benefits, Plaintiff is not entitled to the *Watkins* presumption of continuing temporary total disability.

Rather, my dissenting view is limited to Part II, Subpart C of the Opinion of the Court and more so on the appropriate mandate of this Court. In my view, the appropriate disposition is to vacate the Opinion and Award of the Full Commission and remand this matter to the Full Commission to allow the Commission—as the sole judge of the credibility of the evidence—to undertake any further proceedings it deems necessary and to make findings of fact and conclusions of law applying the correct standard based on the evidence before it. This is so because while I agree there are findings of fact which generally address Plaintiff's overall reported sedentary limitations and the fact there may potentially be positions which may or "appear" to accommodate sedentary restrictions, the Commission's Findings do not address the more individualized analysis necessary to determine whether Plaintiff had the capacity to be hired in any of these potential positions in light of his limitations.

Here, the Commission determined Plaintiff has some ability to do some work to earn some wage. But the analysis does not end there. Indeed, it is axiomatic " 'if other pre-existing conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be

compensated for the incapacity which he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience or who is younger or in better health[.]' " *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982) (quoting *Little v. Food Service*, 295 N.C. 527, 532, 246 S.E.2d 743, 746 (1978)). "A plaintiff must adduce, in cases where he is physically able to work, evidence that he is unsuited for employment due to characteristics peculiar to him." *Id.* (citation omitted). For example:

> In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment. An unsuccessful attempt to obtain employment is, certainly, evidence of disability. Where, however, an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.

Peoples v. Cone Mills Corp., 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986).

For instance, here, the Commission found Plaintiff could potentially "be able to find some employment, at a minimum, part-time work in a sedentary position." There is, however, no finding that such jobs are available or that Plaintiff would be otherwise qualified or hireable in those positions. Indeed, Defendant's vocational expert did not even review part-time jobs—merely assuming they might be available—instead focusing on full-time sedentary jobs up to 50 miles away from Plaintiff's home and outside his home county of Anson, including specifically identifying only two possible full-time jobs in Mecklenburg and Union Counties that "appear" to be able to accommodate the types of restrictions reported by Plaintiff. As such, on the existing findings of fact, there is no indication of any part-time sedentary work available to Plaintiff.

Moreover, while it is true there is evidence that Plaintiff may have the ability to work in some employment, there is also evidence Plaintiff may nevertheless be unable to obtain such employment. *Hilliard*, 305 N.C. at 596, 290 S.E.2d at 684. For example, the Commission did not grapple with the question of whether Plaintiff would be able to travel to or work in jobs up to 50 miles away considering Plaintiff's alleged limitation on being able to sit or stand for no more than 10 minutes at a time. Nor did the Commission take on the individual question of whether Plaintiff's chronic back pain flare-ups would impact his ability to perform the proffered jobs such that he could meet job requirements and availability.

For that matter, the Commission made no consideration of the length of Plaintiff's absence from the workforce, or the lack of any vocational rehabilitation provided by Defendant over the intervening years. Indeed, the Commission did not even make a definitive finding Plaintiff was, in fact, subject to sedentary restrictions. In short, there are still factual questions—and likely others not identified here—to be resolved by the Commission before determining whether Plaintiff is or is not entitled to extended temporary total disability benefits. This is so because the Commission was focused on the question of whether Plaintiff could perform some type of work—including theoretical part-time sedentary work on any given theoretical day—and not whether Plaintiff would, in fact, be suited to any of that employment based on factors peculiar to him.

Thus, in my view, the Commission did not make specific findings of fact as to "the crucial questions necessary to support a conclusion" as to whether Plaintiff remains totally disabled so as to qualify for extended benefits. *Id.* "This Court is therefore unable to determine whether adequate basis exists, either in fact or law," for the Commission's denial of extended benefits. *Id.* at 596-97, 290 S.E.2d at 684. Consequently, in my view, the proper result is to vacate the Opinion and Award of the Industrial Commission and remand this matter to the Full Commission for any further proceedings it deems necessary and a new Opinion and Award applying the proper legal standard and making supporting findings of fact. *Id.*

CHRISTOPHER B. VENTERS, Plaintiff
v.
PHILLIP RUSSELL LANIER, Defendant

No. COA22-854

Filed 18 April 2023

Appeal and Error—notice of appeal—defective—jurisdiction remained with trial court—refusal to rule on motions

In an action for alienation of affections and criminal conversation, where defendant's purported pro se notice of appeal from the trial court's summary judgment order was defective and did not confer jurisdiction on the Court of Appeals, jurisdiction remained with the trial court; therefore, the trial court erred in declining to rule on defendant's motions to amend his admissions and to reconsider summary judgment.

Appeal by defendant from orders entered 13 September 2021 and 4 May 2022 by Judge Keith Gregory in Wake County Superior Court. Heard in the Court of Appeals 7 March 2023.

Buckmiller, Boyette & Frost, PLLC, by Matthew W. Buckmiller, for plaintiff-appellee.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for defendant-appellant.

ARROWOOD, Judge.

Phillip Russell Lanier ("defendant") appeals from an order granting Christopher B. Venters's ("plaintiff") motion for summary judgment and from the trial court's order refusing to rule on his motions to amend and to reconsider. On appeal, defendant argues the trial court erred in granting plaintiff's motion for summary judgment and in declining to rule on defendant's motions to amend his admission and for reconsideration of summary judgment. In response, plaintiff has filed a motion to dismiss defendant's appeal "only as to the summary judgment order due to numerous violations of the appellate rules." For the following reasons, we remand the matter to the trial court that abstained from ruling on defendant's motion to amend his responses to the requests for admission and his Rule 56 and 60 motions with respect to reconsider summary judgment.

I. Background

Plaintiff filed the initial complaint against defendant on 25 January 2021, asserting claims of alienation of affection and criminal conversation. On 12 April 2021, defendant, acting *pro se*, responded to the complaint answering only four of the allegations. On 28 June 2021, defendant filed another answer to the complaint, this time addressing all of the allegations. On 7 May 2021, defendant was served with plaintiff's first set of interrogatories, requests for production of documents, and first set of requests for admissions. In pertinent part, the requests for admissions stated:

> 50. Admit or deny that Plaintiff is entitled to recover from you compensatory damages in excess of $500,000.00.
>
> 51. Admit or deny that Plaintiff is entitled to recover from you punitive damages in excess of $500,000.00.

Defendant replied to the request for admissions on 1 July 2021, which was twenty-five days late. In his untimely response to the request for admissions, defendant admitted to having an affair with plaintiff's ex-wife, but denied that plaintiff was entitled to recover compensatory or punitive damages from him. On 9 July 2021, plaintiff filed a motion for summary judgment, arguing that defendant was untimely in his response to the admissions and plaintiff was entitled to summary judgment as the issues were deemed admitted.

The matter came on for hearing on plaintiff's motion in Wake County Superior Court on 13 September 2021, Judge Gregory presiding. At the hearing, plaintiff's counsel argued that because defendant failed to respond within thirty days of being served with the request for admissions, those facts were admitted under Rule 36A and plaintiff was therefore entitled to summary judgment. Plaintiff offered no evidence other than the late response to the request for admissions to support a judgment. Defendant, still acting *pro se*, admitted that he was late in answering the request for admissions, and stated he could not afford an attorney and although he requested an extension for filing his answers, plaintiff's counsel declined to provide one.

The trial court initially expressed concern about granting plaintiff's motion for summary judgment, stating it was "not required to grant the motion[,]" as defendant did not seem to be intentionally doing "anything to usurp or obstruct the process[,]" and plaintiff was not prejudiced by defendant's late response. However, plaintiff's counsel advised the trial court that defendant had deeded real property, "right after this lawsuit was filed" to his parents and plaintiff's ex-wife, insinuating

defendant was attempting to safeguard the property from the lawsuit. Defendant admitted he did deed the property to others. "[B]ased on that representation," the trial court granted plaintiff's motion for summary judgment in open court and in an order filed 13 September 2021, finding plaintiff was entitled to a judgment of $1,000,000.00. Defendant filed a *pro se* paper writing labeled "Notice of Appeal" on 13 October 2021.

On 17 November 2021, plaintiff filed another complaint against defendant, defendant's parents, and plaintiff's ex-wife regarding the transfer of real property. Thereafter, defendant hired an attorney who filed a motion to amend defendant's answers to plaintiff's request for admissions and a Rule 56 and 60 motion for reconsideration of summary judgment. These matters came on for hearing in Wake County Superior Court on 27 April 2022, Judge Gregory presiding.

At this hearing, defendant's counsel requested the trial court set aside summary judgment as to damages only under Rule 60(b)(1), (b)(5), and (b)(6). However, plaintiff's counsel argued defendant's claim under Rule 60(b) had no merit, and even if it had, the trial court did not have "discretion to grant the motion" since defendant filed a notice of appeal, depriving the trial court of jurisdiction. When plaintiff's counsel presented the defective notice of appeal, defendant's attorney said it was the first time he had seen that "but [he] didn't think" it was "a notice of appeal," and confirmed that there was no "appeal that's been filed or docketed with the Court of Appeals."

Following the hearing, in open court and in an order entered 4 May 2022, the trial court found it did "not have jurisdiction to hear" defendant's motions to reconsider summary judgment and to amend defendant's admissions since defendant had filed a notice of appeal to this Court. Therefore, the trial court abstained from ruling on the motions. Defendant appealed.

II. Discussion

On appeal, defendant raises two issues: (1) the trial court erred in granting plaintiff's motion for summary judgment for $1,000,000.00 in damages; and (2) the trial court should have ruled upon defendant's motion to amend his admissions and reconsider summary judgment. Plaintiff has filed a motion to dismiss defendant's appeal "only as to the summary judgment order due to numerous violations of the appellate rules." For the following reasons, we dismiss the purported appeal from the order granting summary judgment, vacate the trial court's order declining to rule on defendant's motions, and remand to the trial court to consider the motions.

Defendant's purported *pro se* notice of appeal was defective and did not confer jurisdiction on this Court. "In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure and failure to follow the requirements thereof requires dismissal of an appeal." *In re R.A.F.*, 284 N.C. App. 637, 642, 877 S.E.2d 84, 89 (2022) (citations and internal quotation marks omitted). "Any party entitled by law to appeal from a judgment or order . . . 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[.]" N.C. R. App. P. 3(a) (2022). The notice must "specify the party . . . 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 . . ., or by any such party not represented by counsel of record." N.C. R. App. P. 3(d). "A party must comply with the requirements of Rule 3 to confer jurisdiction on an appellate court. Thus, failure to comply with Rule 3 is a jurisdictional default that prevents this Court 'from acting in any manner other than to dismiss the appeal.' " *In re Moore*, 234 N.C. App. 37, 40, 758 S.E.2d 33, 36 (citations omitted), *disc. review denied*, 367 N.C. 527, 762 S.E.2d 202 (Mem) (2014).

Here, defendant's purported notice of appeal lacked any information other than a heading that would designate it as an attempted appeal. The first page of the document contained a caption with the words "Notice of Appeal" with the remainder of the page blank. The second page consisted of two paragraphs that argues why plaintiff had not been damaged and contained the *pro se* defendant's signature. It did not comply with any of the requirements of Rule 3 other than containing a signature. It is apparent from a cursory review of the paper writing that it was not a proper Notice of Appeal and was not sufficient to deprive the trial court of jurisdiction or to convey jurisdiction to this Court. *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) (" 'Without proper notice of appeal, this Court acquires no jurisdiction.' ") (citation omitted); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364 (2008) ("[A] default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court.") (citation omitted); *State v. Kirkman*, 251 N.C. App. 274, 283, 795 S.E.2d 379, 385 (2016) (finding that because the defendant's "notice of appeal was defective, . . . jurisdiction was not with this Court, but rather still with the trial court[,]" but still assessing the merits of the claim since the defendant acknowledged this error and filed a petition for *writ of certiorari*) (citing *State v. Miller*, 205 N.C. App. 724,

696 S.E.2d 542 (2010)), *disc. review denied*, 369 N.C. 523, 797 S.E.2d 299 (Mem) (2017).

In view of the fact that the appeal was clearly insufficient to satisfy the Rules of Appellate Procedure, jurisdiction remained with the trial court to rule on all the motions filed by defendant. Accordingly, the trial court erred in declining to rule on the motions. The order abstaining from ruling on all the motions must be vacated and this matter remanded to Judge Gregory.

III. Conclusion

For the foregoing reasons, we dismiss the purported appeal from the initial summary judgment order for lack of jurisdiction, vacate the order in which the trial court abstained from ruling on defendant's pending motions, and remand for the trial judge to consider defendant's motions.

DISMISSED IN PART, VACATED AND REMANDED IN PART.

Judges MURPHY and RIGGS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS
(Filed 18 April 2023)

Case	County	Disposition
FOSTER v. FOSTER No. 22-786	Currituck (19CVD237)	Affirmed
HAGER v. BUCHANAN No. 22-617	Lincoln (16CVD619)	Affirmed
IN RE A.S. No. 22-301	Mecklenburg (20JT44)	Affirmed
IN RE B.M. No. 22-302	Union (20JT4)	Affirmed
IN RE I.W. No. 22-540	Cleveland (20JT29)	Affirmed
IN RE J.B. No. 22-304	Surry (21JT84)	Vacated and Remanded
IN RE J.G. No. 22-467	Wilson (21JA76) (22CVD403)	Affirmed
IN RE L.M. No. 22-608	Gaston (17JT219) (17JT220)	Affirmed
IN RE M.B.E. No. 22-587	Caldwell (20JA102)	Affirmed
IN RE M.S. No. 22-401	Robeson (17JA84-86) (18JA15)	Affirmed in Part; Remanded in Part.
IN RE N.P. No. 22-350	Cumberland (17JA161-162) (21JA39)	Vacated and Remanded
IN RE P.C. No. 22-229	Martin (18JT29)	Affirmed.
IN RE S.G. No. 22-506	Durham (19JT216) (19JT4) (19JT5)	Affirmed

IN RE S.G. No. 22-371	Onslow (20JA185) (20JA186)	Affirmed
IN RE T.P. No. 22-652	Union (19JT51) (19JT52) (19JT53) (19JT55)	Affirmed
KCK RES., INC. v. SCHWARZ PROPS., L.L.C. No. 22-564	Davidson (18CVS1473)	Affirmed
STATE v. BRACEY No. 21-643	New Hanover (13CRS3278) (13CRS50987) (13CRS8301)	Affirmed
STATE v. BROWN No. 22-892	Wake (19CRS200245)	Dismissed
STATE v. BRYANT No. 22-626	Onslow (17CRS50321-22)	No Error in Part, Remanded for Resentencing in Part
STATE v. COLLINS No. 22-771	Nash (19CRS50078)	No Error
STATE v. EDWARDS No. 22-706	Iredell (19CRS55365) (20CRS1219)	No Error
STATE v. FOLSOM No. 22-731	Iredell (19CRS53058)	Affirmed
STATE v. HARRIS No. 22-566	Richmond (18CRS51541) (19CRS1062)	No Error
STATE v. POOLE No. 22-836	Lincoln (20CRS52212-13)	No Error
STATE v. RICHARDSON No. 22-797	Forsyth (18CRS56536) (18CRS720562)	No Error
STATE v. SIMMONS No. 22-642	Columbus (18CRS52462-63)	No Error

STATE v. WINGATE No. 22-641	Caswell (19CRS50631)	No Error

ROBERT BREWER, Employee, Plaintiff
v.
RENT-A-CENTER, Employer, TRAVELERS INSURANCE CO.
(SEDGWICK CLAIMS SERVICES, Third-Party Administrators), Carrier, Defendants

No. COA22-296

Filed 2 May 2023

Workers' Compensation—Parsons presumption—compensable spine injuries—rebuttal testimony merely speculative

The Industrial Commission (IC) did not err by ordering defendants (plaintiff's employer and its insurance carrier) to continue to pay plaintiff's medical expenses related to his cervical and lumbar spine conditions from a fall at work over a decade earlier where defendants failed to produce competent evidence to overcome the *Parsons* presumption (that continued medical treatment is directly related to the original, compensable injury). Testimony by defendants' two medical experts, neither of whom examined or treated plaintiff, that none of plaintiff's injuries were related to his fall at work was based on conjecture and directly contradicted the prior admission of defendants and award of the IC establishing the initial compensability of plaintiff's injuries. Finally, the IC's determination that plaintiff's experts were more credible than defendants' was well within its discretion.

Judge DILLON concurring by separate opinion.

Judge GRIFFIN joins in this separate concurring opinion.

Appeal by Defendants from an Opinion and Award entered 9 November 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 October 2022.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Neil P. Andrews, Linda Stephens, and Brennan Cumalander, for Defendant-Appellants.

Cardinal Law Partners, by Kristin P. Henriksen, for Plaintiff-Appellee.

WOOD, Judge.

This appeal is from an Opinion and Award of the Industrial Commission concluding that Defendants must continue to pay for a former employee's medical expenses related to a compensable injury. At issue is whether the Defendants produced competent evidence sufficient to rebut the *Parsons* presumption, which shifts from an employee to an employer the burden of proof for causation of an injury. After careful review, we affirm the Opinion and Award of the Industrial Commission.

I. Background

On 1 July 2010, Robert Brewer ("Plaintiff") fell from a stack of furniture boxes while working at Rent-A-Center. He injured, among other body parts, his neck, back, spleen, and kidneys. As a store manager for Rent-A-Center, Plaintiff was inventorying items in the company's stockroom when he fell.

Rent-A-Center filed an Industrial Commission Form 63 on 23 July 2010, listing injuries to Plaintiff's neck, back, spleen, sternum, and kidneys. Through this form, Rent-A-Center agreed to pay for Plaintiff's initial treatment, subject to contest within a prescribed period. Rent-A-Center never contested payment for the initial or continued treatment.

Over the next decade, Plaintiff visited a host of medical professionals to treat his neck and back pain. Beginning with an initial emergency room visit to Frye Regional Medical Center on the day of his fall, Plaintiff followed up with his primary care physician Dr. W. Lee Young within a week. Tests did not show that Plaintiff had fractured anything in his back, but his doctor prescribed medication to ease his pain. On 22 October 2010, Plaintiff began orthopedic treatment with Dr. Russell Gilchrist, a physiatrist, who ordered an MRI. The MRI "revealed moderate degenerative changes at C5-6, resulting in moderate canal stenosis and some flattening of the spinal cord, as well as mild flattening of the spinal cord at C4-5 and C6-7." It also showed "mild multilevel degenerative lumbar spondylosis without significant central canal or neural foraminal stenosis at any level." Plaintiff received a "cervical spine epidural injection" from Dr. Gilchrist without experiencing much relief from his symptoms. Subsequently, Dr. Gilchrist referred Plaintiff to a neurologist and recommended a functional capacity evaluation, but his primary care physician was unable to provide medical clearance for the evaluation due to Plaintiff's prior history of stroke.

On 3 November 2011, Plaintiff sought a second opinion from Dr. John Welshofer, a pain management physician, who ordered more MRIs of Plaintiff's cervical, thoracic, and lumbar spine. These MRIs revealed mild degenerative disc disease, several bulging discs, a herniated disc,

and stenosis, among other findings. During 2012, Dr. Gilchrist continued to treat Plaintiff with pain medications.

On 27 August 2012, Plaintiff underwent an evaluation with Dr. David Jones, an expert, board-certified neurosurgeon. Dr. Jones found Plaintiff's cervical spine MRI to be "fairly impressive" but also believed Plaintiff to be "overly dramatic" and hesitated to recommend further treatments because he was unable to "figure out at this point why [Plaintiff] moves the way he does." He reported he would be willing to see Plaintiff again after repeat diagnostic studies and a psychological evaluation. Several months later, another MRI showed worsening disc hemorrhaging. On 2 July 2013, Dr. Jones reevaluated Plaintiff and his updated cervical spine MRI. Dr. Jones found Plaintiff to be "less dramatic" and more reasonable and recommended Plaintiff undergo anterior cervical discectomy and fusion ("ACDF") surgery. However, Dr. Gilchrist recommended diagnostic testing before having the recommended surgery. Plaintiff then received a radiofrequency ablation procedure on 19 December 2013 and sacroiliac joint injections while continuing his pain medication regimen.

On 10 January 2014, Plaintiff consulted with Dr. Ralph Maxy, an orthopedic surgeon who specializes in spine surgery and practices, for a second opinion on the necessity of an ACDF surgery. Dr. Maxy agreed with the recommendation for surgery and performed the surgery on 27 January 2014. Plaintiff was prescribed pain medication and limited to light duty or no duty. After the surgery, another lumbar spine MRI was performed on 30 April 2014 and revealed minimal degenerative changes and was essentially unchanged from Plaintiff's 2010 lumbar spine MRI. Dr. Maxy released Plaintiff at a maximum medical improvement for his cervical spine and assigned a ten-percent permanent partial impairment rating on 16 May 2014. Although he assigned a zero-percent rating for Plaintiff's lumbar spine, he noted Plaintiff would require long-term pain management to wean off his medications over time. Dr. Maxy assigned permanent restrictions of "no lifting more than five pounds, avoidance of repetitive bending, twisting, or stooping, and standing or sitting as tolerated."

On 30 July 2014, Dr. Mark Tiffany, a pain management specialist, took over Plaintiff's care from Dr. Maxy and began treating Plaintiff "with opioids, muscle relaxers, and sleep aids, as well as injections and neuropathic cream." However, Plaintiff struggled with constipation and diarrhea that Dr. Tiffany attributed to the medications. During the course of treatment, Dr. Tiffany also diagnosed Plaintiff with fibromyalgia and found that Plaintiff's "work injury was a significant contributing factor in the development of the condition." Dr. Tiffany continued to treat

Plaintiff through 2018. In 2019, Dr. Troy Gingerich, a board-certified pain management specialist and expert in interventional pain medication, took over Plaintiff's treatment because Dr. Tiffany had moved to a different practice.

Dr. Gingerich continued to treat Plaintiff's condition with injections and pain medication and ordered a cervical spine CT scan. The CT scan was conducted on 3 July 2019 and did not reveal any new problems. Thereafter, Dr. Gingerich recommended Plaintiff undergo a spinal cord stimulator trial for his lumbar spine and lower extremity pain in the hope that it would treat Plaintiff's pain and eventually allow him to reduce his pain medication. Consistent with its agreement, Rent-A-Center continued to pay for all of Plaintiff's treatments. However, in 2019, Rent-A-Center filed an Industrial Commission Form 33 requesting a hearing to review "the necessity of Plaintiff's current prescription medication regimen" and a "determination to stop indemnity benefits" for Plaintiff's treatment.

The case was initially heard on 9 December 2020 before Deputy Commissioner Mary Claire Brown. Rent-A-Center and their insurance provider Travelers Insurance Company (together "Defendants") presented the testimony of several doctors they had retained who had reviewed Plaintiff's incident and medical history.

The Deputy Commissioner ordered Defendants to authorize medical treatment for Plaintiff's cervical pain and to continue paying weekly, temporary, and total disability benefits to Plaintiff. The Deputy Commissioner allowed Defendants to discontinue payment of medical compensation for Plaintiff's lower back, legs, coccyx, headaches, myofascial pain, fibromyalgia, and "other conditions outside the cervical spine." The Deputy Commissioner also ordered that Defendants not be required to authorize attendant care services, Plaintiff's Lyrica prescription, or the spinal cord stimulator. The Opinion and Award also denied Plaintiff's request for attorney's fees and ordered him to submit to an independent medical examination with Dr. Gualtieri. Both Plaintiff and Defendants appealed the decision to the Full Commission.

The Full Commission held a hearing on 13 May 2021. The Commission heard testimony from Dr. Suzanne Novak, a board-certified anesthesiologist and pharmacy school professor who is not licensed in North Carolina, and Dr. George Young, a board-certified expert in diagnostic radiology licensed in the state of North Carolina. In its Opinion and Award, the Commission stated the following concerning Dr. Young's testimony:

> In the present matter, Defendants have failed to rebut the *Parsons* presumption. To the extent Dr. Young offered opinions regarding causation, those opinions are all based upon his conclusion that Plaintiff's fall on July 1, 2010 did not result in an injury to Plaintiff's cervical and/or lumbar spine – in sum, he testified that because Plaintiff sustained no injuries (either new injuries or an aggravation of preexisting injuries) on July 1, 2010, any treatment Plaintiff is now receiving for his cervical and/or lumbar spine is unrelated to his fall on July 1, 2010. Such testimony is insufficient to rebut the *Parsons* presumption where the existence of injuries to Plaintiff's cervical and lumbar spine has been established by an Award of the Commission in the form of a never-denied Form 63. The entire premise of Dr. Young's opinion (that Plaintiff never had any injuries as a result of his July 1, 2010 fall) stands in direct contradiction to the admission made by Defendants and the award of the Commission establishing that Plaintiff sustained injuries to his cervical and lumbar spine when he fell on July 1, 2010. Where an expert's opinion is based upon facts not supported by the record, it is merely speculation and therefore not competent to prove causation. *Seay v. Wal-Mart, Inc.*, 180 N.C. App. 432, 436-37, 637 S.E.2d 299, 302 (2006). Accordingly, Dr. Young's testimony is insufficient to rebut the *Parsons* presumption afforded Plaintiff. *Young* 353 N.C. at 230, 538 S.E.2d at 915.

The Commission held similarly for Dr. Novak's testimony before concluding, "As Defendants have failed to present competent expert medical testimony to rebut the *Parsons* presumption, Plaintiff is entitled to payment of medical expenses . . . ."

In its Opinion and Award issued on 9 November 2021, the Commission ordered Defendants to continue authorizing all medical expenses related to Plaintiff's cervical and lumbar spine conditions and to continue paying temporary total disability compensation. The Commission denied Plaintiff's claims for attendant care, for attorney's fees pursuant to Section 97-88.1 of our General Statutes, and for medical treatment for myofascial pain, headaches, and fibromyalgia. The Commission further ordered Plaintiff to submit to the independent medical examination with Dr. Gualtieri. Defendants appealed the Commission's Opinion and Award pursuant to Section 7A-29(a).

II. Standard of Review

"The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of" our Supreme Court. *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008), *reh'g denied*, 363 N.C. 260, 676 S.E.2d 472 (2009).

> Under the Workers' Compensation Act, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law.

Id. (citations and internal quotation marks omitted). "[A]n award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact." N.C. Gen. Stat. § 97-86 (2022).

We review the Commission's conclusions of law *de novo*. *Graham v. Masonry Reinforcing Corp. of Am.*, 188 N.C. App. 755, 758, 656 S.E.2d 676, 679 (2008). "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).

III. Discussion

Defendants first argue that the Commission erred when it held that Defendants did not overcome their burden under the *Parsons* presumption.

Generally, "[a] party seeking additional medical compensation pursuant to N.C. Gen. Stat. § 97-25 must establish that the treatment is 'directly related' to the compensable injury." *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005). However, under the *Parsons* presumption, employee-plaintiffs who receive a favorable opinion and award from the Industrial Commission are afforded the rebuttable "presumption that additional medical treatment is causally related to the original injury." *Gross v. Gene Bennett Co.*, 209 N.C. App. 349, 351, 703 S.E.2d 915, 917 (2011) (citing *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997)). "To require [a] plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the [Workers' Compensation] Act in favor of injured employees." *Parsons*, 126 N.C.

App. at 542, 485 S.E.2d at 869. Employer-defendants bear the burden "to prove the original finding of compensable injury is unrelated to [a plaintiff's] present discomfort." *Id.* The *Parsons* presumption extends to cases involving an uncontested Form 63 as if the plaintiff had received a favorable Opinion and Award from the Full Commission. *Gonzalez v. Tidy Maids*, *Inc.*, 239 N.C. App. 469, 476, 768 S.E.2d 886, 892 (2015). If the employer successfully rebuts the presumption, the burden to prove that the medical treatment is directly related to the compensable injury shifts back to the employee. *Miller v. Mission Hosp.*, *Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014).

To overcome the *Parsons* presumption, a defendant must present competent evidence that the original, compensable injury is not causally related to a plaintiff's current medical treatment. *Seay v. Wal-Mart Stores*, *Inc.*, 180 N.C. App. 432, 436, 637 S.E.2d 299, 302 (2006). Whether evidence is competent is a question of law that this Court reviews *de novo*. *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 97-98, 360 S.E.2d 109, 110 (1987).

Unlike a determination of competency, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Id.* at 434, 144 S.E.2d at 274. It is well established that "[t]he findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274. "The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 632 (1965).

Defendants contend that any expert evidence is sufficiently competent to rebut the *Parsons* presumption if that evidence supports, in any way, a theory that current medical treatment is not related to an original, compensable condition. This argument ignores our more nuanced jurisprudence of competent evidence. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, 233 N.C. App. 620, 625, 757 S.E.2d 494, 499 (2014). In Workers' Compensation cases, "[t]he quantum and quality of the evidence required to establish *prima facie* the causal relationship

will of course vary with the complexity of the injury itself." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). For instance, "[s]peculative and general lay opinions and bare or vague assertions do not constitute competent evidence." *Innovative 55, LLC v. Robeson Cnty.*, 253 N.C. App. 714, 723, 801 S.E.2d 671, 678 (2017). Even with expert testimony, " 'could' or 'might' expert testimony [is] insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000). Whether evidence is sufficiently competent may be a confusing question as "[t]reatises on evidence note that the standards for admissibility of expert opinion testimony have been confused with the standards for sufficiency of such testimony." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003).

Here, Rent-A-Center filed a Form 63, specifying injuries to Plaintiff's neck and back, among other body parts, and did not contest payment for continued medical treatment. Thus, Defendants were required to overcome the *Parsons* presumption before the Commission could consider ceasing Defendants' payment obligations; the burden rested with Defendants to provide the Commission with competent evidence that Plaintiff's current treatment was unrelated to his compensable injury. In an attempt to do this, Defendants enlisted Doctors Young and Novak who testified as expert witnesses that they did not believe Plaintiff's continued medical treatment was related to his original injury. *See Click*, 300 N.C. at 167, 265 S.E.2d at 391 ("[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.").

The Commission determined that Defendants did not produce competent evidence sufficient to overcome the *Parsons* presumption. It relied principally upon *Seay v. Wal-Mart Stores, Inc.* for this conclusion. In that case, the testimony of a medical expert was not deemed competent because it was "based on speculation and conjecture." *Seay*, 180 N.C. App. at 436-37, 637 S.E.2d at 302. Specifically, the directing attorney asked a testifying doctor a hypothetical question about the employee's injury. "[T]he response elicited by plaintiff's hypothetical question required Dr. Davidson to assume the truth of facts that were not supported by the record. An expert's opinion that was solicited through the assumption of facts unsupported by the record is entirely based on conjecture." *Id.* at 437, 637 S.E.2d at 303 (citing *Thacker v. City of Winston-Salem*, 125 N.C. App. 671, 675, 482 S.E.2d 20, 23 (1997)). Expert

testimony as to the possible cause of a medical condition is admissible if helpful but "is insufficient to prove causation, particularly 'when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation.' " *Holley*, 357 N.C. at 233, 581 S.E.2d at 753 (quoting *Young*, 353 N.C. at 233, 538 S.E.2d at 916).

The Commission's unchallenged findings of fact regarding Dr. Novak's testimony are as follows:

> 38. Defendants retained Suzanne Novak, Ph.D., M.D., a board-certified anesthesiologist and pharmacy school professor who is not licensed in North Carolina, to perform a records review of Plaintiff's care and to offer an opinion about his conditions and treatment. Dr. Novak does not treat patients clinically, is not board certified in pain management, did not examine Plaintiff, did not provide any treatment to Plaintiff, and has never met him. Based upon her records review, Dr. Novak concluded that Plaintiff's current complaints and his current need for treatment are unrelated to his original July 1, 2010 work- related fall. She ultimately opined that "the claimant has some sort of autoimmune disease" unrelated to his July 1, 2010 fall at work that is the cause of Plaintiff's current symptomology, but she was unable to identify the disease, unable to say with any certainty that Plaintiff has any specific disease, and did not explain how she could definitively say Plaintiff's symptoms are unrelated to his compensable work injuries if she cannot identify the autoimmune disease. She testified that there is no clear explanation for Plaintiff's low back or lower extremity symptoms and these symptoms are not related to his work injury. When asked the basis of her opinion regarding Plaintiff's lumbar spine and lower extremity condition, Dr. Novak testified:
>
> The number one basis is that he doesn't have imaging studies to support that. His – his imaging studies are basically negative and have been since the very beginning. What he does have, on the other hand, is he has possible lupus, a probably – probable autoimmune disease of some type. He has a sensory polyneuropathy that could be extremely painful and could be causing his weakness, numbness, in all – in all probability is causing his weakness, numbness, falls, if that's the only reason he's

> having them. And all of this is related to whatever disease – diseases that he has that are not work related and are extremely significant.

> 39. Dr. Novak testified that Plaintiff "has no spinal injury whatsoever," that his fall did not aggravate any preexisting condition, and that Plaintiff's coccyx pain, myofascial pain, fibromyalgia, headaches, and chronic pain syndrome are unrelated to his July 2010 fall at work. She noted that long-term opioid use was not helping his symptoms and that he should be weaned off of them. She explained Plaintiff "doesn't need to be on opioids at all" or have further injections, further ablation procedures, or occipital nerve blocks for his injuries. She opined that Plaintiff is not a candidate for a spinal cord stimulator because it will not treat Plaintiff's cervical spine condition, because he has a history of skin break downs, and because, in her opinion, he has a yet-undiagnosed medical condition that could impact the procedure. Ultimately, Dr. Novak testified that "any other treatment" Plaintiff is receiving is "wholly unrelated to his July 2010 work accident," including prescription medications. She explained that because Cyclobenzaprine is intended to treat acute muscle spasms and is contraindicated for anyone with a heart condition, that it should not be prescribed for Plaintiff. Dr. Novak testified that Plaintiff's amitriptyline and Lyrica prescriptions are also unrelated to his July 2010 injuries. She further opined that it was not reasonable and not medically necessary to continue to prescribe Plaintiff opioids long-term due to the associated risks. When asked if she would defer to Plaintiff's treating physicians, Dr. Novak indicated that she would not. Dr. Novak expressed all of her opinions to a reasonable degree of medical certainty.

The Commission's unchallenged findings of fact regarding Dr. Young's testimony are as follows:

> 40. Defendants also retained George Young, M.D., a board-certified expert in diagnostic radiology licensed in the state of North Carolina, to review Plaintiff's medical records and prior imaging studies and render an opinion regarding the cause of Plaintiff's current condition. He expressed all of his opinions to a reasonable

degree of medical certainty. Dr. Young did not examine or evaluate Plaintiff in person and has never spoken to him. Based upon his review of the November 19, 2010 MRI of Plaintiff's cervical spine, Dr. Young concluded that although Plaintiff had degenerative disc disease, disc desiccation, disc bulging, foraminal stenosis, and cord flattening, he did not have cord compression and there was no indication of an acute injury to Plaintiff's cervical spine at that time. He explained that all of the findings present on the November 19, 2010 MRI were chronic, long-standing, and unrelated to Plaintiff's July 1, 2010 fall and that there was no evidence of aggravation shown on the MRI. With regard to Plaintiff's lumbar spine MRI, also from November 19, 2010, Dr. Young testified that Plaintiff had degenerative changes but no acute injury or abnormalities, and no evidence of any exacerbation of a preexisting condition. When asked about Plaintiff's February 4, 2011 thoracic spine MRI, Dr. Young opined there were no acute abnormalities and no aggravation of a preexisting condition attributable to his July 1, 2010 fall. Dr. Young also reviewed Plaintiff's April 30, 2014 lumbar spine MRI and indicated that Plaintiff's lumbar spine was stable and unchanged from 2010. Based upon his conclusion that Plaintiff's July 1, 2010 fall was not the cause of any injury or aggravation to Plaintiff's cervical, thoracic, or lumbar spine, Dr. Young offered the opinion that he is unable to explain the cause of Plaintiff's chronic pain and is unable to relate Plaintiff's current symptoms to the original injury based on the MRIs he reviewed. When asked if Plaintiff's current neck and back pain is causally related to the July 2010 work event, Dr. Young responded "not on the basis of the MRI scan."

41. Dr. Young agreed with Dr. Novak's opinion regarding the cause of Plaintiff's current condition and deferred to her regarding the appropriateness of Plaintiff's medication. When questioned about the basis of his opinions, he agreed that his opinion regarding causation is based solely on his review of Plaintiff's MRIs. He further agreed that a patient can have postsurgical pain. On cross examination, Dr. Young indicated that if Dr. Maxy had reviewed Plaintiff's MRIs, he would defer to Dr. Maxy regarding the cause of Plaintiff's current complaints and would also

> defer to Plaintiff's pain management physician regarding the need for pain medications. He further agreed that it is possible to have aggravation without signal abnormalities on an MRI. Dr. Young ultimately agreed he was not offering an opinion regarding whether Plaintiff's current need for pain medications is related to his original injury, and that imaging studies are just one part of determining a patient's diagnosis.

Both Doctors Novak and Young, without ever having examined or treated Plaintiff, reviewed Plaintiff's medical history and determined that his current ailments were not the result of the previous, compensable injury. The Commission found that the experts essentially denied the existence of an original, compensable injury and held that such a conclusion was "merely speculation" and, therefore, not competent because it "stands in direct contradiction to the admission made by Defendants and the award of the Commission establishing that Plaintiff sustained injuries . . . when he fell on July 1, 2010." Therefore, the Commission did not believe that a reasonable mind would find these experts' testimonies adequate to overcome the *Parsons* presumption in light of the additional evidence showing that their insufficient clinical experience and certifications and lack of access to Plaintiff resulted in mere guesswork. Additionally, Dr. Young stated he would defer a causation determination to Dr. Maxy, one of Plaintiff's treating doctors. Likewise, we agree and hold that the testimonies of Doctors Young and Novack were speculative and not sufficiently competent to overcome the *Parsons* presumption.

Further, although not explicitly stated in its findings, it is clear the Commission gave no weight to the testimony of Defendants' experts. This credibility determination, unlike the evidentiary determination, is wholly within the discretion of the Commission. *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. As this Court held in *Gonzalez v. Tidy Maids, Inc.*, "even assuming without deciding that this testimony could adequately show that plaintiff's current symptoms are unrelated to her original compensable back injuries, the Commission discredited this testimony, as it was entitled to do." 239 N.C. App. 469, 477, 768, S.E.2d 886, 893 (2015). Similarly, we held in *McLeod v. Wal-Mart Stores, Inc.* that "[e]ven assuming *arguendo* that [the expert] testimony . . . was enough to rebut the *Parsons* presumption, . . . '[t]he [F]ull Commission is the sole judge of the weight and credibility of the evidence.' " 208 N.C. App. 555, 560, 703 S.E.2d 471, 475 (2010) (quoting *Roberts v. Century Contractors, Inc.*, 162 N.C. App. 688, 691, 592 S.E.2d 215, 218 (2004)). The weight given expert evidence is a duty for the Commission to decide, not this Court.

Contrary to its reception of Doctors Young and Novak, the Commission found Plaintiff's treating physicians persuasive. It found Dr. Maxy "noted that Plaintiff had objective pathology in his cervical spine related to his original injury and resulting surgery." Dr. Maxy is an orthopedic surgeon specializing in spine surgery and practices in North Carolina. He performed spinal surgery on Plaintiff and "testified that he considered himself in a better position, as a treating physician, to render an opinion about Plaintiff's condition."

Dr. Tiffany, another treating physician, took over Plaintiff's care from Dr. Maxy. Dr. Tiffany was the pain management physician working in the same clinic and prescribed Plaintiff with medication and performed spinal injections. The Commission specifically quoted Dr. Tiffany in saying that while "there is no way to be certain that these injuries are related to his fall, there's also no way to be certain they weren't." He noted "that the opinion of a diagnostic radiologist is not as helpful as that of a treating physician like Dr. Maxy." The Commission also noted specifically that he "believes that a clinician who is the treating physician is better equipped to determine the appropriate medication for a patient than a records review physician."

The Commission also noted Dr. Gingerich's qualifications and testimony. Dr. Gingerich is a board-certified pain management specialist and an expert in interventional pain medication. As with the rest of Plaintiff's doctors, he practices in this state and had hands-on experience with Plaintiff. Specifically, he treated, and continues to treat, Plaintiff with injections and pain medications, reviewed his CT scan, and recommended further treatment. Dr. Gingerich testified as to causation of Plaintiff's current pain complaints that, "based on the history that he gave me, it makes it seem like it was related to the [July 1, 2010] injury." Dr. Gingerich further testified that Plaintiff is "more than likely" incapable of gainful employment.

After considering the entire record, including the testimonies of the experts, the Commission found that Plaintiff's ongoing care was "reasonably necessary to effect a cure or provide relief" "[b]ased upon the preponderance of the evidence in view of the entire record." It is clear from the Commission's findings that it found Plaintiff's physicians more persuasive than Defendant's experts.

Because we hold the Commission considered and properly weighed the testimonies of Defendants' medical experts before reaching the conclusion that Defendants did not overcome the *Parsons* presumption, we need not address Defendants' remaining arguments.

IV. Conclusion

Because the Defendants did not produce competent evidence sufficient to rebut the *Parsons* presumption, the Commission did not err when it denied Defendants' request to cease payments for Plaintiff's continued medical treatment.

AFFIRMED.

Judge DILLON concurs by separate opinion.

Judge GRIFFIN joins in separate opinion.

DILLON, Judge, concurring.

Most mandatory presumptions merely shift a burden of production to the opposing party. However, under the current state of our jurisprudence, the *Parsons* presumption also shifts the burden of proof to the opposing party (the employer). In this case, it may be that Defendants produced evidence from which the Commission could reasonably have found Plaintiff's requested medical treatment is not related to the compensable injuries he suffered in 2010. But because the Commission essentially found by the greater weight of the evidence that the requested treatment is related to the 2010 injury, I concur.[1]

An employee seeking workers' compensation benefits "has the burden of proving that his claim is compensable." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). However, like plaintiffs in civil actions, an employee may be entitled to a presumption of a certain (presumed) fact he must otherwise prove where another (basic) fact has been established.

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1. We recognized in *Parsons* that it was "unjust" to require an employee "to re-prove causation each time [he] seeks treatment for" his compensable injury. 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). We extended *Parsons* to situations where an employee never proves causation in the first instance because the employer has admitted a claim by filing a Form 63. *Gonzalez v. Tidy Maids*, 239 N.C. App. 469, 768 S.E.2d 886 (2015). In this case, Defendants filed a Form 63, admitting that Plaintiff's injuries to his "neck" and "back" (and other body parts) were caused, at least in part, by his workplace fall. *See*, *e.g.*, *Counts v. Black & Decker*, 121 N.C. App. 387, 465 S.E.2d 343 (1996) (employee entitled to benefits where work-related is not the sole cause of his disability). We have suggested that the presumption may be rebutted where the Commission finds credible the testimony of an employer's expert that the work-related factor which contributed to an employee's original discomfort had resolved, and that his current discomfort is caused solely by a non-work related factor as *McLeod v. Wal-Mart*, 208 N.C. App. 555, 560, 703 S.E.2d 471, 475 (2010).

The term presumption "is often loosely used." *Henderson Cty. v. Osteen*, 297 N.C. 113, 117, 254 S.E.2d 160, 163 (1979). For example, it is sometimes used to describe a mere inference:

> [A] presumption has a technical force of weight, and the [fact-finder], in the absence of sufficient proof to overcome it, should find in accordance with the presumption;
>
> but in the case of a mere inference there is no technical force attached to it. The [fact-finder], in case of an inference, [is] at liberty to find the ultimate fact one way or the other as they may be impressed by the [evidence].

Cogdell v. Wilmington & W. R. Co., 132 N.C. 852, 854, 44 S.E.2d 618, 619 (1903). With an inference, the factfinder *may* find a certain fact based on the presence of a basic fact, even if the opposing party has not offered any rebuttal evidence. For example, where a factfinder finds that a party intentionally destroys evidence, it may infer the evidence would have been unfavorable to the party who destroyed it, though "[n]othing compels the factfinder to ultimately draw [this] inference." *Reynolds v. Third Motor*, 379 N.C. 524, 540, 866 S.E.2d 869, 888 (2021). This type of presumption is sometimes referred to as a "permissive" presumption. *See State v. Malachi*, 371 N.C. 719, 731 n.4, 821 S.E.2d 407, 417 (2018) ("[E]videntiary presumptions are either 'permissive,' 'conclusive,' or 'mandatory'[.]").

However, where a presumption is a *true presumption*, "the presumed fact must be found to exist unless sufficient evidence of the nonexistence of the basic fact is produced or unless the presumed fact is itself disproven." *Henderson*, 297 N.C. at 117, 254 S.E.2d at 163. For example, where a factfinder finds that an insured individual covered for an accidental death suffered a violent, unexplained death by external means, it *must* be presumed that the death was accidental if the insurance company does not offer sufficient rebuttal evidence. *Moore v. Union Fid. Life Ins. Co.*, 297 N.C. 375, 381, 255 S.E.2d 160, 164-65 (1979). In such case, sufficient rebuttal evidence could be offered either by showing the basic fact (that the death was violent and unexplained) was not true or the presumed fact (that the death was not accidental) was not true. This true presumption is also referred to as a mandatory presumption. *See Malachi*, *supra*.[2]

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2. Our Supreme Court in *Malachi* describes a third type of presumption, known as a "conclusive" presumption. *Malachi*, 371 N.C. at 731, n.4, 821 S.E.2d at 417. A conclusive presumption is an irrebuttable presumption: For example, in the past, where a plaintiff is under seven years of age, it is conclusively presumed that he "is incapable of contributory

This appeal concerns whether Defendants rebutted the *Parsons* presumption. The *Parsons* presumption is a true (mandatory) presumption, requiring the Commission as factfinder to presume as fact that the treatment sought by an employee is related to his injury which the Commission had previously found to be compensable. And as a true presumption, it is rebuttable.

With most true presumptions favoring a plaintiff, the burden of *proof* (also referred to as the burden of persuasion) regarding the presumed fact remains with the plaintiff, while the burden of *production* (also referred to as the burden of going forward) shifts to the defendant. Generally, where a plaintiff is entitled to a true presumption and has proven the basic fact, the presumed fact is deemed proved by the plaintiff unless the defendant has offered evidence sufficient for a reasonable jury to conclude the presumed fact does not exist. But if the defendant offers sufficient rebuttal evidence, the factfinder must weigh all the evidence to determine whether the plaintiff has proven the existence of the presumed fact.

