NORTH CAROLINA COURT OF APPEALS REPORTS

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF C.A.D., A MINOR CHILD

No. COA24-619

Filed 5 March 2025

Termination of Parental Rights—motion to continue—extraordinary circumstances and necessity for the proper administration of justice not shown—no abuse of discretion

In a termination of parental rights proceeding, the district court did not abuse its discretion in denying respondent-mother's counsel's motion to continue the hearing—filed when respondent did not appear—because the juvenile petition had been pending for 90 days and respondent's counsel did not make any argument regarding extraordinary circumstances or the necessity of a continuance in order to secure the proper administration of justice. Under those circumstances, no balancing of respondent's need for the continuance with the potential harm that might arise was required. Further, respondent's counsel did not raise any notice or due process arguments in the district court, and, thus, respondent waived appellate review of any alleged constitutional violations.

Appeal by respondent-mother from order entered 12 April 2024 by Judge Scott D. Conrad in Catawba County District Court. Heard in the Court of Appeals 11 February 2025.

Maranda W. Stevens for petitioner-appellee Catawba County Department of Social Services.

Administrative Office of the Courts, by NC GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

Peter Wood for respondent-appellant mother.

ZACHARY, Judge.

Respondent-Mother appeals from the trial court's order[1] terminating her parental rights to her minor child, "Charlie."[2] After careful review, we affirm.

I. Background

Charlie was born in November 2019. On 26 February 2023, the Catawba County Department of Social Services ("DSS") assumed temporary emergency custody of Charlie. The next day, DSS filed a juvenile petition alleging Charlie to be neglected and dependent.

As set forth in the petition, Respondent-Mother and Charlie presented at Catawba Valley Medical Center Emergency Department on 26 February 2023 when Respondent-Mother was experiencing suicidal ideations. Respondent-Mother "had a bizarre affect, was hallucinating, heard someone calling her name, heard phantom crying, and was falling asleep during conversations." She completed a 5-panel drug screen and tested positive for amphetamines and marijuana. Charlie had two burn marks on his left hand—injuries Respondent-Mother reported Charlie incurred from "grabbing a burning stick next to a hot burn barrel." Respondent-Mother then attempted to flee the hospital but was detained. As a social worker tried to gather information, Respondent-Mother "did not communicate coherently and appeared to doze off at times."

In its juvenile petition, DSS also detailed Respondent-Mother's history of drug use and manufacturing, which had led to her first child's adjudication as neglected and dependent, and eventually, the termination of Respondent-Mother's parental rights to the child.

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1. The file numbers on the documents in the appellate record vary; in some documents, the file number is 23 JA 33 and in other documents, the file number is 23 JT 33. Because the order from which Respondent-Mother appeals uses file number 23 JA 33, we will use this file number as well.

2. We use the pseudonym to which the parties stipulated for ease of reading and to protect the juvenile's identity. In addition, we note that Respondent-Father has not appealed from the trial court's order, which also terminated his parental rights to Charlie. Accordingly, he is not a party to this appeal.

On 27 February 2023, the trial court entered an order placing Charlie in the custody of DSS. In March 2023, the court appointed a guardian ad litem to represent Charlie.

The juvenile petition came on for an adjudication and disposition hearing in Catawba County District Court on 24 April 2023. The trial court entered an adjudication and disposition order on 22 May 2023, in which it adjudicated Charlie to be a neglected and dependent juvenile and determined that maintaining Charlie's placement with DSS was in Charlie's best interests. The court ordered that Respondent-Mother enter into and comply with a case plan that required her to:

> a. Complete a psychological evaluation and parenting capacity evaluation and cooperate with all recommended mental health services;
>
> b. Complete a substance abuse assessment and cooperate with all recommended services;
>
> c. Sign a release of information to DSS and any other treatment providers of any substance abuse assessments and/or treatment;
>
> d. Complete drug screen[s] when requested by DSS;
>
> e. Obtain and maintain employment, and provide proof of employment;
>
> f. Obtain and maintain stable housing appropriate for [Charlie]; and
>
> g. Demonstrate a consistent and improved capability to care for [Charlie] safely, and to protect [Charlie] from others who are unsafe (using drugs, criminal activity, etc.)[.]

This matter came on before the trial court for permanency planning hearings on 17 July 2023 and 9 October 2023. On 12 December 2023, DSS filed a motion in the cause seeking to terminate parental rights to Charlie. DSS alleged that Respondent-Mother's parental rights should be terminated on the grounds of (1) neglect; (2) willful failure to pay a reasonable portion of the cost of Charlie's care; (3) dependency; and (4) Respondent-Mother's inability or unwillingness to establish a safe home for Charlie following the termination of her parental rights to another one of her children. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (3), (6), (9) (2023).

The motion for termination of parental rights came on for hearing on 12 March 2024. At that hearing, Respondent-Mother was not present. Her counsel made a motion to continue based on her absence which

DSS opposed. The trial court denied the motion. On 12 April 2024, the court entered a "Consolidated Judgment and Order" terminating both parents' rights to Charlie. The court concluded, *inter alia*, that grounds for terminating Respondent-Mother's parental rights existed under N.C. Gen. Stat. § 7B-1111(a)(1), (6), (7), and (9). Respondent-Mother filed timely notice of appeal.

II. Discussion

On appeal, Respondent-Mother argues that "[t]he trial court abused its discretion when it failed to conduct the proper balancing test before denying the motion to continue the termination hearing when [she] had not appeared in court." We disagree.

A. Standard of Review

"Because counsel did not assert a constitutional basis for the requested continuance, we review denial of the motion to continue for abuse of discretion." *In re L.A.J.*, 381 N.C. 147, 149, 871 S.E.2d 697, 699 (2022). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted). "Moreover, regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when [a respondent] shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." *In re J.E.*, 377 N.C. 285, 291, 856 S.E.2d 818, 822 (2021) (cleaned up).

B. Analysis

"In reviewing for an abuse of discretion, we are guided by the Juvenile Code, which provides that continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice." *Id.* at 291, 856 S.E.2d at 822–23 (cleaned up); *see also* N.C. Gen. Stat. § 7B-1109(d). "Furthermore, continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice." *J.E.*, 377 N.C. at 291, 856 S.E.2d at 823 (cleaned up).

At the commencement of the termination hearing, Respondent-Mother was not present. Her counsel made a motion to continue:

> [COUNSEL]: . . . [Respondent-Mother] is not present. I did speak with her on multiple occasions, but most recently late last week to remind her that she does have a court

> date this morning, 9:00 a.m. I asked her to be here because she was wanting to contest this action.
>
> Typically, when she is late for court, she will contact my office to have them give me some information about what her arrival time is. She has not contacted my office this morning to advise that she's going to be late . . . . But I would make a motion to continue the matter given the fact that she's not here, or at least hold it open until she can be here. . . .

The trial court heard from counsel for DSS and then denied the motion to continue:

> THE COURT: . . . [T]here was a notice of hearing for pretrial and for the termination of parental rights filed in this matter.
>
> On January the 8th, 2024, the pretrial was had on January the 29th setting the court date, and . . . that court date was set for today . . . .
>
> [Respondent-Mother] was at that pretrial conference. That order set the court date for March the 12th at nine o'clock in the morning, which is today. It's now 9:25. [Respondent-Mother] is not here. Since she has been in contact with you, it's obvious that she was aware of the court date today, and nobody ha[s] heard any reason why she's not here at nine o'clock, or here today at all at this point. I'm going to deny your motion to continue.