For example, Rule 301 of our Rules of Evidence provides that a mandatory presumption "does not shift the burden of proof" to the defendant. N.C. R. Evid. 301 (2021). The Rule merely provides that "the presumed fact shall be deemed proved" unless the defendant meets his burden of production sufficient to rebut the presumption. *Id.* And a defendant meets this burden with evidence "sufficient to permit reasonable minds to conclude that the presumed fact does not exist." *Id.*

In workers' compensation law, where it is shown that an employee's death occurred while at work and no medical reason for the death can otherwise be adduced, the employee's estate is entitled to a presumption – the *Pickrell* presumption – that the death was work-related, rather than by suicide. *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 369-70, 368 S.E.2d 582, 585-86 (1988). Our Supreme Court described the *Pickrell* presumption as a "true presumption", such that the death is presumed compensable unless the employer "come[s] forward with some evidence that the death occurred as a result of a non-compensable cause[.]" *Id.* at 371, 368 S.E.2d at 586. Only after the employer rebuts the presumption does the Commission assess the credibility of the employer's rebuttal evidence, with the burden of proof always with the employee's estate:

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negligence" no matter the evidence offered by the defendant of the child's negligent behavior. *Walston v. Greene*, 247 N.C. 693, 696, 102 S.E.2d 124, 126 (1958).

> In that event, the Industrial Commission should find the facts based on all the evidence adduced, taking into account its credibility, and drawing such reasonable inferences from the credible evidence as may be permissible, the burden of persuasion remaining with the claimant.

Id.

Also in workers' compensation law, there is a presumption – known as the *Watkins* presumption – that an employee's compensable disability continues until he returns to work. *See Watkins v. Cent. Motor Lines, Inc.*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971). However, it is a little less clear whether the *Watkins* presumption merely shifts the burden of production (the burden of coming forward) to the employer to show that the employee is capable of gaining employment or if the presumption also shifts the burden of proof to the employer.

For instance, in a 1997 case, our Supreme Court suggests the presumption merely shifts the burden of production, stating that "the employee need not present evidence . . . unless and until the employer . . . *comes forward with evidence to show*" the existence of a suitable job which the employee can get. *Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 763-64, 487 S.E.2d 746, 749 (1997) (quoting *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)). However, though our Court in *Kennedy* affirmed a Commission's determination that an employer did not adequately rebut the presumption, in part, because the Commission "has the exclusive authority to assign the weight to the evidence which was presented." *Kennedy*, 101 N.C. App. at 33, 398 S.E.2d at 682. In any event, our Supreme Court in *Saums* does not quote this language in *Kennedy* and otherwise reminds that "the claimant has the burden of proving the existence of his disability and its extent." *Saums*, 346 N.C. at 763, 487 S.E.2d at 749.

Three years after *Saums*, our Supreme Court in *dicta* quotes *Saums* and *Kennedy*, but suggests that the *Watkins* presumption also shifts the burden of proof to the employer:

> "Likewise, in order to rebut plaintiff's claim of ongoing partial disability, in the event such issue arises, defendants have the burden of proving 'not only suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.' *Saums* [citation] (quoting *Kennedy* [citation]."

Saunders v. Edenton Ob/Gyn Ctr., 352 N.C. 136, 141-42, 530 S.E.2d 62, 66 (2000).

It is unclear whether our Supreme Court has intended to create a rule that the *Watkins* presumption shifts the burden of proof to the employer. Indeed, that Court has noted that sometimes courts use "careless speech" at times conflating burden of proof with the burden of production:

> The terms, "the burden of the issue," and "the burden of proof," and "the duty to go forward with evidence," have given much perplexity to both the trial and appellate courts. The definition and the office of these terms, and their application to concrete cases, have been "often blurred by careless speech." (*Hill v. Smith*, 260 U.S. 592.)

Hunt v. Eure, 189 N.C. 482, 484, 127 S.E. 593, 594 (1925). *See also Speas v. Merchants' Bank & Trust Co.*, 188 N.C. 524, 526, 125 S.E. 398, 399-400 (1924).

The *Parsons* presumption that is the subject of this appeal was created by our Court. In *Parsons*, our Court suggests that the presumption being created shifted the burden of proof to the employer to show that subsequent medical treatment was not related to the compensable injury, stating that the Commission erred "placing the burden on plaintiff to prove causation[.]" *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869.

Our Court has repeatedly described the burden on the employer as a burden of proof and held that it is appropriate for the Commission to *weigh* the employer's evidence to determine whether the presumption had been rebutted (rather than merely determining whether the employer's evidence is sufficient to cause a reasonable factfinder to find the new medical treatment was not related to the compensable injury). *See*, *e.g.*, *Gross v. Gene Bennett*, 209 N.C. App. 349, 351, 703 S.E.2d 915, 917 (2011) ("the burden of proof is shifted from the plaintiff to the defendant [to prove causation]"); *Miller v. Mission*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014) (the *Parsons* presumption is rebutted by the employer, "the burden of proof shifts back to the plaintiff"); *Kluttz-Ellison v. Noah's Playloft Preschool*, 283 N.C. App. 198, 211, 873 S.E.2d 414, 423 (2022) (the Commission could weigh employer's rebuttal evidence when determining whether the evidence was sufficient to rebut the *Parsons* presumption); *Gonzalez v. Tidy Maids*, *Inc.*, 239 N.C. App. 469, 477-78, 768 S.E.2d 886, 893 (2015) (same); *McLeod v. Wal-Mart Stores*, *Inc.*, 208 N.C. App. 555, 560, 703 S.E.2d 471, 475 (2010) (same); *Spain v. Spain*, 236 N.C. App. 507, 765 S.E.2d 556 (2014) (unpublished) (rejecting an employer's argument that the *Parsons* presumption works like Rule 301 presumptions, which do not shift the burden of proof).

There are older decisions from our Court, however, suggesting that the *Parsons* presumption merely shifts the burden of production to the employer. *See, e.g.*, *Pomeroy v. Tanner*, 151 N.C. App. 171, 182, 565 S.E.2d 209, 216-17 (2002) (*Parsons* is a "rebuttable presumption" where "the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury"); *Reinninger v. Prestige*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999) (same).

Judge GRIFFIN joins in separate concurrence.

GREGORY D. BROWN, Plaintiff
v.
TAMMY BROWN, Defendant

No. COA22-765

Filed 2 May 2023

1. **Appeal and Error—interlocutory order—equitable distribution—no Rule 54(b) certification—no substantial right affected—final as to equitable distribution issues**

   An interlocutory order granting equitable distribution of an ex-husband's military pension was immediately appealable pursuant to N.C.G.S. § 50-19.1 where, although the trial court did not certify it under Civil Procedure Rule 54(b) and the order did not affect a substantial right, the record established that the order was final as to all issues regarding equitable distribution and therefore would have been a "final order" within the meaning of Rule 54(b) but for the other pending claims in the action.

2. **Divorce—equitable distribution—ex-husband's military pension—discharge in Chapter 13 bankruptcy—no effect**

   An order granting the equitable distribution of a retired marine's military pension was affirmed where the marine's discharge in his Chapter 13 bankruptcy case did not extinguish his ex-wife's right to pursue her share of the military pension, which was per se marital property. Unlike proprietary interests in real or personal property, marital property rights in a military pension are not dischargeable in bankruptcy since no creditor in a bankruptcy case could ever reach that property (and, therefore, there would be no reason to treat an ex-spouse as a creditor whose rights to the pension were discharged).

Appeal by plaintiff from order and judgment entered by Judge James L. Moore, Jr., in Onslow County District Court. Heard in the Court of Appeals 12 April 2023.

Jonathan McGirt for plaintiff-appellant.

Pro Se, Tammy Brown for defendant-appellee, no brief.

GORE, Judge.

This matter arises from a domestic action following the parties' separation and absolute divorce. Plaintiff Gregory D. Brown, II, appeals from the trial court's Order and Judgment, both denying his motion to dismiss and granting defendant Tammy Brown an equitable distribution of plaintiff's military pension. Plaintiff asserts his discharge in bankruptcy bars defendant from obtaining any relief on her equitable distribution claim. Upon review, we affirm.

I.

Plaintiff and defendant were married, each to the other, on or about 4 January 1994. Plaintiff was already employed with the United States Marine Corps when the parties were married. The parties separated on 23 June 2011 and were subsequently divorced on 31 December 2012. Plaintiff enlisted in the United States Marine Corps on 1 January 1993 and served until 11 August 2018, giving plaintiff a total active-duty service time of three hundred and six (306) months. The time period the marriage overlapped plaintiff's service time is two hundred and ten (210) months.

On 25 June 2012, plaintiff initiated this action by filing a Complaint for child custody, child support, and equitable distribution. On 6 August 2012, defendant filed an Answer and Counterclaim for child custody, child support, equitable distribution, and spousal support.

On 29 January 2013, plaintiff filed a voluntary petition in United States Bankruptcy Court, Eastern District of North Carolina, seeking relief under Chapter 13 of the Bankruptcy Code Case No. 13-00567-8-DMV. The court took judicial notice of this case at trial. In his bankruptcy Petition under the statement of financial affairs, plaintiff listed this lawsuit including the caption, nature of all proceedings, venue, and status of "pending." Further, plaintiff listed defendant with her full name and address as an unsecured creditor with her unsecured claim of "equitable distribution and debt Potential claims for marital property/debt distribution." Defendant's attorney's name and address were also listed.

Defendant and her then attorney received notice of the bankruptcy proceeding sent by first class mail on 1 February 2013 and were properly served a copy of the petition.

Defendant never requested relief from the automatic stay to commence her claim for equitable distribution, nor did she file for any relief from the bankruptcy court to protect her interests. On 25 April 2013, the court confirmed plaintiff's Chapter 13 Plan. Plaintiff completed payments totaling approximately $60,000.00 under the Plan on 9 November 2017, and the court granted the plaintiff a discharge pursuant to 11 U.S.C. § 1328(a) ("Bankruptcy Discharge"). On 24 September 2018, the bankruptcy court entered a Final Decree and closed the case.

In August of 2019, defendant scheduled a hearing in this matter for interim allocation to assert her claim to plaintiff's military pension after discovering plaintiff had retired in August of 2018. On 28 August 2019, plaintiff filed a Motion to Dismiss the Equitable Distribution Claim based on failure to prosecute the equitable distribution action. On 6 March 2020, plaintiff filed a Motion to Dismiss the Equitable Distribution Claim on the basis that plaintiff's Chapter 13 bankruptcy action discharged the equitable distribution lawsuit, and such would include defendant's right to petition the court to divide plaintiff's military retirement.

On 11 May 2020, defendant filed a Motion in the United States Bankruptcy Court to reopen the Chapter 13 case to determine dischargeability of debt. On 21 May 2020, the bankruptcy court denied defendant's Motion to reopen, concluding that: (i) the bankruptcy court had concurrent jurisdiction with the North Carolina district court; and (ii) when plaintiff filed his motion to dismiss using his completed Chapter 13 bankruptcy case as an affirmative defense, the bankruptcy court no longer had jurisdiction over this issue, and the North Carolina district court was the appropriate forum to handle the matter.

On 23 October 2020, the trial court conducted a hearing for a ruling on plaintiff's Motion to Dismiss heard 7 August 2020 and to hear all remaining issues of equitable distribution. On 8 December 2021, the trial court entered an Order relating to the equitable distribution of plaintiff's military pension with the following operative findings and conclusions:

> 18. The Court finds:
>
> > a. The defendant's interest in the military pension is proprietary as a co-owner of marital property and, her interest in the military pension is not a claim upon debt.

b. That military pensions have been held to be beyond the reach of a chapter 7 Trustee.

c. Plaintiff's military pension was not liquidated or otherwise distributed to any creditor and the plaintiff continues to receive the pension based on military employment during the course of his marriage to defendant.

d. The retirement could not be reached by a creditor.

e. The military pension is not personal property upon which an execution lien could have been levied.

f. The marital property rights in a military pension are not dischargeable.

g. The defendant has a marital property right in the plaintiff's military retirement and this right is not held in the nature of a creditor's claim.

h. The defendant's right to pursue her claim for a portion of the plaintiff's military retirement was not extinguished by the plaintiff's discharge in bankruptcy.

i. The plaintiff was not receiving retirement payments during the entirety of his Bankruptcy Payment Plan.

j. The military pension of plaintiff was a per se marital property asset without any defensible argument to the contrary.

k. The Public Policy associated with the entitlement to, and ultimate division of Military Retirement is an appropriate shield to the efforts of avoiding an equitable apportionment thereof by the use of the Bankruptcy Code.

l. The parties stipulated and the court finds [50%] of the marital portion of Plaintiff's military pension is [34.3%].[1]

1. The parties stipulated as to the mathematical calculation of what 50% of the "martial portion" subject to division *would be* if it were subject to an equitable division.

. . .

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and of the subject matter herein.

2. The defendant has a martial property right in the plaintiff's military retirement, and this right is not held in the nature of a creditor's claim.

3. The defendant's right to prosecute her claim for a portion of the plaintiff's military retirement has not been lost by virtue of the plaintiff's discharge in bankruptcy.

4. The monies paid to and thru the bankruptcy court is a distribution factor for the court to consider.

5. No other assets or indebtedness remains subject to this court's jurisdiction.

6. That an equitable division of the marital portion of the plaintiff's military pension is equitable.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That the plaintiff's motion to dismiss is denied.

2. That the defendant is hereby awarded [34.3%] of the plaintiff's military pension with payments to begin on [1 November 2020].

3. The court has considered the plaintiff's monetary expenses paid to and thru the bankruptcy court as a distributional factor and awards no arrears; however, arrears since [1 November 2020] shall accrue until entry of this Order and become payable in the amount of $100.00 per month until fully satisfied.

4. This judgment is a final judgment on all issues regarding the issue of Equitable Distribution pursuant to [N.C. R. Civ. P. 54(b)].

On 7 January 2022, plaintiff timely filed and served notice of appeal from the trial court's 8 December 2020 Order. On 13 January 2022, defendant filed and served a notice of cross-appeal from the same Order. Defendant has not filed a brief with this Court.

II.

[1] As a preliminary matter, we must discuss whether this Court has jurisdiction to hear plaintiff's appeal. We note the Order appealed addresses fewer than all the parties' claims; defendant's 2012 alimony counterclaim is still pending in the trial court. Further, plaintiff asserts in his statement of grounds for appellate review, "[a]lthough it is not apparent on the face of the [8 December 2021] 'equitable distribution' Order, it would appear from the colloquy at the [18 August 2020] hearing that the trial court understood that it was entering some species of 'interim distribution' order, pursuant to N.C. Gen. Stat. § 50-20(i1)." Such a distinction does matter for the purposes of appellate jurisdiction because "[i]nterim 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) (citation omitted). " '[I]nterim' orders entered in the domestic context are not immediately appealable." *Id.* at 708, 486 S.E.2d at 245 (citation omitted).

A.

"Generally, there is no right of immediate appeal from an interlocutory order." *Hanna v. Wright*, 253 N.C. App. 413, 415, 800 S.E.2d 475, 476 (2017) (quotation marks and citation omitted). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). On the other hand, "[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." *Id.* at 361-62, 57 S.E.2d at 381 (citations omitted).

Ordinarily, appeal from an interlocutory order is allowed in two instances. To obtain appellate review, "the trial court's order must: (1) certify the case for appeal pursuant to N.C. R. Civ. P. 54(b); or (2) have deprived the appellant of a substantial right that will be lost absent review before final disposition of the case." *Bessemer City Express v. City of Kings Mt.*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002) (citing N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2001)). Here, plaintiff does not argue the Order appealed affects a substantial right, and the trial court did not certify this case for appeal pursuant to N.C. R. Civ. P. 54(b). *See IO Moonwalkers, Inc. v. Banc of Am. Merch. Servs., LLC*, 258 N.C. App. 618, 627, 814 S.E.2d 583, 589 (Dillon, J., concurring) (citation omitted) ("[T]he plain language of Rule 54(b) requires that the trial court expressly state in the order that it has determined that there is 'no

just reason for delay' for it to be properly certified as a final judgment."), *disc. rev. denied*, 371 N.C. 341, 814 S.E.2d 101 (2018).

B.

In the absence of a Rule 54(b) certification or a showing that the Order appealed affects a substantial right, "this Court has jurisdiction to review some interlocutory family law orders under North Carolina General Statute § 50-19.1." *Bezzek v. Bezzek*, 264 N.C. App. 1, 4, 824 S.E.2d 865, 867 (2019); *see also* N.C. Gen. Stat. § 7A-27(b)(3)(e) (2021) (allowing for immediate appeal when an interlocutory order or judgment determines a claim prosecuted under N.C. Gen. Stat. § 50-19.1.). Section 50-19.1 provides, in pertinent part:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or *equitable distribution* if the order or judgment would otherwise be a *final* order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

N.C. Gen. Stat. § 50-19.1 (2021) (emphasis added). Appellate jurisdiction under section 50-19.1 does not require the appellant to demonstrate the order affects a substantial right, nor does it require the trial court to certify the order for immediate appellate review pursuant to Rule 54(b). *Beasley v. Beasley*, 259 N.C. App. 735, 742, 816 S.E.2d 866, 873 (2018). Thus, plaintiff must demonstrate the trial court's 8 December 2021 Order is a *final* order "adjudicating a claim for . . . equitable distribution . . . ." for this Court to have jurisdiction to hear this appeal. § 50-19.1.

As previously noted, plaintiff raises the issue of whether the trial court intended to enter an interim allocation with a distributive award, or a final judgment on all issues of equitable distribution. Our review of the transcript and the record reveals the written Order from which plaintiff appeals is final for the purposes of equitable distribution, and thus, immediately appealable. The Order states the trial court conducted a full evidentiary hearing "on all remaining issues of equitable distribution." The trial court concluded as a matter of law that "[n]o other assets or indebtedness remains subject to this court's jurisdiction," and declared that "[t]his judgment is a final judgment on all issues regarding the issue of Equitable Distribution pursuant to [N.C. R. Civ. P. 54(b)]." The trial court did not schedule future proceedings to be conducted on

the matter. There is no indication that the Order is temporary or subject to change, or that there is anything remaining to be judicially determined on the issue of equitable distribution. Therefore, we have jurisdiction to review this final equitable distribution Order pursuant to N.C. Gen. Stat. §§ 7A-27(b)(3)(e) and 50-19.1.

III.

[2] We now turn to address plaintiff's sole issue presented on appeal: whether the trial court erred by entering an equitable distribution order after plaintiff's discharge in bankruptcy.

"In 1981, our legislature provided a framework for the equitable division of marital property upon divorce by enacting the Equitable Distribution Act, now codified as N.C.G.S. §§ 50-20 and 50-21." *Armstrong v. Armstrong*, 322 N.C. 396, 400-01, 368 S.E.2d 595, 597 (1988) (citation omitted). In 1982, the United States Congress passed the Uniformed Services Former Spouses Protection Act ("USFSPA"), *codified in part as* 10 U.S.C. § 1408, which "authorized the states, after 25 June 1981, to classify military retirement pay as either marital or separate property and to provide for direct payments to a former spouse who was married to the member for at least ten years while the member performed military service." *Id.* at 401, 368 S.E.2d at 597-98 (citing 10 U.S.C. § 1408(c)(1) (1983)). "In response to this federal enactment, our legislature amended the Equitable Distribution Act to include within its definition of marital property 'all vested pension and retirement rights, including military pensions eligible under the federal . . . [USFSPA].' " *Id.* at 401, 368 S.E.2d at 598 (quoting N.C. Gen. Stat. § 50-20(b)(1) (1987)); *see also* N.C. Gen. Stat. § 50-20(b)(1) (2021) ("Marital property includes all vested and non-vested . . . military pensions eligible under the federal [USFSPA].").

A.

Our standard of review on appeal from a final equitable distribution order is well-settled:

> When the trial court conducts a trial without a jury, the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding. A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. Findings not supported by competent evidence are not conclusive and will be set aside on appeal. By contrast, conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.

Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd., 379 N.C. 524, 529, 866 S.E.2d 869, 880-81 (2021) (cleaned up). Additionally, "[t]he division of property in an equitable distribution is a matter within the sound discretion of the trial court." *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005) (quotation marks and citation omitted).

> It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted).

B.

Plaintiff effectively challenges the trial court's conclusion of law 3, that "the defendant's right to prosecute her claim for a portion of the plaintiff's military retirement has not been lost by virtue of the plaintiff's discharge in bankruptcy."

It is undisputed that plaintiff was granted a discharge as relief in his Chapter 13 bankruptcy. The debt relating to defendant's equitable distribution claim was provided for by plaintiff's Chapter 13 Plan and was discharged by the bankruptcy court. Plaintiff contends a North Carolina trial court has no mechanism for the involuntary assignment of a portion of a servicemember's military pension to the servicemember's former spouse after a bankruptcy discharge of an equitable distribution claim. Plaintiff asserts the trial court's conclusion of law stands in direct contradiction to the holdings in *Perlow v. Perlow*, 128 B.R. 412 (E.D.N.C. 1991), *Justice v. Justice*, 123 N.C. App. 733, 475 S.E.2d 225 (1996), and *Hearndon v. Hearndon*, 132 N.C. App. 98, 510 S.E.2d 183 (1999), all of which addressed the application of dischargeability proceedings to equitable distribution claims. We disagree.

In *Perlow*, the court reasoned that following a petition for a Chapter 7 liquidation, a bankruptcy trustee acts as "a hypothetical lien creditor and a hypothetical bona fide purchaser of property from the debtor," such that "the vested interests of the [non-filing spouse] in any specific

marital property were cut off by the bankruptcy filing." 128 B.R. at 415. Thus, the court determined that "because Ms. Perlow failed to object to Mr. Perlow's discharge or request an exception from the stay in a timely manner, her general unsecured claim for equitable distribution was discharged along with Mr. Perlow's other debts . . . ." *Id.* at 416 (citation omitted). This holding in *Perlow* was expressly relied upon by this Court's decisions in *Justice* and *Hearndon*. The holdings in *Perlow*, *Justice*, and *Hearndon* stand for a general rule that the non-filing spouse's "interests in marital property [are] cut off by the filing of [a] bankruptcy petition where the [non-filing spouse's] rights had not been fixed [pre-petition]." *Perlow*, 128 B.R. at 415.

C.

However, plaintiff acknowledges the fly in the ointment, *Walston v. Walston*, 190 B.R. 66 (E.D.N.C. 1995), "upon which the trial court clearly relied as the grounds for its decision." The court in *Walston* acknowledged the reasoning in *Perlow*, but limited this general rule based on the nature of the property at issue. *Walston*, 190 B.R. at 68. Specifically, the non-filing spouse has a "proprietary" interest in a military pension that is not a dischargeable claim. *Id.* at 67. As an opinion of a United States District Court, *Walston* is merely persuasive authority. Nevertheless, *Walston* is "instructive and must be taken into account, particularly in view of the fact that it is a decision of a federal court interpreting federal bankruptcy law." *Justice*, 123 N.C. App. at 737, 475 S.E.2d at 229 (construing *Perlow*).

The facts in this case align closely with those in *Walston*. In *Walston*, the court addressed the question of "whether Ms. Walston had a specific right to the military pension, or merely a general right to have the marital property distributed through an equitable distribution action." 190 B.R. at 67. The court held:

> [a]s a matter of law, Ms. Walston has a marital property right in the [military] pension, and this right is not held in the nature of a creditor's claim against appellee's estate as defined in 11 U.S.C. § 101(5). Ms. Walston further has a right to prosecute her equitable distribution action, and this right has not been lost by virtue of her former husband's discharge in bankruptcy.

Id. In reaching its holding, the court reasoned that "*Perlow* makes sense only when applied to the majority of cases which involve real and personal property," 190 B.R. at 68, "[b]ut *Perlow*'s rationale is inapplicable to military pensions." *Id.* "Unlike furniture or other personal possessions,

a military pension could not be reached by a creditor in bankruptcy . . . .” *Id.* Therefore, “[t]here is no reason to treat Ms. Walston as a creditor whose rights to this property were discharged by bankruptcy, since none of Mr. Walston’s secured creditors could have ever reached this property.” *Id.*

“*Perlow*’s outcome resulted from Ms. Perlow’s failure to file a lis pendens or obtain an execution lien on the personal property.” *Id.* (citing *Perlow*, 128 B.R. at 415). “North Carolina law does not authorize the filing of a lis pendens against a pension, and thus cannot be said to require this step be taken in order to protect pension rights.” *Id.* at 69. The court’s “holding that marital property rights in a pension are not dischargeable in bankruptcy follows a long line of cases which have reached the same conclusion.” *Id.* (citing *Bennett v. Bennett*, 175 B.R. 181, 184 (Bankr. E.D. Pa. 1994)).

In this case, defendant has a proprietary interest in the military pension that survives plaintiff’s bankruptcy discharge. Thus, defendant is entitled to prosecute a claim for distribution of that *per se* marital property. *See* N.C. Gen. Stat. § 50-20(b)(1); *see also Walston*, 190 B.R. at 70 (“Mr. Walston’s discharge in bankruptcy should have no effect upon the pending state court action for equitable distribution of the military pension.”). Defendant’s remaining general claim for an equitable distribution is, as stated in open court, “gone.” Consistent with both *Perlow* and *Walston*, the trial court accurately concluded in its written Order that “[n]o other assets or indebtedness remains subject to this court’s jurisdiction.” “Entry of an order herein is more akin to exercising a property right than to collection of a pre-petition debt.” *Walston*, 190 B.R. at 69 (cleaned up).

IV.

For the foregoing reasons, we discern no abuse of discretion in this case.

AFFIRMED.

Judges WOOD and STADING concur.

[288 N.C. App. 520 (2023)]

AHMED O. CHAHDI, Plaintiff
v.
JOCELYN I. MACK, Defendant

No. COA22-461

Filed 2 May 2023

1. Negligence—sudden emergency—brake failure—delay before collision—jury instructions

In an action arising from defendant's low-speed collision with a convenience store after her vehicle experienced sudden brake failure, causing an indoor display to fall on the arm of a convenience store employee (plaintiff), the trial court did not err by instructing the jury on the doctrine of sudden emergency. The fact that defendant continued to drive for several miles after the sudden brake failure did not negate the emergent nature of the situation; brake failure generally leads to an unavoidable accident, and, as defendant explained, she was unable to pull the car off the road immediately because she could not find a place that was safe or feasible to do so. In addition, it was for the jury to decide whether defendant's actions after the brake failure were negligent.

2. Appeal and Error—notice of appeal—file number of dismissed case—interlocutory order—failure to argue grounds for review

In an action arising from defendant's low-speed collision with a convenience store after her vehicle experienced sudden brake failure, plaintiff's arguments regarding issues from a separate case that plaintiff had voluntarily dismissed, and for which he offered no grounds for appellate review, were not properly before the appellate court. As for plaintiff's arguments in the non-dismissed case regarding interlocutory orders striking allegations concerning punitive damages and awarding attorney fees in favor of defendant, plaintiff failed to designate the interlocutory orders in his notice of appeal and made no effort to assert grounds for the appellate court to review the orders. In addition, plaintiff's arguments regarding punitive damages would necessarily be resolved against plaintiff in light of the appellate court's holding that there was no error at trial.

Appeal by Plaintiff from judgment entered 28 October 2021 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 24 January 2023.

Perry, Perry, & Perry, P.A., by Chelsi C. Edwards and Robert T. Perry, for Plaintiff-Appellant.

Teague, Rotenstreich, Stanaland, Fox & Holt, P.L.L.C., by Kara V. Bordman and Camilla F. DeBoard, for Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff Ahmed O. Chadhi appeals from final judgment entered upon a jury verdict finding Plaintiff was not injured by the negligence of Defendant Jocelyn I. Mack. Plaintiff contends the trial court erred in instructing the jury on the doctrine of sudden emergency, dismissing Plaintiff's claim for punitive damages, and awarding attorney's fees. We hold the trial court properly instructed the jury on the doctrine of sudden emergency. Plaintiff's remaining contentions are not properly before this Court.

I. Factual and Procedural Background

On 7 November 2014, Defendant was driving her grandmother's 2010 Pontiac vehicle when she experienced a brake failure. Upon discovering the brake failure, Defendant asked the other passenger, her fourteen-year-old niece, to call her grandmother. Defendant spoke on the phone with her grandmother for several minutes and continued driving toward downtown Durham as she felt uncomfortable and unsafe trying to stop the car. After several miles, Defendant approached a red light at an intersection, pulled into the parking lot of Buy Quick Food Mart, and, while traveling nearly 10 mph, collided with the convenience store. Plaintiff was working in the store at the time of the collision. As a result of the impact from the collision, an indoor display fell on Plaintiff's arm.

On 13 September 2017, Plaintiff filed a complaint ("17 CVD 4116") alleging Defendant was negligent in operating the vehicle and Plaintiff was personally injured as a result. Defendant filed an answer and Plaintiff thereafter filed a motion for leave to amend and add causes of action for gross negligence and punitive damages. The amendment was allowed, and Defendant filed another answer. Plaintiff, again, filed motion for leave to amend which was granted and Defendant answered. On 19 August 2019, Defendant filed a motion for summary judgment as to punitive damages. Following a hearing, on 29 August 2019, Judge Shamieka L. Rinehart entered an order granting partial summary judgment, dismissing Plaintiff's claim for punitive damages with prejudice. On 25 February 2020, Plaintiff filed a notice of voluntary dismissal without prejudice as to the remaining claims in 17 CVD 4116.

On 10 March 2020, Plaintiff filed a summons and complaint ("20 CVD 2222") which included a second claim for relief for willful and wanton conduct. On 16 April 2020, Defendant answered and filed a motion for judgment on the pleadings and a motion to strike the issue of punitive damages. After a hearing, on 29 June 2020, Judge Rinehart filed an order granting the motion to strike and awarding attorney's fees.

On 14 September 2021, the 20 CVD 2222 matter came on for trial by jury before the Honorable James T. Hill in Durham County District Court. Ultimately, the trial court submitted two questions to the jury: "Was [ ] Plaintiff, Ahmed Chahdi injured by the negligence of Defendant Jocelyn Mack?" and "What amount is Plaintiff Ahmed Chahdi entitled to recover for his injury?" The trial court instructed the jury as to the doctrine of sudden emergency. The jury returned a verdict in favor of Defendant. On 19 November 2021, Plaintiff filed a notice of appeal.

II. Analysis

Plaintiff argues the trial court erred in instructing the jury on the doctrine of sudden emergency, dismissing Plaintiff's claim for punitive damages, and awarding attorney's fees. We disagree.

A. The Doctrine of Sudden Emergency

[1] Plaintiff argues the trial erred in instructing the jury on the doctrine of sudden emergency because (1) there was not an emergency requiring immediate action to avoid injury, and (2) assuming there was an emergency, Defendant's negligence created the emergency. We disagree.

When reviewing challenges regarding the appropriateness of jury instructions, we must first determine "whether the trial court abused its discretion, and, second, whether such error was likely to have misled the jury." *Goins v. Time Warner Cable Se., LLC*, 258 N.C. App. 234, 237, 812 S.E.2d 723, 726 (2018) (internal citations omitted) (citing *Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988); *Union Cty. Bd. of Educ. v. Union Cty. Bd. of Comm'rs*, 240 N.C. App. 274, 290–91, 771 S.E.2d 590, 601 (2015)). Further, "we consider whether the instruction requested is correct as a statement of law and, if so, whether the requested instruction is supported by the evidence." *Minor v. Minor*, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013) (citation omitted).

The doctrine of sudden emergency applies "when a defendant is confronted by an emergency situation not of his own making and requires [the] defendant to act only as a reasonable person would react to similar emergency circumstances." *Massengill v. Starling*, 87 N.C. App. 233, 236, 360 S.E.2d 512, 514 (1987) (citation omitted). In order to

submit jury instructions regarding this doctrine, the trial court must find substantial evidence of two essential elements: "(1) an emergency situation must exist requiring immediate action to avoid injury, and (2) the emergency must not have been created by the negligence of the party seeking the protection of the doctrine." *Allen v. Efird*, 123 N.C. App. 701, 703, 474 S.E.2d 141, 142–43 (1996) (internal marks and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) (citations omitted). Further, the evidence must be viewed in a light most favorable to the party that is claiming the benefit of the sudden emergency doctrine. *Masciulli v. Tucker*, 82 N.C. App. 200, 206, 346 S.E.2d 305, 308–09 (1986).

Unequivocally, where evidence exists regarding the issue of a sudden brake failure caused not by the defendant's own negligence, it is prejudicial error not to instruct the jury on the doctrine of sudden emergency. *See Stevens v. Southern Oil Co. of N.C.*, 259 N.C. 456, 460, 131 S.E.2d 39, 43 (1963) (holding that defendants were entitled to instruction on the doctrine of sudden emergency as the jury, based on evidence presented, may decide that the brakes had been defective); *Stanley v. Brown*, 261 N.C. 243, 248, 134 S.E.2d 321, 325 (1964) (holding that where the defendant presented substantial evidence of an unforeseeable brake failure, he was entitled to a jury instruction regarding the sudden emergency doctrine); *Horne v. Trivette*, 58 N.C. App. 77, 81, 293 S.E.2d 290, 292 (1982) (holding that where there was evidence tending to show the defendant was confronted with a sudden emergency, the trial court was correct in giving the instruction).

1. Emergency

Plaintiff contends Defendant failed to present substantial evidence that she was confronted with an emergency requiring immediate action to avoid injury because she had sufficient notice and ample time to address the brake failure prior to the collision. Specifically, Plaintiff argues Defendant noticed the brake failure several miles from the collision site and spoke on the phone with her grandmother for 60 to 120 seconds following the discovery. Therefore, Plaintiff contends, given the distance and time Defendant traveled, there is not sufficient evidence to conclude the brake failure required Defendant to immediately react.

As noted above, where there is substantial evidence of a sudden brake failure caused not by the defendant's own negligence, it is prejudicial error not to instruct the jury on the issue of sudden emergency. *See supra* II.A. Even still, we address Plaintiff's argument as to the alleged lack of emergency.

Plaintiff's argument here—the trial court erred in its instruction because the brake failure did not require Defendant to act immediately—aims to effectually limit the definition of a sudden emergency to include only those situations in which a defendant is able to immediately resolve the situation, thereby confusing immediate action with immediate resolution. While we understand our precedent indicates the doctrine applies only where an emergency situation exists requiring the defendant to take immediate action to avoid injury, we must also consider the facts surrounding the alleged emergency situation. Plaintiff's argument fails to recognize that a brake failure will generally, inevitably end in an unavoidable accident, in spite of a defendant acting immediately to avoid injury.

Further, despite Plaintiff's attempt to redefine the circumstances under which the doctrine of sudden emergency applies by limiting what constitutes "immediate action," our case law specifies the doctrine is a mere application of the prudent man, or reasonable person, standard stating:

> The emergency is merely a fact to be taken into account in determining whether he has acted as a reasonable man so situated would have done. The extent to which it will excuse a departure from the care and judgment which would be required under normal circumstances will, therefore, vary with the suddenness with which the emergency developed, the seriousness of the threatened damage and other circumstances calculated to excite and confuse. The doctrine of sudden emergency, moreover, relates solely to the appraisal of conduct occurring after the emergency is observed.

Rodgers v. Carter, 266 N.C. 564, 568, 146 S.E.2d 806, 810 (1966); *see also Foy v. Bremson*, 286 N.C. 108, 120, 209 S.E.2d 439, 446 (1974) ("The sudden emergency rule is a mere application of the rule of the prudent man."). Moreover, our Supreme Court holds, "[o]ne who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made." *Ingle v. Cassady*, 208 N.C. 497, 499, 181 S.E. 562, 563 (1935) (citations omitted). The application of the doctrine does not focus on the instant in which the defendant was able to resolve the emergency, but rather on whether, taking the emergency into account, the defendant acted as a reasonable person would, given similar circumstances.

In regard to the existence of an emergency situation, if the court is presented with substantial evidence that an emergency situation existed requiring the defendant to act immediately to avoid injury, it is within the court's discretion to instruct the jury on the doctrine and for the jury to decide if the defendant acted reasonably given the circumstances. *See Allen*, 123 N.C. App. at 703, 474 S.E.2d at 142–43; *see also Rodgers*, 266 N.C. at 568, 146 S.E.2d at 810; *Foy*, 286 N.C. at 120, 209 S.E.2d at 446.

Here, Defendant was driving toward downtown Durham when she realized the car would slow, but not stop. Defendant noted, in her deposition, she was unable to pull the car over before she reached the Buy Quick, as other options were not safe or feasible. Specifically, Defendant noted she did not want to pull into a church parking lot where cars lined both sides of the street, such that she might hit them upon trying to take a sharp turn into the lot without proper, working brakes; nor did she feel safe pulling into the Shell gas station parking lot at night as it was a known hangout for vagrants.

Because Defendant introduced substantial evidence of a sudden brake failure, which unequivocally creates an emergency situation, and substantial evidence as to her actions after the discovery of the brake failure, it was not an abuse of discretion to instruct the jury on the doctrine—assuming Defendant was not otherwise negligent. Further, because the presentation of evidence was such that a jury could decide whether Defendant acted reasonably under the circumstances, the trial court did not err in instructing the jury on the doctrine of sudden emergency, given the emergency situation alone.

2. Negligence

Plaintiff argues if an emergency existed, the emergency was caused by Defendant's own negligence as she continued to drive after realizing there was a brake failure.

As noted above, in order to submit jury instructions regarding the doctrine of sudden emergency, there must be substantial evidence showing the emergency was not "created by the negligence of the party seeking the protection of the doctrine." *Allen*, 123 N.C. App. at 703, 474 S.E.2d at 142–43. While we hold a sudden brake failure must be considered an emergency situation, it is only upon the presentation of sufficient evidence that the brake failure was not caused by the defendant's own negligence which requires the trial court to instruct on the sudden emergency doctrine. *See supra* II.A.

Plaintiff here argues not that Defendant was negligent as to the brake failure itself, but negligent in the conduct she undertook upon the discovery of the brake failure. Further, in analogizing the instant case with our Court's opinion in *Allen v. Efird*, Plaintiff contends Defendant was negligent because she lost control under static conditions, as indicated by her collision with Buy Quick, and not after an unexpected change in condition. *Allen*, 123 N.C. App. at 702, 474 S.E.2d at 142.

In *Allen*, the defendant was driving on a wet roadway when he hydroplaned and lost control of his vehicle. *Id.* The defendant spun off the road on the right, then came back across the road striking the plaintiff's vehicle in the oncoming lane of traffic. At trial, upon the defendant's request, the court instructed on the doctrine of sudden emergency. *Id.* at 702, 474 S.E.2d at 142. On appeal, this Court overturned the decision and ordered a new trial reasoning the "defendant had been proceeding on wet roads for some time prior to the accident, and [made] no assertion that there was any unexpected change in condition for the worse immediately prior to his loss of control." *Id.* at 704, 474 S.E.2d at 143. Further, we noted the defendant failed to present evidence of a sudden change of driving conditions or of "any road condition or highway exigency . . . that he could not have avoided through the exercise of due care." *Id.*

Here, Plaintiff correctly asserts Defendant discovered the brake failure and continued driving. However, unlike the defendant in *Allen*, Defendant in this case had no choice but to continue driving, under the "static condition" of having failed brakes, as the emergent situation faced by Defendant was that she could not stop her vehicle. Further, Defendant introduced evidence of the brake failure and the reason she neglected to stop prior to Buy Quick. Thus, Defendant here, unlike the defendant in *Allen*, not only introduced evidence of an "unexpected change in condition for the worse"—the brake failure—but also of a sudden change in condition "[she] could not have avoided through the exercise of due care"—as she was inevitably going to run into something regardless of how reasonably she acted.

As such, we hold the trial court did not err in instructing on the doctrine of sudden emergency, as it is for the jury to decide whether Defendant's conduct was negligent after realizing her brakes failed.

B. Punitive Damages and Attorney's Fees

[2] Plaintiff argues the trial court erred in dismissing Plaintiff's claim for punitive damages and awarding attorney's fees. We decline to address these contentions as, for the following reasons, Plaintiff has failed to establish either of these issues is properly before this Court.

Any party who is entitled by law to appeal from a judgment of a trial court rendered in a civil action may take appeal by filing a notice of appeal. N.C. R. App. P. 3(a). Moreover, pursuant to Rule 3(d), the notice of appeal must "designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 3(d). "An appellant's failure to designate a particular judgment or order in the notice of appeal generally divests this Court of jurisdiction to consider that order." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 347, 666 S.E.2d 127, 133 (2008); *see also Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 17, 411 S.E.2d 645, 647 (1992). We recognize there is generally no right to appeal from an interlocutory order which does not affect a substantial right and that only upon appeal from the final judgment does this Court have jurisdiction to review issues related to such an order. *See Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 686, 567 S.E.2d 179, 182 (2002); *Love v. Moore*, 305 N.C. 575, 578, 291 S.E.2d 141, 144 (1982). However, where a plaintiff voluntarily dismisses a remaining claim which survives summary judgment, the appeal is no longer premature "but rather has the effect of making the trial court's grant of partial summary judgment a final order" that can be immediately appealed. *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001).

There are two exceptions, under which this Court "may liberally construe a notice of appeal to determine it has jurisdiction over a ruling not specified in the notice." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). "First, if the appellant made a mistake in designating the judgment intended to be appealed" but the intent to appeal can be fairly inferred from the notice and the appellee was not misled, the appeal will not be dismissed. *Id.* at 452, 451 S.E.2d at 351. Second, the appeal will not be dismissed where the "appellant technically fails to comply with procedural requirements in filing papers with the court but accomplishes the functional equivalent of the requirement." *Id.* at 452, 451 S.E.2d at 351.

Plaintiff here, pursuant to Rule 3(d), only noticed appeal "from the final judgment entered by Judge James T. Hill on October 28, 2021" in file number 20 CVS 2222. Nevertheless, Plaintiff now attempts to argue issues on appeal concerning the trial court's order granting Defendant's motion for summary judgment as to punitive damages in 17 CVD 4116, a completely separate case which Plaintiff voluntarily dismissed. Plaintiff offers no ground for appellate review of this order entered in a separate file number and has not sought review of this order by way of certiorari. We conclude this order is not before us to review.

Plaintiff further seeks review of the trial court's order granting Defendant's motion to strike allegations concerning punitive damages in Plaintiff's 20 CVS 2222 complaint and awarding attorney's fees in favor of Defendant entered by Judge Shamieka L. Reinhart. Plaintiff did not designate these interlocutory orders in his notice of appeal from the final judgment. However, N.C. Gen. Stat. § 1-278 provides: "Upon an appeal from a judgment, the [appellate] court may review any intermediate order involving the merits and necessarily affecting the judgment." N.C. Gen. Stat. § 1-278 (2021). Applying this statute, "[t]his Court has held that even when a notice of appeal fails to reference an interlocutory order, in violation of Rule 3(d), appellate review of that order pursuant to N.C. Gen. Stat. § 1-278 is proper under the following circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment." *Tinajero v. Balfour Beatty Infrastructure, Inc.*, 233 N.C. App. 748, 757, 758 S.E.2d 169, 175 (2014) (citation omitted).

Here, however, Plaintiff has, again, made no effort to assert grounds for this Court to review the interlocutory order striking allegations of punitive damages or awarding attorney's fees pursuant to N.C. Gen. Stat. § 1-278. *See* N.C. R. App. P. 28(b)(4). In the absence of any proffered basis for review of these orders, we conclude they are not properly before us. Moreover, Plaintiff's arguments that he should be permitted to pursue punitive damages claims arising from the accident are necessarily resolved against Plaintiff in light of our decision concluding there was no error at trial and affirming the trial court's judgment entered upon the jury verdict determining Defendant was not liable for Plaintiff's injuries on the same facts.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not err in instructing the jury on the doctrine of sudden emergency. Further, we decline to address Plaintiff's remaining contentions regarding punitive damages and attorney's fees as neither issue is properly before this Court.

NO ERROR.

Judge ZACHARY and HAMPSON concur.

ESTATE OF RODNEY BAKER, Plaintiff
v.
DAVID W. REINHARDT and RANDY REINHARDT, Defendants

No. COA22-744

Filed 2 May 2023

1. Appeal and Error—interlocutory order—denial of motions for summary judgment and to dismiss—exclusivity provision of Workers' Compensation Act—substantial right

Where the estate of a deceased machine operator (plaintiff) sued a co-employee (defendant) for alleged willful, wanton, or reckless negligence in connection to a workplace accident resulting in the operator's death, the trial court's interlocutory order denying defendant's motion for summary judgment and his Rule 12(b)(1) motion to dismiss was immediately appealable. Defendant's motions implicated a substantial right where they asserted that the court lacked subject matter jurisdiction over plaintiff's claim because of the exclusivity provision of the Workers' Compensation Act, which grants the Industrial Commission exclusive jurisdiction over all actions falling under the Act.

2. Workers' Compensation—workplace death—liability of co-employee—failure to show willful, wanton, or reckless negligence

After a machine operator at a furniture manufacturing plant died from injuries he sustained when passing by the exposed side of a bandsaw he was cleaning, the trial court improperly denied defendant-plant manager's motion for summary judgment and Rule 12(b)(1) motion to dismiss an action brought by the operator's estate (plaintiff), where plaintiff's forecast of evidence failed to show the willful, wanton, or reckless negligence needed to establish a valid claim under *Pleasant v. Johnson*, 312 N.C. 710 (1985) (allowing recovery for workplace accidents, independent of the Workers' Compensation Act's exclusivity provision). Although some evidence indicated that defendant knew of the danger that the bandsaw posed, all other evidence reflected defendant's attempts to share that knowledge to employees, which included running an award-winning safety training program (which trained the operator on how to run the bandsaw and explicitly warned him not to clean it while it was in operation) and making some efforts to block off the exposed side of the bandsaw.

Appeal by Defendant Randy Reinhardt from an order entered 14 July 2022 by Judge Alan Z. Thornburg in Catawba County Superior Court. Heard in the Court of Appeals 7 March 2023.

Patrick, Harper & Dixon, L.L.P., by David W. Hood, for Plaintiff-Appellee.

Bailey & Dixon, LLP, by David S. Coats, David S. Wisz, and Devon H. Collins, for Defendant-Appellant Randy Reinhardt.

RIGGS, Judge.