Respondent-Mother never appeared in court that day. Now, on appeal, she contends that "[t]he need for [her] continuance outweighed any need to hold the hearing immediately." Particularly, she states that "[s]ince [DSS] did not allege any harm from granting the continuance, the interests of the party opposing the continuance did not weigh against a continuance." However, Respondent-Mother has mischaracterized the applicable standard for the trial court's consideration of her motion to continue.

In the instant case, if the trial court had granted the motion to continue—because the termination petition was filed on 12 December 2023 and the termination hearing was held on 12 March 2024—this matter would have been continued beyond the 90-day deadline provided in the Juvenile Code. *See* N.C. Gen. Stat. § 7B-1109(d). It is well settled that "continuances that extend beyond 90 days after the initial petition shall

be granted only in extraordinary circumstances when necessary for the proper administration of justice." *J.E.*, 377 N.C. at 291, 856 S.E.2d at 822–23 (cleaned up); *see also* N.C. Gen. Stat. § 7B-1109(d). Thus, DSS was not required to forecast any harm that might arise were the trial court to grant the continuance. Rather, Respondent-Mother was required to show the existence of "extraordinary circumstances" together with the necessity of the continuance to ensure "the proper administration of justice." *J.E.*, 377 N.C. at 291, 856 S.E.2d at 823 (citation omitted). This, she did not do. Instead, counsel simply "ma[d]e a motion to continue the matter given the fact that [Respondent-Mother was] not here."

Further, to the extent that Respondent-Mother claims that her constitutional rights were violated, we note that Respondent-Mother was represented by counsel and no due-process argument was raised. "There [wa]s no mention of the need to continue due to a lack of notice or in order to ensure due process." *Id.* at 290, 856 S.E.2d at 822. A review of the transcript shows that the only basis for the motion to continue was Respondent-Mother's absence. Constitutional "arguments not raised at a termination hearing may not be raised for the first time on appeal." *In re A.L.L.*, 254 N.C. App. 252, 264 n.7, 802 S.E.2d 598, 607 n.7 (2017). Thus, Respondent-Mother "has waived any argument that the denial of the motion to continue violated [her] constitutional rights." *J.E.*, 377 N.C. at 290–91, 856 S.E.2d at 822.

Indeed, the facts before us are quite similar to those presented to our Supreme Court in *J.E.* There, the respondent-father failed to appear at the termination hearing, with which the trial court proceeded after denying counsel's motion to continue. *Id.* at 289–90, 856 S.E.2d at 822. The respondent-father offered no explanation for his absence either before the trial court or on appeal. *Id.* at 290, 856 S.E.2d at 822. Our Supreme Court reviewed the denial of the respondent-father's motion to continue and was "satisfied the trial court did not abuse its discretion in determining [the] respondent[-father]'s unexplained absence did not amount to an extraordinary circumstance, as required by [N.C. Gen. Stat.] § 7B-1109(d), to merit continuing the termination hearing further beyond the 90-day timeframe set forth in the Juvenile Code." *Id.* at 291–92, 856 S.E.2d at 823.

"Continuances are not favored, and motions to continue ought not to be granted unless the reasons therefor are fully established." *L.A.J.*, 381 N.C. at 151, 871 S.E.2d at 700 (cleaned up). As DSS notes in its brief, "[t]his motion to continue was solely based on [Respondent-Mother]'s failure to appear. . . . There was no indication of any other reason for the continuance." Therefore, "[h]aving offered no legitimate reason

for being unable to attend the hearing, [R]espondent-[M]other failed to establish extraordinary circumstances requiring another continuance far beyond the ninety-day deadline." *Id.*

Respondent-Mother has failed to argue, let alone establish, the existence of any "extraordinary circumstances" or the necessity of a continuance in order to secure "the proper administration of justice." *J.E.*, 377 N.C. at 291, 856 S.E.2d at 823 (citation omitted); *see also* N.C. Gen. Stat. § 7B-1109(d). Further, in light of Respondent-Mother's "counsel's advocacy on behalf of [Respondent-Mother] at the termination hearing and the unchallenged findings of fact supporting the termination of h[er] parental rights . . . , we believe it is unlikely that the result of the termination proceedings would have been different had the hearing been continued." *J.E.*, 377 N.C. at 292, 856 S.E.2d at 823. As such, the trial court did not abuse its discretion in denying counsel's motion to continue.

III. Conclusion

Accordingly, we affirm the trial court's order terminating Respondent-Mother's parental rights.

AFFIRMED.

Judges CARPENTER and MURRY concur.

IN THE MATTER OF D.E.

No. COA24-289

Filed 5 March 2025

Child Abuse, Dependency, and Neglect—permanency planning—specific visitation not in juvenile's best interest—supervised visitation left to foster parents' discretion—order affirmed

In a neglect proceeding involving a child who tested positive for methamphetamine at birth and whose parents had a long history of domestic violence, the district court did not err by giving the juvenile's foster parents discretion over whether the juvenile's father could exercise supervised visitation with the child where the court made findings of fact—including that the father had not participated in substance abuse or mental health treatment; had multiple positive drug screens and missed others; was terminated from a domestic violence education program for failure to comply with

drug screening; continued to engage in domestic violence against the child's mother, leading to a charge of assault on a female; did not take advantage of visitation opportunities for approximately 10 months before the permanency planning hearing; and blocked the foster parents from texting him—that supported its conclusion of law that it was not in the child's best interest to order specific visitation with the father, determinations that were sufficient to permit the denial of visitation for the father entirely.

Appeal by respondent-father from order entered 22 December 2023 by Judge Resson O. Faircloth in District Court, Harnett County. Heard in the Court of Appeals 13 February 2025.

Staff Attorney Duncan B. McCormick for petitioner-appellee Harnett County Department of Social Services.

Ward and Smith, P.A., by Mary V. Cavanagh, for guardian ad litem.

Garron T. Michael for respondent-appellant father.

STROUD, Judge.

Respondent-Father appeals from the trial court's permanency planning order granting guardianship of the minor child to foster parents and ceasing reunification efforts with Father. Father contends the trial court abused its discretion by failing to order a minimum frequency of visitation and leaving supervised visitation in the discretion of Foster Parents. Because the trial court made sufficient findings of fact and conclusions of law to deny visitation to Father entirely and concluded that it was not in the child's best interest to order specific visitation for Father, it did not err by authorizing Foster Parents to allow supervised visitation as agreed between them and Father. We affirm the trial court's permanency planning order.

I. Background

On 29 December 2021, the Johnston County Department of Social Services ("JCDSS") filed a juvenile petition alleging the minor child, "Devin,"[1] was a neglected and dependent juvenile. That same day, an

1. Stipulated pseudonyms are used to protect the identity of minor children. *See* N.C. R. App. P. 42.

order was entered placing Devin in the nonsecure custody of JCDSS. In a hearing on 5 January 2022, the trial court in Johnston County found Devin had been living in Harnett County with one or both of his parents since his removal on 29 December 2021. The trial court entered an order transferring jurisdiction to Harnett County.

On 7 January 2022, a subsequent juvenile petition was filed by the Harnett County Department of Social Services (hereinafter "DSS"), also alleging Devin to be a neglected and dependent juvenile. The trial court in Harnett County issued an order granting DSS nonsecure custody of Devin that same day. Devin was placed in the home of Foster Parents on 4 March 2022, "pending further proceedings."