The central underlying facts of this case are not in dispute: Rodney Baker, a model employee of 24 years, died tragically in a workplace accident without any eyewitnesses. His surviving spouse sought and received full workers' compensation benefits from the Industrial Commission. Subsequent to the award, and in an understandable desire to speak for Mr. Baker and prevent future accidents, his estate ("Plaintiff") filed suit against Defendants David W. Reinhardt and Randy Reinhardt as co-employees for willful, wanton or reckless negligence under *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). The Reinhardts moved to dismiss the complaint and for summary judgment for lack of subject matter jurisdiction under Rules 12(b)(1) and 56(b) of the North Carolina Rules of Civil Procedure. The trial court granted those motions as to David Reinhardt while denying them as to Randy Reinhardt. Randy Reinhardt appeals that order, arguing that the forecast of evidence presented at the hearing fails to show the requisite degree of negligence to establish a valid *Pleasant* claim. After careful review, and in light of binding precedents establishing a high bar applicable to *Pleasant* claims, we agree and reverse the trial court's denial of summary judgment as to Randy Reinhardt.

I. FACTUAL AND PROCEDURAL HISTORY

Dimension Wood Products, Inc., ("Dimension") is a closely-held wood furniture manufacturer based in Catawba County, North Carolina. David Reinhardt and Randy Reinhardt worked for Dimension as President and Plant/Operations Manager, respectively. Mr. Baker also worked for Dimension as a bandsaw operator, beginning in 1996. Mr. Baker was a model employee, was safety conscious, thought highly of David Reinhardt, and enjoyed his work. Other than complaining about the heat and limited bathroom breaks, Mr. Baker never expressed any safety concerns about the plant to friends or family.

Dimension's workplace was generally free from serious workplace safety incidents; aside from employees occasionally cutting their hands and fingers on the saws and a back injury suffered picking up a box, Dimension had no recorded work-related injuries and illnesses for the years 2017 to 2019. The Occupational Safety and Health Division of the North Carolina Department of Labor ("OSHA") periodically inspected Dimension's woodworking plant, and issued no final orders for serious, repeat, or willful workplace safety violations during that timeframe. Dimension likewise maintained a Days Away, Restricted, or Transferred rate, or DART rate—indicative of serious workplace injuries—below the national average over the same period.

Employees participated in a machine guarding program to reduce the risk of injuries, and Dimension held "tool box talks" with its staff to discuss workplace hazards like cuts, slips, and trips. Workplace safety meetings were held on a quarterly basis, which included, *inter alia*, the following discussion topics:

> ALL GUARDS & SHIELDS MUST BE IN PROPER PLACE BEFORE RUNNING A MACHINE AND DURING OPERATION
>
> STAY CLEAR OF ALL MOVING PART[S] WHILE RUNNING A MACHINE
>
> . . . .
>
> MAKE SURE [THE] MACHINE COMES TO [A] COMPLETE STOP AND [IS] LOCKED OUT BEFORE MAKING ADJUSTMENTS, AND FOLLOW ALL LOCK OUT AND TAG OUT PROCEDURES
>
> BE SURE TO TURN MACHINES OFF AND MAKE SURE THEY COME TO A COMPLETE STOP BEFORE BENDING OVER AND CLEANING AROUND MACHINERY

During the meetings, employees were asked if they knew of any improperly placed machine guards or safety issues related to the machines on the plant floor. FFVA Mutual awarded Dimension a "Commitment to Safety Award" for its "effective and comprehensive workplace safety program" in 2019.

Mr. Baker was the sole operator of one of the bandsaws in use at the plant. Another bandsaw, in operation beginning in 2004, was located approximately 25 feet from Mr. Baker's ordinary workstation. That bandsaw was replaced by a substantially similar bandsaw in October

2018 (the "Machine"). Mr. Baker was trained to operate these bandsaws, but he was not their assigned or usual operator.

The Machine itself was used to create parts for chairs, sofa frames, and other pieces of furniture. It consists of two mechanically-linked motorized tables, situated atop one another, that move forward and backwards during operation. A table arm extends out from the rear of the Machine at a height of approximately three feet. When the Machine is running, the table arm travels horizontally and parallel to the floor at a speed of 0.82 feet per second, and its path terminates about four-to-five inches from a vertical steel beam that serves as a support pillar for the plant building. The Machine is capable of running without an operator present.

Dimension enclosed two sides of the rear of the Machine—where the table arm extends outwards—with fencing; however, the third side was open and ordinarily blocked only by movable barrels or work carts. Dimension received no safety complaints about the Machine or its predecessor from employees or from OSHA representatives who had observed both bandsaws in operation. Indeed, OSHA did not cite Dimension for any safety violations related to the Machine or its prior during periodic inspections. Over the combined 15 years of the bandsaws' use, no injuries or accidents occurred as a result of their operation.

On 17 March 2020, Mr. Baker, without direction or instruction from anyone, was cleaning around the Machine when he stepped into the partially-enclosed area to its rear. Nearby employees heard a strange noise from the Machine before observing Mr. Baker laying on his back in a semi-conscious state. Co-workers then moved Mr. Baker and initiated CPR until emergency medical services could arrive. The area of the accident was not observable by any surveillance cameras, there were no eyewitnesses to the event, and the Reinhardts were both offsite at the time of the accident. Mr. Baker ultimately died of his injuries at the scene, which included contusions to his back and blunt force trauma and lacerations to his chest. Local police documented the incident, and the medical examiner's report surmised that Mr. Baker had been crushed between the Machine's table arm and the steel support beam.

OSHA arrived to investigate the accident the following day. Per its report—which includes redactions of all interviewed employees' names—Mr. Baker "was crushed between the [Machine's lower table arm] and a steel support structure on the side of the building, suffering trauma to his chest." One or more Dimension employees reported "that there are usually barrels in place to keep employees from entering that area." The unknown employee(s) also said "[REDACTED] was

aware of the machine guarding hazard," but only partial fencing had been installed because "most of the time they were too busy and there would have been buggy loads (carts with wood products) stacked in front of the machine and you would not be able to get in there." One or more employees also noted that "everyone in the plant knew they could not be back in the area of the machine where Mr. Baker was found when the machine was running." OSHA assessed Dimension with a "serious"[1] violation for failing to provide "one or more methods of machine guarding" that would have prevented the accident. Dimension remedied the violation during the inspection and installed an appropriate barrier gate.

Various members of Mr. Baker's family were permitted by Dimension and the Reinhardts to visit and observe the site of the accident after it occurred. During the course of these visits, the Reinhardts expressed bewilderment as to how the accident occurred; neither one believed Mr. Baker had been crushed between the pillar and the lower table arm, telling the family that he would have been cut in half had that happened given the small distance between the end of the lower table arm and the pole. The Reinhardts were likewise unsure how Mr. Baker, who was of adult height, suffered a chest wound from the lower table arm located three feet off the ground. They also allowed Mr. Baker's family to observe the Machine in action, which one family member described as "slow moving." The Reinhardts explained to the family that the area had not been fenced off because they intended but had not yet been able to attach a conveyer belt to the rear of the Machine.

Mr. Baker's widow pursued and received a full award of workers' compensation benefits from the North Carolina Industrial Commission on 12 April 2022. Three days later, Mr. Baker's estate filed the instant suit against the Reinhardts. Per the complaint, Plaintiff's sole claim for relief is "for the cause of action outlined in *Pleasant v. Johnson*," which allows recovery for workplace accidents, independent of the Workers' Compensation Act's exclusivity provision, N.C. Gen. Stat. § 97-10.1 (2021), that arise out of the "willful, wanton and reckless negligence" of co-employees. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 250.

The Reinhardts moved to dismiss Plaintiff's complaint under Rule 12(b)(1) and for summary judgment under Rule 56(b), asserting that

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1. Per OSHA, a "serious" violation occurs "if it is reasonably predictable that death or serious physical harm could result and . . . the employer knew, or should have known, of the hazard." This is distinct from a "willful" violation, "where the evidence shows either an intentional violation of the OSH Act of North Carolina or plain indifference to its requirements."

Plaintiff had failed to allege or forecast evidence establishing facts adequate to support a *Pleasant* claim. Both Reinhardts filed affidavits with exhibits in support of their summary judgment motion; the redacted OSHA report, medical examiner's report, and deposition transcripts from Mr. Baker's family members were likewise filed with the trial court. The trial court heard the Reinhardts' motions on 11 July 2022 and allowed the motions as to David Reinhardt; however, it denied both motions as to Randy Reinhardt. Randy Reinhardt was served with the trial court's written order on 20 July 2022, and he filed a notice of appeal on 1 August 2022.

II. ANALYSIS

Randy Reinhardt contends, as he did below, that the trial court lacked subject matter jurisdiction over Plaintiff's claim because the forecast of evidence fails to establish an exception to the Workers' Compensation Act's exclusivity provision under *Pleasant*. Because this is an appeal from an interlocutory order, we first address our jurisdiction to hear the appeal before holding that the trial court erred in denying summary judgment as to Randy Reinhardt.

A. Appellate Jurisdiction

[1] Randy Reinhardt concedes that the order appealed is interlocutory, but asserts that an order denying a motion raising the exclusivity provision of the Workers' Compensation Act affects a substantial right authorizing immediate appellate review. *See Blue v. Mountaire Farms, Inc.*, 247 N.C. App. 489, 495, 786 S.E.2d 393, 397-98 (2016) (recognizing that there is generally no right to appeal an interlocutory order unless it affects a substantial right or is certified pursuant to N.C. R. Civ. P. 54(b)). Indeed, this Court has held that "the denial of a motion concerning the exclusivity provision of the Workers' Compensation Act affects a substantial right and thus is immediately appealable." *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 737, 796 S.E.2d 529, 532 (2017) (citing *Blue*, 247 N.C. App. at 495, 786 S.E.2d at 397-98). Because the trial court's denial of Randy Reinhardt's motions under Rules 12(b)(1) and 56(b) both fall into this category, we have jurisdiction over this appeal. *See id.* (holding interlocutory order denying Rule 12(b)(1) and 56(b) motions raising the exclusivity provision of the Workers' Compensation Act affected a substantial right and was immediately appealable).

B. Standard of Review

Denials of motions to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction are subject to *de novo* review where, as here, the trial court resolves the motion without findings of fact. *Munger v. State*,

202 N.C. App. 404, 410, 689 S.E.2d 230, 235 (2010). So, too, are denials of motions for summary judgment. *Blue*, 247 N.C. App. at 496, 786 S.E.2d at 398. Evidence outside the pleadings may be considered in both circumstances. *See id.* (recognizing that matters outside the pleadings may be consulted in ruling on a 12(b)(1) motion); N.C. R. Civ. P. 56(c) (2021) (providing that summary judgment motions are to be resolved based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any"). Under either motion, the record and evidence are to be construed in the light most favorable to the non-movant. *See United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624, 881 S.E.2d 32, 43 (2022) ("This Court . . . views the allegations as true and the supporting record in the light most favorable to the non-moving party, with this being the applicable standard of review . . . [if] the complaint is dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1)." (cleaned up) (citations omitted)); *McCutcheon v. McCutcheon*, 360 N.C. 280, 286, 624 S.E.2d 620, 625 (2006) (noting that summary judgment motions are resolved by taking the evidence "in a light most favorable to the non-moving party" (citation and quotation marks omitted)).

C. *Pleasant* Claims and Willful, Wanton, and Reckless Negligence

[2] The Workers' Compensation Act ordinarily provides "the exclusive remedy in the event of [an] employee's injury by accident in connection with [their] employment[,] . . . [and] the injured employee may not elect to maintain a suit for recovery of damages for [their] injuries, but must proceed under the Act." *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 883 (2000) (citations omitted). This rule is one of subject matter jurisdiction, as "[s]uch cases are within the exclusive jurisdiction of the Industrial Commission; the superior court has been divested of jurisdiction by statute." *Id.* (citation omitted). It is not, however, absolute; in *Pleasant*, our Supreme Court held that an injured employee may sue a co-employee for workplace injuries caused by the latter's "willful, wanton and reckless negligence." 312 N.C. at 717, 325 S.E.2d at 250. In that case, the plaintiff was injured by a co-employee who was driving a truck "in such a fashion so as to see how close he could operate the [truck] to the plaintiff without actually striking him but, misjudging his ability to accomplish such a prank, actually struck the plaintiff with the [truck] he was operating." *Id.* at 711, 325 S.E.2d at 246.[2]

2. An additional exception, first acknowledged in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), was not raised by the parties and is not at issue in this appeal.

The exception announced in *Pleasant* is based on a recognition that "wanton and reckless behavior may be equated with an intentional act," and therefore, "injury to another resulting from willful, wanton and reckless negligence [by a co-employee] should also be treated as an intentional injury" that falls outside the exclusive jurisdiction of the Industrial Commission. 312 N.C. at 715, 325 S.E.2d at 248. *Pleasant* defined reckless and wanton conduct "as an act manifesting a reckless disregard for the rights and safety of others." *Id.* at 714, 325 S.E.2d at 248 (citations omitted). "Willful negligence" was afforded a more complex definition:

> At first glance the phrase appears to be a contradiction in terms. The term "willful negligence" has been defined as the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property which it is owed. A breach of duty may be willful while the resulting injury is still negligent. Only when the injury is intentional does the concept of negligence cease to play a part. We have noted the distinction between the willfulness which refers to a breach of duty and the willfulness which refers to the injury. In the former only the negligence is willful, while in the latter the injury is intentional.
>
> Even in cases involving "willful injury," however, the intent to inflict injury need not be actual. Constructive intent to injure may also provide the mental state necessary for an intentional tort. Constructive intent to injure exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified. Wanton and reckless negligence gives rise to constructive intent.

Id. at 714-15, 325 S.E.2d at 248 (citations omitted). In short, the negligence exhibited must be so gross as to be "equivalent in spirit to actual intent," *Pender v. Lambert*, 225 N.C. App. 390, 396, 737 S.E.2d 778, 783 (2013) (citation omitted), and "*Pleasant* equated willful, wanton and reckless misconduct with intentional injury for Workers' Compensation purposes," *Woodson*, 329 N.C. at 339, 407 S.E.2d at 227.

Plaintiffs must clear a high bar in alleging and proving such a claim, as "[c]ases from [the Supreme] Court and the Court of Appeals indicate that the burden of proof is heavy on a plaintiff who seeks to recover under *Pleasant*." *Trivette v. Yount*, 366 N.C. 303, 310, 735 S.E.2d 306,

311 (2012). Mere negligence, even if conclusively established, does not suffice to establish a *Pleasant* claim, as "even unquestionably negligent behavior rarely meets the high standard of 'willful, wanton or reckless' negligence." *Id.* at 312, 735 S.E.2d at 312. This high bar is no less applicable to a non-movant plaintiff's claims at summary judgment. *Id.* at 312-13, 735 S.E.2d at 312-13. *Pleasant* claims that survive summary judgment are thus few and far between. *Id.* at 312, 735 S.E.2d at 312.

Several cases demonstrate this high standard. In *Echols v. Zarn, Inc.*, 116 N.C. App. 364, 448 S.E.2d 289 (1994), *abrogated on separate grounds by Mickles v. Duke Power Co.*, 342 N.C. 103, 110, 463 S.E.2d 206, 211 (1995), the injured plaintiff's hand was smashed by a plastic molding machine that she had never been trained to operate. 116 N.C. App. at 367-68, 448 S.E.2d at 291. Prior to the accident, a supervisory co-employee who knew of the machine's dangers and was responsible for safety enforcement directed the plaintiff to reach her hand under the machine's safety gate while it was in operation to remove a part; when she did so, her hand got caught and crushed in the machine. *Id.* at 375, 448 S.E.2d at 295-96. The trial court dismissed the plaintiff's *Pleasant* claim at summary judgment and we affirmed, reasoning that "[e]ven if we assume that [the co-employee] knew that reaching under the safety gate could be dangerous, we do not believe this supports an inference that [the co-employee] intended that plaintiff be injured or that she was manifestly indifferent to the consequences of plaintiff reaching under the safety gate." *Id.* at 376, 448 S.E.2d at 296. In support of that analysis, we observed that the evidence indisputably showed that employees had reached under the safety gate without injury for over fifteen years. *Id.* Thus, while the co-employee's request to reach under the guard "might well be negligent, it does not rise to the level of conduct necessary to create personal liability over and above the Workers' Compensation Act." *Id.* at 377, 448 S.E.2d at 296.

Our Supreme Court reached a similar result in *Pendergrass v. Card Care, Inc.*, where a plaintiff's arm was caught in a final inspection machine. 333 N.C. 233, 236, 424 S.E.2d 391, 393 (1993). The plaintiff alleged gross and wanton negligence on the part of two co-employees who "direct[ed] [the plaintiff] to work at the final inspection machine when they knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards." *Id.* at 238, 424 S.E.2d at 394. Our Supreme Court held that no *Pleasant* claim arose under these facts because, "[a]lthough they may have known certain dangerous parts of the machine were unguarded when they instructed [the plaintiff] to work at the machine, [the Supreme Court] [did] not believe this supports an inference that [the defendants]

intended that [the plaintiff] be injured or that they were manifestly indifferent to the consequences of his doing so." *Id.*

This Court's decision in *Regan v. Amerimark Bldg. Prods., Inc.*, 127 N.C. App. 225, 489 S.E.2d 421 (1997), is likewise instructive. There, two supervisors required the plaintiff to manually clean a steel drum on a paint line machine with a piece of scrap metal while the line was operating. *Id.* at 226, 489 S.E.2d at 423. The machine was designed with a guard that obviated any need to manually clean the drum, but that part was missing on the day the plaintiff was working; in fact, three months prior, the plaintiff's employer had received a citation for a serious OSHA violation related to the lack of adequate machine guards on the line where the plaintiff worked. *Id.* Those violations had not been remedied on the date in question. *Id.* at 226-27, 489 S.E.2d at 423. As the plaintiff was cleaning the drum, his hand got caught and he was pulled into the machine; he attempted to hit two emergency cut-off switches, but both switches failed. *Id.* at 226, 489 S.E.2d at 423. The plaintiff suffered "severe and disabling injuries" as a result. *Id.* We affirmed the trial court's grant of summary judgment against the plaintiff on his *Pleasant* claim because:

> even though the evidence here shows that both [supervisors] were aware that the coater was unguarded and required plaintiff to manually clean the coater, there was no evidence from which a trier of fact could conclude that [the supervisors] engaged in conduct that was willful, wanton or reckless or that they were manifestly indifferent to the consequences of requiring plaintiff to manually scrape the coater.

Id. at 229, 489 S.E.2d at 424-25.

This Court recently considered and rejected a *Pleasant* claim in *Fagundes*. The plaintiff in that case was employed as a blaster at a rock-crushing company and was seriously injured when struck by blast debris. 251 N.C. App. at 737, 796 S.E.2d at 531. OSHA investigated the accident, found the plaintiff's supervisor at fault, and assessed five citations for "egregious" safety violations stemming from the blast. *Id.* at 740, 796 S.E.2d at 534. The plaintiff sued his supervisor, relying on the five OSHA violations to establish willful, wanton, and reckless negligence under *Pleasant*. *Id.* We held that this evidence was insufficient to establish such a claim at summary judgment because, "before his accident, neither [the supervisor] nor the company had ever been cited for any OSHA violations, nor had anyone been injured as a result of the company's blasting activities." *Id.* at 740, 796 S.E.2d at 534.

The high standard is no less applicable in cases involving workplace deaths. In *Dunleavy v. Yates Const. Co., Inc.*, a construction worker in a trench was killed when a portion of the trench collapsed on his head. 106 N.C. App. 146, 150, 416 S.E.2d 193, 195 (1992). The worker and the rest of his crew had no prior experience on the job, were not issued hardhats as required by OSHA, and the trench was not adequately supported under OSHA regulations. *Id.* at 149-50, 416 S.E.2d at 195. While the employee's supervisor was away from the trench, it collapsed and killed the worker. *Id.* We held that summary judgment against the estate's *Pleasant* claim was proper because the trench only reached a dangerous depth while the supervisor was not present, and the failure to issue a hardhat required by OSHA or supervise the inexperienced crew, "although arguably negligent, was not willful, wanton, and reckless . . . [and] did not manifest reckless disregard for the rights and safety of the . . . crew." *Id.* at 155-56, 416 S.E.2d at 198-99.

Estate of Vaughn v. Pike Elec., LLC, 230 N.C. App. 485, 751 S.E.2d 227 (2013), presents the rare case of a successful *Pleasant* claim, and the remarkably egregious facts demonstrate why. There, the decedent had been working for less than two months as a groundman for an electrical crew that serviced overhead powerlines. *Id.* at 486-87, 751 S.E.2d at 229. Groundmen, unlike linemen, were prohibited from working on poles with energized powerlines. *Id.* The decedent's supervisor knew about this prohibition, the decedent's lack of training, and the risk of death posed by working energized powerlines, and yet he instructed the decedent to climb a pole, de-energize the pole, and start retrofitting a transformer. *Id.* at 487-88, 751 S.E.2d at 229-30. The decedent died during the process; at the time of the accident, his employer had received at least ten prior serious OSHA safety violations after other employees had been killed or injured working on powerlines. *Id.* at 488-89, 751 S.E.2d at 230. We held that these facts successfully established a *Pleasant* claim:

> [The] [d]efendant . . . knowingly directed [the] [d]ecedent, an untrained groundman who had previously worked as a truck driver, to climb a power pole and work on highly dangerous and "near energized" power lines, without the necessary training, equipment, or experience. Though it cannot be inferred from these allegations that [the defendant] *intentionally injured* [the] [d]ecedent by requiring him to de-energize the transformer, we hold that his alleged direction to send [the] [d]ecedent up that utility pole despite [the] [d]ecedent's severe lack of training and expertise is sufficient to create an inference that [the

> defendant] was manifestly indifferent to the consequences of his actions.

Id. at 503, 751 S.E.2d at 239 (citation omitted).

D. The Evidence Below Fails to Establish a *Pleasant* Claim

Randy Reinhardt argues that the above cases show that Plaintiff's forecasted evidence cannot meet the high bar necessary to establish a *Pleasant* claim. We agree. The uncontroverted evidence establishes that Dimension operated an award-winning safety program, which included quarterly safety briefings; Mr. Baker attended just such a program in the weeks before the accident, where Dimension explicitly instructed staff to "BE SURE TO TURN MACHINES OFF AND MAKE SURE THEY COME TO A COMPLETE STOP BEFORE BENDING OVER AND CLEANING AROUND MACHINERY." Dimension trained Mr. Baker on the Machine and its predecessor and made all employees aware of the danger of stepping into the area where Mr. Baker was killed. During a combined 15 years of operation, all of which occurred during Mr. Baker's employment: (1) nobody was injured on the Machine or its predecessor; (2) OSHA issued no violations related to the same; and (3) Dimension received no safety complaints from staff about those bandsaws. In fact, Dimension received no serious OSHA violations, had no serious injuries, and maintained a DART rate below the national average for the entire three years preceding the accident. All evidence in the record indicated, without dispute, that the Reinhardts did not request or instruct Mr. Baker to clean around the machine. And, though ultimately insufficient to prevent Mr. Baker's accidental death, Dimension did make some attempt to cordon off and limit access to the rear of the Machine. Again, Plaintiff offered no evidence at summary judgment to rebut the above.

Attempted *Pleasant* claims have been dismissed even when employers knew of the danger and instructed the employee to engage in that activity anyway. *See Regan*, 127 N.C. App. at 229, 489 S.E.2d at 424-25 (holding there was no *Pleasant* claim when supervisory defendants instructed the seriously injured plaintiff to clean a working machine with an improperly removed guard despite a prior uncorrected serious OSHA violation for that exact issue); *Pendergrass*, 333 N.C. at 238, 424 S.E.2d at 394 (holding the same on similar facts). That OSHA ultimately cited Dimension[3] for the accident does not alone suffice. *Fagundes*, 251 N.C. App. at 740-41, 796 S.E.2d at 534. This case is likewise distinct from

3. Though plainly not dispositive, OSHA cited Dimension for a "serious," rather than a "willful," violation.

the egregious situation presented in *Vaughn*, where the employer had numerous past OSHA violations for the conduct at issue, the decedent was untrained, inexperienced, and prohibited from de-energizing lines, and the defendant co-employee nonetheless directly ordered the decedent to undertake that dangerous activity with full knowledge of these facts. 230 N.C. App. at 486-89, 751 S.E.2d at 229-30.

Notwithstanding the above, Plaintiff argues that willful, wanton, and reckless negligence is established by three facts: (1) Randy Reinhardt knew of the hazard presented by the Machine because employees were told in safety trainings to stay clear of machines' moving parts while in operation; (2) Randy Reinhardt knew the Machine posed a life-threatening hazard because he told Mr. Baker's family after the accident that someone caught between the Machine's lower table arm and nearby pillar would be cut in half; and (3) plant management, based on the OSHA report, was aware of the fatal danger posed by the Machine but were too busy to complete the necessary fencing.[4]

Even if we take this evidence, accurately described, in the light most favorable to Plaintiff, it falls short of showing negligence so egregious as to be "equivalent in spirit to actual intent." *Pender*, 225 N.C. App. at 396, 737 S.E.2d at 782-83. While it may show that Randy Reinhardt knew of the potential fatal danger posed by the Machine, all the other evidence in the record shows that Dimension and the Reinhardts attempted to share that knowledge with Mr. Baker to reduce the risk of accident. Indeed, two of the facts cited by Plaintiff—Dimension's safety trainings and efforts to block off the area—show an intent, albeit insufficient, to keep Mr. Baker safe. Though ultimately unsuccessful in their efforts, the steps undertaken by Dimension and the Reinhardts—which included training Mr. Baker on the Machine, explicitly warning him and other employees from cleaning around the Machine while it was in operation, and taking some action to block off the area around the Machine—served to increase the relative safety of the situation. At no point did they intentionally undercut those efforts by, for example, directing Mr. Baker to clean the area while the Machine was running, ignoring prior

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4. It is not plainly apparent from the OSHA report whether this statement was made by or about the Reinhardts, as the name(s) of interviewees were redacted along with the identity of the person(s) said to be aware of the hazard. Further, the statement that "most of the time they were too busy and there would have been buggy loads (carts with wood products) stacked in front of the machine and you would not be able to get in there," is reasonably read to mean that no permanent fencing was installed because the plant was so busy that carts always blocked off the area. Regardless, even if the statement is read as Plaintiff urges, it does not constitute willful negligence under *Pleasant*.

OSHA violations or safety complaints concerning the Machine, and/or tasking him with an unfamiliar duty involving a plainly lethal hazard. *See Vaughn*, 230 N.C. App. at 503, 751 S.E.2d at 239 (holding such allegations by a deceased employee's estate sufficed to plead a *Pleasant* claim). Knowledge of a dangerous hazard, standing alone, does not establish a viable claim under *Pleasant*. *See Echols*, 116 N.C. App. at 376, 448 S.E.2d at 296 (holding facts did not establish a *Pleasant* claim at summary judgment "[e]ven if we assume that [the co-employee] knew that reaching under the safety gate could be dangerous"); *Pendergrass*, 333 N.C. at 238, 424 S.E.2d at 394 (holding facts were inadequate to support a *Pleasant* claim at summary judgment "[a]lthough [the defendant co-employees] may have known certain dangerous parts of the machine were unguarded when they instructed [the plaintiff] to work at the machine"); *Regan*, 127 N.C. App. at 229, 489 S.E.2d at 424-25 (holding summary judgment dismissing the plaintiff's *Pleasant* claim was proper "even though the evidence here shows that both [supervisors] were aware that the coater was unguarded and required plaintiff to manually clean the coater").

III. CONCLUSION

This case involves an undeniable tragedy. We are cognizant of the heartbreak caused by Mr. Baker's death and the ensuing pain endured by his family. But the State has guaranteed them some measure of recompense, however inadequate it may feel following the avoidable loss of a family member, through the guarantees of the Workers' Compensation Act:

> The Act seeks to balance competing interests and implement trade-offs between the rights of employees and their employers. It provides for an injured employee's certain and sure recovery without having to prove employer negligence or face affirmative defenses such as contributory negligence and the fellow servant rule. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244. In return the Act limits the amount of recovery available for work-related injuries and removes the employee's right to pursue potentially larger damage awards in civil actions. *Id.* at 712, 325 S.E.2d at 246-47.

Woodson, 329 N.C. at 338, 407 S.E.2d at 227 (additional citations omitted). And while there is an exception to this statutory arrangement where a co-employee's negligence is so gross as to be equivalent to intentional injury, *id.* at 339, 407 S.E.2d at 227, the binding precedents

applying *Pleasant* discussed above preclude us from recognizing such a claim on the facts presented here. As a result, we reverse the trial court's order denying summary judgment for Randy Reinhardt and remand for entry of a judgment consistent with this opinion.

REVERSED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

IN THE MATTER OF K.C.

No. COA22-396

Filed 2 May 2023

Child Abuse, Dependency, and Neglect—temporary guardianship to nonparents—constitutionally protected parental status—insufficient findings

The trial court erred in a neglect case—in which DSS never sought non-secure custody of the child, and where the first time the court contemplated removal of the child from respondent-father, the non-offending parent, was at the disposition hearing—by awarding temporary custody of the child to her paternal aunt and uncle where its conclusion that the father had acted inconsistently with his constitutionally protected rights as a parent was not supported by the evidence or the findings of fact. After disregarding findings on socioeconomic factors, which were irrelevant to the question of the father's parental fitness, the appellate court vacated the trial court's order because the remaining findings—which included details of the father's criminal history and pending assault on a female charge—did not show that the child was at risk of endangerment or injury in her father's care or that the father had failed to meet her needs. The fact that the father sought temporary assistance from family members in caring for his daughter did not undermine his parental status.

Judge CARPENTER dissenting.

Appeal by respondent-father from orders entered 21 October 2021 and 8 February 2022 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 3 April 2023.

Robin K. Martinek, for Durham County Department of Social Services, petitioner-appellee.

Alston & Bird LLP, by Kelsey L. Kingsbery and Michelle C. Prendergast, for the Guardian ad Litem.

Richard Croutharmel, for the father, respondent-appellant.

WOOD, Judge.

Respondent-father appeals from the disposition order placing K.C. ("Katy")[1] in the temporary custody of the paternal aunt and uncle following the trial court's adjudication of Katy as a neglected juvenile. For the reasons stated herein, we vacate the disposition order and remand for further proceedings.

I. Background

Katy was born in January 2020. On 25 August 2020, Durham County Department of Social Services filed a petition alleging Katy to be a neglected juvenile. The petition alleged Katy and her mother[2] both tested positive for marijuana at Katy's birth, and that mother admitted to using cocaine during her pregnancy. Mother had a history of mental health, substance abuse, and domestic violence issues, as well as a history of housing instability. On 9 August 2020, mother was charged with driving while impaired and reckless endangerment after she fled the scene of an automobile accident. Following this incident, DSS and the parents established a safety plan for Katy whereby Katy would be placed with respondent-father, the non-offending parent, with whom she has had regular visits since birth. The only mention of Respondent in the petition states that he is the father of Katy and had regular visitation with her until she was placed with him pursuant to the safety plan. DSS did not seek non-secured custody of Katy.

On 15 October 2021, more than a year after the filing of the juvenile petition, the matter came on for adjudication. On 21 October 2021, the trial court entered an order adjudicating Katy to be a neglected juvenile. The dispositional hearing was held on 10 December 2021. **This is the first time the court contemplated removal of the child from the non-offending parent.** On 13 January 2022, the trial court entered

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1. A pseudonym agreed upon by the parties pursuant to N.C. R. App. P. 42(b).

2. Katy's mother is not a party to this appeal.

a limited order placing Katy in the temporary custody of her paternal aunt and uncle. The trial court entered the formal disposition order on 8 February 2022, wherein it formally placed Katy in the "temporary custody" of her paternal aunt and uncle and ordered Respondent to complete a parenting class with a domestic violence component, complete a domestic violence program for perpetrators, refrain from physically disciplining Katy, maintain contact with the social worker, maintain stable housing, maintain employment and income, refrain from using illegal substances, sign all necessary releases to allow the social worker to access service records, and ensure that all service providers have copies of the trial court's orders. He was granted up to three hours of weekly, unsupervised visitation with Katy. Respondent appeals.

II. Discussion

On appeal, Respondent argues the trial court erred in placing Katy in the temporary custody of the paternal aunt and uncle where its determination that he acted inconsistently with his constitutional rights as a parent was not supported by the evidence or the findings of fact. Respondent's argument has merit.

We begin by noting that Respondent properly preserved this issue for our review.[3] Respondent had notice that DSS was recommending temporary custody of Katy be placed with the paternal aunt and uncle. At the dispositional hearing, he opposed DSS's recommendation, testified that he had the ability to care for Katy, and specifically requested the court to allow Katy to remain in his custody. *See In re B.R.W.*, 278 N.C. App. 382, 399, 863 S.E.2d 202, 216 (2021) (holding that the respondent-mother's challenge to the trial court's determination that she acted inconsistently with her protected status was preserved where she presented evidence of her ability to care for the children, opposed the recommendation of guardianship, and requested the trial court to reject the recommendation of guardianship), *aff'd*, 381 N.C. 61, 871 S.E.2d 764 (2022).

Here, the trial court determined that Respondent had "acted inconsistent[ly] with [his] constitutional right [as a] parent." Respondent initially contends that the trial court erred in labeling this determination as a finding of fact when it is a conclusion of law. We agree. Although the trial court characterized this determination as a finding of fact, it is a conclusion of law; and we review it accordingly. *See In re J.S.*, 374 N.C. 811, 818, 845 S.E.2d 66, 73 (2020) ("We are obliged to apply the

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3. On 28 June 2022, DSS filed a motion to dismiss respondent's appeal on the ground that respondent had failed to preserve his sole argument on appeal for review. Petitioner's motion to dismiss is denied.

appropriate standard of review to a finding of fact or conclusion of law, regardless of the label which it is given by the trial court."). "The trial court's legal conclusion that a parent acted inconsistently with his constitutionally protected status as a parent is reviewed de novo to determine whether the findings of fact cumulatively support the conclusion and whether the conclusion is supported by clear and convincing evidence." *In re I.K.*, 377 N.C. 417, 421, 858 S.E.2d 607, 611 (2021).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects "a natural parent's paramount constitutional right to custody and control of his or her children" and ensures that "the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody" or "where the parent's conduct is inconsistent with his or her constitutionally protected status." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001). A parent's constitutionally protected interest

> in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on the presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child.

Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). "[T]here is no bright line beyond which a parent's conduct" constitutes action inconsistent with their protected status. *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010). "Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents." *Price*, 346 N.C. at 79, 484 S.E.2d at 534-35. "[E]vidence of a parent's conduct should be viewed cumulatively." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 267 (2003).

Here, the trial court relied on the following findings of fact to support its conclusion that Respondent acted inconsistently with his constitutionally protected right to parent Katy:

> 20. Starting in April 2021, [Katy] was staying with her [paternal aunt and uncle] on a consistent basis. In order to have a stable and consistent caregiver, [respondent]

elected to have [Katy] stay with his sister . . . and her husband[.] She and her husband moved into a new apartment to ensure that [Katy] has a stable place to be at all times. [Respondent] is often in the home visiting his daughter and will spend the night there as well.

21. At the end of June 2021, [respondent] decided that he would provide the care and supervision to his daughter. He has been providing this care to [Katy] and allowing her to spend an occasional night with other family members.

22. In November 2021, [respondent] was arrested and charged with assault on a female. At the time, he was at home with a female who he said he was and was not in a relation[ship] with. According to [respondent], the altercation took place outside the home, while [Katy] and a three-year-old were in a back room alone and unsupervised. After that, the child was placed with [the paternal aunt and uncle]. Guilford County DSS conducted a kinship assessment of the [paternal aunt and uncle] and approved placement with them. They are in the process of getting [Katy] enrolled in daycare.

. . . .

49. When [Katy] was placed in his home, [respondent] was employed full time with ABM Building Values, a commercial cleaning service, and resided in the home of the paternal grandmother in Guilford County. Both the paternal grandmother and [paternal aunt] assisted with childcare, provided clothing, and spent quality time with [Katy].

50. Around December 2020, [respondent] moved to his own place in Guilford County. At that time, he was still employed with ABM Building Values; however, he was not working due to lack of business related to COVID. [Respondent] received unemployment benefits. [Respondent] also reported that he was an entrepreneur with a business that showcased his urban clothing line, the Wise Mark Company. [Respondent] reports he has been running his own business for three years.

. . . .

53. Since the filing of the petition in August 2020, [respondent] has lived in four different locations. He is currently living with his mother.

> 54. [Respondent] has a significant criminal history with convictions for drug-related crimes and assault on a female. Durham DSS was not aware of the criminal history until after [Katy] was already in the home and Alamance County DSS had approved the placement. Since the filing of the petition, [respondent] had to turn himself in to the Alamance County Jail for charges of communicating threats and larceny of a firearm. He was released later that day. [Respondent] also had pending charges for assault on a female with an ex-girlfriend as a victim. In November 2021, he was charged with assault on a female.
>
> 55. [Respondent] has a history of domestic violence.
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> 56. The Court was disturbed by what she saw at [respondent's] house during the video testimony. [Respondent] wore a wife beater to court and his home was filled with [what appeared to be] dirty laundry.
>
> 57. The Court did not find [respondent's] description and downplay of the domestic violence incident credible.
>
> 58. [Respondent] reported that he would tote his daughter around in the car while delivering his product for his business. The Court finds that was inappropriate.
>
> 59. The Court is concerned that [respondent] continues to involve himself with women that results in domestic violence.

Respondent challenges the portion of dispositional finding of fact 49 which provides that "[b]oth the paternal grandmother and [paternal aunt] assisted with childcare, provided clothing, and spent quality time with [Katy]" while Katy was placed in his care. The paternal aunt testified at the dispositional hearing that over the past year, while Katy was in Respondent's care, Katy would stay overnight in her home at least three days a week. Respondent would leave Katy with the paternal aunt "when he had things to do." An addendum to the August 2020 DSS court report, dated 13 October 2021, which was admitted into evidence at the dispositional hearing without objection, demonstrates that the paternal grandmother and paternal aunt "help[ed] with caring" for Katy. Katy was "often" with her paternal aunt due to Respondent's work schedule, and the paternal aunt reported to a DSS social worker that she had purchased clothes and food items while Katy was in her care. Providing babysitting services would qualify as assisting with childcare

and spending quality time with the child. Thus, clear and convincing evidence supports finding of fact 49.

Respondent challenges the portion of dispositional finding of fact 54 pertaining to his criminal history and DSS's awareness of his criminal history as not being supported by the evidence. However, the August 2020 DSS court report, which was admitted into evidence at the dispositional hearing without objection, stated Respondent's criminal history of convictions for driving while license revoked, assault on a female, possession of marijuana, and possession of a firearm. An addendum to the court report provides that DSS was not made aware of Respondent's criminal history until Katy was already in respondent's home and Respondent had a pending charge of assault on a female. Thus, Respondent's challenge to this finding fails. Although DSS became aware of Respondent's criminal history before its 15 October 2020 addendum to its report to the court, DSS did not seek nonsecure custody of Katy at any of the pretrial hearings or at the adjudication hearing on 15 October 2021.

Throughout the approximately fifteen months Katy was in the custody of Respondent, from the safety plan immediately preceding filing of the petition to the disposition hearing, the DSS court report and each addendum thereafter set forth the circumstances of the Respondent and Katy. DSS consistently reported Katy was doing well in the custody of the Respondent, that he was meeting all her needs, was utilizing family support when needed, and "is providing a safe home that [has] adequate supplies and space for his daughter." DSS consistently reported that Katy and Respondent have a "strong bond," and she is affectionate toward him and happy to see him. Each report, until the 13 October 2021 addendum, recommended Katy be placed in the custody of Respondent at disposition. That report recommended that Katy be placed in the temporary custody of the paternal aunt and uncle while simultaneously reporting that Respondent "is providing a safe home that [has] adequate supplies and space for his daughter." There was no allegation that Respondent was unable to meet Katy's needs or that she was at risk of any injury while in Respondent's care. *See In re Evans*, 81 N.C. App. 449, 452-54, 344 S.E.2d 325, 327 (1986) (The task at the initial "removal stage is to determine whether the child is *exposed* to a substantial risk of physical injury because the parent is unable to provide adequate protection.").

Next, Respondent argues that findings of fact 50, 53, 56, 57, and 58 constitute socioeconomic factors irrelevant to an analysis of whether a parent has acted inconsistently with their constitutionally protected status. It is well established that a parent's "socioeconomic status is irrelevant to a fitness determination." *Raynor v. Odom*, 124 N.C. App.

724, 731, 478 S.E.2d 655, 659 (1996) (citing *Jolly v. Queen*, 264 N.C. 711, 713-14, 142 S.E.2d 592, 595 (1965)).

> Socioeconomic factors that this Court has held do not show a parent's unfitness or acts inconsistent with constitutionally-protected status include *the propriety of the parent's place of residence*, *that the parents move frequently*, *that their house* at times lacked heat or *was not cleaned regularly*, their choice in spouse or babysitter, that the parent did not have relatives nearby to assist in caring for the child, *a history of being unable to maintain stable employment*, and *loss of a job*. While socioeconomic factors such as the quality of a parent's residence, job history, or other aspects of their financial situation would be relevant to the determination of whose custody is in the best interest of the child, those factors have no bearing on the question of fitness.

Dunn v. Covington, 272 N.C. App. 252, 265, 846 S.E.2d 557, 567 (2020) (emphasis added).

We reject respondent's contention that findings of fact 57 and 58 constitute findings regarding socioeconomic factors. They address Respondent's "description and downplay" of the domestic violence incident that occurred in November 2021 and how Respondent would "tote" Katy around in his vehicle while working. In findings of fact 50, 53, and 56, however, the trial court found that Respondent was not working and receiving unemployment benefits around December 2020, had moved to four different locations since the filing of the juvenile petition in August 2020, was currently living with his mother, and had a messy home. These findings regard socioeconomic factors that potentially could reflect on the child's best interest but have no bearing on the issue of whether Respondent's conduct was inconsistent with his constitutional rights as a parent. The trial court inappropriately considered these factors, and we do not consider them here.

The trial court's remaining findings of fact demonstrate that Katy was placed in Respondent's custody in August 2020 and for approximately three months in 2021, Respondent elected to have Katy stay with the paternal aunt and uncle. He visited her regularly during this time, and at the conclusion of the three months, Respondent resumed the care and supervision of Katy. This short period of time Katy was with the paternal aunt and uncle was temporary and does not undermine respondent's constitutionally protected status. *See Price*, 346 N.C. at 83, 484 S.E.2d at 537 (stating that if a parent allows a party to have "custody

of the child only for a temporary period of time" and then seeks custody at the conclusion of that period, the parent "would still enjoy a constitutionally protected status absent other conduct inconsistent with that status"). The other findings establish the following: (1) Respondent received assistance from the paternal grandmother and aunt in caring for Katy; (2) Respondent had prior convictions for drug-related crimes, assault on a female, and a pending charge of assault on a female; (3) Respondent's pending charge arose from an incident that occurred in November 2021 wherein he is alleged to have assaulted a female outside his home while Katy was inside and unsupervised; and (4) Katy accompanied Respondent when he delivered merchandise for his business. The trial court did not make any findings about the effects that these findings might have on Katy or specific risks that might result, nor did the court find that the condition of the Respondent's home contributed to any particular risk of endangerment or injury to Katy.

Viewing Respondent's conduct cumulatively, we are unable to say that receiving support from family members in caring for Katy, having Katy accompany Respondent while he worked and conducted business, having prior criminal convictions (the dates, number, and effects of which are unknown), and the existence of an unproven domestic violence charge warrant forfeiture of Respondent's constitutionally protected status. Based on the record evidence, the trial court's findings of fact do not show that Respondent "fail[ed] to shoulder the responsibilities that are attendant to rearing a child." *Price*, 346 N.C. at 79, 484 S.E.2d at 534. There were no allegations in the petition or findings in the adjudication order that Respondent, the non-offending parent, has neglected the child, is unfit, or has acted inconsistently with his paramount constitutional right to custody of his child. Therefore, his constitutionally protected rights remain intact at this juncture. To be clear, the disposition hearing is the *first* time the trial court contemplated removal of the child from the non-offending parent. The child was not in DSS custody, nor had she ever been placed in non-secured custody.

III. Conclusion

Accordingly, we are constrained to hold that the trial court's findings of fact are insufficient to support the trial court's conclusion that Respondent acted inconsistently with his paramount constitutionally protected status as a parent. The portion of the disposition order entered 8 February 2022 that removed Katy from the Respondent's custody and granted temporary custody of Katy to the paternal aunt and uncle is vacated, and the case is remanded to the trial court for further proceedings and entry of a new dispositional order. Because the disposition

hearing occurred more than a year ago, the trial court may conduct a new disposition hearing for Katy.

VACATED AND REMANDED.

Judge COLLINS concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

In my view, the trial court's finding of fact 61, stating that Respondent-Father acted inconsistent with his constitutional rights as a parent, was premature and unnecessary to the trial court's dispositional decision awarding temporary custody to relatives. I agree with the majority to the extent that finding of fact 61 is actually a conclusion of law, reviewable *de novo* on appeal. Nonetheless, this conclusion is only necessary and proper when making a permanent custody determination. *See In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (explaining the trial court could not award permanent custody without a finding that the respondent was unfit or had acted inconsistent with his constitutional rights as a parent). The proper standard of review for a trial court's disposition order is abuse of discretion; therefore, I believe the majority erroneously reviewed an improper and superfluous conclusion of law *de novo*. Because the trial court did not abuse its discretion in awarding temporary custody to relatives in its disposition order, I respectfully dissent.

I. Standard of Review

It is well settled that North Carolina Appellate Courts review a trial court's dispositional choices—including temporary placement with a relative—for abuse of discretion. *In re A.P.W.*, 378 N.C. 405, 410, 861 S.E.2d 819, 826 (2021). "An abuse of discretion results where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (citation and quotation mark omitted).

"The district court has broad discretion to fashion a disposition from the prescribed alternatives in N.C. Gen. Stat. § 7B-903(a), based upon the best interests of the child." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008) (citations omitted); *see also* N.C. Gen. Stat.

§ 7B-903(a)(4) (2021) (providing the trial court may "[p]lace the juvenile in the custody of a parent, relative, private agency offering placement services, or some other suitable person" as a dispositional alternative).