An adjudication and disposition hearing was held on 11 March and 25 March 2022. On 4 January 2023, the trial court entered an order adjudicating Devin to be a neglected juvenile. As grounds for this adjudication, the trial court made these relevant findings of fact:

> 35. [Devin's] meconium screen was positive for methamphetamines and amphetamines.
>
> 36. The mother tested positive for amphetamines on September 23, 2021, November 12, 2021, and November 24, 2021.
>
> 37. The mother reported taking Sudafed almost daily during the pregnancy.
>
> 38. The mother at this hearing testified that she used methamphetamines during the pregnancy.
>
> 39. The mother used methamphetamine as recently as one week prior to [Devin's] birth.
>
> . . . .
>
> 42. The mother and [F]ather have a significant history of domestic violence[.]
>
> . . . .
>
> 46. On December 7, 2021, a social worker made contact with the mother. The mother reported that she and . . . [F]ather had a history of physical and verbal altercations. She acknowledged a history of obtaining domestic violence protective orders against . . . [F]ather.
>
> . . . .

> 52. The parents had a verbal altercation at the Johnston County Courthouse on January 5, 2022. A Johnston County social worker observed this altercation.
>
> . . . .
>
> 54. [Devin] lived in an environment injurious to his welfare in the care of the parents. [Devin] would have lived in an environment injurious to his welfare if placed in the care of the parents at the time of the filing of the January 7, 2022 juvenile petition in Harnett County.

In its dispositional order, the trial court concluded "[i]t is in the best interests of [Devin] to award legal and physical custody to [DSS]" and further "in the best interests of [Devin]" to maintain placement with Foster Parents. The trial court also granted both parents supervised visitation of a minimum of two hours per week to be supervised by either Foster Parents, DSS, or "an adult approved by DSS and the GAL."

The trial court held a permanency planning hearing on 17 October 2023. Neither the mother nor Father were present for this hearing, but were both represented by counsel. Following this hearing, the trial court entered an order on 22 December 2023 awarding primary care and guardianship to Foster Parents. Father timely appealed this permanency planning order on 17 January 2024. The mother did not appeal.

II. Permanency Planning Order

On appeal, Father challenges the trial court's permanency planning order as it relates to his visitation rights. Father does not challenge any of the trial court's nearly nine single-spaced pages of findings of fact, so the findings are binding on appeal. *See In re J.M.*, 384 N.C. 584, 591, 887 S.E.2d 823, 828 (2023) ("Uncontested findings of fact are . . . binding on appeal." (citation omitted)). First, Father challenges one of the trial court's conclusions as being unsupported by the evidence and "directly in contradiction to the trial court's own findings." Second, Father argues the trial court's decree failed to comply with North Carolina General Statute Section 7B-905.1 in not establishing a "minimum frequency of visitation." Finally, he argues the trial court impermissibly awarded Foster Parents excessive power and control in determining Father's ability to exercise visitation with Devin. We disagree and affirm the trial court's permanency planning order.

A. Standard of Review

This Court "review[s] disposition orders, including visitation determinations, for abuse of discretion. When reviewing for abuse of

discretion, we defer to the trial court's judgment and overturn it only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *In re K.W.*, 272 N.C. App. 487, 495, 846 S.E.2d 584, 590 (2020) (citations omitted). Further, "[a]ppellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re R.A.H.*, 182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007) (citation and quotation marks omitted). "Unchallenged findings of fact are binding on appeal. Whether the trial court's findings of fact support its conclusions of law is reviewable *de novo*. If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Isom v. Duncan*, 279 N.C. App. 171, 175, 864 S.E.2d 831, 836 (2021) (citations and quotation marks omitted).

B. Visitation

Father challenges the trial court's Conclusion of Law 10 as being unsupported by competent evidence and "in contradiction" to the trial court's findings. Conclusion of Law 10 reads: "It is not in the best interests of [Devin] to award . . . [F]ather a minimum period or a minimum frequency of visitation. Supervised visitation and contact should be authorized as set forth in the decretal." Father's argument focuses on the evidence more than the trial court's findings of fact, and Father challenged none of the findings of fact as unsupported by the evidence. Under our standard of review, we must determine if the trial court's unchallenged findings support its conclusion of law. *See id.*

Under North Carolina General Statute Section 7B-905.1, "[a]n order that removes custody of a juvenile from a parent . . . or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, *including no visitation*." N.C. Gen. Stat. § 7B-905.1(a) (2023) (emphasis added). Further, "the court may prohibit visitation or contact by a parent when it is in the juvenile's best interest consistent with the juvenile's health and safety." *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019) (citations omitted).

In making his argument, Father directs us to the testimony of Ms. Taylor, social worker for DSS. Ms. Taylor testified Father, generally, "pays attention to [Devin's] needs[]" and that "there does appear to be a bond between [Devin and Father]." Further, when asked if DSS's "recommendation is that there be no visits?" Ms. Taylor responded "[n]ot that there are not visits, just that the foster parent and the parent could work out visit times." Father argues "[n]othing contained in Ms. Taylor's testimony, [n]or any other evidence presented for that matter, indicated

any concerns or any justification to curtail Father's ongoing visitation." We note that the trial court found Father had not exercised his "ongoing visitation" established in the prior order since January 2023. And the trial court's findings of fact provide abundant justification for curtailing Father's visitation.

This Court has upheld limitations on parental visitation rights when a trial court's findings support its conclusions that visitation would be inconsistent with the best interests of the juvenile. *See In re N.L.M.*, 283 N.C. App. 356, 373, 873 S.E.2d 640, 650 (2022). Findings that a parent did not make adequate progress with their case plan, including the resolution of issues pertaining to domestic violence and substance abuse, support a conclusion that visitation would not be in the best interests of a juvenile. *See In re J.L.*, 264 N.C. App. at 422, 826 S.E.2d at 268.

Here, the trial court made a finding consistent with Ms. Taylor's testimony that "[t]here is a bond [between Devin and Father]." In this finding, however, the trial court also noted "[F]ather has difficulty consoling [Devin] when [Devin] cries." In non-jury proceedings, the trial court is required to "weigh and consider all competent evidence[]" in making its ultimate determinations. *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted). "Moreover, the trial court's decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence, are not subject to appellate review." *In re J.M.*, 384 N.C. at 591, 887 S.E.2d at 828 (citation, quotation marks, and brackets omitted).

In support of its conclusion as to Father's visitation rights, the trial court also made the following relevant findings:

> ss. . . . [F]ather has not participated in any substance abuse or mental health treatment.
>
> tt. . . . [F]ather tested positive for marijuana, amphetamines, and methamphetamines on April 26, 2022.
>
> uu. . . . [F]ather missed screens on March 22, May 31, June 28, September 27, and November 1, 2022.
>
> vv. . . . [F]ather declined to cooperate with a hair follicle screen on January 9, 2023. He cooperated with an oral swab screen, which was negative.
>
> ww. . . . [F]ather missed screens on January 24, February 23, and March 13, 2023.

xx. . . . [F]ather cooperated with an oral swab screen on March 28, 2023. He tested positive for marijuana.

yy. . . . [F]ather declined to cooperate with a hair follicle screen on March 28, 2023.

zz. . . . [F]ather did not show for a drug screens (sic) on July 25 and September 25, 2023.