II. Analysis

On appeal, Respondent-Father argues that because insufficient evidence supports the trial court's conclusion that he acted inconsistent with his constitutional rights as a parent, the trial court erred in placing Katy in the temporary custody of her paternal relatives. Our Court has previously rejected this constitutional argument, albeit in unpublished decisions, where the trial court's custody determination at the dispositional stage was temporary. *See In re B.S.*, 225 N.C. App. 654, 738 S.E.2d 453 (2013), 2013 N.C. App. LEXIS 156, at *4 (N.C. Ct. App. Feb. 19, 2013) (unpublished) (holding the trial court's "finding of fact at disposition that respondent was unfit and had acted inconsistently with his constitutionally protected parental rights was both *unnecessary and improper* at [the dispositional] stage of the proceedings") (emphasis added); *In re E.B.*, 241 N.C. App. 656, 775 S.E.2d 693 (2015), 2015 N.C. App. LEXIS 481, at *7 (N.C. Ct. App. June 16, 2015) (unpublished) (explaining the trial court was not required to make a finding that the respondent was an unfit parent or had acted inconsistently with his constitutionally protected parental rights because the trial court awarded only temporary custody at the dispositional stage); *see also In re J.W.M.*, 283 N.C. App. 470, 2022-NCCOA-354, ¶ 17–19 (unpublished) (rejecting the respondent-father's argument that the trial court should have engaged in an analysis of his constitutionally protected parental rights at the dispositional stage where it awarded temporary custody of the juvenile to the department of social services). Respondent-Father challenges several findings of fact but does not contend the trial court abused its discretion.

Here, the trial court made findings of fact regarding: Katy's need for stability and more adequate care and supervision in her placement; Respondent-Father's criminal and domestic violence history—including one domestic violence incident that occurred while Katy was home unsupervised; the trial court's concern for Respondent-Father's continued domestic violence; and Respondent-Father's four home changes since the petition was filed. The trial court also considered Katy's placement options, including being returned to Respondent-Father's home. Based on its findings of fact, the trial court concluded it was in Katy's best interest to be placed in the temporary custody of relatives. I disagree with the majority that the trial court was required to make specific findings at this stage of the proceedings regarding a risk of

substantial injury posed by Respondent-Father's home environment. In the 21 October 2021 adjudication order, the trial court adjudicated Katy to be neglected, and Respondent-Father did not appeal from this order.

In light of the trial court's findings, I cannot conclude the trial court abused its discretion in its award of temporary custody to Katy's relatives at this stage of the juvenile proceeding. *See In re A.P.W.*, 378 N.C. at 410, 861 S.E.2d at 826. Accordingly, I would affirm the disposition order.

III. Conclusion

The trial court's disposition order, including its award of temporary custody, was not "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *See In re T.L.H.*, 368 N.C. at 107, 772 S.E.2d at 455. Therefore, I would affirm the disposition order.

IN THE MATTER OF N.D.M.

No. COA22-483

Filed 2 May 2023

Native Americans—Indian Child Welfare Act—termination of parental rights—active efforts to prevent breakup of family —non-Indian father incarcerated

In terminating the parental rights of respondent-father to his son, whose mother was a member of an Indian tribe, the trial court erred by concluding that the county department of social services (DSS) had complied with the Indian Child Welfare Act by providing active efforts to prevent the breakup of the child's family. The father's incarceration did not relieve DSS of its duty to make active remedial efforts, and DSS's formulation of a case plan and procurement of a paternity test for the father were insufficient.

Appeal by Respondent-Father from order entered 3 March 2022 by Judge Burford A. Cherry in Burke County District Court. Heard in the Court of Appeals 3 April 2023.

Amanda C. Perez for Appellee Burke County Department of Social Services.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for Appellee Guardian ad Litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky L. Brammer, for Appellant Respondent-Father.

COLLINS, Judge.

Respondent-Father appeals from the trial court's order terminating his parental rights to his son, Nathan.[1] The dispositive issue on appeal is whether the trial court erred by finding and concluding that Burke County Department of Social Services ("DSS") provided active efforts toward reunification in compliance with the Indian Child Welfare Act ("ICWA").[2] Because DSS failed to provide active efforts toward reunification within the meaning of ICWA, we reverse the order terminating Father's parental rights to Nathan and remand the matter to the trial court for further proceedings.

I. Procedural and Factual Background

DSS filed a petition on 19 August 2018 alleging that Nathan was a neglected and dependent juvenile. Supporting these allegations, the petition further alleged that on 18 August 2018, DSS received a report that Nathan had been abandoned by Mother's boyfriend at a public safety office at Mother's direction; Mother was suffering from substance abuse and could not identify an alternate safety provider for Nathan; Mother was a member of the Monacan Indian Tribe; and Nathan's putative father, Father, was incarcerated. DSS obtained nonsecure custody of Nathan on 19 August 2018.

The trial court held adjudication and disposition hearings on 18 October 2018. The trial court found, in part, that Nathan was eligible for membership in the Monacan Tribe and ICWA applied to his case, and that Father had "submitted to DNA testing which confirmed that he is the biological father of the juvenile." The trial court further found that DSS had made active efforts to prevent the breakup of the family by, among other things, communicating with respondent parents and monitoring their status. Upon facts stipulated to by the parties, including Father, the trial court adjudicated Nathan neglected and dependent by written order entered 1 November 2018. The trial court ordered that

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1. We use a pseudonym to protect the juvenile's identity. *See* N.C. R. App. P. 42.

2. This appeal does not involve the termination of Nathan's Mother's parental rights.

Father not have visitation during his incarceration and that he enter into an out of home family services agreement and complete the following:

> a. Submit to a comprehensive clinical assessment and follow recommendations;
>
> b. Submit to a substance abuse assessment and follow recommendations;
>
> c. Submit to random drug screens;
>
> d. Complete a parenting class and demonstrate skills learned;
>
> e. Obtain and maintain a legal means of income;
>
> f. Obtain and maintain transportation;
>
> g. Obtain and maintain stable housing.

Custody of Nathan was continued with DSS.

After a review hearing on 7 February 2019, by written order entered 7 March 2019, the trial court found that Father was currently incarcerated and had not entered into a case plan or engaged in any services, and that DSS had made active efforts to prevent the breakup of the family by, among other things, DNA testing, communicating with respondent parents, and monitoring their status. Father was ordered to enter into an out-of-home family services agreement and complete certain requirements, and was awarded no visitation.

After a permanency planning review hearing on 30 May 2019, by written order entered 27 June 2019, the trial court found that Father had been released from incarceration but had yet to enter into a case plan or engage in services. The trial court found that DSS had made active efforts to prevent the breakup of the family by, among other things, communicating with respondent parents and monitoring their status. The trial court again ordered Father to enter into an out-of-home family services agreement and complete certain requirements, and again ordered that Father have no visitation.

After a permanency planning review hearing on 9 January 2020, by written order entered 23 January 2020, the trial court found as follows: Father had been released from incarceration on 8 February 2019, rearrested on 22 February 2019, and reincarcerated on 19 June 2019; Father had not engaged in any services; and DSS had engaged in active efforts to prevent the breakup of the family by, among other things, communicating with respondent parents, "[i]dentifying appropriate services to assist parents to overcome barriers," and "[m]onitoring the parents'

status[.]" The trial court concluded that a primary plan of adoption with a secondary plan of reunification was the most appropriate plan and Father was ordered to have no visitation.

After a permanency planning review hearing on 23 July 2020, by written order entered 20 August 2020, the trial court found that Father was incarcerated and had not entered into an out-of-home family services plan and that DSS had made active efforts to prevent the breakup of the family. Father was ordered to have no visitation.

On 3 December 2020, DSS filed a termination of parental rights ("TPR") petition, alleging that grounds existed to terminate Father's parental rights based on the following: neglect; willfully leaving Nathan in foster care for more than twelve months without showing reasonable progress in correcting the conditions that led to Nathan's removal; being incapable of providing proper care and supervision such that Nathan is a dependent juvenile; and willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), (6), (7) (2022). Also on that date, DSS prepared and filed a Notice of Termination of Parental Rights under the Indian Child Welfare Act. On 21 January 2021, DSS filed an amended TPR petition to include the ground that Father's parental rights with respect to another child had been terminated and he lacked the ability or willingness to establish a safe home. *See id.* § 7B-1111(a)(9).

After numerous continuations for various reasons, the trial court held a hearing on the TPR petition on 6 December 2021. By written order entered 3 March 2022, the trial court terminated Father's parental rights. The trial court found, among other things, that Father had not completed any of the court-ordered services recommended by DSS; had failed to enter into a case plan; had not engaged in any programs while incarcerated; and, "[d]espite his inability to engage in many services, [] Father still had access to the social worker and failed in any respect to engage with the Department during his incarceration or to otherwise establish or maintain a parental relationship with the juvenile." The trial court also found that DSS had engaged in active and reasonable efforts to reunify Nathan with Father. The trial court concluded that all five grounds alleged in the petition existed to terminate Father's parental rights and that termination was in Nathan's best interests.

Father timely appealed.

II. Analysis

Father first argues that the trial court erred by finding and concluding that DSS provided active efforts to prevent the breakup of the family, as required by ICWA.

We review de novo the trial court's determination that DSS provided active efforts toward reunification within the meaning of ICWA. *See In re A.P.*, 260 N.C. App. 540, 818 S.E.2d 396 (2018), *disc. review denied*, 372 N.C. 296, 827 S.E.2d 99 (2019). Due to the paucity of North Carolina case law involving ICWA, we look for guidance from jurisdictions such as Alaska, Montana, Oklahoma, South Dakota, and Washington that regularly address issues involving ICWA.

The decision to terminate parental rights in this case is governed by both state and federal statutes. North Carolina standards for terminating parental rights are provided in Chapter 7B of our General Statutes, which allows the trial court to terminate parental rights if it finds by clear, cogent, and convincing evidence that one or more grounds for terminating a parent's rights exist and that terminating the parent's rights is in the juvenile's best interest. N.C. Gen. Stat. §§ 7B-1109–1111 (2022). In addition to the state requirements, Nathan's case is governed by the more stringent protections of ICWA.[3] *See* 25 U.S.C. § 1903(1)(ii)(2022); 25 U.S.C. § 1903(4); *In re E.J.B.*, 375 N.C. 95, 100, 846 S.E.2d 472, 475 (2020). ICWA was passed

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902 (2022). *See In re E.J.B.*, 375 N.C. at 98-100, 846 S.E.2d at 474-76 (giving a detailed background on ICWA).

ICWA provides that a party seeking to terminate an individual's parental rights must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d) (2022). The active efforts requirement applies in situations that involve the termination of the rights of Indian and non-Indian parents alike. *See* 25 C.F.R. § 23.2 (2022) (defining "active efforts" to include efforts to help the "Indian child's parents"); *In re Adoption of T.A.W.*, 383 P.3d 492, 500 (Wash. 2016) (ICWA active efforts are "premised not on the Indian status of the parents but

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3. The applicability of ICWA is undisputed in this case.

is instead based on whether the child is an Indian child."); *C.J. v. State*, 18 P.3d 1214 (Alaska 2001) (ICWA applied based on the tribal affiliation of the children's mother).

Although not defined by ICWA, the United States Department of the Interior, through the Bureau of Indian Affairs,[4] issued a final rule in 2016 providing the following definition of "active efforts" and a non-exhaustive list of examples of what may constitute active efforts:

> Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:
>
> (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
>
> (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
>
> (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
>
> (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family

4. Pursuant to the statutory authority in 5 U.S.C. § 301; 25 U.S.C. §§ 2, 9, 1901-1952.

members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

25 C.F.R. § 23.2. "[T]he sufficiency of 'active efforts' will vary case-by-case and the final rule's definition of active efforts retains a state court's discretion to consider the facts and circumstances of each case." *In re E.L.*, 502 P.3d 1049, 1068 (Kan. App. 2021) (citing 81 Fed. Reg. 38,778, 38,791 (2016)).

"[T]he practical circumstances surrounding a parent's incarceration–the difficulty of providing resources to inmates generally, the unavailability of specific resources, and the length of incarceration–may

have a direct bearing on what active remedial efforts are possible." *A.A. v. Dep't of Family & Youth Servs.*, 982 P.2d 256, 261 (Alaska 1999) (citation omitted). However, "neither incarceration nor doubtful prospects for rehabilitation will relieve the State of its duty under ICWA to make active remedial efforts[.]" *Id.* (brackets and citation omitted).

Furthermore, there is a distinction between passive and active efforts. *See* 81 Fed. Reg. 38,778, 38,790 ("[W]here an agency is involved in the child-custody proceeding, active efforts involve assisting the parent through the steps of a case plan, including accessing needed services and resources. This is consistent with congressional intent-by its plain and ordinary meaning, 'active' cannot be merely 'passive.' "). On this distinction, the Alaska Supreme Court explained:

> Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. In contrast, active efforts are where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own.

Pravat P. v. Office of Children's Servs., 249 P.3d 264, 271 (Alaska 2011) (brackets and citation omitted). Oklahoma appellate courts have drawn a similar distinction between active and passive efforts, while also recognizing that a parent's incarceration significantly affects the scope of active efforts the State can provide. *See In re W.P.*, 516 P.3d 263, 269 (Okla. Civ. App. 2022); *In re E.P.F.L.*, 265 P.3d 764, 772 (Okla. Civ. App. 2011); *In re J.S.*, 177 P.3d 590, 593 (Okla. Civ. App. 2008).

Here the trial court made the following pertinent findings and conclusions regarding the efforts made by DSS to prevent the breakup of the Indian family:

> 123. [DSS] has worked with the family since August 19, 2018 to reunify the family and return the juvenile to the home. The efforts have been unsuccessful due to the lack of progress of the respondents.
>
> . . . .
>
> 170. [DSS] engaged in active and reasonable efforts to reunify the juvenile with the Respondent-Mother including referrals for parenting classes, requesting random drug screens, referrals for comprehensive clinical assessments, attempts to meet with Respondent-Mother on a monthly basis, [and] attempt[s] to locate service providers within the geographical area of her residence.

> . . . .
>
> 174. [DSS] engaged in active and reasonable efforts to reunify the juvenile with the []Father including attempts to reach out to [Father] on a regular basis, complete DNA screening to establish paternity, formulating a case plan and requesting that he complete services.
>
> 175. [DSS] also provided the additional active efforts to take the necessary steps to secure tribal membership for the juvenile and by using ICWA placement preference to conduct an ICPC on [tribe members] for potential placement. [DSS] also provided active efforts to secure approval for continued unlicensed placement for the juvenile in the placement chosen by the tribe after that placement's foster care license expired.
>
> . . . .
>
> 188. The court makes the following additional findings of fact beyond a reasonable doubt.
>
> > a. Active efforts, in the context of the prevailing social and cultural conditions and way of life of the Monacan Indian Nation, have been made by [DSS] and available family and tribal services and been used to reunify the family; however, the risk of serious emotional or physical damage to the juvenile [ ] is still present if the child were returned home.

Father challenges findings 123, 174, and 188.[5]

Father first argues that the portion of finding 174 which states, "DSS attempt[ed] to reach out to [Father] on a regular basis[,]" is unsupported. Regarding DSS's efforts to reach out to Father, the DSS Social Worker testified:

> [SOCIAL WORKER:] So we were trying to reach out to [Father] through the court system. It -- with his being incarcerated and then not knowing where he was when he was outside of it, it was more difficult. We did contact

5. Father also challenges corresponding findings "[t]hroughout the underlying court file." However, as Father did not appeal from those orders, we do not address those challenges. Father further challenges findings not directly relevant to his argument on active efforts. We address only necessary findings in relation to termination of parental rights orders. *In re T.M.B.*, 378 N.C. 683, 687, 862 S.E.2d 632, 636 (2021).

> [Father] in the beginning and did DNA screening to ensure that [Nathan] was his child. . . . The only times that I've ever had contact with [Father] would happen at court.

The DSS Social Worker did not testify as to any attempts made by DSS to contact Father outside of sending DNA testing materials to him and speaking to him in court. There is no other record evidence as to DSS's attempts to contact Father. Accordingly, the portion of finding 174 that "DSS attempt[ed] to reach out to [Father] on a regular basis" is unsupported.

Father further argues the trial court's conclusion in Finding 188, subsection a, that "[a]ctive efforts . . . have been made by [DSS]," is unsupported. Father specifically argues that DSS's efforts in providing him with paternity testing, formulating a case plan, and requesting that he complete services did not constitute "active efforts." Father also challenges Finding 123, wherein the trial court found DSS's efforts had been unsuccessful due to Father's lack of progress, to the extent it "states or implies DSS provided active or reasonable efforts to [Father] during the case[.]" Because these findings relate to the determination of what constitutes active efforts, they are more appropriately labeled conclusions of law and we review them de novo. *See In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004).

At the termination hearing, the DSS Social Worker testified as follows:

> [DSS ATTORNEY:] And in the few periods of time when [Father] was not incarcerated, did he contact you in order to let you know that he wasn't incarcerated and was ready to sign and enter into a case plan?
>
> [SOCIAL WORKER:] No he did not.
>
> [DSS ATTORNEY:] Did he ever contact you to ask for referrals?
>
> [SOCIAL WORKER:] No.
>
> [DSS ATTORNEY:] And during the time that he was incarcerated, did he ever ask or call and talk to you about potentially doing any of these services while he was incarcerated?
>
> [SOCIAL WORKER:] No.
>
> [DSS ATTORNEY:] To your knowledge did he ever attempt to reach out to prison officials to see if he could do any of these services while he was incarcerated?

> [SOCIAL WORKER:] No.
>
> . . . .
>
> [DSS ATTORNEY:] Has he communicated with you regarding any programs that he could take while in prison to help his situation and assist him in providing appropriate care for the juvenile?
>
> [SOCIAL WORKER:] No.

When asked about the availability of programs in prison that could have satisfied his court-ordered obligations, Father testified he did not complete any such programs in prison because none of them had been available to him, and that an inmate "ha[s] to go through processes to be signed up for classes like that if [the prison has] them."

Father's incarceration for much of the history of this case surely had "a direct bearing on what active remedial efforts [were] possible." *Dep't of Family & Youth Servs.*, 982 P.2d at 261 (citation omitted). However, his incarceration did not relieve DSS "of its duty under ICWA to make active remedial efforts[.]" *Id.* Although DSS was able to send Father a paternity test in prison, DSS made no other effort to contact him via fax, mail, or in person while he was incarcerated. Although DSS "formulat[ed] a case plan," the formulation of a plan is merely a passive effort. *See Pravat P.*, 249 P.3d at 271. There is no record evidence that DSS actively did anything to assist Father through the steps of the plan and with accessing or developing the resources necessary to satisfy the case plan. *See* 25 C.F.R. § 23.2. While DSS cannot dictate what services Father may receive in prison, there is no record evidence that DSS communicated with Father or prison staff to ascertain the availability of prison programs to help Father achieve the goals of the case plan. Father was denied visitation with Nathan throughout the entire case and there is no record evidence that DSS made any effort to facilitate telephone or written communication between Father and Nathan. Furthermore, DSS made no effort to locate or communicate with Father during the time he was not incarcerated.

The Guardian ad Litem ("GAL") cites a string of cases involving incarcerated parents to support its position that "[Father's] contention that under ICWA incarcerated parents are entitled to the same 'level' of effort at reunification as parents who are not incarcerated has been flat out rejected by the majority of courts that have addressed this precise issue." However, the cases cited by the GAL are readily distinguishable from the present case in that in every one of those cases, despite the fact that the parent was incarcerated and the scope of available options was

narrowed, some active efforts were still undertaken. *See In re D.A.*, 305 P.3d 824, 827, 829 (Mont. 2013) (Mother received parenting classes in two different detention settings. The Department of Health and Human Services scheduled visits between Mother and D.A., her younger child. A Department child protection specialist helped Mother receive services while in a pre-release program and met with Mother to devise a plan to return D.A. to Mother's care.); *People ex rel. D.G.*, 679 N.W.2d 497, 502 (S.D. 2004) ("[W]hen assessing what options are available to prepare the parent for the return of a child, incarceration narrows the available options. Father was referred to drug and alcohol classes, parenting courses, independent living and management courses at the penitentiary and received regular contact from the caseworker. Under these circumstances, which included father's incarceration, DSS's efforts were active and reasonable. DSS cannot be faulted for father's criminal choice which limited its ability to return the child."); *In re E.P.F.L.*, 265 P.3d 764, 767, 770 (Okla. Civ. App. 2011) (Various assessments, referrals, classes, and services were provided to father in prior case that "were designed to remedy the same problems that are at issue in this case." Furthermore, father received a gas voucher, a referral to a substance abuse treatment program, and transportation of the children to the jail to visit him.). *See also People ex rel. S.H.E.*, 824 N.W.2d 420, 424 (S.D. 2012) ("While he was incarcerated, Father attended two different therapy classes, took antidepressants daily, and was on a waiting list for drug and alcohol treatment. Father also wrote DSS five letters, requesting pictures and updates of the children and teleconferencing so he could talk to the children. In response, DSS sent Father court reports, three letters, and some pictures. DSS also sent Father a parenting packet and postage-paid envelopes. As a result, Father sent thirty-four letters to the children. Finally, DSS facilitated a visit between Father and the children while Father was in the Pennington County jail, completed two case plan evaluations, and included Father in concurrent planning meetings.").

Moreover, this is not a case where DSS's efforts were frustrated by Father's "demonstrated lack of willingness to participate in treatment." *Bob S. v. Dep't of Health & Soc. Servs.*, 400 P.3d 99, 107 (Alaska 2017) (citation omitted). To the contrary, Father made some showing that he was engaged. When DSS faxed Father his paternity results in prison, Father immediately signed and returned them as instructed. Father attended almost every court date in this matter, as evidenced by the trial court's findings in its various orders and the numerous applications and writs of habeas corpus ad testificandum in the record. Additionally, Father specifically requested current photographs of Nathan at the permanency planning hearing in August 2021. Father was in court again

for TPR continuances in late August, late September, late October, and mid-November 2021. On 27 November 2021, Father wrote a letter to the trial court informing it that DSS still had not given him current him pictures of his son. Father was finally given a photograph of Nathan at the TPR hearing on 6 December 2021.

Some states consider efforts provided to the non-incarcerated parent in determining whether DSS provided active efforts to the family. For example, the Montana Supreme Court reasoned, "Since 'active efforts' are designed to prevent the breakup of the Indian family, it is appropriate for a court to consider efforts provided to the other parent of the child when evaluating the total 'active efforts' and whether they were unsuccessful." *In re A.L.D.*, 417 P.3d 342, 345 (Mont. 2018) (citation omitted). Here, even considering the efforts provided to Mother, by excluding Father from all active efforts, we cannot say that DSS provided active efforts to prevent the breakup of Nathan's family.

Accordingly, the trial court's conclusion that DSS provided active efforts to prevent the breakup of Nathan's family is not supported by the trial court's findings of fact. The trial court thus erred by terminating Father's parental rights to Nathan.

III. Conclusion

We conclude that the trial court erred by finding that DSS provided "active efforts to prevent the breakup of the Indian family," as required by 25 U.S.C. § 1912(d). Therefore, we reverse the termination of parental rights order as to Father and remand the matter to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges CARPENTER and WOOD concur.

JUSTIN MARLOW, as Administrator of the Estate of
Michelle Marlow (Deceased), Plaintiff
v.
TCS DESIGNS, Inc., JOBIE G. REDMOND, JEFF McKINNEY,
and ERIC PARKER, Defendants

No. COA22-862

Filed 2 May 2023

1. Appeal and Error—interlocutory order—denial of Rule 12(b) motions to dismiss—denial of motion to stay—substantial right

In a civil action where—after plaintiff's wife was fatally shot at work by her coworker—plaintiff asserted claims of negligence, gross negligence, and willful and wanton conduct against the coworker's husband (defendant-spouse) and the furniture manufacturing company where his wife worked, the trial court's interlocutory order denying defendants' motions to dismiss (under Civil Procedure Rules 12(b)(1) and (6)) and defendant-spouse's motion to stay the proceedings was immediately appealable. Each of defendants' motions implicated a substantial right where: (1) defendants based their motions to dismiss on the exclusivity provision of the Workers' Compensation Act, which grants the Industrial Commission exclusive jurisdiction over all actions falling under the Act; and (2) defendant-spouse's motion to stay alleged that permitting the action to proceed would infringe upon his Fifth Amendment rights in a pending criminal case related to the shooting. However, to the extent that defendant-spouse's Rule 12(b)(6) motion did not relate to the Act's exclusivity provision, it did not implicate a substantial right and therefore its denial was not immediately appealable.

2. Jurisdiction—Industrial Commission—Workers' Compensation Act—exclusivity provision—inapplicable—death not arising from employment

In a civil action where—after plaintiff's wife was fatally shot at work by her coworker—plaintiff asserted claims of negligence, gross negligence, and willful and wanton conduct against the coworker's husband (defendant-spouse) and the furniture manufacturing company where his wife worked, the trial court did not err by denying defendants' motions to dismiss under Civil Procedure Rules 12(b)(1) and (6). Because the coworker did not have any job-related motivation for shooting plaintiff's wife, and because getting shot to death was not a natural and probable consequence of the wife's job as a factory worker, the wife's death did not arise

out of her employment for purposes of the Workers' Compensation Act; therefore, the Industrial Commission did not—as defendants' motions contended—have exclusive jurisdiction over plaintiff's claims pursuant to the Act's exclusivity provision.

3. Constitutional Law—Fifth Amendment—civil negligence case—related pending criminal case—motion to stay civil case

In a civil action where—after plaintiff's wife was fatally shot at work by her coworker—plaintiff asserted claims of negligence, gross negligence, and willful and wanton conduct against the coworker's husband (defendant), the trial court did not abuse its discretion when it denied defendant's motion to stay, in which he asserted that permitting the action to proceed would infringe upon his Fifth Amendment rights against self-incrimination in a pending criminal case related to the shooting. Defendant—who was charged with felony accessory after the fact for helping his wife abscond to Arizona—had already delayed the civil proceedings by absconding himself, and any further delay would have substantially prejudiced plaintiff's ability to pursue his claims. Furthermore, there is no such thing as an absolute right not to be forced to choose between testifying in a civil case and asserting your Fifth Amendment privilege in a criminal case.

Appeal by Defendants from order entered 22 July 2022 by Judge Gregory Hayes in Catawba County Superior Court. Heard in the Court of Appeals 22 February 2023.

White & Stradley, PLLC, by J. David Stradley and Nicole D. McNamara, and Helton, Cody & Associates, PLLC, by Lyndon R. Helton, for Plaintiff-Appellee.

Pinto Coates Kyre & Bowers, PLLC, by Lyn K. Broom and Richard L. Pinto, for Defendants-Appellants TCS Designs, Inc., Jobie G. Redmond, and Jeff McKinney; and Goldberg Segalla LLP, by Martha P. Brown, for Defendant-Appellant Eric Parker.

COLLINS, Judge.

TCS Designs, Inc., Jobie G. Redmond, Jeff McKinney, and Eric Parker (collectively, "Defendants") appeal from the trial court's order denying their Rule 12(b)(1) motions to dismiss claims filed by Plaintiff Justin Marlow, as administrator of the estate of his deceased wife, Michelle Marlow, in connection with her death. Parker also appeals

from the trial court's order denying his Rule 12(b)(6) motion to dismiss and his motion to stay. Defendants contend that the trial court erred by denying their motions to dismiss because the North Carolina Industrial Commission has exclusive jurisdiction over Plaintiff's claims. Parker also contends that the trial court abused its discretion by denying his motion to stay the proceedings because there is a pending criminal case against him stemming from Michelle's death. The trial court did not err by denying Defendants' motions to dismiss based on the exclusivity provision of the Workers' Compensation Act because the pleadings and jurisdictional evidence considered establish that Michelle's death did not arise out of her employment. We dismiss Parker's appeal from the denial of his Rule 12(b)(6) motion to the extent that it does not relate to the Industrial Commission's exclusive jurisdiction. Furthermore, the trial court did not abuse its discretion by denying Parker's motion to stay. Accordingly, we dismiss in part and affirm in part.

I. Procedural and Factual Background

Tangela Parker and Michelle Marlow were employed as factory workers at TCS Designs, Inc. ("TCS"), a commercial furniture manufacturer in Hickory, North Carolina. At approximately 2:30 p.m. on 13 January 2021, Tangela went to the TCS parking lot, retrieved a gun from her car, returned to the factory, and shot Michelle twice in the head at point-blank range. Michelle died from the gunshot wounds that day. Tangela and Michelle had been involved in two prior verbal confrontations during work hours, both of which were investigated by TCS. According to Tangela and Michelle's supervisor, during a 28 July 2020 altercation:

> Tangela had her earphones on and was singing at a level that Michelle could hear in spite of having her own earphones in. When Michelle asked Tangela if she could lower her voice[,] Tangela became irate and stated she could not ask her to do anything she had to ask her supervisor to discuss it with her.

During a 4 January 2021 altercation, company employees heard Tangela threaten to "wipe the floor" with Michelle and "whip her ass." Tangela was given a warning and a 3-day suspension following the second confrontation.

Following Michelle's death, Plaintiff filed a Form 18 in the North Carolina Industrial Commission, indicating that Michelle's death occurred as a result of being "[s]hot by co-worker." In response, TCS filed a Form 61, asserting that "Plaintiff's allegations do not establish that plaintiff has carried plaintiff's burden of proving that a compensable event occurred on 01/13/2021" and reserving the right to assert

any defense consistent with the evidence. Plaintiff filed a Form 33 on 10 March 2021, requesting a hearing "for determination and Order from the Industrial Commission for payment of death benefits." Over the next eleven months, the parties engaged in discovery, motions, and mediation.

A hearing was scheduled for 23 February 2022. However, on 17 February 2022, Plaintiff moved to voluntarily dismiss the case without prejudice, and the motion was allowed.

Plaintiff filed a complaint in Catawba County Superior Court on 21 February 2022 against TCS; Jobie Redmond, president of TCS; Jeff McKinney, a manager at TCS; and Eric Parker, an employee of TCS and Tangela's husband. The complaint asserted claims for negligence, gross negligence, and willful and wanton conduct, and sought compensatory and punitive damages.

On 11 April 2022, Defendants filed a Form 60 with the Industrial Commission accepting Plaintiff's claim as compensable. Two days later, TCS, Redmond, and McKinney moved to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(1), asserting that the trial court lacked subject matter jurisdiction over the case because the Industrial Commission possessed "exclusive jurisdiction" over Plaintiff's claims. Parker moved to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting that "[t]he Industrial Commission has exclusive jurisdiction over Plaintiff's claims for compensation against . . . Parker and Plaintiff's common-law claims against . . . Parker are barred by the exclusivity provisions of N.C.G.S. § 97-10.1." Parker also moved to stay the proceedings, asserting that permitting the civil action to proceed would infringe upon his Fifth Amendment rights in a pending criminal case related to the same incident.

After a hearing on 27 and 28 June 2022, the trial court entered an order on 22 July 2022 denying Defendants' motions to dismiss and Parker's motion to stay. Defendants filed and served a joint written notice of appeal on 15 August 2022.

II. Discussion

A. Appellate Jurisdiction

[1] The trial court's order denying Defendants' Rule 12(b)(1) motions to dismiss, Parker's 12(b)(6) motion to dismiss, and Parker's motion to stay is not a final order and is therefore interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not

dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Clements v. Clements*, 219 N.C. App. 581, 583, 725 S.E.2d 373, 375 (2012) (quotation marks and citation omitted). However, an interlocutory order may be immediately appealable if it affects a substantial right. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2022).

The denial of a Rule 12(b)(1) motion to dismiss based on the exclusivity provision of the North Carolina Workers' Compensation Act (the "Act") affects a substantial right and is immediately appealable. *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 737, 796 S.E.2d 529, 532 (2017). Similarly, the denial of a Rule 12(b)(6) motion to dismiss based on the exclusivity provision of the Act affects a substantial right and is immediately appealable. *Est. of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 492, 751 S.E.2d 227, 232 (2013). Additionally, an order in a civil case affecting a litigant's Fifth Amendment privilege against self-incrimination is immediately appealable. *See Roadway Express, Inc. v. Hayes*, 178 N.C. App. 165, 168, 631 S.E.2d 41, 44 (2006) ("[A] trial judge's ruling requiring a party to provide evidence over a Fifth Amendment objection is . . . immediately appealable."); *see also Staton v. Brame*, 136 N.C. App. 170, 176, 523 S.E.2d 424, 428 (1999) (reversing the trial court's order compelling defendant's testimony in a civil action where defendant asserted his Fifth Amendment privilege against self-incrimination).

Here, Defendants' Rule 12(b)(1) motions to dismiss and a portion of Parker's 12(b)(6) motion to dismiss are based on the exclusivity provision of the Act and the trial court's lack of jurisdiction over the matter. Accordingly, the order denying those motions based on the exclusivity provision of the Act is immediately appealable. However, the remaining portion of Parker's 12(b)(6) motion to dismiss is based on Plaintiff's alleged failure to state a claim for negligence against Parker. As this allegation is not based on the exclusivity provision of the Act, the order denying this portion of the motion is not immediately appealable and is therefore dismissed. The trial court's order denying Parker's motion to stay affects his Fifth Amendment privilege against self-incrimination and is immediately appealable.

B. Motions to Dismiss

[2] Defendants contend that the trial court erred by denying their Rule 12(b)(1) motions to dismiss and Parker also contends that the trial court erred by denying his Rule 12(b)(6) motion to dismiss because the

North Carolina Industrial Commission has exclusive jurisdiction over Plaintiff's claims.

A Rule 12(b)(1) motion to dismiss represents a challenge to the trial court's subject matter jurisdiction over a plaintiff's claims. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2022). "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) (citation omitted). The trial 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 (1998) (quotation marks, brackets, and citations omitted). We review a trial court's order on a Rule 12(b)(1) motion de novo. *Burton v. Phx. Fabricators & Erectors, Inc.*, 194 N.C. App. 779, 782, 670 S.E.2d 581, 583 (2009).

In ruling on a Rule 12(b)(6) motion to dismiss, "the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted). We review a trial court's order on a Rule 12(b)(6) motion to dismiss de novo. *Est. of Long v. Fowler*, 378 N.C. 138, 148, 861 S.E.2d 686, 694 (2021).

"The [s]uperior [c]ourt is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute." *Morse v. Curtis*, 276 N.C. 371, 374-75, 172 S.E.2d 495, 498 (1970) (citing N.C. Gen. Stat. § 7A-240) (other citations omitted). "By statute the [s]uperior [c]ourt is divested of original jurisdiction of all actions which come within the provisions of the [Workers'] Compensation Act." *Id.* at 375, 172 S.E.2d at 498 (citations omitted).

Where an employee and their employer are subject to and have complied with the provisions of the Act, the rights and remedies granted to the employee under the Act exclude all other rights and remedies of the employee. N.C. Gen. Stat. § 97-10.1 (2022). An action comes within the provisions of the Act if: (1) the injury was caused by an accident; (2) the injury was sustained in the course of the employment; and (3) the injury arose out of the employment. *Holliday v. Tropical Nut & Fruit Co.*, 242 N.C. App. 562, 566, 775 S.E.2d 885, 889 (2015). Here, the parties do not dispute that Michelle's death was caused by an accident within the meaning of the Act and that her death was sustained in the course of her employment. The issue before this Court is whether Michelle's death arose out of her employment.

"Arising out of employment relates to the origin or cause of the accident." *Morgan v. Morgan Motor Co.*, 231 N.C. App. 377, 381, 752 S.E.2d 677, 680 (2013) (quotation marks and citation omitted). "The controlling test of whether an injury arises out of the employment is whether the injury is a natural and probable consequence of the nature of the employment." *Id.* (quotation marks and citation omitted). "An injury arises out of the employment if a contributing proximate cause of the injury is a risk to which the employee was exposed because of the nature of the employment, and to which the employee would not have been equally exposed apart from the employment." *Dildy v. MBW Invs., Inc.*, 152 N.C. App. 65, 69, 566 S.E.2d 759, 763 (2002) (quotation marks and citation omitted). "In North Carolina, courts have consistently held that an intentional assault in the work place by a fellow employee or third party is an accident that occurs in the course of employment, but does not arise out of the employment unless a job-related motivation or some other causal relation between the job and the assault exists." *Wake Cnty. Hosp. Sys. v. Safety Nat'l Cas. Corp.*, 127 N.C. App. 33, 39, 487 S.E.2d 789, 792 (1997) (citations omitted). "[I]f one employee assaults another solely under the impulse of anger, or hatred, or revenge, or vindictiveness, not growing out of but entirely foreign to the employment, the injury should be treated as the voluntary act of the assailant and not as one arising out of or incident to the employment." *Harden v. Thomasville Furniture Co.*, 199 N.C. 733, 735-36, 155 S.E. 728, 730 (1930).

In this case, the pleadings and jurisdictional evidence show the following: At approximately 2:30 p.m. on 13 January 2021, Tangela went to the TCS parking lot, retrieved a gun from her car, returned to the factory, and shot Michelle twice in the head at point-blank range. Tangela and Michelle had been involved in two verbal altercations at work prior to that date; the second altercation resulted in a 3-day suspension. The pleadings and jurisdictional evidence do not show a job-related motivation or some other causal relation between the job and Tangela's shooting of Michelle. Michelle's death, although caused by a coworker, is not "a natural and probable consequence of the nature of [Michelle's] employment." *Morgan*, 231 N.C. App. at 381, 752 S.E.2d at 680; *see Jackson v. Timken Co.*, 265 N.C. App. 470, 474, 828 S.E.2d 740, 743 (2019) (holding that plaintiff's injury, resulting from a failure to properly diagnose a stroke he suffered on the job, did not arise out his employment as a grinding machine operator). Stated differently, when Michelle reported to work as a factory worker, she would not have considered being shot twice in the head at point-blank range as a possible consequence of that work. Rather, the shooting arose out of Tangela's personal animosity towards Michelle. *See Harden*, 199 N.C. at 735-36, 155 S.E. at 730.

As Michelle's death did not arise out of her employment with TCS, the Industrial Commission does not have exclusive jurisdiction over the matter. Furthermore, because the Industrial Commission does not have exclusive jurisdiction over the matter, Plaintiff need not have alleged facts sufficient to establish an exception to the Industrial Commission's exclusive jurisdiction under *Pleasant v. Johnson*, 312 N.C. 710, 717, 325 S.E.2d 244, 250 (1985) (holding that an employee may pursue a civil action against a co-employee for willful, wanton, and reckless negligence). Accordingly, the trial court did not err by denying Defendants' motions to dismiss under Rule 12(b)(1) and Parker's motion to dismiss under Rule 12(b)(6).

C. Motion to Stay

[3] Parker argues that the trial court abused its discretion by denying his motion to stay the proceedings pending the outcome of the criminal case against him stemming from Michelle's death.

We review a trial court's denial of a stay for abuse of discretion. *Peter Millar, LLC v. Shaw's Menswear, Inc.*, 274 N.C. App. 383, 388, 853 S.E.2d 16, 20 (2020). "We do not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted." *Bryant & Assocs., LLC v. ARC Fin. Servs., LLC*, 238 N.C. App. 1, 4, 767 S.E.2d 87, 90 (2014) (citation omitted). "Instead, mindful not to substitute our judgment in place of the trial court's, we consider only whether the trial court's denial was a patently arbitrary decision, manifestly unsupported by reason." *Muter v. Muter*, 203 N.C. App. 129, 134, 689 S.E.2d 924, 928 (2010) (quotation marks, brackets, and citations omitted).

Here, Parker was charged with felony accessory after the fact for assisting Tangela in absconding to Arizona after she shot Michelle. In denying Parker's motion to stay the proceedings pending the resolution of his criminal case, the trial court found:

> The [c]ourt has considered the [m]otion, the potential prejudice to each of the [p]arties, the interest of the court system in the prompt resolution of all matters, civil and criminal, the equities involved, in particular, the fact that Defendant Parker delayed the criminal proceedings by absconding for some six months.

Parker delayed the proceedings by absconding to Arizona for approximately six months before he was extradited to North Carolina. Any further delay in the proceedings would substantially prejudice

Plaintiff's ability to pursue this wrongful death claim. Parker has no absolute right not to be forced to choose between testifying in this matter and asserting his Fifth Amendment privilege. *See Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995) ("A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege."); *Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009); *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012). We cannot say that the trial court's denial of Parker's motion to stay was a patently arbitrary decision, manifestly unsupported by reason. *Muter*, 203 N.C. App. at 134, 689 S.E.2d at 928.

III. Conclusion

The trial court did not err by denying Defendants' Rule 12(b)(1) and 12(b)(6) motions to dismiss to the extent they were based on the exclusivity provision of the Act. Parker's appeal from the denial of his Rule 12(b)(6) motion to the extent it was not based on the exclusivity provision of the Act is dismissed. The trial court did not abuse its discretion by denying Parker's motion to stay. Accordingly, we dismiss in part and affirm in part the trial court's order.

DISMISSED IN PART; AFFIRMED IN PART.

Judges HAMPSON and WOOD concur.

PUGH v. HOWARD

[288 N.C. App. 576 (2023)]

BARBARA CLARK PUGH; GENE TERRELL BROOKS; THOMAS HENRY CLEGG; THE WINNIE DAVIS CHAPTER 259 OF THE UNITED DAUGHTERS OF THE CONFEDERACY, Plaintiffs
v.
KAREN HOWARD; MIKE DASHER; DIANNA HALES; JIM CRAWFORD; and ANDY WILKIE, in their official capacities as members of the Board of County Commissioners of Chatham County, North Carolina, Defendants
and
CHATHAM FOR ALL and WEST CHATHAM BRANCH 5378 of the NAACP, Defendant-Intervenors

No. COA20-533

Filed 2 May 2023

1. Jurisdiction—standing—multiple bases—removal of Confederate monument—motion to dismiss

Plaintiffs, including an association which over a century earlier had erected and dedicated a monument on a county courthouse square to honor Confederate soldiers, lacked standing to pursue a declaratory judgment action regarding the decision to remove the monument by a board of county commissioners. Plaintiffs failed to include the requisite allegations to support a claim of taxpayer standing; where plaintiffs failed to allege any possessory or contractual interest in the statue, and in fact acknowledged that the monument was county property, they did not establish that they were entitled to notice and an opportunity to be heard as an "owner" or "part[y] in interest"; plaintiffs did not include sufficient facts in their complaint to establish a private right of action to enforce the provisions of N.C.G.S. § 100-2.1 (regarding the removal of monuments or memorials); and plaintiffs failed to allege sufficient facts demonstrating that they had sustained a legal or factual injury arising from the county's decision, particularly where they had disclaimed any proprietary interest in the monument after dedicating it to the county.

2. Civil Procedure—declaratory judgment—lack of standing—improperly dismissed with prejudice—remanded for dismissal without prejudice

In a declaratory judgment action challenging the removal of a Confederate monument from public property, where the trial court properly determined that plaintiffs lacked standing to pursue their claim and that the complaint should be dismissed for lack of subject matter jurisdiction, the trial court nevertheless erred by dismissing the complaint with prejudice pursuant to Civil Procedure

Rule 12(b)(6); rather, the court should have dismissed the complaint without prejudice pursuant to Rule 12(b)(1).

3. Civil Procedure—Rule 5—Rule 6—service of brief and affidavit —timeliness—discretionary decision to disregard

In a declaratory judgment action challenging the removal of a Confederate monument from public property, at a hearing on defendant's motion to dismiss, the trial court properly exercised its discretion pursuant to Civil Procedure Rules 5 and 6 when it declined to consider an affidavit and brief submitted by plaintiffs, where both were served on defendants less than two days before the hearing.

Appeal by plaintiffs from order entered 10 December 2019 by Judge Susan E. Bray in Chatham County Superior Court. Heard in the Court of Appeals 21 February 2023.

James A. Davis for plaintiffs-appellants.

Poyner Spruill LLP, by J. Nicholas Ellis and Dylan J. Castellino, for defendants-appellees.

Kilpatrick Townsend & Stockton LLP, by Joseph S. Dowdy and Phillip A. Harris, Jr., for defendants-intervenors-appellees.

ZACHARY, Judge.

Plaintiffs Barbara Clark Pugh, Gene Terrell Brooks, Thomas Henry Clegg, and the Winnie Davis Chapter 259 of the United Daughters of the Confederacy ("the UDC") (collectively, "Plaintiffs") appeal from the trial court's order dismissing their complaint with prejudice pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. We affirm in part, vacate in part, and remand the court's order for the reasons enunciated by our Supreme Court in *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 881 S.E.2d 32 (2022).

Background

On 23 August 1907, the UDC erected and installed a 27-foot-tall Confederate monument (the "Monument") in a public ceremony in front of the Chatham County Courthouse to "honor th[e] individuals who had served in the armed forces of the Confederate States of America during the Civil War[.]" The Monument remained in front of the Courthouse until 2019.

On 19 August 2019, the Chatham County Board of County Commissioners (the "County Commissioners") voted to request that the UDC "remove and relocate" the Monument from the Courthouse grounds, at Chatham County's expense, by 1 November 2019. The County Commissioners informed the UDC that if it refused to remove the Monument, then Chatham County would do so.

Plaintiffs filed a complaint against the County Commissioners on 23 October 2019 in Chatham County Superior Court, seeking a declaratory judgment, a temporary restraining order, and a preliminary injunction. In their complaint, Plaintiffs alleged that the Monument was Chatham County property, in that Chatham County had accepted the UDC's dedication of the Monument and had "specifically authorized" its placement at the Courthouse square. Plaintiffs further alleged that the Monument was an "object of remembrance" that could "only be relocated, whether temporarily or permanently," in accordance with the provisions of N.C. Gen. Stat. § 100-2.1, and that the County Commissioners' vote to remove the Monument was a "proscriptive action" in violation of the statute. The same day, Plaintiffs filed a separate motion for a temporary restraining order to prevent the County Commissioners "from attempting to remove, alter, disassemble, or destroy the . . . Monument[.]" On 1 November 2019, the trial court granted Plaintiffs' motion, issuing a temporary restraining order prohibiting the County Commissioners from "dismantling, removing, destroying and/or disturbing in any manner or fashion the Monument"; the order was set to expire on 8 November 2019.

Plaintiffs filed a separate motion for a preliminary injunction on 4 November 2019, requesting that the court "restrain[ ] and enjoin[the County Commissioners] from taking affirmative action to remove or relocate the [M]onument prior to a full adjudication of the respective rights and obligations of the [p]arties[.]" However, the trial court was unable to hold a hearing on Plaintiffs' motion for a preliminary injunction until 13 November 2019, "[d]ue to other business of the [c]ourt"; consequently, the court extended its temporary restraining order until 13 November 2019.

Meanwhile, on 1 November 2019, the County Commissioners filed a motion to dismiss Plaintiffs' complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 5 November 2019, the County Commissioners filed an amended motion to dismiss on the same grounds, asserting, *inter alia*, that the Monument belonged to the UDC and that the County had granted it a license "to erect a monument on the [Courthouse] square." The County Commissioners further asserted that Plaintiffs lacked standing to initiate the instant action

under either the law of taxpayer standing or as a private right of action pursuant to N.C. Gen. Stat. § 100-2.1.