. . . .

ccc. . . . [F]ather started the HALT domestic violence education program. He was terminated from HALT for failure to comply with their drug screening.

. . . .

iii. . . . [F]ather told a DSS social worker that he was working in construction. He has not provided DSS or the court with any proof of employment.

jjj. In August 2022, . . . [F]ather was charged with assault on a female. The mother was the alleged victim. The incident happened on July 29, 2022. Law enforcement saw the mother bleeding from her knee and elbow. Law enforcement had to separate the parents due to them arguing. The mother told officers that . . . [F]ather threw the mother in the road and drug her across the road. She said that the argument started early in the morning.

. . . .

mmm. On May 8, 2023, the mother told a social worker that she and . . . [F]ather had gotten into an argument. . . . [F]ather hit and bit the mother. The mother charged . . . [F]ather with assault on a female. The mother later asked the State to drop the charge. The State took a voluntary dismissal.

. . . .

qqq. Pursuant to Section 7B-906.2(d), the court finds:

> . . . .
>
> D. The parents' failure to make significant progress is conduct that is inconsistent with the health and safety of [Devin].

. . . .

> uuu. By clear, cogent, and convincing evidence, the court finds that the parents neglected [Devin] and acted inconsistently with their respective parental rights (including constitutional rights), duties, and obligations.

In addition to the above findings regarding Father's lack of progress with his case plan, the trial court also found there were existing communication and coordination issues between Father and Foster Parents. The trial court took judicial notice of the disposition order entered on 4 January 2023 based on a hearing held in March 2022; this order originally established supervised visitation for both parents. The trial court found that Foster Parents had begun supervising visitation for both the mother and Father on 4 March 2022 under the previous order. Father was granted a minimum of 2 hours per week visitation "if supervised by" Foster Parents. The order also authorized specific minimum visitation which could be supervised by either DSS or "an adult approved by DSS and the GAL." However, the trial court found Foster Parents "have not supervised any visits with . . . [F]ather since January 2023. They do not have a relationship with . . . [F]ather. . . . [F]ather has blocked . . . [Foster Parents] from texting him. [Foster Parents] are not willing to supervise . . . [F]ather's visitation or contact."

Father did not challenge these findings and such "[u]ncontested findings of fact are . . . binding on appeal." *See In re J.M.*, 384 N.C. at 591, 887 S.E.2d at 828 (citation omitted). Under these findings, the trial court did not abuse its discretion in concluding "[i]t is not in the best interests of [Devon] to award . . . [F]ather a minimum period or a minimum frequency of visitation." Though the trial court found some bond exists between Father and Devin, the trial court's other findings as to Father's lack of progress with his case plan, and continued issues with substance use and domestic violence, and his failure to take advantage of the supervised visitation he had been granted support limiting his visitation rights in accordance with Devin's best interests.

Father next argues the trial court's decretal failed to comply with North Carolina General Statute Section 7B-905.1(c) in that it "specifically denied both a minimum period and frequency for [Father's] visitation." Specifically, Father contends he "did not forfeit his right to visitation[,]" and absent such findings, Father was entitled to a provision in the order specifically outlining his minimum visitation rights. We disagree.

When a trial court revokes parental custody or continues placement of the juvenile outside the parent's home, the trial court's order must

"establish a visitation plan for parents unless the trial court finds that the parent has forfeited their right to visitation *or that it is in the child's best interest to deny visitation*." *In re M.S.*, 289 N.C. App. 127, 145, 888 S.E.2d 242, 253 (2023) (emphasis added) (citation and quotation marks omitted).

> In the absence of findings that the parent has forfeited his or her right to visitation or that it is in the child's best interest to deny visitation, the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place, and conditions under which such visitation rights may be exercised.

Id. (citation, quotation marks, and brackets omitted). The trial court did not find Father had forfeited his right to visitation, but it did conclude "[i]t is not in the best interests of [Devin] to award . . . [F]ather a minimum period or a minimum frequency of visitation." The trial court also found "[b]y clear, cogent, and convincing evidence" Father "acted inconsistently with [his] parental rights (including constitutional rights), duties, and obligations." Accordingly, under North Carolina General Statute Section 7B-905.1(c), the trial court here was not required to "safeguard . . . [Father]'s visitation rights[,]" *id.*, by outlining a "minimum frequency and length of . . . visits" as it would be inconsistent with the best interests of Devin. *See* N.C. Gen. Stat. § 7B-905.1(c).

Finally, Father argues the trial court erred in delegating authority to set visitation to Foster Parents. As a general rule, we agree with Father's contention it is improper for a trial court to award custodians of a child full authority to determine a parent's ability to exercise their visitation rights – but this rule applies only if the trial court has granted the parent visitation. Here, the trial court did not grant Father any visitation but only authorized Foster Parents to allow Father to see Devin, as long as the visit was supervised and Father was "not under the influence of an impairing substance."

This Court has held it to be improper for a trial court to "delegate its authority to set visitation to the custodian of the child[.]" *In re N.K.*, 274 N.C. App. 5, 11, 851 S.E.2d. 389, 394 (2020) (citation omitted).

> We do not think that the exercise of this judicial function [in determining visitation rights] may be properly delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To

> give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.

In re Custody of Stancil, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971).

"*If the district court orders visitation*, the court 'shall specify the minimum frequency and length of the visits and whether the visits shall be supervised.' " *In re N.K.*, 274 N.C. App. at 11, 851 S.E.2d at 394 (emphasis added) (quoting N.C. Gen. Stat. § 7B-905.1(d)). In *In re N.K.*, this Court determined "the district court neither completely denied visitation nor set out terms for visitation but instead delegated both the authority to allow visitation and the terms of that visitation to three therapists who worked with [the] respondent-mother and each child." *Id.* at 12, 851 S.E.2d at 394.

Here, as discussed above, the trial court *did* find it in the best interests of Devin to deny Father's visitation, distinguishing the present case from *In re N.K.* where the district court did not "completely den[y] visitation[.]" *See id.* The trial court also found that Father had acted "inconsistently with [his] parental rights (including constitutional rights), duties, and obligations."

In *Routten v. Routten*, our Supreme Court held

> that in light of the trial court's authority to deny *any* visitation to [the] defendant pursuant to N.C.G.S. § 50-13.5(i), any delegation of discretion to [the] plaintiff to allow *some* visitation is mere surplusage, albeit admittedly confusing. The trial court had already determined that it was not in the children's best interests to have visitation with [the] defendant. Although it is curious that the trial court would afford an opportunity for [the] defendant to have visitation with the children at the discretion of [the] plaintiff after denying visitation rights to her, nonetheless we choose to interpret the trial court's openness to the potential prospect of [the] defendant's ability to see her children as a humane accommodation rather than as an error of law.

374 N.C. 571, 579, 843 S.E.2d 154, 159-60 (2020) (emphasis in original) (citation and quotation marks omitted).

Here, the trial court's order specifically outlines that "[Foster Parents] are *authorized*, *but not required*, to arrange for supervised

visitation and contact[.]" (Emphasis added.) As did our Supreme Court in *Routten*, we consider this authorization of Foster Parents to allow supervised visitation "as a humane accommodation rather than an error of law." *Id.* at 579, 843 S.E.2d at 160. The trial court made sufficient findings to support the conclusion of denying Father's visitation rights as being in the best interests of Devin. Based on the trial court's findings and conclusions, the trial court was not required to grant Father *any* opportunity for visitation. But the trial court graciously awarded Father the opportunity to try to improve his relationship with Foster Parents and authorized them to allow supervised visitation. And even if Foster Parents remain unwilling to supervise visitation, Father still has the opportunity to file a motion for review of visitation in the future.

III. Conclusion

The trial court did not abuse its discretion in denying Father "a minimum period or a minimum frequency of visitation" but authorizing Foster Parents to allow supervised contact. The trial court made sufficient findings to support its conclusion that this limitation would be in the best interests of Devin. Further, the trial court did not abuse its discretion by authorizing Foster Parents to allow Father supervised visitation if he and Foster Parents agree to do so. We affirm the trial court's permanency planning order.

AFFIRMED.

Judges ARROWOOD and FREEMAN concur.

IN RE D.R.W., JR.

No. COA24-623

Filed 5 March 2025

Termination of Parental Rights—grounds for termination—willful abandonment—complete lack of contact

The trial court properly terminated a mother's parental rights to her son based on willful abandonment where there was clear, cogent, and convincing evidence that, during the relevant six-month period, the mother: had no contact or communication of any sort with her son; did not request visitation; did not send any cards, gifts, or letters to her son; did not provide any financial support for her son; and failed to respond to a letter written to her by her son. The court's findings were supported by the evidence and, despite the mother's argument to the contrary, showed the court's consideration of the mother's history and circumstances; together, the evidence and findings demonstrated the mother's lack of any parental concern for her son and, in turn, supported the court's conclusion that termination based on willful abandonment was warranted.

Appeal by Respondent-Mother from orders entered 26 March 2024 by Judge J. Calvin Chandler in Columbus County District Court. Heard in the Court of Appeals 12 February 2025.

Jane R. Thompson for Petitioner-Appellee Columbus County Department of Social Services.

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

Robinson & Lawing, L.L.P., by Christopher M. Watford, for Respondent-Appellant Mother.

COLLINS, Judge.

Respondent-Mother appeals from the trial court's termination of her parental rights to her minor child based on the grounds of willful abandonment and willful failure to make reasonable progress in correcting the conditions that led to the minor child's removal. Mother challenges two adjudicatory findings of fact as being unsupported by clear,

cogent, and convincing evidence and argues that the trial court failed to make certain findings of fact regarding Mother's willfulness. Mother does not challenge the trial court's dispositional conclusion that it was in the minor child's best interest to terminate Mother's parental rights. We affirm.

I. Background

Mother is the biological mother of David,[1] a minor child born in 2013. On 17 February 2022, Columbus County Department of Social Services ("CCDSS") filed a petition alleging that David was neglected and dependent, stating that Mother did not have housing for herself or David, did not take David to school, used drugs in front of David, frequently dropped David off at "several people's houses," and frequently gave "temporary guardianship" of David to other people. CCDSS learned that Mother was on probation and contacted her probation officer; Mother was directed to drive to the CCDSS office and was immediately drug tested. Mother "tested positive for amphetamine, buprenorphine, THC, methamphetamine, and fentanyl." When asked by CCDSS where David was located, Mother first reported that he was in another county and unreachable, but a CCDSS social worker found David in Mother's car in the parking lot. Mother agreed to a kinship placement of David with her sister and granted CCDSS non-secure custody of David; CCDSS began efforts to contact David's biological father.[2] CCDSS conducted a hair follicle drug test of David, and he tested positive for amphetamines and methamphetamines.

On 29 June 2022, Mother stipulated to the following facts:

> [T]he respondent mother had a substance abuse issue. The respondent mother's substance abuse led to the respondent mother and the juvenile having unstable housing and the respondent mother being unable to take the juvenile to school. The respondent mother placed the juvenile with various people for varying amounts of time without a definitive time to return to pick up the minor child. During one of these temporary placements, the juvenile was exposed to and tested positive for amphetamines and methamphetamines.

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

2. Respondent-Father's parental rights to David were also terminated, but he is not a party to this appeal.

. . . .

> [T]he respondent parents agree to include the following as components of a case plan for reunification: (1) completion of approved parenting classes; (2) completion of a substance abuse assessment and following recommended treatment; (3) completion of a mental health assessment and following recommended treatment; (4) submitting to random drug screens; and (5) obtaining the means to adequately provide for the juvenile's food, clothing, and shelter.
>
> The parties acknowledge that from these facts the Court may enter an adjudication.

The trial court proceeded to an adjudication hearing, adjudicating David neglected based on the stipulated facts and dismissing the allegation of dependency. As part of the adjudication order, Mother again agreed to the components of the case plan outlined in the stipulation. On 11 August 2022, the trial court proceeded to the disposition hearing and entered a disposition order, finding that Mother had entered into a case plan with CCDSS; Mother was incarcerated at the time of the disposition hearing due to a probation violation and could not visit with David; and, prior to her incarceration, Mother had only visited with David one time. The trial court maintained David's custody with CCDSS and found that reunification was in his best interest. The trial court again ordered Mother to comply with and satisfy the conditions of her case plan with CCDSS and ordered Mother to contact CCDSS to arrange supervised visits with David when she was released from incarceration.

The trial court held permanency planning hearings in September and December 2022. In its December 2022 permanency planning hearing order, the trial court found that: David was doing well in his foster placement and felt secure; Mother had recently contacted CCDSS and "her mental health therapy and substance abuse counseling seem to be ongoing"; Mother had "not done inpatient therapy and parenting classes"; Mother did not have suitable housing; Mother tested positive for various illegal drugs during screenings at Coastal Horizons on 25 October and 15 November 2022; and Mother had one virtual visit with David in May 2022 for seven minutes. The trial court found that "continued efforts of reunification with respondent parents would clearly be futile, unsuccessful and inconsistent with [David's] health, safety, and need for a safe, permanent home within a reasonable period of time." It ceased reunification efforts and adopted a primary permanent plan of adoption with a secondary plan of guardianship with a caretaker for David.

On 30 May 2023, CCDSS filed a petition to terminate Mother's parental rights ("TPR Petition"). The TPR Petition alleged grounds of abuse or neglect "within the meaning of G.S. 7B-101"; willful failure to make reasonable progress in correcting the conditions that led to David's removal; willful failure to pay a reasonable portion of the cost of David's care; and willful abandonment.

On 2 June 2023, the trial court held another permanency planning hearing. In its June 2023 permanency planning hearing order, the trial court found that: David remained in foster care placement, was "thriving," and felt "secure"; Mother was "afforded the opportunity to participate in in-patient drug treatment . . . and she declined to participate"; Mother "has not had a visit with [David] since" the December 2022 permanency planning hearing; Mother had "maintained minimal contact with CCDSS since the inception of this case"; and Mother did not have appropriate housing or the ability to provide for David's needs. The trial court further found that Mother was not making adequate progress on her case plan, was not actively participating in the plan for David, and was not cooperating with CCDSS or the guardian ad litem ("GAL"). The trial court found that it was in David's best interest that CCDSS continue its efforts to implement the permanent plan of adoption with a secondary plan of guardianship with a court-approved caretaker. The trial court further found that, if Mother wanted to request visitation, she was "required to give one week's notice to the CCDSS so that proper measures can be taken so that the visitation can be made safely[.]"