On 4 November 2019, the West Chatham Branch of the National Association for the Advancement of Colored People ("the NAACP") and Chatham for All filed a motion to intervene as third-party defendants pursuant to Rule 24 of the North Carolina Rules of Civil Procedure. That same day, they also filed a motion to dismiss Plaintiffs' complaint pursuant to Rules 12(b)(1) and 12(b)(6), maintaining, *inter alia*, that Plaintiffs lacked standing to bring the instant action. On 13 November 2019, the trial court granted the NAACP and Chatham for All's motion to intervene.

Plaintiffs' motion for a preliminary injunction came on for hearing in Chatham County Superior Court on 13 November 2019, and was denied by the trial court's order entered on 22 November 2019. The court also determined that the temporary restraining order filed on 1 November 2019 "ha[d] expired and [wa]s of no further effect[.]"

Both motions to dismiss came on for hearing on 2 December 2019. Following the hearing, the trial court granted the motions to dismiss by order entered on 10 December 2019. The court determined that "Plaintiffs lack standing to bring this action and Plaintiffs' [c]omplaint fails to state a claim upon which relief can be granted"; having so concluded, the trial court dismissed Plaintiffs' complaint with prejudice.

Plaintiffs timely appealed.

Discussion

On appeal, Plaintiffs argue (1) that the trial court erred by dismissing their complaint on the ground that Plaintiffs lacked standing, and that the court thus lacked subject-matter jurisdiction; (2) that the trial court erred by dismissing Plaintiffs' complaint with prejudice; (3) that the trial court abused its discretion by "refusing to consider the brief and affidavit tendered by Plaintiffs in opposition to [the County Commissioners'] amended motion to dismiss"; and (4) that the trial court erred by granting Chatham for All and the NAACP's motion to intervene.

I. Standard of Review

Our appellate courts review "a trial court's decision to grant or deny a motion to dismiss for lack of standing using a de novo standard of [re]view, under which it views the allegations as true and the supporting record in the light most favorable to the non-moving party[.]" *United Daughters of the Confederacy*, 383 N.C. at 624, 881 S.E.2d at 43 (citation and internal quotation marks omitted).

"An appellate court considering a challenge to a trial court's decision to grant or deny a motion to dismiss for lack of subject[-]matter jurisdiction may consider information outside the scope of the pleadings in addition to the allegations set out in the complaint." *Id.*

II. Analysis

On appeal, Plaintiffs advance a number of arguments in support of their contention that they "have standing to seek a declaratory judgment determining the respective rights and obligations of the [p]arties with regard to the . . . Monument." We address these arguments separately.

A. Standing

[1] "[T]he object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated." *Perry v. Bank of Am., N.A.*, 251 N.C. App. 776, 779, 796 S.E.2d 799, 802 (2017) (citation omitted); *see also Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949) (explaining that declaratory judgments "declar[e] and establish[ ] the respective rights and obligations of adversary parties in cases of actual controversies without either of the litigants being first compelled to" act in a way that may result in a violation of the other party's rights or a repudiation of a party's own obligations).

A plaintiff may maintain an action pursuant to the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.* (2021), only insofar "as it affects the civil rights, status and other relations in the present actual controversy between parties[,]" *Chadwick v. Salter*, 254 N.C. 389, 395, 119 S.E.2d 158, 162 (1961) (citation and internal quotation marks omitted). "[T]he mere filing of a declaratory judgment is not sufficient, on its own, to grant a plaintiff standing, with it being necessary for a party to establish standing as a prerequisite for the assertion of a declaratory judgment claim[.]" *United Daughters of the Confederacy*, 383 N.C. at 629, 881 S.E.2d at 46 (citation and internal quotation marks omitted).

"Standing to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001) (citation and internal quotation marks omitted). "Standing, which is properly challenged by a Rule 12(b)(1) motion to dismiss, is a necessary prerequisite to a court's proper exercise of subject[ ]matter jurisdiction. If a party does not have standing to bring a claim, a court has no subject[-]matter jurisdiction to hear the claim." *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 650, 801 S.E.2d 150, 156 (2017) (citations and internal quotation marks omitted); *see also United Daughters of the Confederacy*, 383 N.C. at 649, 881 S.E.2d at

59 (recognizing that "standing is a necessary prerequisite to a court's proper exercise of subject[-]matter jurisdiction" (citation and internal quotation marks omitted)).

1. Taxpayer Standing

Plaintiffs assert that they have taxpayer standing, giving them "the right to seek equitable and declaratory relief when governing authorities are preparing to put property dedicated to the public to an unauthorized use."[1]

It is well settled that a taxpayer may bring an action "on behalf of a public agency or political subdivision for the protection or recovery of the money or property of the agency or subdivision in instances where the proper authorities neglect or refuse to act." *Peacock v. Shinn*, 139 N.C. App. 487, 491, 533 S.E.2d 842, 845 (citation and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). However, "where a plaintiff undertakes to bring a taxpayer's suit . . . , his complaint must disclose that he is a taxpayer of the agency or subdivision," and allege facts that adequately establish either: (1) that "there has been a demand on and a refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political subdivision[,]" or (2) that "a demand on such authorities would be useless." *United Daughters of the Confederacy*, 383 N.C. at 630–31, 881 S.E.2d at 47–48 (citations omitted).

In the present case, Plaintiffs did not make the requisite allegations to support their claim of taxpayer standing. To be sure, the complaint alleges that each individual Plaintiff was a taxpayer of Chatham County; nonetheless, it fails to allege that "there ha[d] been a demand on and a refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political subdivision or that a demand on such authorities would [have] be[en] useless." *Id.* at 631, 881 S.E.2d at 47–48 (citations and internal quotation marks omitted). Because Plaintiffs failed to allege all of the required elements, they failed to establish that they had taxpayer standing. This argument is therefore overruled.

1. To the extent that Plaintiffs assert the issue of associational standing as members of the UDC, Plaintiffs advance no reason or argument in support of it in their brief. Accordingly, this issue is deemed abandoned. *See* N.C.R. App. P. 28(b)(6); *see also*, *e.g.*, *Wilson*, 253 N.C. App. at 650, 801 S.E.2d at 156 (concluding that where an appellant's brief "does not contain any substantive arguments on [an issue presented], this issue has been abandoned").

2. Standing Under Section 153A-140

Plaintiffs next argue that "Defendants must abide by the clear and unequivocal mandate of law pertaining to structures deemed to be [a] threat to public health and safety before undertaking to remove them." According to Plaintiffs, because Defendants failed to follow the provisions of N.C. Gen. Stat. § 153A-140, Plaintiffs "have been 'injuriously affected' by the course of conduct initiated by [the] County and . . . they have the right to seek redress from the courts."

Plaintiffs cite *Monroe v. City of New Bern*, 158 N.C. App. 275, 580 S.E.2d 372, *disc. review denied*, 357 N.C. 461, 586 S.E.2d 93 (2003), in support of their argument that N.C. Gen. Stat. § 153A-140 provided them with the right to notice and an opportunity to be heard before the County removed the Monument. In *Monroe*, this Court held that before a city may demolish a dwelling, the procedures outlined in Chapter 160A, Article 19[2] require that the city provide the owner of the dwelling with notice and an opportunity to be heard. 158 N.C. App. at 278, 580 S.E.2d at 375.

We find *Monroe* instructive, in that § 160A-193—which governs the abatement of public health nuisances in cities—and § 153A-140—which governs the abatement of public health nuisances in counties—are both subject to the procedures outlined in Chapter 160D, Article 12. *Compare* N.C. Gen. Stat. § 160A-193, *with id.* § 153A-140; *see also id.* § 160D-101(c). Section 160D-1203(2), which regulates the demolition of a "dwelling" deemed "unfit for human habitation," requires that a local authority provide notice and opportunity to the owner of the dwelling before demolition. *Id.* § 160D-1203(2); *see also United Daughters of the Confederacy*, 383 N.C. at 646, 881 S.E.2d at 57. As such, a party seeking notice and opportunity to be heard regarding a dwelling's demolition must establish that the party meets the statutory definitions of "owner" or "part[y] in interest"—that is, that the party is either an owner: "the

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2. Although Chapter 160A, Article 19 (N.C. Gen. Stat. § 160A-441 *et seq.*) has been repealed and recodified in Chapter 160D, Article 12 (N.C. Gen. Stat. § 160D-1201 *et seq.*) since our Court's decision in *Monroe*, the provisions remained largely unchanged. *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, 2019 N.C. Sess. Law 424; *United Daughters of the Confederacy*, 383 N.C. at 645 n.17, 881 S.E.2d at 57 n.17.

In light of Chapter 160A's recodification, as well as "the fact that the new statute is retroactively applicable," we conclude that N.C. Gen. Stat. § 160D-1201 *et seq.* governs here. *United Daughters of the Confederacy*, 383 N.C. at 645 n.17, 881 S.E.2d at 57 n.17; *see also* An Act to Complete the Consolidation of Land-Use Provisions Into One Chapter of the General Statutes, S.L. 2020-25, 2020 N.C. Sess. Law 152.

holder of the title in fee simple . . . [or a] mortgagee of record[,]" or that the party meets one of the statute's broader categories deemed "parties of interest," which include "[a]ll individuals, associations, and corporations that have interests of record in a dwelling and any that are in possession of a dwelling." N.C. Gen. Stat. § 160D-1202(1)–(2); *see also United Daughters of the Confederacy*, 383 N.C. at 646, 881 S.E.2d at 57.

Our Supreme Court recently applied the reasoning in *Monroe* to the facts presented in *United Daughters of the Confederacy*, a case with facts quite similar to those in the case at bar. There, the plaintiff argued that the provisions of Chapter 160D, Article 12 required the city of Winston-Salem to provide the plaintiff with notice and an opportunity to be heard regarding the city's planned removal of a Confederate monument. *United Daughters of the Confederacy*, 383 N.C. at 644, 881 S.E.2d at 56. According to the plaintiff, "if it were determined to be the owner of the monument, it would necessarily follow that [the] plaintiff ha[d] standing to defend the placement of the monument on the courthouse property, as well as to invoke the arguments that the monument d[id] not constitute a public nuisance under" N.C. Gen. Stat. § 160A-193. *Id.* (internal quotation marks omitted). Our Supreme Court disagreed, concluding that because the plaintiff "did not allege in the amended complaint that it had any proprietary or contractual interest in the monument or that it ha[d] an interest of record or [wa]s in possession of the monument," the plaintiff was "simply not a member of the class of persons entitled to notice and an opportunity to be heard under" the statute. *Id.* at 646, 881 S.E.2d at 57 (citation and internal quotation marks omitted).

In the case at bar, Plaintiffs similarly failed to plead any facts that tend to establish that they had any possessory, proprietary, or contractual interest in the Monument; indeed, Plaintiffs maintain that the Monument is County property. In that Plaintiffs have not sufficiently pleaded sufficient facts to establish that they meet the statutory definitions of an "owner" or a "part[y] in interest[,]" *see* N.C. Gen. Stat. § 160D-1202(1)–(2), Plaintiffs cannot demonstrate that they are "member[s] of the class of persons entitled to notice and an opportunity to be heard under" N.C. Gen. Stat. § 153A-140. *United Daughters of the Confederacy*, 383 N.C. at 646, 881 S.E.2d at 57.

Accordingly, Plaintiffs have failed to establish that they have standing pursuant to N.C. Gen. Stat. § 153A-140.

3. Standing Under Section 100-2.1

Plaintiffs next argue that they have standing pursuant to N.C. Gen. Stat. § 100-2.1, in that the Monument is County property and is therefore

subject to the removal procedures outlined in N.C. Gen. Stat. § 100-2.1. Plaintiffs maintain that by "funding and erecting" the Monument, the UDC "made a dedication of the statue to [the] County, and the [C]ounty expressly accepted that dedication"; upon its placement on County property, the Monument "became real property as a fixture[.]" Thus, argue Plaintiffs, because the Monument is County property, "any action contemplated or executed with regard to [the Monument's] location is subject to the provisions of" N.C. Gen. Stat. § 100-2.1. In light of our Supreme Court's holding in *United Daughters of the Confederacy*, we must disagree.

Section 100-2.1 provides the circumstances and manner under which a State-owned "monument, memorial, or work of art" may be removed and relocated:

> (a) Approval Required. – Except as otherwise provided in subsection (b) of this section, a monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission.
>
> (b) Limitations on Removal. – An object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection. . . . An object of remembrance that is permanently relocated shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated. An object of remembrance may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location. As used in this section, the term "object of remembrance" means a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history.

N.C. Gen. Stat. § 100-2.1(a)–(b).

Plaintiffs have advanced a private action under § 100-2.1. "A statute may authorize a private right of action either explicitly or implicitly, though typically, a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute." *United Daughters of the Confederacy*, 383 N.C. at

637, 881 S.E.2d at 52 (citation omitted). "As a result, in the event that the legislature exercises its power to create a cause of action under a statute, the plaintiff has standing to vindicate the legal right *so long as he is in the class of persons on whom the statute confers a cause of action.*" *Id.* (citation and internal quotation marks omitted).

United Daughters of the Confederacy presented similar issues regarding the application of N.C. Gen. Stat. § 100-2.1 as those arising in the instant case. There, the plaintiff alleged in its complaint that (1) "members of its local chapter [of the United Daughters of the Confederacy] raised the funds necessary to design, build, and install the [Confederate] monument from private sources"; (2) the plaintiff "dedicated the monument to Forsyth County and its citizens"; and (3) "the Forsyth County Commissioners expressly permitted the monument to be placed on land which the [c]ounty owned." *Id.* at 636, 881 S.E.2d at 51. The plaintiff maintained that the monument was therefore Forsyth County property, in that the Forsyth County Commissioners accepted the plaintiff's dedication by placing the monument on public property. *Id.* The plaintiff further argued that "upon its placement on the courthouse property, the monument became a 'fixture' attached to real property and that its status did not change when the [c]ounty sold the property" to a private entity. *Id.* Thus, according to the plaintiff, it had standing to seek a declaratory judgment and a preliminary injunction against the County Commissioners pursuant to N.C. Gen. Stat. § 100-2.1. *Id.*

Our Supreme Court rejected this argument: "We are unable to identify anything in [N.C. Gen. Stat.] § 100-2.1, particularly when read in conjunction with the allegations of the amended complaint, that explicitly authorizes the assertion of a private cause of action . . . ." *Id.* at 638, 881 S.E.2d at 52 (noting "[t]he absence of explicit language authorizing the assertion of a private right of action" in the statute). Therefore, the Court concluded, N.C. Gen. Stat. § 100-2.1 did not confer "any legal rights upon [the] plaintiff sufficient to give rise to any sort of . . . valid legal claim." *Id.* at 637, 881 S.E.2d at 52.

Moreover, nor did the statute *implicitly* authorize a private right of action. Our Supreme Court reasoned that "nothing in [N.C. Gen. Stat.] § 100-2.1 requires action from a party with which that party has failed to comply"; instead, the statute "*prohibits* the removal or relocation of certain specified objects that are owned by the State or located on public property." *Id.* at 638, 881 S.E.2d at 52 (citation and internal quotation marks omitted). And "even if [N.C. Gen. Stat.] § 100-2.1 could be interpreted to implicitly authorize the assertion of a private right of action," the Court concluded, "nothing in the relevant statutory language or the

allegations contained in the amended complaint suggest[ed] that [the] plaintiff would be in the class of persons on which the statute confers the right." *Id.* (citation and internal quotation marks omitted).

Finally, the Court determined that N.C. Gen. Stat. § 100-2.1 did not have "any bearing upon the proper resolution of th[e] case given the absence of any allegation in the amended complaint that the monument [wa]s 'owned by the State.' " *Id.* at 641, 881 S.E.2d at 54. "[E]ven if the [c]ounty own[ed] the monument, that fact would not convert the monument into State property subject to" § 100-2.1(a) because "the General Assembly has specifically authorized counties to independently acquire, maintain, and dispose of real or personal property," and "the North Carolina Constitution authorizes counties and municipalities to own property independently of the State." *Id.* at 642, 881 S.E.2d at 55; *see also* N.C. Gen. Stat. §§ 153A-158, -169, -176; N.C. Const. art. V, § 2.

Here, as in *United Daughters of the Confederacy*, Plaintiffs alleged in their complaint that the Monument was property subject to § 100-2.1 because "the [M]onument was accepted as a gift" by the County, as evidenced by the fact that the Monument's "placement at the Chatham County Courthouse was specifically authorized and directed by the Chatham County Board of County Commissioners[.]" *See United Daughters of the Confederacy*, 383 N.C. at 636, 881 S.E.2d at 51. Plaintiffs also alleged that the County Commissioners "act[ed] in a manner in contravention of [their] constitutional or statutory authority" when they voted to remove the Monument in violation of the provisions of N.C. Gen. Stat. § 100-2.1. According to their complaint, Plaintiffs "have legitimate and cognizable interests in [e]nsuring that [the] County does not engage in activities or enact local legislation . . . which are unlawful[.]"

Plaintiffs argue on appeal that these allegations were sufficient to establish their standing pursuant to N.C. Gen. Stat. § 100-2.1. We are bound by precedent to disagree.

As our Supreme Court made plain in *United Daughters of the Confederacy*, N.C. Gen. Stat. § 100-2.1 does not "explicitly authorize[ ] the assertion of a private cause of action for the purpose of enforcing that statutory provision." *Id.* at 638, 881 S.E.2d at 52. Furthermore, even if N.C. Gen. Stat. § 100-2.1 implicitly authorized a private right of action, Plaintiffs' allegations, like those in *United Daughters of the Confederacy*, are inadequate to support that Plaintiffs "would be in the class of persons on which the statute confers the right." *Id.* (citation and internal quotation marks omitted); *see also Charles Stores Co. v. Tucker*, 263 N.C. 710, 717, 140 S.E.2d 370, 375 (1965) ("Only one who is in immediate danger of sustaining a direct injury from legislative action may

assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public."). Here, Plaintiffs merely alleged a general interest in lawful government action—an interest common to all members of the public.

Moreover, N.C. Gen. Stat. § 100-2.1 has no "bearing upon the proper resolution of this case given the absence of any allegation in the . . . complaint that the [M]onument is 'owned by the State.' " *United Daughters of the Confederacy*, 383 N.C. at 641, 881 S.E.2d at 54.

Therefore, as in *United Daughters of the Confederacy*, Plaintiffs failed to allege facts sufficient to assert a private right of action pursuant to N.C. Gen. Stat. § 100-2.1, and the trial court appropriately dismissed their complaint for lack of standing.

4. Standing Arising out of Legal or Factual Injury

Finally, Plaintiffs assert that they have standing because they "merely seek to defend themselves from an onslaught which they did not initiate and which raises serious questions about the ability of the government to decide for itself free of judicial review what it can do to the exclusion of the customary rule of law."

Here, Plaintiffs assert an argument nearly identical to that advanced by the plaintiff in *United Daughters of the Confederacy*—that "[t]o deny that [the UDC] does not have the right to defend itself in a court of law when it was the recipient of a clear and unequivocal attack would be to subvert accepted and well-established concepts of due process and equal protection under law." The only allegation in Plaintiffs' complaint that could be interpreted as pertaining to whether they had sustained a legal or factual injury arising from the County's conduct was that Plaintiffs "have legitimate and cognizable interests in [e]nsuring [the] County does not engage in activities or enact local legislation . . . which are unlawful[.]" However, this allegation fails to articulate how the County's actions resulted in a cognizable legal or factual injury to Plaintiffs. Furthermore, like the plaintiff in *United Daughters of the Confederacy*, Plaintiffs contended in their complaint that they dedicated the Monument to the County, and thus, they disclaimed any "proprietary or contractual interest in the [M]onument." *Id.* at 629, 881 S.E.2d at 47.

Plaintiffs were required to allege additional facts "to demonstrate that [they] ha[d] sustained a legal or factual injury arising from [D]efendants' actions[.]" *Id.* at 629, 881 S.E.2d at 46. Because they did not do so, Plaintiffs failed to establish their standing to maintain the declaratory judgment action. *Id.*; *see also Comm. to Elect Dan Forest v. Employees*

Political Action Comm., 376 N.C. 558, 609–10, 853 S.E.2d 698, 734 (2021). Accordingly, we must reject Plaintiffs' argument.

B. Dismissal with Prejudice

[2] Plaintiffs next argue that the trial court erred by dismissing their complaint with prejudice because a "court cannot dismiss a complaint with prejudice if it has held that it lacks jurisdiction over the proceeding." We agree.

Our appellate courts have historically held that a party may challenge the plaintiff's standing to bring an action in a motion to dismiss pursuant to Rule 12(b)(6). *See*, *e.g.*, *Energy Investors Fund*, *L.P. v. Metric Constructors*, *Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000); *Teague v. Bayer AG*, 195 N.C. App. 18, 22, 671 S.E.2d 550, *disc. review denied*, 363 N.C. 381, ___ S.E.2d ___ (2009). This precedent "appear[ed] to rest upon the notion . . . that standing for purposes of North Carolina law requires the allegation of an 'injury in fact.' " *United Daughters of the Confederacy*, 383 N.C. at 649, 881 S.E.2d at 60. However, our Supreme Court recently rejected the view that a plaintiff must allege an "injury in fact" to establish standing, concluding that alleging either a factual injury or an infringement of a legal right is sufficient to confer standing under North Carolina law. *Comm. to Elect Dan Forest*, 376 N.C. at 609, 853 S.E.2d at 734.

Accordingly, when a trial court determines that it lacks subject-matter jurisdiction over a matter because of the plaintiff's failure to establish standing, the court may not dismiss the matter with prejudice pursuant to Rule 12(b)(6). *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60. Rather, in such circumstances, the matter is properly dismissed without prejudice pursuant to Rule 12(b)(1). *See id.*; *Wilson*, 253 N.C. App. at 650, 801 S.E.2d at 156; N.C. Gen. Stat. § 1A-1, Rule 12(b)(1).

In the instant case, the trial court granted Defendants' motions to dismiss under Rules 12(b)(1) and 12(b)(6) and dismissed the complaint with prejudice. As explained above, the trial court correctly concluded that Plaintiffs had failed to allege an infringement of a factual or legal right sufficient to establish standing, and therefore, it appropriately dismissed the complaint pursuant to Rule 12(b)(1). *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60. However, as in *United Daughters of the Confederacy*, having properly determined that it lacked subject-matter jurisdiction over the matter, the trial court should have dismissed the matter without prejudice pursuant to Rule 12(b)(1). *See id.* As a result, "we vacate the portion of the trial court's order dismissing the . . . complaint with prejudice and remand this case

to [Chatham County Superior Court], with instructions to dismiss the . . . complaint without, rather than with, prejudice." *Id.*

C. *Refusal to Consider Plaintiffs' Untimely Served Documents*

[3] Finally, Plaintiffs argue that the trial court "abused its discretion in refusing to consider the brief and affidavit tendered by Plaintiffs in opposition to Defendants' amended motion to dismiss." We disagree.

Rule 6 of the North Carolina Rules of Civil Procedure provides, in relevant part, that "[i]f the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may . . . proceed with the matter without considering the untimely served affidavit[.]" N.C. Gen. Stat. § 1A-1, Rule 6(d). Rule 5 contains a similar provision concerning the service of briefs. *See id.* § 1A-1, Rule 5(a1) ("If the brief or memorandum is not served on the other parties at least two days before the hearing on the motion, the court may . . . proceed with the matter without considering the untimely served brief or memorandum . . . .").

Here, during the hearing on Defendants' motion to dismiss, Plaintiffs' counsel offered the trial court the affidavit of Plaintiff Pugh, as well as Plaintiffs' brief opposing Defendants' motion. Counsel for Defendants informed the court that they had not received the affidavit or Plaintiffs' brief until the day of the hearing. The trial court then declined to consider the affidavit, and orally rendered its ruling from the bench without considering Plaintiffs' brief. Because Plaintiffs served their affidavit and brief on Defendants less than two days before the hearing, the trial court was well within its discretionary authority to "proceed with the matter without considering the" documents. *Id.* §§ 1A-1, Rule 5(a1), 6(d). Therefore, Plaintiffs' argument is overruled.

Conclusion

For the foregoing reasons, we conclude that the trial court appropriately determined that Plaintiffs lacked standing to initiate this action. We thus affirm in part the trial court's order dismissing Plaintiffs' complaint for lack of subject-matter jurisdiction. However, because the trial court improperly dismissed the complaint with prejudice, we vacate the order in part and remand this matter to the trial court to dismiss the complaint without prejudice. In light of our disposition, we need not address Plaintiffs' remaining argument.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Judges FLOOD and RIGGS concur.

[288 N.C. App. 590 (2023)]

STATE OF NORTH CAROLINA
v.
STEPHEN MICHAEL CANNON

No. COA22-572

Filed 2 May 2023

1. Search and Seizure—warrantless blood draw—driving while impaired—exigent circumstances

In a prosecution for second-degree murder and aggravated serious injury by vehicle, the trial court properly denied defendant's motion to suppress the results of a warrantless blood draw, which was taken after defendant caused a fatal accident by crossing over the center line of the road and upon law enforcement officers' suspicion that defendant was impaired (based on defendant's slurred speech, glassy eyes, lack of concern over the seriousness of the accident, an odor of alcohol on defendant's breath, and the presence of beer cans and aerosol cans in defendant's truck). Exigent circumstances existed to justify the blood draw before further dissipation of impairing substances could occur where the investigation of the accident took a significant amount of time and various other delays would have added at least another hour to the process of obtaining a warrant.

2. Motor Vehicles—driving while impaired—timing of impairment—sufficiency of evidence

In a prosecution for charges related to a fatal car accident, the State presented sufficient evidence from which a jury could conclude that defendant was appreciably impaired when driving his truck at the time of the accident, including: the presence of beer cans and aerosol cans in defendant's truck; law enforcement officers' observations that defendant's speech was slow and slurred and that he had glassy eyes; defendant's admission to drinking alcohol earlier in the day and taking an anti-seizure medicine that included instructions not to drive or operate machinery for six months; defendant's apparent disconnection from the severity of the accident by expressing concern about the damage done to his truck despite the fact that the driver of the other vehicle was killed in the accident; and the presence of alcohol, benzodiazepines, cocaine, and anti-depressants in defendant's body, as shown by a urinalysis screen and blood draw.

Appeal by Defendant from judgment entered 12 November 2021 by Judge L. Lamont Wiggins in Edgecombe County Superior Court. Heard in the Court of Appeals 8 February 2023.

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

J. Clark Fischer, for Defendant.

WOOD, Judge.

Stephen Cannon ("Defendant") appeals from the trial court's denial of his motion to suppress the evidence of results of a warrantless blood draw and the denial of his motion to dismiss for insufficient evidence. For the reasons stated below, we affirm the trial court.

I. Factual and Procedural Background

On 14 June 2015, Defendant and Mr. Hardee ("Hardee") were at Defendant's father's shop so Defendant could make repairs to his truck and, during this time, visited with a neighbor, Mr. Peaden ("Peaden"). According to Peaden, he spoke with Defendant for thirty or forty-five minutes, during which time both Defendant and Hardee each drank a single beer, and Defendant acted "completely normal" during this interaction. After giving Defendant twenty dollars to buy more beer, Defendant and Hardee drove in Defendant's truck to a Wal-Mart in Tarboro.

After leaving Wal-Mart and entering the public roadway, Defendant drove his truck across the center line into the opposite lane of travel and hit an SUV driven by Gina Marie Merchant ("Merchant"). Merchant's daughter was a passenger in the SUV. The collision was nearly head on, with the front left of Defendant's vehicle striking the front right of Merchant's vehicle. Merchant was pronounced dead at the scene of the collision.

Lieutenant Rickie Dozier of the Tarboro Police Department ("Lt. Dozier") responded to the scene of the collision. When he asked Defendant what happened to cause the crash, Defendant alternatively told Lt. Dozier that the accident occurred because something broke underneath the vehicle and because the tire blew out. While at the scene of the fatal accident, Defendant told his passenger he was concerned about his truck and twice-told Lt. Dozier, "Damn, I loved that truck." At one point, Defendant attempted to leave the scene. Lt. Dozier asked Defendant where he was going, and Defendant stated that he was going

to Falkland. Lt. Dozier told Defendant that he was not free to leave the scene of the accident.

At 7:21 p.m., Officer Pocoroba of the Tarboro Police Department ("Officer Pocoroba") responded to the car accident. Upon arrival at the scene and after determining that Defendant was one of the drivers involved in the accident, Officer Pocoroba began interviewing him. During their interaction, Officer Pocoroba observed there was an odor of alcohol on Defendant's breath, his speech was slurred, and his eyes appeared glassy. Defendant's vehicle contained beer cans and an aerosol can of "Ultra Duster."

When Officer Pocoroba asked Defendant what happened to cause the crash, Defendant responded that he believed something broke under the truck. Defendant also informed Officer Pocoroba that he was extremely concerned about the damage to his truck, and Officer Pocoroba observed Defendant appeared to be disconnected from the severity of the accident and Merchant's fatality. Defendant initially told Officer Pocoroba he had not consumed any alcohol that day, but later admitted he had, in fact, consumed alcohol that day.

Based on his observations and interaction with Defendant, Officer Pocoroba conducted a portable field breathalyzer test, with Defendant's test result returning as a 0.03. Officer Pocoroba believed Defendant was under the influence of some impairing substance other than solely alcohol, though he wasn't "sure if it was pills or if it was inhalants." Officer Pocoroba placed Defendant under arrest "on suspicion of misdemeanor driving while impaired and Felony Death by Vehicle" and transported him to the Vidant Emergency Department, approximately five miles from the accident scene. At the hospital, Officer Pocoroba obtained a blood draw kit from nursing staff, read the kit rights form to him, and asked Defendant for consent for the blood draw. However, Officer Pocoroba neither read Defendant his Chapter 20 implied consent rights nor obtained a search warrant before conducting the blood draw. The blood draw occurred at 9:10 p.m.

On 17 June 2015, an arrest warrant was issued, charging Defendant with aggravated serious injury by vehicle. On 11 April 2016, the Edgecombe County Grand Jury returned a true bill of indictment for the original charge of aggravated serious injury by vehicle in addition to a charge of second-degree murder. On 12 December 2019, Defendant filed a motion to suppress evidence obtained during the 14 June 2015 blood draw. Following a hearing on the motion to suppress, the trial court entered a written order denying Defendant's motion to suppress on 26 October 2020.

The case was called for jury trial on 8 November 2021. Several witnesses testified during the trial. Serving as Defendant's witness, Hardee testified that he was a passenger in Defendant's vehicle at the time of the collision and that prior to the accident, he felt the truck jerk to the right and observed Defendant leaning down in the floorboard of his truck when the truck veered into the oncoming lane of traffic. According to Hardee, Defendant did not drink any alcohol or use any sort of drug during the five hours the two had been together before the wreck.

Both Lt. Dozier and Officer Pocoroba testified about their observations and interactions with Defendant. Additionally, Chief Officer Jordan of the Lake Royale Police Department ("Officer Jordan") testified that on the date of the collision, he was a police officer with the Tarboro Police Department and interacted with the Defendant at the accident scene. Officer Jordan observed that Defendant's speech was slow, slurred, and hard to understand. A Suboxone strip was located among Defendant's possessions. Officer Jordan testified that during a custodial interview, Defendant stated he had been drinking earlier on the day of the collision and had taken a prescribed anti-seizure medication that his doctor had advised against him taking prior to driving or operating machinery for the first six months.

Dr. Rinson Weathers, ("Dr. Weathers") testifying as an expert in emergency medicine and pharmacology, described examining Defendant at the Vidant Emergency Room. As part of Defendant's treatment, Dr. Weathers ordered a urinalysis screen of Defendant's urine. According to the urinalysis, Defendant's urine contained benzodiazepines, which are a class of sedative drugs typically found in such drugs as Valium and Ativan, as well as cocaine. Dr. Weathers testified that the presence of these drugs could have played a role in whether a person was alert or aware of their environment. Dr. Weathers further stated she advises patients they should not drive or operate dangerous machinery while taking benzodiazepine and that they should not be taken with alcohol or other drugs.

Amber Rowland, an analyst in the Toxicology Section of the North Carolina State Crime Lab, testified as an expert in forensic science and forensic toxicology. Her testing of Defendant's blood sample gave positive results for the presence of Diazepam, a benzodiazepine, and benzyl ethylene, a cocaine metabolite. The testing also found the presence of Citalopram and Sertraline, which are anti-depressants. The State Crime Lab considers all five of these substances to be impairing substances. Ms. Rowland testified that Defendant's blood alcohol level was 0.02 and the presence of difluoroethane, an aerosol propellant, was detected in

his blood. She further testified that it could cause dizziness and possible loss of consciousness.

After hearing the testimony of witnesses and the evidence presented, the jury returned verdicts of guilty for both offenses on 12 November 2021. The trial court sentenced Defendant to active sentences of 180-228 months' imprisonment for second-degree murder and 29-47 months' imprisonment for aggravated serious injury by vehicle to run consecutively. The trial court arrested judgment on the lesser included charges of driving while impaired and felony death by motor vehicle. Defendant gave notice of appeal in open court on 12 November 2021.

II. Discussion

A. Defendant's Motion to Suppress

[1] On appeal, Defendant argues that the trial court erred in denying his motion to suppress because no exigent circumstances existed which prevented police from properly obtaining a search warrant before drawing his blood. We disagree.

In evaluating the denial of a motion to suppress, the appellate court determines "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d. 874, 878 (2011) (citation omitted). Conclusions of law are reviewed *de novo*. *Id.* (citations omitted). The trial court's findings of fact on a motion to suppress which are supported by evidence in the record are binding on the appellate courts. *State v. Fincher*, 309 N.C. 1, 9, 305 S.E.2d 685, 691 (1983). While Defendant argues in his brief "the trial court erred in finding that exigent circumstances existed" the State points to the fact that Defendant "does not challenge the trial court's findings of fact, which are supported by the evidence presented at the suppression hearing and [therefore] are binding on appeal." We agree.

Because Defendant does not contest any specific findings of fact in the order, the findings "are presumed to be supported by competent evidence and are binding on appeal." *State v. Baker*, 312 N.C. 34, 37, S.E.2d 670, 673 (1984) (citation omitted). We also agree that "the trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Upon review of the record and transcript, we note that Defendant's trial counsel objected to the admittance into evidence of one lab result of the blood test, testing for volatiles and alcohol, but did not object to the admittance of the lab report on the drug analysis on the blood. It is

well settled, that "a trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (citations omitted). Therefore, Defendant's arguments pertaining to Exhibit 63 are overruled.

In its order denying Defendant's motion to suppress, the trial court determined:

> 8. Officer Pocoroba placed the defendant under arrest and took him to the Vidant Emergency Department for a blood draw. The defendant's blood was taken at 9:10 pm. This was about an hour and forty-nine minutes after the accident.
>
> 9. It would have taken Officer Pocoroba over an hour to get a search warrant for the defendant's blood.
>
> 10. The defendant did not properly consent to a blood draw and his blood was taken without a search warrant.
>
> 11. Exigent circumstances existed which contributed to the need to take the defendant's blood without a search warrant. The exigent circumstances included:
>
> a.) The time involved investigating the accident.
>
> b.) The time it took to drive the defendant to the hospital.
>
> c.) The high volume of traffic throughout the Tarboro Police Department, including a shift change, contributing to the lack of assistance or help to Officer Pocoroba.
>
> d.) The extra time it would have taken Officer Pocoroba to prepare a search warrant, drive and submit [it] to the magistrate would have caused further delay.

Thus, the trial court concluded as a matter of law that, "given the exigent circumstances of the possible dissipation of some impairing substance present in the defendant's blood combined with the exigent circumstances outlined above justified the search of defendant's blood without a warrant."

The Fourth Amendment to the United States Constitution and Article I of the North Carolina Constitution protect the rights of people to be secure from unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Our courts have held that drawing blood from a person constitutes a search under both the Federal and

North Carolina Constitutions. *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908, 918 (1966); *State v. Carter*, 322 N.C. 709, 722-23, 370 S.E.2d 553, 561 (1988). A warrantless search of a person is *per se* unreasonable unless it falls within a recognized exception to the warrant requirement. *Missouri v. McNeely*, 569 U.S. 141, 147, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696, 703-04 (2013).

One of these exceptions is "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *State v. Romano*, 369 N.C. 678, 681, 800 S.E.2d 644, 647 (2017) (citation omitted). The United States Supreme Court has further recognized that in certain circumstances,

> law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. *See Cupp v. Murphy*, 412 U.S. 291, 296 (1973); *Ker v. California*, 374 U.S. 23, 40-41 (1963) (plurality opinion). While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because 'there is compelling need for official action and no time to secure a warrant.' *Tyler*, 436 U.S., at 509.

McNeely, 569 U.S. at 149, 133 S. Ct. at 1559, 185 L. Ed. 2d at 705. Thus, a court "looks to the totality of circumstances" to determine whether exigent circumstances justified law enforcement in acting without a warrant. *Romano*, 369 N.C. at 681, 800 S.E.2d at 647 (citation omitted).

Here, the record indicates that the investigation of the scene of the collision took significant time, as Defendant was transported to the hospital one hour and forty-five minutes after officers responded and arrived on scene. *See State v. Granger*, 235 N.C. App. 157, 165, 761 S.E.2d 923, 928 (2014) (the totality of the circumstances showed that exigent circumstances justified the warrantless blood draw based upon the trial court finding that the officer "had concerns regarding the dissipation of alcohol from [d]efendant's blood, as it had been over an hour since the accident when [the officer] established sufficient probable cause to make his request for [d]efendant's blood.").

Further, testimony from Officer Pocoroba and Lt. Dozier indicated that they observed Defendant's glassy eyes, slurred speech, general disconnect, and lack of concern over the fatal accident. Officer Pocoroba also detected an odor of alcohol on Defendant's breath and observed beer cans and aerosol cans located on the roadway and in Defendant's

truck, thus prompting Officer Pocoroba to give Defendant a portable breath test, which tested positive for the presence of alcohol. Officer Pocoroba suspected that other substances were involved such as pills or inhalants to account for Defendant's appeared impairment. While it is "recognized that alcohol and other drugs are eliminated from the blood stream in a constant rate, creating an exigency with regard to obtaining samples[,]" *State v. Fletcher*, 202 N.C. App. 107, 111, 688 S.E.2d 94, 97 (2010) (cleaned up) (citation omitted), the United States Supreme Court has held, that the natural dissipation of alcohol in the bloodstream cannot, standing alone, create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant. *McNeely*, 569 U.S. at 156, 133 S. Ct. at 1563, 185 L. Ed. 2d at 709.

However, "exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process." *Granger*, 235 N.C. App. at 164, 761 S.E.2d at 928 (citation omitted). The totality of circumstances indicate that further delays existed which affected Officer Pocoroba's ability to secure a warrant. At the motion to suppress hearing, Officer Pocoroba testified that at the time relevant to this case, there was a shift change that would interfere with his ability to obtain a search warrant as there was a lack of assistance or help available to the Officer in filling out and obtaining the warrant or helping to maintain custody of Defendant. Officer Pocoroba testified that due to the call volume in Tarboro, going to the magistrate's office would have added significant time to the process and he estimated obtaining a warrant would have added at least another hour to the process. Based upon our holding in *Granger*, which upheld a finding of exigent circumstances where the Officer's "knowledge of the approximate probable wait time" and "time needed to travel" exceeded forty minutes round trip, we hold under the facts of the present case, the trial court correctly found the existence of exigent circumstances sufficient to justify Defendant's warrantless blood draw. *Id.*, 235 N.C. App. at 165, 761 S.E.2d at 928 (citation omitted). Therefore, we affirm the trial court's denial of Defendant's motion to suppress.

B. Defendant's Motion to Dismiss

[2] Next, Defendant argues that the trial court erred by denying his motion to dismiss when the State's evidence did not establish sufficient evidence that he "was impaired at the time of the fatal accident." We disagree.

The standard of review on a motion to dismiss for insufficient evidence is whether the State has offered substantial evidence of each

required element of the offense charged, and that defendant was the perpetrator of the offense. *State v. Carr*, 122 N.C. App. 369, 371-72, 470 S.E.2d 70, 72 (1996). "Substantial evidence is that relevant evidence which a reasonable mind would find sufficient to support a conclusion." *Id.* at 372, 470 S.E.2d at 72. All evidence, whether direct or circumstantial, must be viewed "in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom" when deciding a motion to dismiss for insufficient evidence. *State v. Martinez*, 149 N.C. App. 553, 561, 561 S.E.2d 528, 533 (2002). "The trial court need only satisfy itself that the evidence is sufficient to take the case to the jury" and "[i]f there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant's guilt." *State v. Franklin*, 327 N.C. 162, 171-72, 393 S.E.2d 781, 787 (1990) (citations omitted). Additionally, any alleged contradictions or credibility issues are for the jury to resolve. *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) (citations omitted).

Pursuant to N.C. Gen. Stat. § 20-141.4, an individual commits the offense of aggravated felony serious injury by vehicle if:

> (1) The person unintentionally causes serious injury to another person, (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury, and (4) The person has a previous conviction involving impaired driving, as defined in G.S. 20-4.01(24a), within seven years of the date of the offense.

N.C. Gen. Stat. § 20-141.4(a4) (2021). N.C. Gen. Stat. § 20-138.1 further provides that an individual commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area:

> (1) While under the influence of an impairing substance; or (2) After having consumed sufficient alcohol that he has, at any relevant time after driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or (3) With any amount of a Schedule I controlled substance, as listed in N.C.G.S. § 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 20-138.1(a) (2021). An impairing substance is defined as "[a]lcohol, [a] controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances." N.C. Gen. Stat. § 20-4.01(14a) (2021). Hence, a person is under the influence of an impairing substance if "his physical or mental faculties, or both, [are] appreciably impaired by an impairing substance." N.C. Gen. Stat. § 20-4.01(48b).

Thus, to determine whether a person has committed the offense of impaired driving under N.C. Gen. Stat. § 20-138.1, the State must prove "that defendant had ingested a sufficient quantity of an impairing substance to cause his faculties to be appreciably impaired." *State v. Fincher*, 259 N.C. App. 159, 162, 814 S.E.2d 606, 76 (2018) (citation omitted). Additionally, the fact that a "motorist has been drinking, when considered in connection with faulty driving or other conduct indicating an impairment of physical and mental faculties, is sufficient *prima facie* to show a violation" of N.C. Gen. Stat. § 20-138.1. *State v. Coffey*, 189 N.C. App. 382, 387, 658 S.E.2d 73, 76 (2008) (cleaned up). "It follows that evidence of such faulty driving, along with evidence of consumption of *both* alcohol *and cocaine*, is likewise sufficient to show a violation of section 20-138.1." *State v. Norton*, 213 N.C. App. 75, 79, 712 S.E.2d 387, 390 (2011).

In the present case, the evidence, viewed in the light most favorable to the State, was sufficient to prove that Defendant was appreciably impaired at the time of the collision. Hardee, the passenger in Defendant's truck, testified that he and Defendant had gone to Tarboro to buy some beer and were returning when the accident occurred. Further, Hardee testified that at some point after he had informed Defendant that a woman was killed in the collision, Defendant responded that he was concerned about his truck. Officer Jordan provided testimony that he observed beer cans at the scene of the accident and an aerosol can of "Ultra Duster" in Defendant's vehicle. Officer Jordan also reported that Defendant's speech was slow, slurred, and hard to understand during their interaction. Officer Jordan further testified that Defendant later shared with him that he drank earlier on the day of the collision and that he was also taking an anti-seizure medication, for which his doctor had advised him not to drive or operate machinery for six months.

Officer Pocoroba testified that when he arrived at the scene of the collision, he observed beer cans and aerosol cans scattered inside Defendant's truck as well as across the road. In speaking with Defendant at the collision site, Officer Pocoroba observed that Defendant appeared

disconnected from the severity of the situation and instead, expressed extreme concern with the damage to his vehicle after being told of Merchant's death. Officer Pocoroba testified that he smelled alcohol on Defendant's breath and Defendant appeared glassy-eyed and slurred his speech. Defendant was tested on site with an Alco-sensor, testing positive for the presence of alcohol. Based upon his observation, Officer Pocoroba suspected Defendant was impaired and that something other than alcohol was involved. After Defendant was arrested and taken to the hospital, his possessions were searched and Suboxone was found.

Defendant's treating physician at Vidant Medical Center, Dr. Weathers, testified regarding the results of Defendant's urinalysis screen. Dr. Weathers stated that benzodiazepines, a class of sedative drugs typically found in such drugs as Valium and Ativan, and cocaine were detected in Defendant's urine sample. Dr. Weathers testified that the presence of these drugs could play a role in whether a person is alert or aware of the situation.

Ms. Rowland, an analyst in the Toxicology Section of the North Carolina State Crime Lab, testified that the results from her testing of Defendant's blood indicated the presence of alcohol, benzyl ethylene (a cocaine metabolite), Diazepam (a benzodiazepine such as Valium), Citalopram (an anti-depressant) and Sertraline (another anti-depressant called "Zoloft"). The State Crime Lab considers all five of these substances to be impairing substances. Ms. Rowland also testified that Defendant's blood was tested for "volatiles" like alcohol and that his blood contained the presences of alcohol at a concentration of 0.02 and also the presence of difluoroethane, a propellant used in "Dust Off" and other aerosolized products. Accordingly, viewing this evidence in the light most favorable to the State, the trial court did not err in denying Defendant's motion to dismiss where the State presented sufficient evidence to withstand Defendant's motion. Defendant's argument is overruled.

III. Conclusion

We affirm the trial court's order denying Defendant's motion to suppress, and conclude under the totality of the circumstances, exigent circumstances existed to compel a warrantless blood draw sample from Defendant. Additionally, we hold the trial court did not err in denying Defendant's motion to dismiss as the State presented evidence of Defendant's impairment sufficient to withstand the motion.

AFFIRMED.

Judges GRIFFIN and FLOOD concur.

STATE OF NORTH CAROLINA
v.
CHRISTINE MARIA CHISHOLM, Defendant

No. COA22-659

Filed 2 May 2023

Motor Vehicles—felony speeding to elude arrest—motion to dismiss—sufficiency of evidence—speed above fifteen miles per hour over posted speed limit

The trial court properly denied defendant's motion to dismiss a charge of felony speeding to elude arrest where there was substantial evidence that, while leading police on a car chase along the highway after she had refused to cooperate during a traffic stop, defendant was speeding in excess of fifteen miles per hour over the legal speed limit. Testimony from one of the officers involved in the chase—that he knew the highway had a posted speed limit and that it was either thirty-five or forty-five miles per hour—was sufficient evidence of the speed limit to send to the jury. That same officer's testimony was sufficient to establish defendant's speed during the chase where he testified that he saw defendant speeding past other traffic for half of a mile and "going way faster" than his patrol car, which he drove "at a relatively high rate of speed"; further, defendant's contention that no evidence corroborated the officer's testimony went to the weight of the evidence, which was a matter for the jury to consider.