On 26 September 2023, the trial court held a final permanency planning hearing. It again found that David had been adjudicated neglected based on the stipulations made by Mother; David was in a foster home for adoptive placement and making positive strides and thriving; David desired no contact with Mother; Mother had not completed "any components" of her case plan; Mother was currently incarcerated for heroin and meth possession; and that the best permanent plan for David was the primary plan of adoption with a secondary plan of guardianship with a court-approved caretaker. The trial court concluded that it was in David's best interest to remain in CCDSS custody and in his foster home, and it decreed that there shall be no visits between David and Mother until ordered by the trial court.

On 1 December 2023, Mother filed a pro se motion requesting visitation with David and asking the trial court to appoint a new attorney to her case. She stated that she was enrolled in recovery services and had been sober for six months. She also stated that she did "not want [her] parental rights terminated." The trial court entered an order allowing

Mother's attorney to withdraw and appointed her a new attorney, but it did not address Mother's request for visitation.

The TPR Petition came on for hearing on 25 January 2024. During the adjudication phase of the TPR hearing, the trial court took judicial notice of the prior adjudication order and disposition order. A social worker with CCDSS testified about Mother's case plan and Mother's inaction on her case plan, testifying that Mother: attended only three mental health counseling sessions; refused every drug screen requested by CCDSS during the twelve months prior to the filing of the TPR Petition; admitted to CCDSS that she was living in South Carolina and absconding from probation; provided no financial support for David; failed to complete any component of her case plan; did not contact CCDSS to have contact with David; had a single, two-minute phone call with David on 30 May 2023; and failed to write a letter to David or respond to the letter that David wrote to her.

Mother also testified at the TPR hearing, testifying that: she had no documentation to prove that she completed any mental health counseling between February 2022 and May 2023; she lived with friends and had experienced periods of homelessness and incarceration; she did not have a job; she had not been in David's presence since his removal from her care; she had only briefly spoken to David one time over the phone in May 2023; she knew how to communicate with her social worker through CCDSS; and, as of May 2023, she had not worked to complete "any component" of her case plan with CCDSS. Mother also testified that she pled guilty to possession with intent to manufacture, sell, and deliver methamphetamine in May 2023 and was at the Rose House drug treatment center as a condition of her plea agreement.

The trial court adjudicated grounds to terminate Mother's parental rights to David based on willful abandonment and willful failure to make reasonable progress in correcting the conditions that led to David's removal. The trial court moved to the disposition phase of the TPR hearing, and it found that the termination of Mother's parental rights would further the permanent plan of adoption of David and that it was in David's best interest to terminate Mother's parental rights. The trial court entered the adjudication and disposition orders on 26 March 2024. Mother timely filed notice of appeal from the orders on 1 April 2024.

II. Discussion

Mother argues that (1) the trial court erred in concluding that she willfully abandoned David because the trial court "failed to make findings regarding [Mother's] limitations during the relevant six-month

period to determine if [Mother] had the ability to maintain contact with" David and (2) the trial court erred in concluding that Mother willfully failed to make reasonable progress in correcting the conditions that led to David's removal when "the trial court's findings of a lack of reasonable progress were made under a misapprehension of law."

"Termination of parental rights involves a two-stage process." *In re L.H.*, 210 N.C. App. 355, 362 (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" N.C. Gen. Stat. § 7B-1111(a). *In re D.C.*, 378 N.C. 556, 559 (quotation marks and citation omitted). "[A]n adjudication of any single ground in [N.C. Gen. Stat.] § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019) (citations 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 (2019) (citation omitted). At the dispositional stage, if the trial court determines that it is in the child's best interests, the trial court may, in its discretion, terminate the parent's rights. *In re Howell*, 161 N.C. App. 650, 656 (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. at 392 (quotation marks and citations 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 (2022) (citation omitted). This Court reviews "only those [challenged] findings necessary to support the trial court's determination that grounds existed to terminate" a parent's rights, and the unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citations omitted). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

A trial court may terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) upon a finding that the parent has "willfully abandoned the juvenile for at least six consecutive months immediately preceding

the filing of the petition[.]" N.C. Gen. Stat. § 7B-1111(a)(7) (2023). "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 (2020) (quotation marks and citation omitted). "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 (1997) (quotation marks and citation omitted). "[T]he 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re B.R.L.*, 379 N.C. 15, 18 (2021) (quotation marks and citations omitted).

A parent's incarceration during the relevant six-month period does not preclude a finding of the ground of willful abandonment. *In re E.H.P.*, 372 N.C. at 394. Our Courts have made "quite clear . . . that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re A.G.D.*, 374 N.C. 317, 320 (2020) (quotation marks, brackets, and citations omitted). "Although a parent's options for showing affection while incarcerated are greatly limited, a parent *will not be excused from showing interest in the child's welfare by whatever means available*." *Id.* (emphasis in original). Thus, while our Courts "recognize the limitations for showing love, affection, and parental concern" that incarcerated parents experience, they are still required "to do what they can to exhibit the required level of concern for their children." *Id.* (citation omitted).

Mother first argues that the trial court erred in concluding that she willfully abandoned David because the trial court "failed to make findings regarding [Mother's] limitations during the relevant six-month period to determine if [Mother] had the ability to maintain contact with" David. Mother specifically challenges two adjudicatory findings of fact, findings 57 and 58, as being unsupported by clear, cogent, and convincing evidence. The challenged adjudicatory findings of fact state:

> 57. During the six month period prior to the filing of the petition in this case, [Mother's] . . . conduct in not visiting with [David], not communicating with [David], not completing any component of [her] reunification plan as ordered by the court, not providing any financial support for [David], and not making any appreciable progress in remedying the conditions that led to the removal of [David] evidence a willful intent to forego all parental duties and relinquish all parental claims with respect to [David].

> 58. [Mother] . . . [has] willfully abandoned [David] for at least six consecutive months immediately preceding the filing of the petition in this case.

The trial court also made the following relevant, unchallenged adjudicatory findings of fact:

> 22. On 29 July 2022, an order was filed in Columbus County file number 22 JA 16 finding [David] to be a neglected juvenile based on abandonment and living in an environment injurious to [David's] welfare. The adjudication was based on stipulations made by [Mother] and [Father]. . . .
>
> 23. On 11 August 2022, this Court filed a disposition order continuing legal and physical custody of [David] with CCDSS and ordering [Mother] and [Father] to enter into, and complete, reunification plans designed to address the conditions that led to the removal of [David] from his home. The disposition order required [Mother] and [Father] to:
>
> > a. Submit to a substance abuse and mental health assessment.
> >
> > b. Complete any treatment recommended following the substance abuse and mental health assessments.
> >
> > c. Submit to random drug screenings.
> >
> > d. Enroll in, and complete, parenting classes.
> >
> > e. Obtain and maintain appropriate, safe, and stable housing.
> >
> > f. Obtain and maintain financial responsibility to allow them to appropriately provide for [David].
>
> . . . .
>
> 31. [Mother] quit school following completion of the 8th grade.
>
> 32. [Mother] has been living on her own since she was 16 years old. She is currently 33 years old.
>
> 33. [Mother] has not seen or visited with [David] since the day that he was taken into the custody of CCDSS.

34. From 17 February 2022 until 16 May 2022, [Mother] did not visit with [David], nor did she request to visit with [David].

35. On 16 May 2022, a CCDSS employee provided [Mother] with a method to contact [David] and [Mother] contacted [David] that day by phone. The telephone contact lasted approximately two minutes.

36. From 17 May 2022 through 30 May 2023 [Mother] did not have any visitations with [David], did not have any telephone contact with [David], and did not communicate with [David] in any other manner.

37. Since [David] was taken into the custody of CCDSS, [Mother] has not had a job, has not had a valid driver's license, and no reliable transportation.

38. From the date that [David] came into the custody of the CCDSS through the date that the petition was filed in this case, [Mother] was a regular user and abuser of illegal controlled substances.

39. [Mother] did enter into a reunification plan with CCDSS with requirements as set forth in [finding] #23 above.

40. [Mother] did attend approximately three appointments at Coastal Horizons for mental health treatment and did receive some substance abuse counseling as part of those appointments.

41. [Mother] did not comply with the requirement that she obtain a mental health assessment and complete any recommended treatment.

42. [Mother] did not comply with the requirement that she obtain a substance abuse assessment and complete any recommended treatment.

43. [Mother] did not appear for drug screenings requested by CCDSS at any time between 17 February 2022 and 30 May 2023. However, [Mother] admits that she tested positive for illegal controlled substances on multiple drug screenings at Coastal Horizons during the time she attended there.

44. [Mother] did not complete an approved parenting class.

45. From the date that [David] came into the custody of the CCDSS through the date that the petition was filed in this case, [Mother] did not have stable housing. [Mother] was homeless for periods of time, lived with friends and family for periods of time, and was incarcerated for periods of time.

46. [Mother] was incarcerated at various times from the date that [David] came into the custody of the CCDSS through the date that the petition was filed in this case.

47. [Mother] was incarcerated at the time that the petition was filed in this case. She has since been released and is currently living at the Rose House (a residential treatment facility located in Brunswick County, North Carolina) pursuant to a term of her supervised probation.

48. From the date that [David] came into the custody of the CCDSS through the date that the petition was filed in this case, [Mother] did not provide any financial support for [David].

49. [Mother] has not had, and still does not have, a valid driver's license or reliable transportation.

50. From 21 February 2022 until 30 May 2023, there were 14 court hearings conducted in Columbus County file # 22 JA 16. [Mother] attended four of those hearings . . . .

51. Following a hearing in December 2022, [Mother] did indicate that she would like to visit with [David]. [Mother] was asked to write a letter to [David]. [Mother] did not write a letter to [David] prior to the filing of the petition in this case.

52. [David] wrote a letter to [Mother] on 6 April 2023. A CCDSS employee gave the letter to [Mother]. As of the filing of the petition in this case, [Mother] did not respond to [David].

53. From the time that [David] came into the custody of CCDSS through the date of the filing of the petition in this case, neither [Mother] or [Father] provided any gifts, cards, or letters to [David].

54. For the six-month period prior to the filing of the petition in this case, neither [Mother] nor [Father] attended any child and family team meetings that were held to

> discuss issues related to [David]. Notices of the meetings were mailed to [Mother] and [Father] at the last address that CCDSS had on file and it is unlikely that either actually received any of those notices due to the instability of their living arrangements.
>
> . . . .
>
> 56. [Mother] and [Father] had the ability to take appropriate action to make reasonable progress under their circumstances to correct the conditions that led to the removal of [David].

The above unchallenged findings of fact "are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. These findings show that, during the relevant six-month period prior to the filing of the petition, Mother: "had not seen or visited [David]"; did not request any visits with David; "did not have any telephone contact with [David] and did not communicate with [David] in any other manner"; failed to respond to a letter written to her by David; did not provide any gifts, cards, or letters to David; provided no financial support for David; "was a regular user and abuser of illegal controlled substances"; failed to appear for drug screenings when requested by CCDSS; admitted to testing positive for illegal controlled substances on multiple drug screenings at Coastal Horizons; and failed to complete the majority of her case plan with CCDSS. These unchallenged findings of fact support the challenged findings of fact 57 and 58. Additionally, there is clear, cogent, and convincing record evidence, in the form of court reports from CCDSS, court reports from the GAL, and testimony from the CCDSS social worker and Mother to support the challenged findings of fact 57 and 58.

Moreover, contrary to Mother's assertion that the trial court failed to consider her limitations and failed to make findings regarding those limitations, the trial court's unchallenged adjudicatory findings 31, 32, 35, 39, 40, 43, 45, 47, and 54 show that the trial court appropriately considered Mother's history and circumstances. The clear, cogent, and convincing record evidence, along with the trial court's adjudicatory findings of fact, support that Mother made no effort to contact David in any manner during the relevant six-month period and took no action to show any "love, affection, and parental concern" for David. *In re A.G.D.*, 374 N.C. at 320.

As Mother's behavior evinces a "complete failure to show any interest" in David, *In re L.L.M.*, 375 N.C. 346, 353 (2020), the trial court

thus properly determined that she willfully abandoned David and terminated Mother's parental rights. Because the trial court properly terminated Mother's parental rights on one ground, we need not address her arguments as to the ground of willful failure to make reasonable progress in correcting the conditions that led to David's removal. *See In re B.S.D.S.*, 163 N.C. App. 540, 546 (2004) ("Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground . . . found by the trial court.").

III. Conclusion

The trial court's challenged findings of fact that are supported by clear, cogent, and convincing evidence, together with the unchallenged findings of fact, support the trial court's conclusion of law that Mother willfully abandoned David for the six-month period of time preceding CCDSS's filing of the TPR Petition. Mother does not challenge the trial court's conclusion that it was in David's best interest to terminate Mother's parental rights. We thus affirm the trial court's orders.

AFFIRMED.

Chief Judge DILLON and Judge FLOOD concur.

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM VIRGINIA LEE GODFREY AND HARRY CRAIG DEES, II A/K/A H. CRAIG DEES, II, IN THE ORIGINAL AMOUNT OF $150,000.00, PAYABLE TO RBC CENTURA BANK, DATED OCTOBER 31, 2003 AND RECORDED ON NOVEMBER 11, 2003 IN BOOK RB 3260 AT PAGE 103, ORANGE COUNTY REGISTRY, TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA24-100

Filed 5 March 2025

Mortgages and Deeds of Trust—non-judicial foreclosure—home equity line of credit—valid debt and right to foreclose—forged signatures on loan documents—ratification of debt and deed of trust

In a non-judicial foreclosure proceeding following the default on a home equity line of credit (HELOC), which was secured by a deed of trust encumbering a property owned by a married couple until they divorced, at which point the wife (respondent) was awarded sole title to both the property and the HELOC, the trial

court erred in finding that the HELOC was not a valid debt and that the holder of the HELOC note (petitioner) had no right to foreclose on the property based on respondent's testimony that her signatures on the HELOC loan documents were forged. Despite respondent's claims of forgery, petitioner still met its burden of showing that the HELOC and the deed of trust were valid by introducing evidence that respondent ratified both by: acknowledging the HELOC as a valid marital debt in her verified complaint for divorce and equitable distribution, making several monthly payments on the HELOC loan, entering into (and benefitting from) subordination agreements related to the HELOC, and using the HELOC debt to satisfy a prior loan.

Judge HAMPSON dissenting.

Appeal by petitioner from an order entered 30 May 2023 by Judge Alyson Grine in Orange County Superior Court. Heard in the Court of Appeals 23 October 2024.

Brock & Scott, PLLC, by Alan M. Presel, for petitioner-appellant Paper Profits, LLC.