Appeal by defendant from judgment entered 2 February 2022 by Judge L. Todd Burke in Cabarrus County Superior Court. Heard in the Court of Appeals 7 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph R. Shuford, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for the Defendant-Appellant.

CARPENTER, Judge.

Christine Maria Chisholm ("Defendant") appeals from judgment after a jury convicted her of felony speeding to elude arrest, misdemeanor resisting officers, and misdemeanor giving fictitious information

to an officer. On appeal, Defendant argues the trial court erred in denying her motion to dismiss the charge of felonious speeding to elude arrest. After careful review, we discern no error.

I. Factual & Procedural Background

On 14 September 2018, Cabarrus County Sheriff Sergeant Cody Rominger, and his trainee, Deputy Tyler Cannady, were on patrol on State Highway 49, a four-lane road. Deputy Cannady was driving their marked patrol car, and both officers were in uniform. As the officers were passing a black BMW, Sergeant Rominger observed Defendant texting while driving and motioned to her to put the phone down. The officers passed Defendant again and noticed "she was still on the phone[,]" so they ran her tag, discovered her tag was expired, and initiated a traffic stop. Defendant pulled over right away, and the officers requested her license and registration. According to Sergeant Rominger, Defendant did not provide any documentation, but gave the name and date of birth of "Olivia Chisholm." After running the name "Olivia Chisholm" through the computer terminal, the officers realized: (1) Defendant was not Olivia, and (2) the last name Defendant provided was the same as the registered owner of the vehicle—Christine Chisholm. Using the name "Christine Chisholm" in their search, the officers obtained a DMV photograph and records describing tattoos, which matched Defendant's tattoos, and learned Defendant's license was revoked.

The officers attempted to confirm Defendant's true identity by asking Defendant her name twenty to thirty times. Defendant refused to concede her name was Christine and "rolled the window up," only rolling it down "a little bit" when speaking to the officers. After twenty to thirty minutes of unheeded requests for Defendant's name, appropriate driving documentation and eventually to exit the vehicle, Deputy Cannady struck the passenger window with the intent to remove Defendant from the vehicle. As soon as Deputy Cannady started to hit the window, Defendant "took off" and proceeded to "go through the parking lot, hit the curb, go through the ditch, onto [Highway] 49," headed south towards Charlotte. Sergeant Rominger and Deputy Cannady ran back to their patrol vehicle and pursued Defendant southbound on Highway 49.

With the blue lights and siren on and while traveling "at a relatively high rate of speed," Sergeant Rominger testified Defendant was still "going way faster" than the officers. Sergeant Rominger could "see [Defendant's] car going towards Charlotte [at] a high-rate of speed and going in and out of vehicles." According to Sergeant Rominger, the pursuit lasted "maybe for a half of a mile" before it was terminated because "[Defendant] was going too fast for the conditions," and the officers

had lost sight of her. He estimated Defendant was traveling "over a hundred miles an hour." Approximately thirty to forty-five seconds after he ceased pursuing Defendant, Sergeant Rominger observed Defendant's crashed vehicle sitting at the bottom of a hill, "smoking pretty bad," with Defendant still in the driver's seat. No other vehicles were involved in the accident. Sergeant Rominger and Deputy Cannady removed Defendant from the vehicle, detained her, and called EMS and the fire department. Paramedics transported Defendant to the hospital, which released her to police custody later the same day.

On 1 October 2018, the grand jury indicted Defendant for three offenses, including felony fleeing or eluding arrest with a motor vehicle, in violation of N.C. Gen. Stat. § 20-141.5. To elevate the offense to a felony, the State alleged two aggravating factors were present at the time of the violation: (1) speeding in excess of fifteen miles per hour over the legal speed limit, and (2) driving when the person's driver's license was revoked.[1]

On 2 February 2022, Defendant's jury trial commenced before the Honorable L. Todd Burke in Cabarrus County Superior Court. The State introduced a photograph of Defendant's wrecked vehicle, which the trial court admitted as State's Exhibit 2. At the close of the State's evidence and again at the close of all evidence, Defendant moved to dismiss the felony charge for insufficiency of the evidence. The trial court denied both motions, and the jury found Defendant guilty of all three offenses. The trial court entered judgment and sentenced Defendant to imprisonment for eight to nineteen months, suspended the execution of that sentence, and placed her on supervised probation for thirty-six months.

II. Jurisdiction

This Court has jurisdiction to address Defendant's appeal from a jury conviction pursuant to N.C. Gen. Stat. § 7A-27(b) (2021) and N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issue

The sole issue before this Court is whether the trial court erred in denying Defendant's motion to dismiss the felony charge of speeding to elude arrest due to insufficient evidence.

IV. Standard of Review

This Court "reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007)

1. Defendant stipulated that her driver's license was revoked at the time.

(citation omitted). "Under a *de novo* review, [this C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation and internal quotation marks omitted).

V. Analysis

On appeal, Defendant argues the State failed to present substantial evidence to support the jury's finding that Defendant was speeding in excess of fifteen miles per hour over the legal speed limit at the time of the offense. This finding was one of the two aggravating factors invoked to elevate the offense of speeding to elude arrest from a Class 1 misdemeanor to a Class H felony. *See* N.C. Gen. Stat. § 20-141.5(a), (b)(1) (2021). The State contends there was substantial evidence that Defendant was speeding in excess of fifteen miles per hour over the legal speed limit, and thus, the trial court properly denied Defendant's motion to dismiss the charge of felonious speeding to elude arrest. After careful review, we agree with the State.

"When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990) (citation omitted). "If there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant's guilt." *Id.* at 171–72, 393 S.E.2d at 787; *see State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009).

To determine whether substantial evidence exists, "the trial judge must view all the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it and resolving any contradiction in the evidence in its favor." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citation and internal quotation marks omitted). "Competent evidence is evidence that is admissible or otherwise relevant." *State v. Bradley*, 282 N.C. App. 292, 296, 870 S.E.2d 297, 301 (2022) (citation omitted).

Moreover, in ruling on a motion to dismiss, "[t]he trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *State v. Butler*, 356 N.C. 141, 145,

567 S.E.2d 137, 140 (2002). As such, "the trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss." *Lee*, 348 N.C. at 488, 501 S.E.2d at 343 (citation and internal quotation marks omitted). "[C]ontradictions and inconsistencies do not warrant dismissal" on a motion to dismiss because "the trial court is not to be concerned with the weight of the evidence." *Id.* at 488, 501 S.E.2d at 343 (citation omitted).

"The test of the sufficiency of evidence to withstand dismissal is the same whether the State's evidence is direct, circumstantial, or a combination of the two." *State v. Porter*, 303 N.C. 680, 686, 281 S.E.2d 377, 381–82 (1981) (citation omitted). "If, upon consideration of all the evidence, only a suspicion of guilt is raised, then the evidence is insufficient, and the motion to dismiss should [have been] granted." *Lee*, 348 N.C. at 488–89, 501 S.E.2d at 343.

Specifically, Defendant argues the State failed to present substantial evidence to support the jury's finding because it did not establish: (1) the posted speed limit on Highway 49, (2) Defendant's speed, and (3) the officers' precise speed in pursuit of Defendant. We consider each challenge in turn.

A. Evidence of Posted Speed Limit

Defendant first argues the State did not establish what the posted speed limit was on Highway 49 because the only evidence provided was this testimony from Sergeant Rominger:

> **Prosecutor**: And is the speed limit posted on [Highway] 49?
>
> **Sergeant Rominger**: It is. I don't know if that part of Harrisburg is 35 [miles per hour] or 45 [miles per hour]. I think that right through there it may be 45 miles an hour.

Relying on *Hensley v. Wallen*, Defendant further argues Sergeant Rominger's testimony is not competent evidence of the speed limit because the State offered no evidence regarding whether this portion of Highway 49 was inside or outside municipal corporate limits or subject to a different speed limit pursuant to an exception. *See* 257 N.C. 675, 678, 127 S.E.2d 277, 280 (1962). We disagree.

The determination of "speed limit is a mixed question of fact and law, *except* where the [North Carolina Department of Transportation] or local authorities, pursuant to [N.C. Gen. Stat. § 20-141], have determined a reasonable and safe speed for a particular area and have declared it by erecting appropriate signs." *Id.* at 678, 127 S.E.2d at 280 (emphasis

added). In *Hensley*, our Supreme Court held witness testimony regarding the speed limit of a particular area was not competent evidence because the witness "did not allege that the approach to the scene of the collision was either a business or a residential district or that the proper authorities had posted any signs giving notice of any determined speed limit for the area." *Id.* at 676–78, 127 S.E.2d at 279–80 (emphasis added) ("It is noted that plaintiff did not say there was a posted sign in the area limiting speed to thirty-five miles per hour. She merely said the speed limit 'was 35.' "). Because there was no testimony or other evidence regarding whether there was a posted speed limit, the *Hensley* Court deemed it "necessary to prove the character of the district before the maximum speed permitted by law [could] be determined." *Id.* at 678, 127 S.E.2d at 280. The Court continued:

> Of course, if a highway sign declaring the speed limit to be thirty-five miles per hour had been posted in the area, it would have been competent for the witness to say so, describe the sign, and testify as to its location. When such a sign is present, nothing else appearing, there is a logical inference that it was erected by the proper authorities pursuant to [N.C. Gen. Stat. § 20-141].

Id. at 678, 127 S.E.2d at 280.

Here, unlike the witness in *Hensley*, Sergeant Rominger testified that the speed limit is posted on that portion of Highway 49. Because the speed limit is posted, there is a logical inference that it was erected by the proper authorities pursuant to N.C. Gen. Stat. § 20-141, and as such, Sergeant Rominger did not need to testify whether the approach to the scene of the collision was either a business or a residential district. *See Hensley*, 257 N.C. at 676–77, 127 S.E.2d at 279–80.

Defendant argues Sergeant Rominger testified that he did not know what the posted speed limit was. Conversely, the Record reflects Sergeant Rominger knew a "highway sign declaring the speed limit" had been posted in the area, described the posted speed limit as either thirty-five or forty-five miles per hour, and immediately clarified that he believed it was forty-five miles per hour "right through" where Defendant fled. *See id.* at 678, 127 S.E.2d at 280. Viewing this evidence in the light most favorable to the State, the testimony indicates Sergeant Rominger knew a posted speed limit existed and that it was either thirty-five or forty-five miles per hour. *See Lee*, 348 N.C. at 488, 501 S.E.2d at 343.

Accordingly, we conclude there is substantial evidence of the maximum posted speed limit on the portion of Highway 49 where Defendant

fled because a reasonable mind could accept Sergeant Rominger's testimony as adequate to support this conclusion. *See Franklin*, 327 N.C. at 171, 393 S.E.2d at 787.

B. Defendant's Speed on Highway 49

Defendant next argues Sergeant Rominger's testimony was not competent to hazard more than a guess of Defendant's speed on Highway 49. The State contends Sergeant Rominger was competent to estimate Defendant's speed because he watched her speed past other traffic for half of a mile as he pursued her in the patrol car. We agree with the State.

"As a general rule, the opportunity of a witness to judge the speed of a vehicle under the circumstances of the case goes to the weight of the testimony rather than its admissibility." *Smith v. Stocks*, 54 N.C. App. 393, 398, 283 S.E.2d 819, 822 (1981) (citation omitted). Nevertheless, "where the witness does not have a reasonable opportunity to judge the speed, it is error to permit such testimony." *Id.* at 398, 283 S.E.2d at 822.

In North Carolina, it is well established "that any person of ordinary intelligence, who had a reasonable opportunity to observe a vehicle in motion and judge its speed may testify as to his estimation of the speed of that vehicle." *State v. Barnhill*, 166 N.C. App. 228, 232, 601 S.E.2d 215, 218 (2004) (citations omitted). "Absolute accuracy . . . is not required to make a witness competent to testify as to speed." *Id.* at 232, 601 S.E.2d at 218 (citation omitted). However, "[t]he observation must be for such a distance and over such a period of time as to enable the witness to do more than merely hazard a guess as to speed." *Stocks*, 54 N.C. App. at 398, 283 S.E.2d at 822 (citation omitted). Similarly, while "[i]t is not necessary for a witness to observe the action described continuously . . . the witness [must] have perceived the incident sufficiently to have gained a rational basis on which to formulate an opinion." *Eason v. Barber*, 89 N.C. App. 294, 298, 365 S.E.2d 672, 675 (1988).

When the witness is a law enforcement officer, "it is not necessary that [the] officer have specialized training to be able to visually estimate the speed of a vehicle, and excessive speed of a vehicle may be established by [the] law enforcement officer's opinion as to the vehicle's speed after observing it." *State v. Royster*, 224 N.C. App. 374, 382, 737 S.E.2d 400, 406 (2012) (citation and brackets omitted); *Barnhill*, 166 N.C. App. at 232, 601 S.E.2d at 218 ("We find it relevant that if an ordinary citizen can estimate the speed of a vehicle, so can [a law enforcement officer].").

North Carolina courts often admit lay witness testimony about speed estimates in a variety of circumstances and distances, and our

appellate courts have held a reasonable opportunity to judge the speed of a vehicle can exist even when a witness's observation is for a relatively short distance. *State v. Clayton*, 272 N.C. 377, 382–83, 158 S.E.2d 557, 561 (1968) (holding a witness had a reasonable opportunity while driving in the opposite direction on a two-lane paved highway to estimate a vehicle was traveling at 60 to 70 miles per hour based on an observation of 200 to 300 feet); *Jones v. Horton*, 264 N.C. 549, 554, 142 S.E.2d 351, 355 (1965) (holding as competent a witness's testimony that a vehicle was traveling "in excess of 60 [miles per hour], between 75–80 [miles per hour]" based on an observation at night over a distance of 400 to 500 feet); *Barnhill*, 166 N.C. App. at 233, 601 S.E.2d at 218 (holding witness had "ample opportunity" to estimate defendant's speed of 40 miles per hour based on an observation of 750 feet, witness's "unobstructed view of the vehicle," the vehicle's engine racing, and the vehicle "bouncing" through the intersection); *Eason*, 89 N.C. App. at 298, 365 S.E.2d at 675 (holding a witness "had ample opportunity to observe plaintiff's vehicle" based on two separate observations, once at 250 feet and again at 150 feet).

In contrast, this Court held in *Smith v. Stocks* that a witness who had a "momentary glimpse" of plaintiff's truck for "a distance of only three feet before the impact" did not have a "reasonable opportunity to judge the speed of plaintiff's vehicle." *Stocks*, 54 N.C. App. at 398, 283 S.E.2d at 822 (citation and internal quotation marks omitted). Similarly, in *State v. Becker*, our Supreme Court concluded that a witness's testimony should have been excluded for lack of reasonable opportunity where the vehicle's speed was only observed for fifteen feet. 241 N.C. 321, 327, 85 S.E.2d 327, 331 (1955).

In the present case, Sergeant Rominger's opportunity for observing Defendant's speed was approximately a half of a mile—or about 2,640 feet. Comparatively, Sergeant Rominger's observation was more than five times as long as the witness's "reasonable opportunity" in *Jones v. Horton* (400 to 500 feet) and more than eight times as long as the observation in *State v. Clayton* (200 to 300 feet). *See Jones*, 264 N.C. at 554, 142 S.E.2d at 355; *Clayton*, 272 N.C. at 382–83, 158 S.E.2d at 561. Because Sergeant Rominger had a reasonable opportunity to judge the speed of Defendant's vehicle traveling on Highway 49, the excessive speed of Defendant's vehicle may be established by Rominger's opinion. *See Royster*, 224 N.C. App. at 382, 737 S.E.2d at 406.

Moreover, unlike the witnesses in *Jones v. Horton*, *State v. Clayton*, and *Eason v. Barber*, who all observed a speeding vehicle as it approached them, Sergeant Rominger's observation coincided with his active pursuit of Defendant's vehicle. *See Jones*, 264 N.C. at 554, 142

S.E.2d at 355; *Clayton*, 272 N.C. at 382–83, 158 S.E.2d at 561; *Eason*, 89 N.C. App. at 298, 365 S.E.2d at 675. According to his testimony, the pursuit caused him to travel "at a relatively high rate of speed[,]" as he simultaneously observed Defendant was "going way faster" than his own patrol car. Based on his observation, he testified he "could see [Defendant's] car going towards Charlotte [at] a high-rate of speed and going in and out of vehicles." According to Sergeant Rominger, Defendant "was going too fast for the conditions" at an estimated speed of "over a hundred miles an hour."

Defendant argues Sergeant Rominger did not have a reasonable opportunity to observe her speed because there was some delay before the officers were able to enter the highway, the pursuit was "during a busy traffic period," and Sergeant Rominger lost sight of her after half a mile. Nonetheless, because we have already determined Sergeant Rominger had a reasonable opportunity to judge Defendant's speed, these contentions go to the weight of the testimony rather than its admissibility. *See Stocks*, 54 N.C. App. at 398, 283 S.E.2d at 822 (citation omitted); *State v. Green*, 77 N.C. App. 429, 431, 335 S.E.2d 176, 177 (1985) ("The ability of the witness to accurately determine the speed is a question of credibility rather than a question of admissibility."). Accordingly, it is for the jury—not the trial court—to weigh the evidence, consider evidence unfavorable to the State, or determine any witness's credibility. *See Butler*, 356 N.C. at 145, 567 S.E.2d at 140.

Drawing all reasonable inferences in the State's favor, the evidence establishes Sergeant Rominger not only had "ample opportunity" to observe Defendant's speed for an extended distance during the pursuit, but he was also able to compare her speed to the other vehicles driving on Highway 49 at that time. *See Miller*, 363 N.C. at 99, 678 S.E.2d at 594. Sergeant Rominger's testimony supports a reasonable inference of Defendant's guilt. *See id.* at 99, 678 S.E.2d at 594.

Therefore, we conclude Sergeant Rominger had a reasonable opportunity to observe the speed of Defendant's vehicle, and as such, there is substantial evidence Defendant was speeding in excess of fifteen miles over the posted speed limit. *See Barnhill*, 166 N.C. App. at 233, 601 S.E.2d at 218; *Eason*, 89 N.C. App. at 298, 365 S.E.2d at 675; *Lee*, 348 N.C. at 488, 501 S.E.2d at 343.

C. Evidence of Officers' Precise Speed in Pursuit

Lastly, Defendant contends no evidence corroborated Sergeant Rominger's testimony because the jury never heard evidence about how fast the officers were traveling. The State argues that corroborative

evidence, or the lack thereof, goes to the weight of Sergeant Rominger's testimony, not its existence. Additionally, the State maintains there was ample corroborating evidence, including the photo of Defendant's catastrophic single car wreck and the details provided by the testimony given by the responding officers. We agree with the State.

A motion to dismiss "should not be granted against the State if there [is] any evidence tending to prove the fact in issue[.]" *Lee*, 348 N.C. at 488, 501 S.E.2d at 343 (citation and quotation marks omitted). "The trial court need only satisfy itself that the evidence is sufficient to take the case to the jury; it need not be concerned with the weight of that evidence." *Franklin*, 327 N.C. at 171, 393 S.E.2d at 787 (citation omitted). When sufficient evidence is presented, it is ultimately "for the jury to say whether it is convinced beyond a reasonable doubt of defendant's guilt." *See id.* at 171–72, 393 S.E.2d at 787.

In this case, even absent testimony regarding the officers' precise speed during pursuit, the State presented substantial evidence of Defendant's guilt. Specifically, Sergeant Rominger testified Defendant was "going way faster" than the officers while they pursued her "at a relatively high rate of speed" with "blue lights and siren" on. Despite active pursuit, Defendant outpaced the officers, passing beyond their line of sight, before losing control and wrecking shortly after. The trial court admitted into evidence a photograph of Defendant's vehicle, taken after it was involved in the single-vehicle collision. Although the jury never heard testimony regarding the officers' precise speed while in pursuit of Defendant, this contention ultimately goes to the weight of the evidence, not the admissibility of Sergeant Rominger's testimony or the other corroborative evidence. *See Green*, 77 N.C. App. at 431, 335 S.E.2d at 178.

At the close of all the evidence, the State had presented sufficient and substantial evidence to send the matter to the jury for consideration of whether Defendant was speeding in excess of fifteen miles per hour over the legal speed limit on Highway 49. *See Franklin*, at 171–72, 393 S.E.2d at 787.

VI. Conclusion

We hold the State presented substantial evidence to prove each element of felonious speeding to elude arrest and that Defendant was the perpetrator of the offense. Accordingly, we discern no error in the trial court's denial of Defendant's motion to dismiss.

NO ERROR.

Judges ZACHARY and WOOD concur.

STATE OF NORTH CAROLINA
v.
ROBERT LEE LAMB, JR.

No. COA22-477

Filed 2 May 2023

Appeal and Error—preservation of issues—eliciting and testifying to evidence—waiver

Defendant's appeal from a judgment for his drug-related convictions was dismissed where he waived appellate review of both evidentiary issues that he raised in his appeal by eliciting and even testifying to the same evidence he alleged was erroneously admitted, or in other instances by failing to object. The appellate court rejected defendant's argument that the trial court's decision to limit his cross-examination of a witness compelled or impelled him to take the stand in his own defense.

Appeal by defendant from judgment entered 11 October 2019 by Judge Lora Christine Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 7 March 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert T. Broughton, for the State.

Sharon L. Smith for defendant-appellant.

ZACHARY, Judge.

Defendant Robert Lee Lamb, Jr., appeals from a judgment entered upon a jury's verdicts finding him guilty of felony possession of cocaine, misdemeanor possession of up to one-half ounce of marijuana, and misdemeanor possession of drug paraphernalia. After careful review, we dismiss Defendant's appeal.

I. Background

At approximately 4:00 a.m. on 22 October 2017, Detective[1] Michael Lewis of the Guilford County Sheriff's Office initiated a traffic stop

1. Detective Lewis had the rank of deputy on the morning of 22 October 2017, but had attained the rank of detective by the time that he testified at trial. For consistency and ease of reading, we refer to him as Detective Lewis.

of a vehicle that he observed driving with revoked tags. The vehicle contained two occupants: the driver and Defendant. Detective Lewis noticed the odor of marijuana as he approached, requested the assistance of additional law enforcement officers, and asked each occupant to exit the vehicle.

Master Corporal Todd Riddle and Deputy Diaz[2] arrived on the scene shortly thereafter; Master Corporal Riddle stood by the vehicle's occupants, while Deputy Diaz assisted Detective Lewis in searching the vehicle. Detective Lewis discovered marijuana in the ashtray and a book bag in the back seat. Detective Lewis asked the occupants to whom the book bag belonged, and Defendant replied that the bag was his. A search of the bag revealed a digital scale and a lockbox, from which emanated the odor of marijuana.

Detective Lewis then asked Defendant if he had a key to open the lockbox; Defendant replied that he did not, and that the lockbox was not his. Detective Lewis pried open the lockbox with a pocketknife and discovered within a small handgun; a white, powdery substance that he believed to be cocaine; a dollar bill on which there was a white, powdery residue; multiple small, blue plastic baggies; a glass jar with a pink, crystallized substance inside; and multiple pills. Defendant was arrested and charged with possession with intent to sell or distribute alprazolam, possession with intent to sell or distribute cocaine, and possession of drug paraphernalia.

On 14 May 2018, a Guilford County grand jury returned indictments charging Defendant with two counts of possession with intent to sell or distribute a controlled substance (one for alprazolam and one for cocaine), misdemeanor possession of drug paraphernalia, and misdemeanor possession of marijuana.

On 6 September 2019, Defendant filed a motion to suppress evidence obtained by warrantless searches, and on 11 September 2019, Defendant filed another motion to suppress evidence obtained in violation of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). On 12 September 2019, Defendant's motions to suppress came on for hearing. The trial court denied both of Defendant's motions in open court and by order entered the next day.

On 2 October 2019, the matter came on for trial. At the outset, Defendant's counsel informed the trial court that he did not anticipate that Defendant would put on any evidence.

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2. Deputy Diaz's first name is not disclosed in the record on appeal.

Detective Lewis testified first for the State. When Detective Lewis was questioned about his investigation of the book bag, Defendant objected based upon the grounds stated in his motions to suppress, which the trial court again overruled. Detective Lewis testified that when he asked "who the [book bag] belonged to[,]" Defendant stated that the book bag belonged to him. Defendant also objected when Detective Lewis was about to testify as to Defendant's answer to whether he had the key to the lockbox, again based on the prior motion to suppress, which this time the trial court sustained.

On cross-examination, defense counsel questioned Detective Lewis about Defendant's statement regarding his ownership of the lockbox, and the State objected on hearsay grounds. The trial court excused the jury and Defendant conducted a voir dire of Detective Lewis. The State contended that Defendant's statements that he did not have a key to the lockbox and that the lockbox was not his were "self-serving" statements that did not fall within any hearsay exception, and were therefore inadmissible because Defendant would not be "subject to cross-examination[.]" The trial court sustained the State's objection.

Before the jury returned, defense counsel asked the trial court whether Defendant could reconsider his initial decision not to testify on his own behalf:

> [DEFENDANT'S COUNSEL]: Okay. If I can't -- if I can't get this – you know, I -- I may have to revisit that.
>
> THE COURT: Okay. But if you -- if you go there with this witness –
>
> [DEFENDANT'S COUNSEL]: Right.
>
> THE COURT: -- you're going to put your client up so [the State] can cross-examine him.
>
> [DEFENDANT'S COUNSEL]: I understand.
>
> THE COURT: Okay.
>
> [DEFENDANT'S COUNSEL]: Could I -- could I briefly speak to him?
>
> THE COURT: Sure. Uh-huh.

After some discussion, Defendant's counsel stated that Defendant would take the stand in order to "confirm" his statements, and requested that the trial court revisit its ruling on the State's objection:

> Please the court, I am going to -- I intend -- I know what I said early on, but based on the -- the ruling I'm going to go ahead and -- and confirm that [Defendant] is going to take the stand to confirm what he said and also subject himself to cross-exam[ination] in this case.
>
> So I am asking to ask those questions since -- since that issue is no longer -- [the State will] have an opportunity to cross-examine him on that, ask any questions [it] wants to.

The trial court agreed to let Defendant proceed with his cross-examination of Detective Lewis. When the jury returned, Defendant asked Detective Lewis to confirm that Defendant stated that he did not have a key for the lockbox and that the lockbox was not his, which Detective Lewis did.

Meanwhile, the State voluntarily dismissed the charge of possession with intent to sell or distribute alprazolam. After the close of the State's evidence, Defendant took the stand to testify on his own behalf. Defendant testified, *inter alia*, that although the book bag was his, neither the digital scale nor the lockbox discovered inside belonged to him. Consequently, Defendant continued, he did not "have a key to the lockbox" because "it was not [his] box."

After deliberating, the jury returned its verdicts finding Defendant guilty of felony possession of cocaine (a lesser-included charge of possession with intent to sell or distribute cocaine); misdemeanor possession up to one-half ounce of marijuana; and misdemeanor possession of drug paraphernalia. The trial court consolidated the convictions into a single judgment, sentenced Defendant to a term of 4 to 14 months in the custody of the North Carolina Division of Adult Correction, then suspended that sentence and placed Defendant on supervised probation for a period of 12 months.

Defendant timely filed notice of appeal.

II. Discussion

Defendant argues that the trial court erred (1) by denying his motion to suppress evidence obtained in violation of his *Miranda* rights,[3] and (2) by initially limiting his cross-examination of Detective Lewis. In response, the State argues, *inter alia*, that Defendant waived appellate review of these issues by subsequently eliciting and even testifying

3. Defendant does not challenge the trial court's denial of his motion to suppress evidence obtained as a result of the warrantless searches.

to the same evidence that he now argues was erroneously admitted. For the reasons that follow, we agree with the State.

"Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Terry*, 337 N.C. 615, 624, 447 S.E.2d 720, 725 (1994) (citation omitted). Although a defendant's privilege against compulsory self-incrimination is constitutionally protected, "a defendant who testifies to the same facts that he alleges to be inadmissible and then fails to claim that his in-court testimony was compelled or impelled by the trial court's errors has cured the errors of the trial judge and rendered them harmless." *Id.* (citation and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 15A-1443(c) (2021) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.").

Here, Defendant's *Miranda* argument concerns his statement regarding his ownership of the book bag, while his cross-examination argument concerns his desire to elicit testimony from Detective Lewis "regarding his interrogation of [Defendant] about the lockbox and its key." As the State correctly observes, however, *Defendant* testified that "[t]he book bag was mine" when he took the stand in his case-in-chief. Defendant thus "testifie[d] to the same fact[ ] that he alleges to be inadmissible" in his first argument on appeal. *Terry*, 337 N.C. at 624, 447 S.E.2d at 725. Further, our careful review of the transcript reveals that Defendant's counsel also elicited testimony about this same statement on cross-examination of Detective Lewis.

Similarly, the State suggests that, with regard to Defendant's cross-examination argument, "the same testimony initially excluded by the trial court was later admitted during both the State's case-in-chief and Defendant's case-in-chief[.]" Indeed, after Defendant informed the trial court that he intended to change his trial strategy and testify on his own behalf, the trial court allowed the cross-examination that it initially limited. Consequently, Defendant was permitted to elicit testimony from Detective Lewis that Defendant had informed Detective Lewis that "the box belong[ed] to his friend and [Defendant did] not have a key for it[.]" Deputy Diaz also testified to this same statement by Defendant, absent any subsequent objection from Defendant. And when Defendant later took the stand, during both his direct examination and upon cross-examination, he testified that he did not "have a key to the lockbox[.]"

In summary, all of the statements central to Defendant's arguments on appeal were admitted into evidence several times, either without objection by Defendant, during Defendant's cross-examination of the

State's witnesses, or during Defendant's own testimony. Accordingly, both issues are susceptible to waiver as unpreserved or invited error.

Nevertheless, Defendant argues that the trial court's decision to limit his cross-examination of Detective Lewis "forced [Defendant] to take the stand in his own defense" and prejudiced him by "open[ing] himself to cross-examination regarding his prior, unrelated arrest for assault . . . and whether he lied to police in conjunction with that arrest." To the extent that this argument implicates our Supreme Court's suggestion that a *Miranda* issue might not be waived if the defendant "claim[s] that his in-court testimony was compelled or impelled by the trial court's errors[,]" we conclude that Defendant was not, in fact, "compelled or impelled" to testify by the trial court's initial decision to limit cross-examination in this case. *Id.* (citation omitted).

When the trial court sustained the State's objection to Defendant's cross-examination of Detective Lewis regarding the key to the lockbox, the trial court ruled that Defendant's statement would be inadmissible hearsay "if [Defendant was] not putting up any evidence." Defendant was then faced with a choice of trial strategy: continue with his initial plan not to testify and leave the hearsay ruling intact, or change his trial strategy and testify on his own behalf in order to render his statement concerning the key to the lockbox admissible. The trial court did not compel Defendant to testify on his own behalf, however. That was a matter of trial strategy, and "matters of trial strategy . . . are not generally second-guessed by" our appellate courts. *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003).

As the State argues in its brief: "A side effect of that strategy decision, however, is the waiver of Defendant's prior efforts to preserve for appellate review the trial court's ruling suppressing that same statement." Each of Defendant's arguments on appeal concern the allegedly erroneous admission of statements that were ultimately admitted repeatedly at trial, absent Defendant's objection and, in some instances, by Defendant's own testimony. Defendant therefore "has cured the [alleged] errors of the trial judge and rendered them harmless." *Terry*, 337 N.C. at 624, 447 S.E.2d at 725 (citation omitted). Moreover, Defendant cannot show prejudice "by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c).

III. Conclusion

We need not address the merits of either of Defendant's arguments on appeal, as Defendant has cured any alleged errors "and rendered

them harmless" such that he is not entitled to appellate review. *Terry*, 337 N.C. at 624, 447 S.E.2d at 725 (citation omitted). We therefore dismiss Defendant's appeal.

DISMISSED.

Judges CARPENTER and WOOD concur.

SHANYBEL MARIE SANTER TORRES, Plaintiff
v.
CITY OF RALEIGH and MARTY LEE HALL, Defendants

No. COA22-447

Filed 2 May 2023

Immunity—governmental immunity—Rule 12(b)(2) motion to dismiss—personal jurisdiction—governmental or proprietary function

In plaintiff's action against defendants (a city and its employee) arising from an automobile accident, the trial court properly denied defendants' Rule 12(b)(2) motion to dismiss where its determination that it had personal jurisdiction over defendants was supported by its conclusion that the city employee was engaged in a proprietary function and, therefore, defendants were not shielded from suit by governmental immunity. The evidence demonstrated that, on the morning of the accident, the city employee's sole assigned duty was to repair a city-owned water main line, which was a proprietary rather than a governmental function.

Appeal by Defendants from order entered 24 November 2021 by Judge John W. Smith in Wake County Superior Court. Heard in the Court of Appeals 11 January 2023.

Miller Monroe & Plyler, PLLC, by William W. Plyler and Robert B. Rader, III, and William D. Webb, for Plaintiff-Appellee.

City of Raleigh City Attorney Robin L. Tatum, by Deputy City Attorney Hunt K. Choi and Senior Associate City Attorney Amy C. Petty, for Defendant-Appellants.

GRIFFIN, Judge.

Defendants City of Raleigh and Marty Lee Hall appeal from the trial court's order holding the court had personal jurisdiction over Defendants and denying Defendants' motion to dismiss. Defendants moved to dismiss on grounds of governmental immunity from Plaintiff Shanybel Marie Santer Torres's claims. Defendants contend the trial court erred by finding that Hall was performing a proprietary function as an employee of the City at the time that Plaintiff and Hall were involved in an automobile accident. We hold that the evidence before the court supported its holding that Hall's mission was proprietary, and therefore affirm.

I. Factual and Procedural History

On 2 January 2018, Hall and Plaintiff were involved in a motor vehicle accident at an intersection in Zebulon. Hall's vehicle collided with the side of Plaintiff's vehicle when Hall attempted to make a U-turn while Plaintiff was traveling in the lane to his left.

The City[1] dispatched Hall around 8:00 a.m. on the freezing cold morning of January 2 to address reports of a water main leak in a City-owned water line near an intersection on N.C. Highway 97. The City owns and operates metered water lines used to sell water as a utility service for its citizens. The City also owns and operates unmetered water lines for emergency response purposes, such as firefighting. Private businesses serviced by the City's unmetered lines must construct backflow valves on the water lines to prevent contaminated water from flowing backwards and commingling with potable water. Backflow valves are owned and operated by private businesses and the City has no duty to maintain or repair backflow valves.

The intersection where the accident occurred is T-shaped, where N.C. Highway 264 meets N.C. Highway 97, in part to allow ingress and egress to a shopping center. The shopping center includes a Murphy gas station with frontage on the westbound side of Highway 97. At this intersection, a city water main exists on the eastbound side of Highway 97 to control the flow of water which the City sells as a utility service. Pipes from this water main extend under the intersection and connect to water infrastructure on the westbound side of Highway 97 to support the needs of the businesses there, including the Murphy gas station. The eastbound side of Highway 97 consists of two lanes as it approaches

1. The events of this case occurred in the Town of Zebulon. The City of Raleigh is named as Defendant here because Zebulon merged its water and sewer utilities with those of the City in 2006.

the intersection: a left lane designated as a left-turn lane and a right lane for traffic continuing straight.

As Hall neared the intersection that day, he saw that the water main on the eastbound side of Highway 97 was not leaking, as reported. Rather, water appeared to be leaking from a ruptured backflow prevention valve in the corner of the Murphy gas station parking lot on the westbound side. Plaintiff, on her way to work at a Wal-Mart store behind the gas station, approached the intersection traveling in the left-turn lane. Hall approached the intersection while traveling in the right lane, slightly ahead of Plaintiff. Just before reaching the intersection, Hall made an abrupt U-turn to the left, colliding with Plaintiff's vehicle.

Plaintiff suffered injuries to her brain and her left arm as a result of the accident. Plaintiff underwent surgery to repair her left arm and was hospitalized for a total of twenty-one days.

On 20 November 2020, Plaintiff filed her initial complaint naming the City and Hall, in his official capacity only, as defendants. Defendants filed an answer and moved to dismiss on grounds which included governmental immunity. On 19 February 2021, Defendants filed a notice of hearing establishing a hearing on their motion to dismiss to be held on 8 April 2021. Plaintiff later filed motions to amend her complaint to also name Hall in his individual capacity, and to assert that Defendants were acting in a proprietary capacity when the accident occurred. On 5 April 2021, Defendants filed affidavits in support of their motion to dismiss, seeking to show that Hall was acting in a governmental role when the accident occurred.

Plaintiff then moved to continue the April 8 hearing so that the parties could undergo jurisdictional discovery regarding the issue of personal jurisdiction. The trial court allowed the motion, continuing the hearing on Defendants' motion to dismiss until 4 November 2021. Plaintiff deposed Hall on his purpose at the time of the accident, and, on 2 November 2021, filed affidavits and other evidence to support her claim.

On 4 November 2021, the trial court conducted a hearing (the "Dismissal Hearing") on Plaintiff's motion to amend her complaint and Defendants' motion to dismiss. On 24 November 2021, the trial court entered written orders denying Defendants' motion to dismiss "under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure" (the "Dismissal Order"); denying Defendants' request to certify the issue of governmental immunity for appellate review (the "Certification Order"); and granting Plaintiff's motion to amend her

complaint (the "Amendment Order"). In denying Defendants' motions, the trial court specified that, based on "the pleadings, competent matters of record, memorandums of law, and oral arguments of counsel, the [c]ourt finds that [Hall] was engaged in the performance of a proprietary function . . . at the time of the vehicular collision in question." The court further stated that the issue of governmental immunity could be "reconsidered . . . upon the completion of all discovery or at or after the pretrial conference."

Defendants timely appeal from the Dismissal Order.[2]

II. Analysis

Defendants contend the trial court erred by denying their motion to dismiss because the facts indisputably showed that Hall was acting in a governmental capacity at the time of the collision, and, therefore, Defendants are entitled to governmental immunity from suit. Defendants also contend the trial court made credibility determinations which were unsupported by the undisputed evidence. We address each argument.

A. Standard of Review

The trial court's Dismissal Order denied Defendants' motion to dismiss "under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure" based on "the contested issue of . . . governmental immunity." Defendants contend only that the trial court's holding is an erroneous conclusion of law that the court had personal jurisdiction over Defendants, and we therefore address only that conclusion in this appeal.

This Court has consistently stated that a denial of governmental immunity should be classified as an issue of personal jurisdiction under Rule 12(b)(2). *See Providence Volunteer Fire Dep't v. Town of Weddington*, 253 N.C. App. 126, 131, 800 S.E.2d 425, 430 (2017) (citing *Can Am S., LLC v. State*, 234 N.C. App. 119, 123–24, 759 S.E.2d 304, 308 (2014); *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245–46 (2001)); N.C. R. Civ. P. 12(b)(2). "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). "Three procedural postures are typical:

2. The trial court issued the Certification Order and the Amendment Order alongside its Dismissal Order, but Defendants challenge neither the Certification Order nor the Amendment Order on appeal, as their notice of appeal takes appeal only from the "Order Denying Defendants' Motion to Dismiss entered on November 24, 2021[.]"

'(1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.' " *Providence*, 253 N.C. App. at 134, 800 S.E.2d at 432 (citation omitted).

Though, in a fourth posture, upon receipt of "dueling affidavits" the trial court may elect to determine the matter based upon evidence presented during an evidentiary hearing:

> [I]f the parties submit dueling affidavits, the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions. If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror. Further, where parties submit depositions to the trial court, and the court's findings are replete with facts taken from these depositions, after holding a hearing on the question of personal jurisdiction where parties argue facts based on the depositions, such a case has moved beyond the procedural standpoint of competing affidavits to an evidentiary hearing. In such circumstances, the trial court must act as a fact-finder, and decide the question of personal jurisdiction by a preponderance of the evidence, because a plaintiff then has the ultimate burden of proving jurisdiction rather than the initial burden of establishing *prima facie* that jurisdiction was proper.

Parker v. Town of Erwin, 243 N.C. App. 84, 97, 776 S.E.2d 710, 721–22 (2015) (alterations cleaned up, internal citations and quotation marks omitted); *see also Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) ("If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits.").

Here, this matter moved into the second typical posture when Defendants submitted affidavits supporting their motion to dismiss. The trial court then continued its Dismissal Hearing to allow the parties to conduct limited jurisdictional discovery. Plaintiff deposed Hall, then submitted the deposition, affidavits supporting her complaint,

and additional documentation to the court. At this time, the case arguably moved into the third typical posture. Defendants contend that the evidence contained in Plaintiff's affidavits did not dispute the evidence pertaining to personal jurisdiction found in Defendants' affidavits, and, therefore, this case should be considered from the second typical posture.

However, this case is more appropriately considered from the fourth posture as described in *Parker*. After receiving the "dueling affidavits" and Hall's deposition, the trial court elected to hold a full evidentiary hearing. During the Dismissal Hearing, the trial court heard arguments from each party's counsel concerning the affidavits, depositions, and multiple exhibits illustrating how the accident occurred. The Dismissal Order does not contain multiple findings "replete with facts" from the depositions, but it is clear from the Order's language that the trial court directed that the matter be heard wholly or partly on Hall's deposition, held an evidentiary hearing, and made its decision based upon matters beyond the affidavits, including "the pleadings, competent matters of record, memoranda of law, and oral arguments of counsel[.]" *See Deer Corp. v. Carter*, 177 N.C. App. 314, 322, 629 S.E.2d 159, 166 (2006) (concluding that the "case had moved beyond the procedural standpoint of competing affidavits to an evidentiary hearing" because "the trial court held a hearing on the question of personal jurisdiction, and although no witnesses testified at the hearing, both parties argued facts based on the depositions").

Therefore, the trial court was charged to "act as a fact-finder, and decide the question of personal jurisdiction by a preponderance of the evidence," with Plaintiff bearing "the ultimate burden of proving jurisdiction rather than the initial burden of establishing *prima facie* that jurisdiction was proper." *Parker*, 243 N.C. App. at 97, 776 S.E.2d at 722. Ordinarily, "[w]hen this Court reviews a decision as to personal jurisdiction, it considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.' " *Banc of Am. Sec., LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (citation omitted). However, "[q]uestions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo," *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citations omitted), and we review the trial court's decision as to personal jurisdiction *de novo*, as well, when it turns solely on the question of governmental immunity, *see Farmer v. Troy Univ.*, 382 N.C. 366, 370, 879 S.E.2d 124, 127 (2022). Where specific findings of fact are not made in the trial court's order, and no such findings were requested by a party, this Court will presume that

the trial court found facts sufficient to support its ruling, if such findings may be made from the record evidence. *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986).

B. Governmental or Proprietary Function

We now consider whether, based on a preponderance of the evidence before the court in its Dismissal Hearing, Plaintiff showed the existence of personal jurisdiction. Specifically, we must determine whether the evidence supports the trial court's determination that Hall was acting in a proprietary capacity at the time of the accident and not entitled to governmental immunity.

"As a general rule, '[u]nder the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity.' " *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 898 (2017) (citation omitted). "Governmental immunity is that portion of the State's sovereign immunity which extends to local governments." *Id.* (citation omitted). "Under the doctrine of governmental immunity, a [municipality] is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citation omitted). "The State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004).

Our Courts "have long held that a 'governmental' function is an activity that is 'discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself.' " *Est. of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012) (citation omitted). "A 'proprietary' function, on the other hand, is one that is 'commercial or chiefly for the private advantage of the compact community.' " *Id.* (citations omitted). "When a municipality is acting 'in behalf of the State' in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign." *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). "When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers." *Id.* at 450–51, 73 S.E.2d at 293.

Defendants concede that the City dispatched Hall on the morning of January 2 to conduct a proprietary task—repairing a water main used to

sell water for private consumption by its citizens.[3] Further, Defendants do not dispute that, at all times up and until the moments just prior to the accident, Hall's assigned mission was to repair a ruptured water main pipe. Nonetheless, Defendants have consistently represented to the courts that Hall's purpose became governmental just before the accident, when Hall realized the water was coming from the Murphy's backflow prevention valve and attempted the U-turn in order to cut the water off for the safety of the public on the freezing winter morning. *See Faw v. Town of N. Wilkesboro*, 253 N.C. 406, 409–10, 117 S.E.2d 14, 17 (1960) ("[H]owever, as a municipality undertakes to supply water to extinguish fires, or for some other public purpose, it acts in a governmental capacity, and cannot be held liable for negligence." (citations omitted)).

Defendants contend the trial court's ruling was erroneous because Hall's purpose as of the specific time of the accident had become governmental, and our courts' focus should be the purpose at that specific point in time. Defendants assert that this is not a novel perspective for this Court, and that, "[m]oreover, the fact that [Hall's] mission changed from its inception is irrelevant." Defendants cite to the following rules to support their argument that the only material time is the employee's mission and/or purpose at the specific moment the tortious conduct occurred: "The mission of the town's employee, out of which the alleged injury to the plaintiff arose, is the determining factor . . . not what such employee was called upon to do at other times and places, but what he was engaged in doing at *the particular time and place alleged*." *Jones v. Kearns*, 120 N.C. App. 301, 304, 462 S.E.2d 245, 247 (1995) (emphasis added) (quoting *Beach v. Town of Tarboro*, 225 N.C. 26, 28, 33 S.E.2d 64, 65–66 (1945)). "While [the] defendant's employee was charged with certain [proprietary] duties . . . , at the time the plaintiff was injured the employee was actually engaged in discharging duties which related to public safety and were purely governmental. It matters not, therefore, to which particular department he was attached." *Hodges v. City of Charlotte*, 214 N.C. 737, 742, 200 S.E. 889, 892 (1939) (Barnhill, J., concurring).

Defendants misconstrue their cited precedent. In *Jones v. Kearns*, the "particular time and place alleged" was a police officer's actions as

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3. Our Supreme Court has long instructed: "When a municipal corporation operates a system of waterworks for the sale by it of water for private consumption and use, it is acting in its proprietary or corporate capacity and is liable for injury or damage resulting from such operation to the same extent and upon the same basis as a privately owned water company would be." *Mosseller v. City of Asheville*, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966) (citation omitted).

a safety officer responding to an emergency during her assignment at a proprietary fair. *Jones*, 120 N.C. App. at 305, 462 S.E.2d at 247. This Court noted that, in accordance with her assigned mission, the officer was actively responding to the emergency as an officer when the tortious conduct occurred. *Id*. However, this fact was not dispositive in our Court's holding. The Court in *Jones* ruled that the officer's mission at the time of the tortious conduct was governmental because she was generally assigned to police the fair as a safety officer, despite the proprietary nature of the fair. *Id*. Similarly, in *Beach v. Town of Tarboro*, the Court also commented on the employee's actions at the time of accident, but ruled that the employee's purpose was governmental based upon the purpose he was assigned that day: repairing streetlights for public benefit. *Beach*, 225 N.C. at 28, 33 S.E.2d at 65–66.

Further, in *Hodges v. City of Charlotte*, this Court held that the particular time and place alleged was the employee's presently assigned task of repairing traffic signals, a governmental duty, despite his simultaneous employment as a street inspector, a proprietary role. *Hodges*, 214 N.C. at 741, 200 S.E. at 891. The *Hodges* plaintiff put forth an argument similar to the one posed by Defendants in this case, contending that the defendant employee's mission could have been both governmental and proprietary, and that the employee could have shifted between the two based on his subjective intent, during his assignment:

> Plaintiff further contends that, in view of the evidence that if the defendant [employee] had seen a defect in the streets or water system, he would have felt it his duty under general directions of the City Manager, to report the defect to the proper department, it may reasonably be inferred that he was engaged at the time of the injury to [the] plaintiff in the performance of two duties: First, in the repair of a traffic signal light; and, secondly, in the inspection of city streets for the repair department. The evidence negatives this contention. [The employee] was going to do a specific job, to install a bulb in the traffic light at College and Trade Streets which regulates traffic in that part of the city. *This was his sole duty at the time.*

Id. The Court in *Hodges* expressly rejected this argument because the employee was assigned a "specific job" which was his "*sole duty*" when the tortious conduct occurred. *Id*. We are bound to reach a similar result here.

It is true that these cases present the longstanding rule that an employee who ordinarily works for a proprietary purpose may be found

to conduct actions for a governmental purpose, or vice versa, based on the particular time and place the tortious conduct occurred. However, our Courts have never so narrowly parsed an employee's assignment into its individual events in order to determine governmental or proprietary purpose. To do so would be to adopt a new rule of law, that a purpose or mission must be assessed as of the exact moment in time even when it would indicate a deviation from the employee's generally assigned mission. Indeed, this Court recognizes that similar legal principles exist in analogous areas of law, such as frolics in other contexts of *respondeat superior* liability. *See Parrott v. Kantor*, 216 N.C. 584, 588, 6 S.E.2d 40, 43 (1939) (stating rule that an employer is not liable for the acts of his employee which deviate from the scope of employment "in pursuit of his private or personal ends" (citation omitted)). Nonetheless, a rule of this kind has never been applied by our Courts in the current context.

Based upon the undisputed evidence before the trial court, the court could reasonably have found that Hall was assigned a single purpose on the morning of January 2: to assess the reports of a water main break near the intersection where the accident occurred. Even more particularly, the undisputed evidence showed only that Hall was attempting a U-turn at the time the accident occurred. Defendants presented to the trial court that Hall turned in order to travel back in the direction of the Murphy gas station, but this was also the route Hall would have taken to begin a return trip after learning there was no water main break. *Hodges*, 214 N.C. at 741, 200 S.E. at 891 (noting that if employee was returning from a finished task, it would not affect the employee's mission). Regardless of whether the service was performed or needed, the evidence showed that Hall's sole duty on the morning of January 2 was to repair a City-owned water main line—a proprietary purpose for which Defendants are not immune from suit. *Mosseller*, 267 N.C. at 107, 147 S.E.2d at 561. The trial court did not err in concluding the evidence showed "Hall was engaged in the performance of a proprietary function within the course and scope of his employment with [the City] at the time of the vehicular collision in question."

C. Credibility Determinations

Defendants also contend "the trial court committed reversible error in making an adverse determination of [Hall's] credibility" because the evidence concerning "Hall's mission at the time of the accident" was undisputed. However, to support their claim that the trial court's decision turned on Hall's credibility, Defendants refer solely to language from the Certification Order. Defendants did not take an appeal from that order and it is therefore not before us for review.

Nonetheless, to the extent that the trial court's focus on Hall's credibility can be derived from the Dismissal Order, the trial court was permitted to consider Hall's credibility when determining whether Plaintiff had shown personal jurisdiction by a preponderance of all the evidence. The only undisputed facts of this case are the objective events that transpired leading up to and including the accident. The subjective statements of purpose proffered by Hall were contradicted by Plaintiff throughout the proceedings, including by Plaintiff's counsel during arguments in the Dismissal Hearing. Therefore, if the trial court did consider Hall's credibility in its determinations, it did not do so in error.

III. Conclusion

We hold that Plaintiff satisfied her ultimate burden of proving the court had personal jurisdiction over her claims because the evidence before the court showed that Hall was carrying out an assigned governmental mission at the time of the motor vehicle accident. We affirm the Dismissal Order.

AFFIRMED.

Judges MURPHY and CARPENTER concur.

JEFFREY LOREN WELCH, Plaintiff
v.
DEBORAH BEAM WELCH, Defendant

No. COA22-448

Filed 2 May 2023

1. Divorce—equitable distribution—consent order—traditional individual retirement account—domestic relations order

Where a couple divorced and entered into an equitable distribution consent judgment and order, which specified the distribution of plaintiff husband's traditional individual retirement account (IRA) via trustee to trustee transfer, and defendant wife moved more than a decade later for a domestic relations order (DRO) to effectuate the transfer of the traditional IRA, the trial court was authorized pursuant to N.C.G.S. § 50-20.1 to enter a DRO as requested by defendant, and it erred by declining to do so based on its incorrect conflation of domestic relations orders with qualified domestic relations orders.

2. Divorce—equitable distribution—traditional individual retirement account—domestic relations order—ten-year statute of limitations

Where a couple divorced and entered into an equitable distribution consent judgment and order, which specified the distribution of plaintiff husband's traditional individual retirement account (IRA) via trustee to trustee transfer, and defendant wife moved more than a decade later for a domestic relations order (DRO) to effectuate the transfer of the traditional IRA, the trial court erred by concluding that, because the original order did not specify a DRO as a means to distribute the equitable distribution award, the motion for entry of a DRO was a new action barred by the ten-year statute of limitations. The ten-year statute of limitations did not apply because defendant's motion for a DRO did not seek an award different from the original equitable distribution award.

Appeal by Defendant from an order entered 28 January 2022 by Judge Michelle Fletcher in Guilford County District Court. Heard in the Court of Appeals 29 November 2022.

No brief for Plaintiff-Appellee.

Woodruff Family Law Group, by Carolyn J. Woodruff, Jessica Snowberger Bullock and Y. Michael Yin, for Defendant-Appellant.

WOOD, Judge.

This is a second appeal in the same matter.[1] Where before this Court reviewed a trial court's denial of a contempt and Rule 70 motion, we now consider whether a motion for entry of a domestic relations order is a proper mechanism for distribution of an individual retirement account under the circumstances or constitutes an action subject to the statute of limitations.

I. Background

Mr. and Ms. Welch were married on 19 June 1981. On 30 January 2007, an action for divorce, child custody, and equitable distribution was commenced, and the parties were divorced on 2 July 2007. The parties entered into a Consent Judgment and Order on 30 October 2008,

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1. For the previous case, *see Welch v. Welch* (*Welch I*), 278 N.C. App. 375, 859 S.E.2d 646 (2021) (unpublished).

which specified the distribution of the marital property. This distribution included Mr. Welch's Individual Retirement Account ("IRA") and provided as follows:

> As soon as practicable following the entry of this Consent Judgement and Order, Plaintiff shall transfer to Defendant one-half (50%) of his Charles Schwab Contributory IRA, Account Number . . . , into an individual retirement account in Defendant's sole name. Upon the division, the tax basis of such individual retirement account, if any, shall also be equally divided between the Parties on a pro rata basis as of the date of transfer from such IRA. This transfer is an incident of the parties' divorce and shall be completed pursuant to I.R.C. § 408(d)(6) via a trustee to trustee transfer. Defendant and Plaintiff shall execute all documents necessary to effectuate such transfer. Plaintiff shall be allowed to withdraw up to his one-half portion of his IRA at any time (but any such withdrawals shall not affect Defendant's one-half amount to be transferred to her).

The parties did not act upon the trial court's order to distribute the IRA until Ms. Welch filed a motion to find Mr. Welch in contempt on 28 October 2019, nearly eleven years after the Consent Judgment and Order. The reason for this delayed action may have been that Ms. Welch believed that she had access to the account for those eleven years by virtue of her vested interest in the account. The trial court denied the contempt motion on 24 February 2020. It held that the statute of limitations, as enumerated in Section 1-47(1) of our General Statutes, barred her motion.

Ms. Welch subsequently filed a motion on 30 January 2020, requesting the trial court to "exercise its ministerial and administrative duty" to transfer title of the IRA to her pursuant to Rule 70 of the North Carolina Rules of Civil Procedure. The trial court denied this motion, too, on 13 April 2020. It held that such action "is beyond the Court performing a mere ministerial act where no facts are in dispute."

Ms. Welch appealed these denials in *Welch v. Welch* (*Welch I*), 278 N.C. App. 375, 859 S.E.2d 646 (2021) (unpublished). In *Welch I*, this Court concluded that the contempt and Rule 70 motions were properly denied. This Court did not address whether the trial court could enter a domestic relations order to effectuate the transfer of the IRA because Ms. Welch had not presented that argument to the trial court. Citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988),

this Court repeated the maxim "where a theory argued on appeal is not raised before the trial court, the argument is deemed waived on appeal." *Welch I*, 278 N.C. App. 375, 859 S.E.2d 646, ¶ 7.

Thereafter, Ms. Welch raised such a theory before the trial court and moved the trial court on 8 September 2021 to enter a domestic relations order to effectuate the transfer of the IRA. The "Motion" asked the court to "enter an IRA Domestic Relations Order (DRO) [p]ursuant to IRC § 408(d)(6) transferring the current balance of Plaintiff's Schwab IRA account." It also contained six alternative motions. They are as follows:

> Motion One: The court has the inherent authority based upon the equitable distribution Judgment to enter orders to effectuate the Judgment so that the court file can be closed.
>
> Motion Two: The Defendant moves for the return of her separate property vested in her pursuant to NCGS 50-20 et seq and requests that the court award her attorney fees from the Plaintiff for the failure to release her vested separate property to her. The IRA at Schwab is her vested separate property now and forever more.
>
> Motion Three: The Defendant moves for an IRA Order effectuating her vested property rights in the Schwab IRA.
>
> Motion Four: Pursuant to GS 50-20.1(j), the Defendant moves for an order effectuating her vested benefit in the Schwab IRA.
>
> Motion Five: Pursuant to NCGS 50-20 (g), the court can enter an order under transferring the title to the Defendant's vested IRA at Schwab to her.
>
> Motion Six: The Defendant generally moves for the magical words necessary for her to obtain her vested interest in the Schwab IRA as a part of all further relief the court deems necessary under equity or law.

The trial court denied the motion on 28 January 2022, holding as conclusions of law:

> a. The Schwab IRA account has not been proven to be a "*qualified retirement plan*" pursuant to ERISA and, thus, a QDRO or DRO is inapplicable and not the appropriate mechanism for distribution thereof;

> b. The 2008 Consent Order specifically addressed the rights and obligations of the parties regarding the Schwab IRA, and the Order did not include language for entry of a QDRO or DRO as the mechanism for division and distribution of the Schwab IRA account;
>
> c. Furthermore, to the extent Defendant's motion continues to seek enforcement of the 2008 Consent Order, the motions are barred by the statute of limitations set forth in N.C.G.S. § 1-47.

Pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2022), Ms. Welch now appeals from the trial court's dismissal.

II. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). Findings of fact are conclusive on appeal if there is evidence to support those findings, while conclusions of law are reviewed *de novo*. *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004). "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).

III. Discussion

Ms. Welch argues that the trial court erred in denying her motion for entry of a domestic relations order ("DRO") when it concluded, as a matter of law, that a DRO is "not the appropriate mechanism for distribution" of the IRA because it must be "proven to be a '*qualified retirement plan*' pursuant to ERISA" and, further, the original order "did not include language for entry of a QDRO or DRO" as a means of distribution. It also held that the motion for entry of a DRO is otherwise a new action "barred by the statute of limitations." We agree with Ms. Welch and overrule these conclusions.

A. Domestic Relations Orders as a Mechanism for Effectuating an Equitable Distribution Order.

[1] An equitable distribution consent order, "once signed and entered by the trial judge, [becomes] a 'court-ordered equitable distribution' " for the purposes of distributing retirement plan benefits under

Section 50-20.1 of our General Statutes. *Patterson v. Patterson*, 137 N.C. App. 653, 664, 529 S.E.2d 484, 490 (2000). Thus, the 2008 Consent Order, after being signed and entered by the trial court, is now treated as an equitable distribution award under Section 50-20.1. Ms. Welch's "interest in the Schwab IRA vested in October 2008 when the Order was entered." *Welch I*, 278 N.C. App. 375, 859 S.E.2d 646, ¶ 5. To "vest" means "to grant, endow, or clothe with a particular authority, right, or property." *Vested*, Webster's Third New International Dictionary (1968).

As part of an equitable distribution award, retirement accounts may be distributed "by means of a qualified domestic relations order, or as defined in section 414(p) of the Internal Revenue Code of 1986, or *by domestic relations order* or other appropriate order." N.C. Gen. Stat. § 50-20.1(g) (2022) (emphasis added). This method of distribution "appl[ies] to all vested and nonvested pension, retirement, and deferred compensation plans, programs, systems, or funds, including . . . *individual retirement accounts* within the definitions of Internal Revenue Code sections 408 and 408A." § 50-20.1(h) (emphasis added). Section 408 of the Internal Revenue Code defines an "individual retirement account" as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" and mandates certain investment limitations. 26 U.S.C. § 408(a). It is apparent from the record that the IRA at issue here falls into this descriptive category and may therefore be distributed through a DRO as outlined in Section 50-20.1(g) or by "other appropriate order." N.C. Gen. Stat. § 50-20.1(g) (2022); *see* 26 U.S.C. § 408(b)(6) (citing 26 U.S.C § 121(d)(3)(C)(i)) (providing generally for the tax-free transfer of an IRA via "written instrument incident to" a divorce decree).

We note that certain employer-sponsored retirement accounts are additionally subject to the federal Employee Retirement Income Security Act of 1974 ("ERISA") and require a special class of DRO, a *qualified* domestic relations order ("QDRO"), to distribute benefits to someone other than the account participant. 29 U.S.C. § 1056(d)(3)(A); see N.C. Gen. Stat. § 50-20.1(g) (2022) (providing for the use of QDROs). However, traditional IRAs, that is, IRAs not funded by an employer, are not "defined contribution plans" or "defined benefit plans" that would otherwise subject them to ERISA's requirements. 26 U.S.C. § 414(i)-(j). The record before us indicates that the IRA at issue is a traditional IRA and is therefore not governed by ERISA.

The trial court here conflated DROs and QDROs. It stated, "The Schwab IRA account has not been proven to be a '*qualified retirement plan*' pursuant to ERISA and, thus, a QDRO or DRO is inapplicable and

not the appropriate mechanism for distribution thereof." As explained above, the trial court need not concern itself with utilizing a more involved QDRO in this case; a simpler DRO suffices as an appropriate mechanism to distribute the IRA at issue. The IRA does not need to be a qualified retirement plan under ERISA for the trial court to issue a DRO.

B. Domestic Relations Orders and the Statute of Limitations

[2] We next address whether a motion for a DRO made more than ten years after the last action in a case is barred by the statute of limitations in initiating an action upon a judgment when the original order did not specify a DRO as a means to distribute the equitable distribution award.

The statute of limitations for initiating an action "[u]pon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its entry" is ten years. N.C. Gen. Stat. § 1-47 (2022). An action, in this sense, may be "defined as 'a formal complaint within the jurisdiction of a court of law.' " *Bradford v. Bradford*, 279 N.C. App. 109, 114, 864 S.E.2d 783, 788 (2021) (quoting *Massey v. Massey*, 121 N.C. App. 263, 267, 465 S.E.2d 313, 315 (1996)).

In *Welch I*, this Court held that a motion for contempt and a Rule 70 motion were "action[s] to enforce the judgment" and barred by the statute of limitations after ten years had passed since entry of the 2008 Consent Order. *Welch I*, 278 N.C. App. 375, 859 S.E.2d 646, ¶ 2. This Court did not elaborate upon the rational for this holding, but it is clear that this Court viewed the motion as a means of enforcing a prior judgment. Though not an independent action, these motions might be said to be "in the *nature of an action*" such that the statute of limitations would bar its entry. *McDonald v. Dickson*, 85 N.C. 248, 250 (1881) (quoting Thomas Campbell Foster, A Treatise on the Writ of Scire Facias 13 (Philadelphia, T. & J.W. Johnson 1851)).

In certain instances, a purported DRO motion seeking to modify a prior order may likewise constitute "an action upon a judgment" so as to invoke the statute of limitations, as was the case in *Bracey v. Murdock*. There, this Court reviewed a motion for a DRO that did "not simply 'seek[] to finalize' the [prior] Consent Order or to effectuate its equitable distribution provisions" but sought to additionally award "all passive gains and losses" from the disputed retirement account and to compel discovery. 286 N.C. App. 191, 194, 880 S.E.2d 707, 709 (2022). " 'Because motions are properly treated according to their substance rather than their labels, we treat [Defendant]'s motion for what it really was, namely, a Rule 59 motion' to amend the 2005 Consent Order." *Id.* (quoting *Scott v. Scott*, 106 N.C. App. 379, 382, 416 S.E.2d 583, 585 (1992)).

Here, by contrast, Ms. Welch's motion for a DRO is not a crafty means to amend the distribution awarded in the 2008 Consent Order. Instead, Ms. Welch sought in her motion "to effectuate the Judgment" and did not request alterations to the original order. Until now, our courts have yet to address whether a motion for a DRO, as here, constitutes a time-barred "action upon a judgment" where the trial court previously granted a party vested property rights in a retirement account and the party seeking the DRO is not seeking anything other than that awarded by the original order. Looking beyond our borders, we note that other state courts have answered the question before us.

In Vermont, a husband and wife divorced, and the husband moved in 2017 for entry of a DRO to effectuate the transfer of retirement funds two years after the eight-year statute of limitations ran from the original equitable distribution order. *Johnston v. Johnston*, 212 A.3d 627, 635 (Vt. 2019). The trial court initially approved a proposed DRO in 2007 after the parties' 2004 divorce. The husband filed a motion to enforce in 2017, claiming that the funds were never transferred to him. *Id.* at 628. "The court denied husband's motion to enforce, finding it barred by the eight-year statute of limitations for actions on judgments." *Id.* The relevant Vermont statute of limitations states, "Actions on judgments and actions for the renewal or revival of judgments shall be brought by filing a new and independent action on the judgment within eight years after the rendition of the judgment, and not after." Vt. Stat. Ann. tit. 12, § 506 (2022). Husband appealed the matter to the Vermont Supreme Court. The Vermont Supreme Court concluded, "We consider husband's motion as one that seeks to effectuate the final judgment through entry of an adjunct order and our decision turns on the unique nature of these procedural devices. We conclude that husband's request is not an 'action on a judgment.' " *Johnston*, 212 A.3d at 632. That court wrestled with the notion that a DRO was an attempt to "enforce" a prior judgment and therefore constituted an "action" as used in Vermont's similar statute of limitations.

> We simply disagree with the conclusion that entry of a DRO is an attempt to enforce the underlying final divorce order or that the filing of a DRO is an attempt to enforce the underlying final divorce order or that the filing of a DRO constitutes an execution upon the judgment. As previously discussed, the right to obtain the retirement funds awarded in a final divorce order depends upon the approval of a third-party, the plan administrator. There is no 'judgment' to execute or enforce until that step has been taken.

Id. at 636. Although the Vermont Supreme Court acknowledged that other state courts may have held differently, it understood the husband's plight and the mechanism necessary to allow him to obtain his vested property. "[A]lthough husband was awarded the right to a particular amount of retirement funds in the 2004 divorce order, he had no effective ability to enforce that portion of the order through an 'action on the judgment.' " *Id.* at 634. It therefore held that "the approval of [a] proposed QDRO is adjunct to the entry of the judgment of divorce and not an attempt to 'enforce' the judgment." *Id.* at 635 (quoting *Joughin v. Joughin*, 906 N.W.2d 829, 832 (Mich. Ct. App. 2017)). It also cited a Tennessee case, *Jordan v. Jordan*, 147 S.W.3d 255 (Tenn. Ct. App. 2004), holding much the same. *Id.* at 632.

The Michigan Supreme Court faced a similar question and held that a motion for a DRO after entry of a distribution award is not barred by that state's statute of limitations on actions upon judgments. *Dorko v. Dorko*, 934 N.W.2d 644, 650 (Mich. 2019). "A party's request for entry of a proposed QDRO does not involve a distinct legal 'claim.' Only claims can be barred by a statute of limitations." *Id.* at 648. The Michigan Supreme Court reasoned that "[a]sking a court to enter a proposed QDRO is therefore not an 'action' that can be time-barred by a statute of limitations because the order does not depend on any underlying *cause* of action. Rather, such a request merely implements a provision of the divorce judgment." *Id.* Though the statute of limitations "*would* apply" to attempts to recover retirement benefits attained in violation of the divorce judgment, that court "differentiate[ed] between defendant's *procedural* entitlement to entry of a proposed QDRO and her *substantive* right to receive 50% of plaintiff's retirement benefits." *Id.* at 649-50. Although *Dorko* addressed a QDRO, the same analysis is applicable to a DRO as in this case.

We find the rational of these cases persuasive, as to hold otherwise would deprive spouses of their vested property under an equitable distribution order if the property were not distributed in a timely manner as happened here. The same rationale applied in the above Vermont and Michigan cases is applicable here. Accordingly, we hold that Section 1-47 does not apply to a party's motion for entry of a proposed DRO when the court previously has ordered the distribution of retirement benefits and the motion does not seek an award different from the original equitable distribution order. We echo *Dorko* in holding that "[t]here is an important distinction between a post[-]judgment *order* that implements a term of a divorce judgment and an *action* to enforce that judgment." *Id.* at 649. We note that, in the above decisions, the original equitable distribution orders specified the entry of DROs as the principal means of

effectuating the distribution of the retirement accounts at issue. Though the 2008 Consent Order here specified a "trustee to trustee transfer" as the means of effectuating the distribution, we hold that the principles outlined above operate to allow the trial court to enter a post-judgment DRO to effectuate the intended result of the 2008 Consent Order.

IV. Conclusion

In accordance with Section 50-20.1 of our General Statutes, the trial court is authorized to enter a DRO as a proper mechanism for distributing a traditional IRA. The statute of limitations does not bar a request for entry of a DRO as a means of effectuating a prior order, so long as such entry does not affect the substantive rights of the parties.

REVERSED AND REMANDED.

Judges ZACHARY and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 2 May 2023)

Case	County	Disposition
BELL ENTERS. v. SFI GRP., INC. No. 22-758	Pender (20CVD788, 20CVD912)	Vacated and Remanded
FIGUEROA v. ST. CLAIR No. 22-907	Henderson (22CVD1120)	Reversed
GARDNER v. RICHMOND CNTY. No. 21-600	Richmond (20CVS1127)	Dismissed
HEDGEPETH v. SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N, INC. No. 22-773	Swain (21CVS223)	Affirmed
IN RE C.S.B. No. 22-1025	Craven (20CR50040-41) (21CR53158) (21CR53254-58) (21CR704341) (22SPC623)	Affirmed
IN RE G.R.D. No. 22-637	Rutherford (19JT34-38)	Affirmed
IN RE L.R.-A. No. 22-519	Davie (20JT31) (20JT32) (20JT33) (20JT34) (20JT35)	Affirmed
PRECISION MACH. DESIGN, LLC v. JBD HOLDINGS, INC. No. 22-838	Mecklenburg (20CVS15886)	Affirmed
STATE v. ANSELMO No. 22-903	Pitt (19CRS54443)	No Error
STATE v. HARRIS No. 18-952-3	Granville (02CRS51192)	NO ERROR IN PART; REMANDED IN PART.
STATE v. HOLMES No. 22-783	Greene (17CRS322) (17CRS329) (17CRS333) (17CRS336) (21CRS423)	No Error

STATE v. McRAE No. 22-614	Forsyth (19CRS53926)	Dismissed
STATE v. McRAVION No. 22-631	Lincoln (20CRS334-335) (20CRS51349)	Affirmed
STATE v. MIZELL No. 22-550	Pitt (20CRS52164) (20CRS52627-28) (20CRS53062) (20CRS53085) (20CRS53268) (20CRS53273) (20CRS53288) (21CRS50346) (21CRS50348) (21CRS50350) (21CRS50920) (21CRS51597) (21CRS52093) (21CRS53517) (21CRS53519) (21CRS53569)	Affirmed in Part; Remanded in Part for Resentencing
STATE v. SANDO No. 22-508	Davidson (13CRS1441-42) (13CRS51420) (13CRS51772-75)	No Error
STATE v. STUBBS No. 22-802	Hoke (18CR51730)	Vacated and Remanded
VASQUEZ v. DUBAI, LLC No. 22-660	Mecklenburg (21CVS2751)	Affirmed

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ADMINISTRATIVE LAW

Coastal Area Management Act minor permit—contested case hearing—petition untimely filed—subject matter jurisdiction—In a case about neighboring oceanfront properties owned by petitioner and intervenor-respondents, where intervenor-respondents were issued a Coastal Area Management Act minor permit to construct a new residence on their property, the Coastal Resources Commission properly denied petitioner's request for a contested case hearing challenging the permit's issuance, because petitioner had filed his request well past the twenty-day window for doing so (under N.C.G.S. § 113A-121.1(b)), and therefore the Commission lacked subject matter jurisdiction to consider the request. Further, where the trial court upheld the Commission's decision, there was sufficient evidence in the whole record to support the court's determination of when intervenor-respondents' permit application was complete (for purposes of determining when the statutory twenty-day period began). Finally, the issue of whether petitioner was an "adjacent riparian landowner" entitled to notice of the permit application (under 15A N.C. Admin. Code 07J.0204(b)(5)(B)) had no bearing on the jurisdictional issue. **Fonvielle v. N.C. Coastal Res. Comm'n, 284.**

APPEAL AND ERROR

Interlocutory order—denial of motions for summary judgment and to dismiss—exclusivity provision of Workers' Compensation Act—substantial right—Where the estate of a deceased machine operator (plaintiff) sued a co-employee (defendant) for alleged willful, wanton, or reckless negligence in connection to a workplace accident resulting in the operator's death, the trial court's interlocutory order denying defendant's motion for summary judgment and his Rule 12(b)(1) motion to dismiss was immediately appealable. Defendant's motions implicated a substantial right where they asserted that the court lacked subject matter jurisdiction over plaintiff's claim because of the exclusivity provision of the Workers' Compensation Act, which grants the Industrial Commission exclusive jurisdiction over all actions falling under the Act. **Est. of Baker v. Reinhardt, 529.**

Interlocutory order—denial of Rule 12(b) motions to dismiss—denial of motion to stay—substantial right—In a civil action where—after plaintiff's wife was fatally shot at work by her coworker—plaintiff asserted claims of negligence, gross negligence, and willful and wanton conduct against the coworker's husband (defendant-spouse) and the furniture manufacturing company where his wife worked, the trial court's interlocutory order denying defendants' motions to dismiss (under Civil Procedure Rules 12(b)(1) and (6)) and defendant-spouse's motion to stay the proceedings was immediately appealable. Each of defendants' motions implicated a substantial right where: (1) defendants based their motions to dismiss on the exclusivity provision of the Workers' Compensation Act, which grants the Industrial Commission exclusive jurisdiction over all actions falling under the Act; and (2) defendant-spouse's motion to stay alleged that permitting the action to proceed would infringe upon his Fifth Amendment rights in a pending criminal case related to the shooting. However, to the extent that defendant-spouse's Rule 12(b)(6) motion did not relate to the Act's exclusivity provision, it did not implicate a substantial right and therefore its denial was not immediately appealable. **Marlow v. TCS Designs, Inc., 567.**

Interlocutory order—divorce case—post-separation support—certiorari allowed—In an action for absolute divorce, the Court of Appeals granted an ex-husband's petition for a writ of certiorari to review an order granting post-separation

APPEAL AND ERROR—Continued

support to his ex-wife. Although the order was interlocutory and not otherwise appealable (the trial court did not certify the order under Civil Procedure Rule 54(b), and post-separation support orders do not affect a substantial right), appellate courts have discretion to issue writs of certiorari where no right of appeal from an interlocutory order exists and where doing so would serve the administration of justice. **Brosnan v. Cramer, 202.**

Interlocutory order—equitable distribution—no Rule 54(b) certification—no substantial right affected—final as to equitable distribution issues—An interlocutory order granting equitable distribution of an ex-husband's military pension was immediately appealable pursuant to N.C.G.S. § 50-19.1 where, although the trial court did not certify it under Civil Procedure Rule 54(b) and the order did not affect a substantial right, the record established that the order was final as to all issues regarding equitable distribution and therefore would have been a "final order" within the meaning of Rule 54(b) but for the other pending claims in the action. **Brown v. Brown, 509.**

Interlocutory order—substantial right—res judicata defense—lack of specific assertions—In a negligence action brought against the owners of an assisted living center (defendants) by the estate of a patient who fell multiple times during her two-week stay, the appellate court determined that it had no jurisdiction to hear defendants' appeal from the trial court's order denying defendants' motion to dismiss (which defendants based on collateral estoppel and res judicata principles after a federal court granted defendants' motion for summary judgment in a prior suit involving the same facts). Since the trial court's order was interlocutory, defendants had the burden of showing that the order was immediately appealable as affecting a substantial right, but they failed to do so by not including in their opening brief—as part of the statement of grounds for appellate review—an explanation of how the challenged order would either create a risk of inconsistent verdicts or otherwise affect a substantial right on the particular facts of the case. **Bartels v. Franklin Operations, LLC, 193.**

Jurisdictional issue—first raised in reply brief—based on references in appellee brief—issue properly raised—In a drug prosecution in which the State appealed from the trial court's decision to grant defendant's motion to suppress (which the court initially rendered in a standard AOC judgment form without findings and conclusions), where the trial court entered an additional suppression order containing findings and conclusions eleven months later—after the State had already entered notice of appeal from the initial order, settled the record on appeal, and filed its principal appellate brief—the State's challenge to the validity of the additional order for the first time in its reply brief was allowable under Appellate Rule 28(h) as a rebuttal to defendant's repeated references to the second order in his appellee brief. **State v. Johnson, 441.**

Mootness—high school student's disciplinary reassignment—subsequent graduation from high school—factual dispute—In an action filed on behalf of a minor by and through his mother (petitioners) against a county board of education (respondent) where—after the minor was issued a ten-day out-of-school suspension from his high school for instigating a fight with another student—respondent issued a written decision affirming the minor's reassignment to an alternative school, petitioners' appeal from the trial court's denial of their petition for judicial review of respondent's decision was not moot. Based on the parties' competing affidavits, a factual dispute existed regarding whether the minor had already completed his high

APPEAL AND ERROR—Continued

school education and graduated by the time petitioners' appeal came on for review. **D.W. v. Onslow Cnty. Bd. of Educ., 273.**

Notice of appeal—defective—jurisdiction remained with trial court—refusal to rule on motions—In an action for alienation of affections and criminal conversation, where defendant's purported pro se notice of appeal from the trial court's summary judgment order was defective and did not confer jurisdiction on the Court of Appeals, jurisdiction remained with the trial court; therefore, the trial court erred in declining to rule on defendant's motions to amend his admissions and to reconsider summary judgment. **Venters v. Lanier, 483.**

Notice of appeal—file number of dismissed case—interlocutory order—failure to argue grounds for review—In an action arising from defendant's low-speed collision with a convenience store after her vehicle experienced sudden brake failure, plaintiff's arguments regarding issues from a separate case that plaintiff had voluntarily dismissed, and for which he offered no grounds for appellate review, were not properly before the appellate court. As for plaintiff's arguments in the non-dismissed case regarding interlocutory orders striking allegations concerning punitive damages and awarding attorney fees in favor of defendant, plaintiff failed to designate the interlocutory orders in his notice of appeal and made no effort to assert grounds for the appellate court to review the orders. In addition, plaintiff's arguments regarding punitive damages would necessarily be resolved against plaintiff in light of the appellate court's holding that there was no error at trial. **Chahdi v. Mack, 520.**

Preservation of issues—constitutional argument—waiver—zoning case—At a hearing on a petition for a writ of certiorari seeking judicial review in superior court of a county board of adjustment's denial of an application for a special use permit (to build and operate a motocross center), intervenors were not denied their due process right to a meaningful opportunity to be heard at the hearing where their counsel was present but did not participate at the hearing, and the record did not show any indication that intervenors' counsel sought to participate but was prevented from doing so. Intervenors' failure to raise their constitutional argument before the trial court barred appellate review of the alleged constitutional error. **Pope v. Davidson Cnty., 35.**

Preservation of issues—eliciting and testifying to evidence—waiver—Defendant's appeal from a judgment for his drug-related convictions was dismissed where he waived appellate review of both evidentiary issues that he raised in his appeal by eliciting and even testifying to the same evidence he alleged was erroneously admitted, or in other instances by failing to object. The appellate court rejected defendant's argument that the trial court's decision to limit his cross-examination of a witness compelled or impelled him to take the stand in his own defense. **State v. Lamb, 611.**

Preservation of issues—objection to jury instruction—failure to specifically object—failure to adequately brief the issue—In plaintiff's action against an insurance carrier (defendant) regarding coverage for plaintiff's sunken yacht, plaintiff failed to preserve for appellate review its objection to one of the trial court's jury instructions, where plaintiff did not raise that specific objection at the close of the charge conference or after the jury instructions were given. Even if plaintiff's objection had been preserved, it was subject to dismissal on appeal because plaintiff failed to adequately brief the issue pursuant to the requirements under Appellate Rule 28(b)(6). **D&B Marine, LLC v. AIG Prop. Cas. Co., 106.**

APPEAL AND ERROR—Continued

Preservation of issues—termination of parental rights—collateral estoppel—failure to object at trial—At a termination of parental rights hearing, respondent-mother failed to preserve for appellate review her argument that collateral estoppel principles barred the trial court from considering certain facts from two prior orders adjudicating her children as neglected. The mother neither raised the argument at the hearing nor objected to petitioner's evidence regarding the prior neglect adjudications. Additionally, she testified at the hearing about those adjudications and presented other evidence relating to them. **In re K.M.C., 143.**

Record on appeal—Rule 11(c) supplement—categories of evidence permitted—In a child custody action, where the trial court had excluded the father's three expert witnesses and their reports from evidence at trial, the court erred by excluding from the record on appeal the experts' CVs and reports, which the father had submitted in an Appellate Rule 11(c) supplement. The expert witness materials fell under two of the five disjunctive categories of evidence that Rule 11(c) allows to be included in a record on appeal—specifically, the father had "served" the materials on the mother, with one of the reports having been served over a year before trial; and the father had "submitted for consideration" all of the materials to the court at trial. **Aman v. Nicholson, 1.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Criminal trial—sealed juvenile records—review by appellate court—On appeal from defendant's convictions for multiple child abuse offenses, pursuant to defendant's request, the Court of Appeals reviewed the victim's sealed juvenile records to determine whether the trial court erred in preventing their disclosure to defendant. The appellate court concluded that none of the sealed records had any relevance to the victim's testimony or to defendant's case and therefore contained nothing favorable to defendant or material to his case. **State v. Demick, 415.**

Intentional child abuse inflicting serious bodily injury—jury instructions—lesser-included offense omitted—plain error analysis—In defendant's trial for multiple child abuse charges, assuming the trial court erred when it did not submit intentional child abuse inflicting serious physical injury (ICAISPI) as a lesser-included offense of intentional child abuse inflicting serious bodily injury (ICAISBI) in its jury instructions, there was no plain error because defendant could not show the requisite prejudice where substantial and uncontradicted evidence in the record established that the victim's injuries met the statutory requirement for ICAISBI, as "a serious permanent disfigurement" or "a permanent or protracted condition that caused extreme pain." **State v. Demick, 415.**

Intentional child abuse inflicting serious bodily injury—permanent or protracted condition—permanent loss of tissue—The trial court properly denied defendant's motion to dismiss the charge of intentional child abuse inflicting serious bodily injury (ICAISBI) where the evidence unequivocally established that the victim's injuries—necrosis that left her with permanent large holes and divots on her backside caused by the loss of muscle and fat tissue—were "permanent or protracted" pursuant to the ICAISBI statute; in addition, the injuries caused long-term pain and substantially interfered with her school attendance. The fact that her injuries could be concealed by clothing had no bearing on whether the injuries amounted to serious bodily injuries. **State v. Demick, 415.**

Intentional child abuse inflicting serious bodily injury—verdict sheet—consistency with indictment and jury instructions—In defendant's trial for multiple

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

child abuse charges, there was no plain error in the way the verdict sheet framed the intentional child abuse inflicting serious bodily injury (ICAISBI) offense—where defendant argued that, by framing the allegation as whether he inflicted permanent scarring, the trial court prevented the jury from considering whether the injury met the definition of serious bodily injury—because the indictment and jury instructions were proper and the verdict sheet was consistent with them. In addition, even assuming error, defendant could not show prejudice, given the extensive and uncontradicted evidence of his guilt. **State v. Demick, 415.**

Intentional child abuse inflicting serious physical injury—jury instructions—lawful corporal punishment—plain error analysis—In defendant's trial for multiple child abuse charges, even assuming the trial court erred when it failed to instruct the jury on lawful corporal punishment for two counts of intentional child abuse inflicting serious physical injury, there was no plain error because defendant could not demonstrate the requisite prejudice where overwhelming evidence showed that defendant's abusive acts were not within the bounds of lawful corporal punishment but rather under the pretext of duty, for the purpose of gratifying malice. **State v. Demick, 415.**

Intentional child abuse inflicting serious physical injury—jury instructions—lesser-included offense omitted—plain error analysis—In defendant's trial for multiple child abuse charges, there was no plain error in the trial court's failure to instruct the jury on misdemeanor child abuse as a lesser-included offense of intentional child abuse inflicting serious physical injury because defendant could not demonstrate the requisite prejudice where the State's evidence showed that each incident of abuse caused serious physical injury and defendant produced no conflicting evidence as to the severity of the victims' injuries. **State v. Demick, 415.**

Neglect—conclusions of law—substantial risk of impairment or harm—no caretaker—In an appeal from the trial court's order adjudicating respondent-mother's child to be a neglected juvenile, the appellate court rejected respondent-mother's challenges to the trial court's conclusions of law. As for the conclusion that the allegations in the juvenile petition had been proven by clear, cogent, and convincing evidence, the appellate court rejected the mother's hypertechnical reading of the conclusion as meaning that every single word in the petition had been proven. As for the conclusion that the child was a neglected juvenile, there was ample support that the child was at a substantial risk of impairment or harm where he was six years old and left without a caretaker for an indefinite period of time because his mother was incarcerated, his father was deceased, and his caretaker had just been arrested for possession of methamphetamine. **In re K.J.M., 332.**

Neglect—findings of fact—appropriate caretaker—In an appeal from the trial court's order adjudicating respondent-mother's child to be a neglected juvenile, after determining that certain findings of fact were actually conclusions of law, the appellate court determined that the remaining challenged findings, which related to the child's lack of a caretaker, were supported by clear and convincing evidence where the mother was incarcerated, the father was deceased, and there was no evidence that other family members were available to be caretakers. **In re K.J.M., 332.**

Temporary guardianship to nonparents—constitutionally protected parental status—insufficient findings—The trial court erred in a neglect case—in which DSS never sought non-secure custody of the child, and where the first time the court contemplated removal of the child from respondent-father, the non-offending parent, was at the disposition hearing—by awarding temporary custody of the child

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

to her paternal aunt and uncle where its conclusion that the father had acted inconsistently with his constitutionally protected rights as a parent was not supported by the evidence or the findings of fact. After disregarding findings on socioeconomic factors, which were irrelevant to the question of the father's parental fitness, the appellate court vacated the trial court's order because the remaining findings—which included details of the father's criminal history and pending assault on a female charge—did not show that the child was at risk of endangerment or injury in her father's care or that the father had failed to meet her needs. The fact that the father sought temporary assistance from family members in caring for his daughter did not undermine his parental status. **In re K.C., 543.**

CHILD CUSTODY AND SUPPORT

Child support action—attorney fees—statutory findings—In an action that, by the time of trial, was solely an action for child support, the trial court erred by awarding attorney fees in favor of plaintiff—the party ordered to pay child support—where the court failed to make the statutorily required finding that "the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding" (N.C.G.S. § 50-13.6) and where the trial court did not find (and would not have found, on the facts of this case) that plaintiff as the supporting party initiated a frivolous action or proceeding. **Limerick v. Rojo-Limerick, 29.**

Division of legal custody—both parents "fit and proper" to co-parent—primary custody and final decision-making authority to mother—In a child custody action, the trial court did not abuse its discretion by awarding the mother primary physical and legal custody of the parties' son or by giving the mother final decision-making authority should the parties disagree when making significant life decisions for the child. The court's unchallenged findings of fact established that the mother was the child's primary caregiver, had made great efforts to maintain a stable and healthy life for the child, had greater work flexibility allowing her to devote more time to childcare, and had several family members who lived locally and could provide additional caregiving support. Further, although the court found that both parties were "fit and proper" persons to co-parent their son and that the father had taken good care of the child, it properly determined that the mother was in a better position to understand the child's medical, educational, and social needs. **Aman v. Nicholson, 1.**

Jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—home state—initial custody determination—In a child neglect case, the trial court did not have jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to enter two orders (the first regarding guardianship and the second regarding custody) determining the custody of a child, where: Maryland was the child's home state; a Maryland court had previously made an initial child custody determination regarding the legal and physical custody of the child; Maryland had not terminated jurisdiction and therefore had exclusive, continuing jurisdiction over the parties; and, even though North Carolina properly exercised temporary emergency jurisdiction when the child's mother was arrested on multiple charges (including child abuse) while she and the child were in North Carolina, there was no statutory basis for the court to extend its temporary jurisdiction. **In re M.B., 351.**

CIVIL PROCEDURE

Declaratory judgment—lack of standing—improperly dismissed with prejudice—remanded for dismissal without prejudice—In a declaratory judgment action challenging the removal of a Confederate monument from public property, where the trial court properly determined that plaintiffs lacked standing to pursue their claim and that the complaint should be dismissed for lack of subject matter jurisdiction, the trial court nevertheless erred by dismissing the complaint with prejudice pursuant to Civil Procedure Rule 12(b)(6); rather, the court should have dismissed the complaint without prejudice pursuant to Rule 12(b)(1). **Pugh v. Howard, 576.**

Rule 5—Rule 6—service of brief and affidavit—timeliness—discretionary decision to disregard—In a declaratory judgment action challenging the removal of a Confederate monument from public property, at a hearing on defendant's motion to dismiss, the trial court properly exercised its discretion pursuant to Civil Procedure Rules 5 and 6 when it declined to consider an affidavit and brief submitted by plaintiffs, where both were served on defendants less than two days before the hearing. **Pugh v. Howard, 576.**

CONSTITUTIONAL LAW

Effective assistance of counsel—direct appeal—dismissal without prejudice—Defendant's claim for ineffective assistance of counsel on direct appeal from his convictions for multiple child abuse offenses was dismissed without prejudice to his right to file a motion for appropriate relief with the trial court where an evidentiary hearing would be needed to resolve questions of fact regarding his attorney's decisions. **State v. Demick, 415.**

Fifth Amendment—civil negligence case—related pending criminal case—motion to stay civil case—In a civil action where—after plaintiff's wife was fatally shot at work by her coworker—plaintiff asserted claims of negligence, gross negligence, and willful and wanton conduct against the coworker's husband (defendant), the trial court did not abuse its discretion when it denied defendant's motion to stay, in which he asserted that permitting the action to proceed would infringe upon his Fifth Amendment rights against self-incrimination in a pending criminal case related to the shooting. Defendant—who was charged with felony accessory after the fact for helping his wife abscond to Arizona—had already delayed the civil proceedings by absconding himself, and any further delay would have substantially prejudiced plaintiff's ability to pursue his claims. Furthermore, there is no such thing as an absolute right not to be forced to choose between testifying in a civil case and asserting your Fifth Amendment privilege in a criminal case. **Marlow v. TCS Designs, Inc., 567.**

Right to be present at criminal trial—refusal to attend—disruption and delay—Even assuming he preserved the issue for review, defendant waived his right to be present during a portion of his criminal trial by refusing to attend and by rejecting the trial court's repeated offers for him to attend. The record showed that defendant was aware of his right to be present and that his decision not to attend was an attempt to disrupt and delay the proceedings; even so, the trial court gave defendant every opportunity to attend and complied with N.C.G.S. § 15A-1032, which permits a trial judge to remove a disruptive defendant from the courtroom. **State v. Jefferson, 257.**

CRIMINAL LAW

Motion to dismiss—flagrant constitutional violation—irreparable prejudice to preparation of defense—speculative—In a prosecution for driving while impaired and reckless driving, where, due to an oversight, defendant remained in detention for six additional days during which he was not provided his medication, suffered a seizure followed by a concussion, and did not receive medical treatment afterwards, the trial court did not err in denying defendant's motion to dismiss under N.C.G.S. § 15A-954(a)(4). Defendant failed to meet his burden of showing that he suffered a flagrant constitutional violation that caused irreparable prejudice to the preparation of his defense where, although defense counsel argued that defendant's injuries damaged his memory and hindered his ability to testify at trial, defendant never indicated an intent to testify at trial, and therefore any prejudice was merely speculative. **State v. King, 459.**

DISCOVERY

Rule 26—required disclosure of expert witnesses—timeliness—prejudice— In a child custody action, the trial court did not abuse its discretion in excluding evidence from two of the father's proposed expert witnesses on grounds that, by waiting until the first day of trial to disclose the experts, the father failed to disclose them sufficiently in advance of trial as required under Civil Procedure Rule 26(b). The court did err under Rule 26(b) in excluding testimony and a report from the father's third expert, who had performed a psychological evaluation of the father pursuant to a prior court order, where the mother had received a copy of the report (including the psychological evaluation) over a year before trial; however, the court's error did not prejudice the father because, based on the court's own factual findings and statements at trial, the primary issues addressed in the expert's report had no bearing on the court's decision to grant primary custody to the mother. **Aman v. Nicholson, 1.**

DIVORCE

Alimony—adultery—summary judgment—before party complied with relevant discovery requests—In an action for alimony and other relief, where the wife admitted to committing adultery, the trial court erred by granting partial summary judgment in favor of the husband on the wife's claim for alimony because the husband had not yet responded to certain discovery requests that could establish that he also had committed adultery during the marriage. **Watson v. Watson, 265.**

Equitable distribution—consent order—traditional individual retirement account—domestic relations order—Where a couple divorced and entered into an equitable distribution consent judgment and order, which specified the distribution of plaintiff husband's traditional individual retirement account (IRA) via trustee to trustee transfer, and defendant wife moved more than a decade later for a domestic relations order (DRO) to effectuate the transfer of the traditional IRA, the trial court was authorized pursuant to N.C.G.S. § 50-20.1 to enter a DRO as requested by defendant, and it erred by declining to do so based on its incorrect conflation of domestic relations orders with qualified domestic relations orders. **Welch v. Welch, 627.**

Equitable distribution—delay in filing claim—compliance with statute— Plaintiff-wife's claim for equitable distribution was filed in a timely manner in accordance with the N.C. General Statutes where she filed her complaint for absolute divorce and equitable distribution seventeen years after the parties had separated. The relevant statute provided that a claim of equitable distribution may be filed at

DIVORCE—Continued

any time after a husband and wife begin to live separate and apart, and that such a claim is extinguished upon decree of absolute divorce unless the right is asserted prior to judgment. In addition, the three-year and ten-year statutes of limitation in N.C.G.S. §§ 1-52 and 1-56 do not apply to claims for equitable distribution. **Read v. Read, 376.**

Equitable distribution—ex-husband's military pension—discharge in Chapter 13 bankruptcy—no effect—An order granting the equitable distribution of a retired marine's military pension was affirmed where the marine's discharge in his Chapter 13 bankruptcy case did not extinguish his ex-wife's right to pursue her share of the military pension, which was per se marital property. Unlike proprietary interests in real or personal property, marital property rights in a military pension are not dischargeable in bankruptcy since no creditor in a bankruptcy case could ever reach that property (and, therefore, there would be no reason to treat an ex-spouse as a creditor whose rights to the pension were discharged). **Brown v. Brown, 509.**

Equitable distribution—monthly payments—ability to pay—ascertained from the record—In an action for absolute divorce and equitable distribution, the trial court did not abuse its discretion in ordering defendant-husband to pay one thousand dollars per month toward the couple's marital debt. Although defendant argued that the trial court failed to make any findings in support of his ability to make the thousand-dollar monthly payment, defendant's liquid assets could be ascertained from the record where the trial court found that defendant was employed full-time as a general manager of a restaurant making ninety thousand dollars per year and had no child support or alimony obligations arising out of the marriage. **Read v. Read, 376.**

Equitable distribution—traditional individual retirement account—domestic relations order—ten-year statute of limitations—Where a couple divorced and entered into an equitable distribution consent judgment and order, which specified the distribution of plaintiff husband's traditional individual retirement account (IRA) via trustee to trustee transfer, and defendant wife moved more than a decade later for a domestic relations order (DRO) to effectuate the transfer of the traditional IRA, the trial court erred by concluding that, because the original order did not specify a DRO as a means to distribute the equitable distribution award, the motion for entry of a DRO was a new action barred by the ten-year statute of limitations. The ten-year statute of limitations did not apply because defendant's motion for a DRO did not seek an award different from the original equitable distribution award. **Welch v. Welch, 627.**

Equitable distribution—unequal distribution—abuse of discretion review—In an action for absolute divorce and equitable distribution, the trial court did not abuse its discretion in ordering defendant-husband to pay thirty percent of the couple's student loan balance, which consisted of the student loans incurred while plaintiff-wife was attending chiropractic school, and the remainder of the balance of an IRS debt from the year prior to separation. The trial court found that twenty-four percent of the student loan debt was used for plaintiff's tuition, seventy-six percent was used for the family's living expenses, plaintiff supported the family with the income from her chiropractic business, plaintiff employed defendant at the business, and plaintiff had paid $4,351 of the $6,774 balance on the IRS debt. The trial court's findings supported its conclusions and complied with the procedure for equitable distribution. **Read v. Read, 376.**

DIVORCE—Continued

Jurisdiction—post-separation support—voluntarily dismissed—raised again after divorce judgment entered—not "pending"—In an action for absolute divorce, where the ex-wife voluntarily dismissed her claim for post-separation support and did not raise it again before the divorce judgment was entered, the trial court lacked subject matter jurisdiction to grant the ex-wife's request for post-separation support after the divorce judgment had been entered because, at that point, the claim was not "pending" within the meaning of N.C.G.S. §§ 50-11(c) and 50-19. **Brosnan v. Cramer, 202.**

DRUGS

Identity of substance—guilty knowledge—jury instructions—In defendant's trial for trafficking opium or heroin, the trial court did not err by denying defendant's request for an instruction that the jury must find that he "knew that what he possessed was fentanyl" in order to convict him, where no evidence in the record suggested that defendant lacked guilty knowledge—including the testimony of the police officer who stated that the officers at first had believed that the substance was cocaine, which had no bearing on whether defendant believed that the fentanyl was cocaine. **State v. Hammond, 58**.

Trafficking by possession and by transportation—acting in concert—constructive presence—distance between vehicles—The State presented substantial evidence to support defendant's convictions for trafficking methamphetamine by possession and by transportation on the theory of acting in concert where defendant initiated a plan with another person, who was a police informant, to buy drugs in another state and transport them into North Carolina; the informant told law enforcement about the plan beforehand and kept in communication with them as the plan unfolded; the two men drove to another state and obtained the drugs; on their return to North Carolina, defendant rode in one vehicle while the informant rode in a separate vehicle with the drugs; and both cars were traveling on the same highway on the way to defendant's residence when they were stopped by law enforcement after crossing over the state line. Although there were no drugs in defendant's vehicle and his car was a few miles apart from the informant's vehicle in which the drugs were being transported, the cars were in sufficiently close proximity to each other to establish that defendant was constructively present for the purpose of proving each offense. **State v. Christian, 50.**

ESTOPPEL

Equitable—applicability to insurance policy exclusion—jury instruction—prejudice—In plaintiff's action against an insurance carrier (defendant) regarding coverage for plaintiff's yacht, which was repeatedly damaged during multiple unlucky voyages until it finally sank, where the trial court allowed defendant to add to the jury instructions and verdict form an affirmative defense relating to a policy exclusion for damage associated with rot and deterioration, the court properly denied plaintiff's request for a jury instruction on equitable estoppel (arguing that defendant should be equitably estopped from relying on the policy exclusion). Under North Carolina law, doctrines of waiver and estoppel may not be used to expand an insurance policy to cover damages that the policy expressly excludes from coverage. Further, even if the court had erred, plaintiff could not show prejudice where the jury never reached the issue of whether the policy exclusion applied to the facts of this case. **D&B Marine, LLC v. AIG Prop. Cas. Co., 106.**

EVIDENCE

Authentication—404(b) evidence—video surveillance—In defendant's prosecution for possession of burglary tools and misdemeanor attempted breaking or entering a building, the trial court did not err by allowing video surveillance evidence of a prior breaking and entering to which defendant had pled guilty where the State sufficiently authenticated the video through the testimony of the investigating officer—that the video was the same video she had seen the night of the prior crime and that it matched the events the victim had described. Even if the State had not sufficiently authenticated the video, defendant failed to show prejudice, as significant other evidence about the same incident was before the jury. **State v. Jones, 175.**

Cross-examination—child sexual abuse case—child's school records—Rule 403 analysis—remoteness—In a child sexual abuse case, where defendant was charged with statutory rape and other crimes against his eleven-year-old step-granddaughter, the trial court did not abuse its discretion under Evidence Rule 403 by preventing defendant from cross-examining the child about conduct referenced in her elementary school records, including instances where she cheated on a test and stole a pen. The conduct described in those records—having occurred between four and six years before the alleged abuse—was too temporally remote from the charged crimes and was only marginally probative of the child's propensity for truthfulness at the time of defendant's trial. **State v. Collins, 253.**

Expert testimony—child sexual abuse case—statement that the child was "not coached"—The trial court in a child sexual abuse case properly admitted expert testimony by a forensic interviewer indicating that the victim had not been "coached." Although an expert may not testify that a prosecuting child-witness in a sexual abuse trial is credible or is not lying about the alleged abuse, a statement that the child was "not coached" is not a statement on the child's truthfulness. **State v. Collins, 253.**

Interrogation video—child sexual abuse case—footage showing polygraph testing equipment—Rule 403 analysis—In a child sexual abuse case, where defendant was charged with statutory rape and other crimes against his eleven-year-old step-granddaughter, the trial court did not abuse its discretion under Evidence Rule 403 by admitting into evidence a video of defendant's interrogation where, even though defendant contended that the footage showed equipment relating to a polygraph test that he took, and polygraph evidence is inadmissible under North Carolina law, the court thoroughly reviewed the video and concluded that it only depicted miscellaneous items on the interrogation table and not the actual polygraph evidence. **State v. Collins, 253.**

Jury examination of photograph—illustrative purposes—no plain error—In a prosecution of multiple drug offenses, the trial court did not commit plain error, even assuming error occurred, by allowing the jury to examine a photograph of defendant from the Department of Motor Vehicles, since the photograph was admitted for illustrative purposes only, and the jury had other, substantive evidence from which to conclude that defendant was the person who had sold drugs to an undercover informant—including video recordings of the drug transactions, still photos from those recordings, and the informant's own identification of defendant as the perpetrator. **State v. Morris, 65.**

Prior bad acts—Rule 403—inappropriate discipline of children—In defendant's prosecution for charges stemming from the death of a twenty-two-month-old who died after suffering blunt force trauma to his head while in defendant's care, where the State sought to introduce Rule 404(b) evidence of defendant's recent prior

EVIDENCE—Continued

inappropriate discipline of the decedent's siblings—punching a four-year-old in the chest, beating a child with a belt, and snatching a video game system out of the wall in anger—the trial court did not abuse its discretion in determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. **State v. Buchanan, 44.**

Prior bad acts—substantially similar—attempted breaking or entering— In defendant's prosecution for possession of burglary tools and misdemeanor attempted breaking or entering a building, the trial court did not err by admitting Rule 404(b) evidence of a prior breaking and entering for which defendant had pled guilty where the incident was substantially similar to the charged conduct—both incidents involved a residential shed shortly after midnight with the use of a small knife or box cutter. Furthermore, admission of the evidence was not an abuse of discretion under Rule 403 given the substantial similarities between the two incidents and the trial court's careful handling of the process in admitting the 404(b) evidence. **State v. Jones, 175.**

IDENTIFICATION OF DEFENDANTS

Out-of-court identification—pretrial show-up—impermissibly suggestive—no likelihood of misidentification—The trial court properly denied defendant's motion to suppress an undercover informant's pretrial identification of defendant—from a single photograph—as the person she bought drugs from, where the court's findings of fact were supported by competent evidence. Further, the identification did not violate defendant's due process rights, even though the single-photograph show-up was impermissibly suggestive, because there was no substantial likelihood of misidentifying defendant as the perpetrator based on a balancing of multiple factors, including that the informant had ample opportunity to observe defendant up close on more than one occasion during daytime hours, the informant was a trained professional who paid a high degree of attention to defendant during their interactions, and the informant accurately described defendant and was certain in her identification. **State v. Morris, 65.**

Pretrial show-up—Eyewitness Identification Reform Act—applicability— In defendant's prosecution for multiple drug offenses, the pretrial identification of defendant as the person who sold drugs to an undercover informant was not subject to the Eyewitness Identification Reform Act because the identification was done by showing the informant a single photograph; therefore, it did not constitute either a lineup (which would involve an array of photographs) or a show-up (which would involve a live person). **State v. Morris, 65.**

IMMUNITY

Governmental immunity—Rule 12(b)(2) motion to dismiss—personal jurisdiction—governmental or proprietary function—In plaintiff's action against defendants (a city and its employee) arising from an automobile accident, the trial court properly denied defendants' Rule 12(b)(2) motion to dismiss where its determination that it had personal jurisdiction over defendants was supported by its conclusion that the city employee was engaged in a proprietary function and, therefore, defendants were not shielded from suit by governmental immunity. The evidence demonstrated that, on the morning of the accident, the city employee's sole assigned duty was to repair a city-owned water main line, which was a proprietary rather than a governmental function. **Torres v. City of Raleigh, 617.**

JURISDICTION

Industrial Commission—Workers' Compensation Act—exclusivity provision—inapplicable—death not arising from employment—In a civil action where—after plaintiff's wife was fatally shot at work by her coworker—plaintiff asserted claims of negligence, gross negligence, and willful and wanton conduct against the coworker's husband (defendant-spouse) and the furniture manufacturing company where his wife worked, the trial court did not err by denying defendants' motions to dismiss under Civil Procedure Rules 12(b)(1) and (6). Because the coworker did not have any job-related motivation for shooting plaintiff's wife, and because getting shot to death was not a natural and probable consequence of the wife's job as a factory worker, the wife's death did not arise out of her employment for purposes of the Workers' Compensation Act; therefore, the Industrial Commission did not—as defendants' motions contended—have exclusive jurisdiction over plaintiff's claims pursuant to the Act's exclusivity provision. **Marlow v. TCS Designs, Inc., 567.**

Notice of appeal filed—trial court divested of jurisdiction—subsequent order vacated—In a drug prosecution, the trial court was divested of jurisdiction—pursuant to statute and the Rules of Appellate Procedure—fourteen days after the State entered notice of appeal from the trial court's order granting defendant's motion to suppress (which the court initially rendered in a standard AOC judgment form without findings and conclusions). Therefore, the trial court's subsequently-entered additional suppression order that contained findings and conclusions (entered eleven months after the initial order) was vacated. Finally, since the subsequent order was a nullity, there was no basis for allowing defendant's motion to amend the record on appeal to include that order in the record. **State v. Johnson, 441.**

Standing—multiple bases—removal of Confederate monument—motion to dismiss—Plaintiffs, including an association which over a century earlier had erected and dedicated a monument on a county courthouse square to honor Confederate soldiers, lacked standing to pursue a declaratory judgment action regarding the decision to remove the monument by a board of county commissioners. Plaintiffs failed to include the requisite allegations to support a claim of taxpayer standing; where plaintiffs failed to allege any possessory or contractual interest in the statue, and in fact acknowledged that the monument was county property, they did not establish that they were entitled to notice and an opportunity to be heard as an "owner" or "part[y] in interest"; plaintiffs did not include sufficient facts in their complaint to establish a private right of action to enforce the provisions of N.C.G.S. § 100-2.1 (regarding the removal of monuments or memorials); and plaintiffs failed to allege sufficient facts demonstrating that they had sustained a legal or factual injury arising from the county's decision, particularly where they had disclaimed any proprietary interest in the monument after dedicating it to the county. **Pugh v. Howard, 576.**

Termination of parental rights case—sufficiency of service of process—statutory requirements—The trial court had personal jurisdiction over respondent mother in a termination of parental rights action that was initiated by the child's father where the original summons contained all statutorily required information—despite respondent's argument that it lacked the name of her provisional counsel—and where respondent and her provisional counsel were personally served with the summons and petition. Since the original summons was legally compliant, a later defective service by publication did not affect the trial court's jurisdiction. **In re C.T.T., 136.**

JURY

Selection—Batson challenge—consideration of evidence presented—weighing of all relevant factors—remand unnecessary—In defendant's *Batson* challenge to the prosecutor's use of peremptory strikes to remove two potential Black jurors from the jury, the trial court sufficiently demonstrated its consideration and weighing of all the relevant factors in the third step of the three-part *Batson* analysis, where the court not only based its determination on the evidence and arguments presented by both sides, but it also inquired about and took into account additional factors not argued by defendant's counsel. Therefore, there was no need to remand the case to the trial court for further findings and conclusions prior to appellate review. **State v. Cuthbertson, 388.**

Selection—Batson challenge—third step of inquiry—finding of no discriminatory intent—In defendant's *Batson* challenge to the prosecutor's use of peremptory strikes to remove two potential Black jurors from the jury in defendant's prosecution for assault on a government official, the trial court did not clearly err by determining that the prosecutor was not motivated by discriminatory intent. While the factors regarding statistical evidence of strike and acceptance rates (here, two of the remaining three Black jurors were peremptorily struck, for a rate of 67%) and susceptibility of the case to racial discrimination (where defendant, a Black man, was accused of assaulting a White police officer) leaned in favor of a finding of purposeful discrimination, when viewed with the remaining factors of lack of disparate questioning and investigation and race-neutral specific reasons for striking the prospective jurors (that they had criminal history, and/or they failed to disclose that history, along with the prosecutor's concern that they could be fair and impartial)—particularly in the absence of evidence of pretextual reasons for striking the two jurors—all the factors together supported the trial court's determination that discriminatory intent was not a motivator for the strike decisions. **State v. Cuthbertson, 388.**

MENTAL ILLNESS

Involuntary commitment—danger to self—sufficiency of findings—The trial court did not err by involuntarily committing respondent, who suffered from schizophrenia, for being mentally ill and dangerous to himself where the doctor who had examined him testified that respondent was in a current state of acute psychosis, suffered from severely impaired insight and judgment, was unable to care for himself adequately, and would become non-compliant with medication if he were released. The evidence and underlying findings supported the ultimate finding that defendant posed a danger to himself, and the trial court appropriately drew the requisite nexus between respondent's past conduct and future danger. **In re D.H., 311.**

MORTGAGES AND DEEDS OF TRUST

Force-placed hazard insurance—reasonable basis—no breach of mortgage loan contract—In a deed reformation action arising from an insurance-related dispute, where a residential mortgage provider (plaintiff) purchased a mortgage loan that a landowner (defendant) had obtained on his property, which consisted of three undeveloped lots and two developed lots on which a house was built, the trial court properly dismissed defendant's counterclaim alleging that plaintiff breached the mortgage loan contract by force-placing hazard insurance on the property after defendant refused to purchase home insurance. Plaintiff properly force-placed insurance under the applicable federal regulation (12 C.F.R. § 1024.37(b)) where, although

MORTGAGES AND DEEDS OF TRUST—Continued

the property deed did not list the two developed lots containing the house, plaintiff still had a reasonable basis to believe that the mortgage loan contract required defendant to obtain home insurance (among other things, defendant sought the mortgage loan to refinance another loan encumbering the house on the developed lots, and defendant had previously paid home and flood insurance on the property for years). **PennyMac Loan Servs., LLC v. Johnson, 363.**

MOTOR VEHICLES

Driving while impaired—timing of impairment—sufficiency of evidence—In a prosecution for charges related to a fatal car accident, the State presented sufficient evidence from which a jury could conclude that defendant was appreciably impaired when driving his truck at the time of the accident, including: the presence of beer cans and aerosol cans in defendant's truck; law enforcement officers' observations that defendant's speech was slow and slurred and that he had glassy eyes; defendant's admission to drinking alcohol earlier in the day and taking an anti-seizure medicine that included instructions not to drive or operate machinery for six months; defendant's apparent disconnection from the severity of the accident by expressing concern about the damage done to his truck despite the fact that the driver of the other vehicle was killed in the accident; and the presence of alcohol, benzodiazepines, cocaine, and anti-depressants in defendant's body, as shown by a urinalysis screen and blood draw. **State v. Cannon, 590.**

Felony speeding to elude arrest—motion to dismiss—sufficiency of evidence—speed above fifteen miles per hour over posted speed limit—The trial court properly denied defendant's motion to dismiss a charge of felony speeding to elude arrest where there was substantial evidence that, while leading police on a car chase along the highway after she had refused to cooperate during a traffic stop, defendant was speeding in excess of fifteen miles per hour over the legal speed limit. Testimony from one of the officers involved in the chase—that he knew the highway had a posted speed limit and that it was either thirty-five or forty-five miles per hour—was sufficient evidence of the speed limit to send to the jury. That same officer's testimony was sufficient to establish defendant's speed during the chase where he testified that he saw defendant speeding past other traffic for half of a mile and "going way faster" than his patrol car, which he drove "at a relatively high rate of speed"; further, defendant's contention that no evidence corroborated the officer's testimony went to the weight of the evidence, which was a matter for the jury to consider. **State v. Chisholm, 601.**

NATIVE AMERICANS

Indian Child Welfare Act—termination of parental rights—active efforts to prevent breakup of family—non-Indian father incarcerated—In terminating the parental rights of respondent-father to his son, whose mother was a member of an Indian tribe, the trial court erred by concluding that the county department of social services (DSS) had complied with the Indian Child Welfare Act by providing active efforts to prevent the breakup of the child's family. The father's incarceration did not relieve DSS of its duty to make active remedial efforts, and DSS's formulation of a case plan and procurement of a paternity test for the father were insufficient. **In re N.D.M., 554.**

NEGLIGENCE

Sudden emergency—brake failure—delay before collision—jury instructions—In an action arising from defendant's low-speed collision with a convenience store after her vehicle experienced sudden brake failure, causing an indoor display to fall on the arm of a convenience store employee (plaintiff), the trial court did not err by instructing the jury on the doctrine of sudden emergency. The fact that defendant continued to drive for several miles after the sudden brake failure did not negate the emergent nature of the situation; brake failure generally leads to an unavoidable accident, and, as defendant explained, she was unable to pull the car off the road immediately because she could not find a place that was safe or feasible to do so. In addition, it was for the jury to decide whether defendant's actions after the brake failure were negligent. **Chahdi v. Mack, 520.**

PLEADINGS

Amended counterclaims—untimely—leave to amend would have been granted—no prejudice to parties—In a deed reformation action arising from an insurance-related dispute between a residential mortgage provider (plaintiff) and a property owner (defendant), where defendant filed counterclaims with the trial court and then, after filing a notice of removal to federal court, untimely filed an amended set of counterclaims with that court, the amended pleading was deemed properly introduced because it was apparent that the federal court would have allowed the amendment had it been timely sought and that none of the parties would have been prejudiced by the change. Therefore, when the federal court remanded the case back to the trial court (where defendant moved to amend his counterclaims a second time), the trial court properly treated defendant's first amended pleading as containing the operative counterclaims in the case. Further, because defendant relied on the first amended pleading when litigating in federal court, he was judicially estopped from arguing before the trial court that the first amended pleading was "void and a legal nullity." **PennyMac Loan Servs., LLC v. Johnson, 363.**

Motion to amend—additional claims allowed—later dismissed by second judge—no relation back—In plaintiff's action against an insurance carrier (defendant) regarding coverage for plaintiff's sunken yacht, where one trial judge had previously granted plaintiff's motion to amend its complaint to add claims for common law bad faith and unfair or deceptive trade practices (UDTP), a second trial judge properly granted partial summary judgment in favor of defendant on those claims on grounds that they were untimely. The original complaint did not give sufficient notice of the events or transactions giving rise to the bad faith and UDTP claims, and therefore the amended complaint did not "relate back" to the original complaint's filing date under Civil Procedure Rule 15(c). Further, the amended complaint did not automatically "relate back" simply because the first judge had granted the motion to amend. Finally, plaintiff could not invoke an exception to the general rule prohibiting one trial judge from modifying or overruling a judgment by another trial judge in the same action where plaintiff did not raise the "relation back" issue before the first judge and later invited the second judge to address the issue. **D&B Marine, LLC v. AIG Prop. Cas. Co., 106.**

Motion to amend—counterclaims—futility—mortgage loan contract—force-placed insurance dispute—In a deed reformation action arising from an insurance-related dispute, where a residential mortgage provider (plaintiff) purchased a mortgage loan that a landowner (defendant) had obtained on his property—which consisted of three undeveloped lots and two developed lots on which a house was built—and then force-placed hazard insurance on the property after defendant

PLEADINGS—Continued

refused to purchase home insurance, the trial court properly denied defendant's motion to amend his counterclaims—alleging breach of contract, breach of contract accompanied by fraudulent acts, and violations of the Racketeering Influence and Corruption Organization Act (RICO) and the Fair Debt Collection Practices Act (FDCPA)—on futility grounds. Specifically, (1) defendant failed to state the essential elements of a RICO claim, (2) defendant failed to show that plaintiff was a "debt collector" for FDCPA purposes, (3) North Carolina law does not recognize a claim for breach of contract with fraudulent act, and (4) plaintiff did not breach the mortgage loan contract by force-placing hazard insurance on the property where it had a reasonable basis for believing that the contract required home insurance on the property. Additionally, defendant had already amended his counterclaims once before by right under state law and was not entitled to amend the pleading by right a second time. **PennyMac Loan Servs., LLC v. Johnson, 363.**

PUBLIC OFFICERS AND EMPLOYEES

Termination—tenured university professor—neglect of duty and misconduct—due process—The termination of a tenured university professor (petitioner) for neglect of duty (for failing both to resolve a student grading issue and to timely open an online class that had been assigned to him) and misconduct (for sending a written letter to his direct supervisor with racially inflammatory language) did not violate petitioner's right to due process and was in accordance with the procedures set forth in the Code of the Board of Governors of the University of North Carolina. The Chancellor, as final decision-maker, was not required to adopt the recommendation of the Faculty Hearing Committee (FHC) to reverse sanctions upon its determination that the university failed to make out a prima facie case; petitioner was given the opportunity to present further evidence after the Chancellor sent the matter back to the FHC but chose not to; and petitioner did not present any evidence to overcome the presumption that the Chancellor acted in good faith and in compliance with governing law when the Chancellor reached a different conclusion than the FHC. **Mitchell v. Univ. of N.C. Bd. of Governors, 232.**

Termination—tenured university professor—use of racially inflammatory language—freedom of speech—matter of public concern—The termination of a tenured university professor for misconduct—based on his use of racially inflammatory language in a letter he wrote to his direct supervisor—did not violate the professor's constitutional right to free speech because the letter did not involve a matter of public concern but, rather, consisted of the professor's personal criticisms of his supervisor's work and disagreement with some of her decisions. **Mitchell v. Univ. of N.C. Bd. of Governors, 232.**

PUBLIC RECORDS

Law enforcement agency recordings—media request—filing requirements—standing—The trial court's order granting the release of law enforcement recordings, which were related to the arrest of two collegiate basketball players, to a group of media organizations (petitioners) was vacated where the petition was filed using an Administrative Office of the Courts form rather than being filed as a civil action in compliance with N.C.G.S. § 132-1.4A(g)—resulting in petitioners lacking standing and the trial court lacking subject matter jurisdiction. **In re Custodial L. Enf't Agency Recording, 306.**

SCHOOLS AND EDUCATION

Disciplinary reassignment—affirmed by board of education—petition for judicial review—subject matter jurisdiction—In an action filed on behalf of a minor by and through his mother (petitioners) against a county board of education (respondent) where—after the minor was issued a ten-day out-of-school suspension from his high school for instigating a fight with another student—respondent issued a written decision affirming the minor's reassignment to an alternative school, the trial court properly determined that it lacked subject matter jurisdiction under N.C.G.S. § 115C-45(c) to review respondent's decision. The minor's assignment to the alternative school constituted a "disciplinary reassignment" as defined in N.C.G.S. § 115C-390.7(e), which states that a disciplinary reassignment is not a "long-term suspension" subject to judicial review as provided in the due process procedures described in N.C.G.S. § 115C-390.8. **D.W. v. Onslow Cnty. Bd. of Educ., 273.**

SEARCH AND SEIZURE

Search warrant—residence—probable cause—smell of marijuana—drugs found during frisk—In the State's appeal from an order granting defendant's motion to suppress, the trial court erred by determining that there was no probable cause to issue a search warrant of a residence, where officers had, in the course of following an individual for whom they had a valid arrest warrant, arrived at a residence where defendant and other individuals were present and where the officers thereafter conducted a lawful frisk of defendant's person—during which officers discovered drugs through a pat-down and plain view observations—and conducted a protective sweep of the residence—during which they observed digital scales and other drug paraphernalia. Despite defendant's argument that probable cause could not be supported by the officers' detection of an odor of marijuana, the totality of the circumstances was sufficient to provide probable cause. **State v. Johnson, 441.**

Warrantless blood draw—driving while impaired—exigent circumstances— In a prosecution for second-degree murder and aggravated serious injury by vehicle, the trial court properly denied defendant's motion to suppress the results of a warrantless blood draw, which was taken after defendant caused a fatal accident by crossing over the center line of the road and upon law enforcement officers' suspicion that defendant was impaired (based on defendant's slurred speech, glassy eyes, lack of concern over the seriousness of the accident, an odor of alcohol on defendant's breath, and the presence of beer cans and aerosol cans in defendant's truck). Exigent circumstances existed to justify the blood draw before further dissipation of impairing substances could occur where the investigation of the accident took a significant amount of time and various other delays would have added at least another hour to the process of obtaining a warrant. **State v. Cannon, 590.**

Warrantless entry of residence—protective sweep of premises—officer safety measures—exigent circumstances—In the State's appeal from an order granting defendant's motion to suppress, the trial court erred by concluding that law enforcement officers conducted an unreasonable and unlawful entry of a residence, where there were specific and articulable facts to support a reasonable belief that a warrantless protective sweep of the house was necessary for officer safety and that exigent circumstances existed. Officers possessed a valid arrest warrant for another individual who was known to be a member of a gang and who was wanted for a violent crime involving a weapon, officers followed that individual to a house where defendant and two others were also located, all four individuals were known to be gang members, one individual came out of the house wearing a ballistic vest after police announced their presence, and the officers were unsure whether any other

SEARCH AND SEIZURE—Continued

individuals remained in the house following their request for everyone to come outside. **State v. Johnson, 441.**

Warrantless search—probable cause—reasonable suspicion—officer safety measures—plain view doctrine—In the State's appeal from an order granting defendant's motion to suppress drugs that were seized from his person, the trial court erred in concluding that there was no probable cause to detain or search defendant. Law enforcement officers had specific and articulable facts from which to form a reasonable belief that defendant could be armed, thus necessitating a frisk for officer safety, where: officers possessed a valid arrest warrant for another individual who was known to be a member of a gang and who was wanted for a violent crime involving a weapon, officers followed that individual to a house where defendant and two others were also located, and one individual came out of the house wearing a ballistic vest after the police announced their presence. Further, the seizure of the drugs was lawful under the plain view doctrine where the officer who frisked defendant saw white plastic baggies in defendant's pocket that were consistent with packaging for heroin. **State v. Johnson, 441.**

SENTENCING

Aggravating factor—evidence necessary to prove element of offense—child abuse offenses—position of trust or confidence—Defendant's convictions for multiple child abuse offenses were remanded for resentencing because the trial court erred in sentencing him in the aggravated range based on the aggravating factor that he took advantage of a position of trust or confidence, where both misdemeanor and felony child abuse require a showing that the defendant is a parent or other person providing care to or supervision of a child. Evidence necessary to prove an element of an offense may not be used to prove any factor in aggravation. **State v. Demick, 415.**

Ambiguous verdict—as to date of offenses—statutory reclassification of offenses—In defendant's trial for multiple child abuse offenses, where the statutory felony classification for each crime was elevated effective December 2013 and the victim alleged that the crimes occurred between January 2009 and March 2014, because the jury made no specific finding as to the date of each offense, the trial court erred in sentencing defendant at the higher felony levels. The jury's verdict was ambiguous as to the dates for sentencing purposes, so the trial court was required to sentence defendant under the lower statutory classification. **State v. Demick, 415.**

Driving while impaired—aggravating factors—province of the jury—A criminal defendant was entitled to a new sentencing hearing on his conviction for driving while impaired (DWI) because the trial court erred in considering aggravating factors at sentencing where, under the most recent version of the DWI sentencing statute (N.C.G.S. § 20-179(a1)(2)), only a jury could determine if those aggravating factors were present. **State v. King, 459.**

Reckless driving—community punishment with probation exceeding eighteen months—specific findings required—A criminal defendant was entitled to a new sentencing hearing on his conviction for reckless driving where the trial court sentenced him to a suspended community punishment with supervised probation for thirty-six months without entering specific findings of fact explaining why a probation period exceeding eighteen months was necessary (as required under N.C.G.S. § 15A-1343.2(d)(1)). **State v. King, 459.**

SENTENCING—Continued

Sale and delivery of cocaine—based on single transfer of drugs—judgment entered on both offenses improper—The trial court erred by entering judgment and sentencing defendant for both selling and delivering cocaine based on a single transfer of drugs, since a defendant may be convicted of only one of those offenses for a single transaction. Since the court improperly entered judgment for both sale and delivery in each of two cases and then consolidated the multiple convictions into a single judgment for sentencing, the matter was remanded for resentencing. **State v. Morris, 65.**

SEXUAL OFFENSES

Human trafficking—sexual servitude—prostitution in exchange for drugs and accommodation—sufficiency of evidence—At a trial for multiple charges arising from a prostitution scheme, the State presented sufficient evidence from which the jury could conclude that defendant trafficked and held the victim in sexual servitude (pursuant to N.C.G.S. §§ 14-43.11 and 14-43.13(a), respectively), including evidence that defendant drove the victim to a truck stop after receiving a phone call requesting sexual services, that defendant paid for hotel rooms and rented a house in which several women—including the victim—lived and engaged in hired sexual acts, and that the victim and other women purchased drugs from defendant and paid him for accommodation with money obtained by providing sexual services to customers. Any contradictions in the evidence were within the jury's province to resolve. **State v. Norman, 90.**

Soliciting a child by computer—intent to commit unlawful sexual act—sufficiency of evidence—In a prosecution for soliciting a child by computer, the State presented substantial evidence from which a jury could conclude that defendant intended to commit an unlawful sexual act with a child under the age of sixteen when he communicated with the victim via a series of instant messages online, despite defendant's argument that there was no definite plan to meet up with the victim in person prior to her sixteenth birthday. Defendant's messages with the victim—who told him that she was fifteen—included descriptions of physical acts that he wanted to do with her and, on at least four separate occasions, the victim visited defendant at his home where he gave her gifts and money, served her alcohol, asked her to sit on his lap wearing only a bikini, and kissed and groped her. **State v. Wilkinson, 99.**

TERMINATION OF PARENTAL RIGHTS

Best interests of the child—sufficiency of findings—weighing of dispositional factors—parent-child bond—The trial court did not abuse its discretion by determining that the termination of a mother's parental rights was in her minor daughter's best interests. Competent evidence supported all (except one) of the dispositional findings challenged on appeal, including that the child's permanent plan of adoption could only be accomplished by terminating the mother's parental rights, the parent-child bond had diminished due to the mother's infrequent visits, and the mother's conduct—particularly, her failure to correct the substance abuse issues that led to the child's removal—would not promote the child's physical or emotional well-being. Further, when addressing the dispositional factors listed in N.C.G.S. § 7B-1110(a), the court properly considered the bond between the mother and her daughter and any potential impact that severing their bond could have on the child. **In re B.M.S., 293.**

TERMINATION OF PARENTAL RIGHTS—Continued

Disposition—hearing on remand—trial court's discretion—refusal to hear new evidence, allow offer of proof, and grant continuance—In a father's appeal of an order that was entered on remand from a prior appeal and that terminated his parental rights in his son, where the trial court's ruling that termination of the father's rights was in the child's best interests was vacated and remanded, the appellate court declined to rule on whether the trial court abused its discretion at the first remand hearing when it denied the father's motion to introduce new evidence and refused to continue the hearing so that the guardian ad litem could update her "best interests" report. Nevertheless, the appellate court held that it was error for the trial court not to allow the father to make an offer of proof of the new evidence that he would have offered. On remand, the trial court would have broad discretion to determine what evidence was "relevant, reliable, and necessary" to its best interests determination, and it could not abuse that discretion by denying a party the opportunity to present such evidence. **In re K.J.E., 325.**

Disposition—new order entered on remand—nunc pro tunc to date of original termination hearing—improper—After a father's parental rights in his son were terminated, the disposition portion of the termination order—which was entered on remand from a prior appeal—was vacated and remanded where, at the remand hearing, the trial court relied solely on the record from the original termination hearing held two years earlier (in 2020) and entered the order *nunc pro tunc* to 2020. The court's use of a *nunc pro tunc* order was inappropriate where (1) it suggested that the court did not understand its duty to determine the best interests of the child as of the date of the remand hearing; and (2) the court was not simply correcting the order to reflect findings that it had already made in 2020, but rather, it was adding new findings. **In re K.J.E., 325.**

Grounds for termination—failure to make reasonable progress—drug abuse —noncooperation with case plan—After the department of social services took custody of a mother's children on three separate occasions because of persistent drug abuse in the home, the trial court properly terminated the mother's parental rights for failure to make reasonable progress in correcting the conditions leading to the children's removal (N.C.G.S. § 7B-1111(a)(2)). According to the court's unchallenged findings, the mother "belatedly obtained" several psychological and substance abuse evaluations pursuant to her case plan, but she neither provided accurate information nor complied with the recommendations following those evaluations; she refused thirty-nine drug screens and admitted to doing so because she was still abusing drugs; and, even though both of her children had tested positive for illegal drugs and the youngest child suffered from brain cancer, she failed to take the children to various medical appointments. **In re K.M.C., 143.**

Grounds for termination—neglect, dependency, and prior involuntary termination of parental rights—sufficiency of evidence—The trial court's order terminating respondent-father's parental rights to his child based upon neglect, dependency, and prior involuntary termination of parental rights was affirmed where clear, cogent, and convincing evidence supported the findings of fact, which supported the conclusions of law. Among other things, the father had a history of mental health issues, domestic violence, and substance abuse; he failed to take responsibility for his actions; he continued to place blame on others for his domestic violence; he continued to show emotional dysregulation; he continued to engage in maladaptive behaviors due to his persistent mental health issues; he continued to use impairing substances; and he showed no empathy for his child. **In re A.W., 123.**

TERMINATION OF PARENTAL RIGHTS—Continued

Grounds for termination—willful abandonment—findings—evidentiary support—The trial court properly terminated a father's parental rights to his daughter on the basis of willful abandonment where the evidence supported the court's findings that, for a period of at least six months preceding the filing of the petition by the child's mother, respondent did not contact the mother about the child's well-being even though he had her contact information, he did not take steps to resume visitation with his daughter, and he did not send any cards or gifts to his daughter. The findings, which did not contradict each other, in turn supported the court's conclusion that respondent willfully abandoned his daughter. **In re S.I.D.-M., 154.**

Parental right to counsel—failure of respondent to appear—dismissal of provisional counsel—inquiry by trial court—In a private termination of parental rights action in which respondent mother and her provisional counsel were properly served with a summons and petition but respondent did not appear at the hearing, the trial court made the requisite inquiry into counsel's efforts to contact respondent before releasing her as provisional counsel. **In re C.T.T., 136.**

WORKERS' COMPENSATION

Extended disability benefits—"total loss of wage-earning capacity"—definition—synonymous with "total disability"—In plaintiff's action for extended disability benefits after he had exhausted the statutory maximum of 500 weeks of temporary total disability benefits, the Industrial Commission erred in its interpretation of "total loss of wage-earning capacity" under N.C.G.S. § 97-29(c), which, based on the plain language of the statute and controlling caselaw, is synonymous with "total disability" under section 97-29(b)—such that an employee may be deemed totally disabled if he or she has the capability of performing some type of work but cannot find a job compatible with his or her limited capability after reasonable efforts, or that it would be futile to try to find such a job. **Sturdivant v. N.C. Dep't of Pub. Safety, 470.**

Extended disability benefits—burden of proof—no presumption from prior determination of total disability—In plaintiff's action for extended disability benefits after he had exhausted the statutory maximum of 500 weeks of temporary total disability benefits, plaintiff was not entitled, when first applying for extended benefits, to the same presumption that applies to employees who have been granted an initial award of weekly disability benefits (whether partial or total) for continued benefits (unless and until certain disqualifying events occur). The plain language of N.C.G.S. § 97-29(c) provides that an employee seeking extended benefits "shall prove" he or she "has sustained a total loss of wage-earning capacity" in order to qualify and there was no indication that the legislature intended for employees seeking extended benefits to rely on a prior determination of total disability. **Sturdivant v. N.C. Dep't of Pub. Safety, 470.**

Extended disability benefits—burden of proof—total loss of wage-earning capacity—In plaintiff's action for extended disability benefits after he had exhausted the statutory maximum of 500 weeks of temporary total disability benefits—for a back injury which resulted in chronic pain and which limited plaintiff's work capability to sedentary positions—the Industrial Commission did not err in determining that plaintiff failed to meet his burden of showing that he had sustained a total loss of wage-earning capacity as required by N.C.G.S. § 97-29(c). **Sturdivant v. N.C. Dep't of Pub. Safety, 470.**

WORKERS' COMPENSATION—Continued

Industrial Commission's exclusive jurisdiction—exceptions—willful negligence of co-employee—Where decedent was crushed to death at his workplace when his employer's on-site vice president (defendant) directed him to stand beneath and disassemble a 2,000-pound metal tire mold that was suspended by a forklift—which had been modified without manufacturer approval—without the support necessary to prevent a crushing-type accident, decedent's estate (plaintiff) alleged facts sufficient to establish an exception to the Industrial Commission's exclusive jurisdiction over plaintiff's claims against defendant. Plaintiff alleged that defendant acted with willful, wanton, and reckless negligence and that his negligence resulted in the death of decedent, who did not have the proper experience, training, or safety equipment to perform the work that caused his death. **Est. of Stephens v. ADP TotalSource DE IV, Inc., 208.**

Industrial Commission's exclusive jurisdiction—exceptions—willful negligence of employer—Where decedent was crushed to death at his workplace when his employer's on-site vice president directed him to stand beneath and disassemble a 2,000-pound metal tire mold that was suspended by a forklift—which had been modified without manufacturer approval—without the support necessary to prevent a crushing-type accident, decedent's estate (plaintiff) alleged facts sufficient to establish an exception to the Industrial Commission's exclusive jurisdiction over plaintiff's claims against decedent's employer (defendant). Plaintiff alleged that the employer intentionally engaged in conduct knowing it was substantially certain to cause serious injury or death to decedent, who did not have the proper experience, training, or safety equipment to perform the work that caused his death. **Est. of Stephens v. ADP TotalSource DE IV, Inc., 208.**

Parsons presumption—compensable spine injuries—rebuttal testimony merely speculative—The Industrial Commission (IC) did not err by ordering defendants (plaintiff's employer and its insurance carrier) to continue to pay plaintiff's medical expenses related to his cervical and lumbar spine conditions from a fall at work over a decade earlier where defendants failed to produce competent evidence to overcome the *Parsons* presumption (that continued medical treatment is directly related to the original, compensable injury). Testimony by defendants' two medical experts, neither of whom examined or treated plaintiff, that none of plaintiff's injuries were related to his fall at work was based on conjecture and directly contradicted the prior admission of defendants and award of the IC establishing the initial compensability of plaintiff's injuries. Finally, the IC's determination that plaintiff's experts were more credible than defendants' was well within its discretion. **Brewer v. Rent-A-Ctr., 491**.

Workplace death—liability of co-employee—failure to show willful, wanton, or reckless negligence—After a machine operator at a furniture manufacturing plant died from injuries he sustained when passing by the exposed side of a bandsaw he was cleaning, the trial court improperly denied defendant-plant manager's motion for summary judgment and Rule 12(b)(1) motion to dismiss an action brought by the operator's estate (plaintiff), where plaintiff's forecast of evidence failed to show the willful, wanton, or reckless negligence needed to establish a valid claim under *Pleasant v. Johnson*, 312 N.C. 710 (1985) (allowing recovery for workplace accidents, independent of the Workers' Compensation Act's exclusivity provision). Although some evidence indicated that defendant knew of the danger that the bandsaw posed, all other evidence reflected defendant's attempts to share that knowledge to employees, which included running an award-winning safety training program (which trained the operator on how to run the bandsaw and explicitly warned him

WORKERS' COMPENSATION—Continued

not to clean it while it was in operation) and making some efforts to block off the exposed side of the bandsaw. **Est. of Baker v. Reinhardt, 529.**

ZONING

Special use permit—application tabled by county board—improper procedure found by trial court—invited error—In an appeal from the trial court's order directing a county board of adjustment to issue a special use permit, where—after the board had denied petitioner-appellees' permit application based on a misreading of the county's zoning ordinance—the board tabled the matter until the next board meeting and then denied the application again, intervenor-appellants could not challenge the trial court's conclusion that the board acted improperly under the procedures set forth in Robert's Rules of Order by tabling the permit application. Intervenor-appellants invited the alleged error by presenting the trial court with a copy of Robert's Rules of Order after the county's attorney argued that the board's own procedural rules were partially based on Robert's Rules of Order. Furthermore, the board's decision to table the application was irrelevant to the main issue on appeal: whether the board erred in denying the application the first time around. **Pope v. Davidson Cnty., 35.**

Special use permit—denied by county board—legal error—misapplication of zoning ordinance—In a zoning case, where a county board of adjustment denied petitioners' application for a special use permit to operate a motocross center despite receiving enough passing votes to issue the permit, and where the board subsequently reopened the application and denied it again at a second hearing, the trial court—having granted certiorari review of the board's decision pursuant to N.C.G.S. § 160D-1402—did not err in ordering the board to issue the permit. The record showed that the board's decision to deny the application at the first hearing and to table the matter until the second hearing resulted from a legal error (the board misapplied the county's zoning ordinance, believing that a super-majority vote was required to issue the permit when, in fact, the ordinance required only a simple majority vote), and that, but for the board's error, petitioners' application would have been granted. **Pope v. Davidson Cnty., 35.**

Special use permit—denied by county board—statutory right to appeal—no waiver—In a zoning case, where a county board of adjustment denied petitioners' application for a special use permit to operate a motocross center despite receiving enough passing votes to issue the permit (the board misapplied the county's zoning ordinance, believing that a super-majority vote was required when, in fact, the ordinance required only a simple majority vote), and where the board subsequently reopened the application and denied it again at a second hearing, petitioners were entitled to appeal the board's second vote by petitioning for certiorari to the superior court pursuant to N.C.G.S. § 160D-1402(b). Specifically, where petitioners argued that the board erred in holding the second hearing instead of issuing the permit at the first hearing, petitioners' participation in the second hearing did not constitute a waiver of their statutory right under section 160D-1402(b) to challenge the results of that second hearing. **Pope v. Davidson Cnty., 35.**