Buckmiller, Boyette & Frost, PLLC, by Joseph Z. Frost, for respondent-appellee Virginia Lee Godfrey.

DILLON, Chief Judge.

I. Background

Trustee Services of Carolina, LLC, (the "Trustee") is the substitute trustee on a deed of trust encumbering a homestead consisting of approximately sixty acres in Orange County (the "Property"). This deed of trust was purportedly executed in 2003 by the Property owners, Borrowers Virginia Lee Godfrey and Harry Craig Dees, II, for the purpose of securing a home equity line of credit (a "HELOC"). Petitioner Paper Profits LLC is the holder of the HELOC note secured by the deed of trust.

In 1998, Borrowers purchased the Property as tenants by the entirety. Five years later, in 2003, Borrowers purportedly obtained a HELOC secured by the deed of trust described in the paragraph above. In 2018, Ms. Godfrey brought a separate action against Mr. Dees for

divorce and equitable distribution. In 2020, Ms. Godfrey was awarded sole title to the Property and to the HELOC debt in that domestic action.

In 2021, Petitioner initiated this foreclosure based on a default in payment on the 2003 HELOC. After a hearing on the matter, the trial court concluded that Petitioner had no right to foreclose, based on Ms. Godfrey's contention asserting that her signatures on the 2003 HELOC loan documents were forged. Petitioner appeals from an order denying its right to foreclose.

II. Analysis

A non-judicial foreclosure under Section 45-21.16 of our General Statutes may not be ordered unless the clerk or judge finds the existence of all six elements set forth in subsection (d) of that Section. Otherwise, it is the duty of the clerk or judge to deny foreclosure.

In reviewing a superior court's order under N.C.G.S. § 45-21.16(d1), "this Court first determines whether the superior court applied the proper scope of review. If so, then this Court decides only whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Garvey*, 241 N.C. App. 260, 263–64 (2015) (citations and quotation marks omitted). On appeal, conclusions of law are reviewable *de novo*. *In re Bass*, 366 N.C. 464, 467 (2013).

Pursuant to Section 45-21.16(d),

> If the clerk finds the existence of **(i) valid debt** of which the party seeking to foreclose is the holder, (ii) default, **(iii) right to foreclose** under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

(Emphasis added).

Based on Ms. Godfrey's testimony that she did not sign the HELOC note in 2003, the court did not find the existence of a valid debt under subsection (i). And based on her testimony that she did not sign the HELOC deed of trust, the court did not find that the Trustee had a right to foreclose under subsection (iii).

On appeal, Petitioner argues, in part, that even if it failed to prove that Ms. Godfrey, herself, had signed the HELOC note and deed of trust in 2003, she is still bound under those documents based on the evidence that she "ratified" the 2003 HELOC through her subsequent actions. Indeed, our Supreme Court adopted a dissent from our Court, which reasoned that a party may ratify an agreement (s)he may not have signed by retroactively authorizing or otherwise approving it, either expressly or by implication. *See Goodwin v. Webb*, 357 N.C. 40 (2003) (adopting the dissenting opinion from our Court). Specifically, the dissenting judge, whose opinion was adopted by our Supreme Court, stated:

> A party ratifies an agreement by retroactively authorizing or otherwise approving it either expressly or by implication. Thus, ratification can occur where a party accepts benefits and performs under an agreement. The act only constitutes ratification if it is done with full knowledge that the acceptance of benefits or the performance arises pursuant to the agreement and is done so without any duress.

Goodwin v. Webb, 152 N.C. App. 650, 656–57 (2002) (Greene, J., dissenting) (citations and quotation marks omitted). *See also Link v. Link*, 278 N.C. 181, 197 (1971) (party bound by agreement she ratifies even if originally procured by fraud or duress).

Before considering Petitioner's "ratification" argument, we first address Ms. Godfrey's contention that an argument based on ratification is not appropriate for a foreclosure hearing held pursuant to N.C.G.S. § 45-21.16. Ms. Godfrey contends that an argument based on "ratification" is *equitable* in nature and, therefore, is not appropriate for consideration in a Section 45-21.16 hearing before the clerk (or before the superior court on review). Rather, she contends, equitable arguments may only be considered in a separate proceeding brought directly before a superior court judge under Section 45-21.34, which provides the procedure to seek an order to enjoin a foreclosure sale on equitable grounds.

It is true, as stated by our Supreme Court, that "[e]quitable defenses to foreclosure . . . may not be raised in a hearing pursuant to N.C.G.S. § 45-21.16 or on appeal therefrom but must be asserted in an action to

enjoin the foreclosure sale under N.C.G.S. § 45-21.34." *In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 374 (1993). We note that our Supreme Court has described "ratification" as equitable in nature at times, *see Maynard v. Moore*, 76 N.C. 158, 164–65 (1877) (stating that "this defense is purely equitable"), and as legal in nature at times, *see Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 193 (1977) (describing ratification as "a doctrine of the common law, not of equity.").

But we conclude that it makes no difference whether Petitioner's ratification argument is equitable in nature or legal in nature, as Petitioner is not seeking to enjoin the foreclosure. Rather, it is Petitioner who is seeking an order to allow the foreclosure to proceed. And Petitioner is merely trying to meet its burden of demonstrating that the 2003 HELOC note and deed of trust are valid through evidence that Ms. Godfrey either signed those documents or otherwise ratified her signatures thereon placed by someone else, perhaps by her then-husband Mr. Dees. And we have held it is appropriate for a trustee/lender in meeting its burden in a Section 45-21.16 hearing, to show the existence of a valid debt and deed of trust to offer evidence that the borrower ratified the documents (s)he claims (s)he did not actually sign. *See, e.g.*, *Espinosa v. Martin*, 135 N.C. App. 305, 308–10 (1999) (considering a bank's ratification argument in the context of an appeal from a Section 45-21.16 hearing); *In re Davis*, 266 N.C. App. 240, *16 (2019) (unpublished) (holding deed of trust was valid in the context of a Section 45-21.16 hearing based on ratification). Accordingly, we hold it is proper for Petitioner to meet its burden of demonstrating the validity of the HELOC note and deed of trust based on evidence that Ms. Godfrey ratified those documents in a Section 45-21.16 hearing.

Petitioner argues that several items in the record point to Ms. Godfrey's ratification of the 2003 HELOC.

First, Petitioner points to Ms. Godfrey's filings in her 2018 domestic proceeding against Mr. Dees. In her *verified* 2018 domestic complaint, she avers and swears to the court that there were "two jointly held debt obligations secured by the [Property]; a home mortgage [obtained from Carolina Farm Credit in 2013] with . . . a current outstanding balance of $660,845.29 . . . and [the 2003 HELOC] held by [RBC Centura's successor entity] with a current outstanding balance of $150,000." In that verified complaint, she requested the district court to divest Mr. Dees of his interest in the marital Property, including the marital HELOC debt. The court eventually agreed and awarded Ms. Godfrey the Property, including the HELOC debt. This evidence is Ms. Godfrey's sworn testimony affirming the HELOC debt was a valid debt and was a marital debt. It shows her

acknowledgement that the $150,000 was advanced to Ms. Godfrey and her then-husband for their use in the marriage. Also, she represented in that proceeding that she had personally made several monthly payments due on the HELOC note. In sum, this evidence is proof of ratification.

Additionally, there is evidence in the record tending to show that Ms. Godfrey and her then-husband requested that RBC Centura subordinate its 2003 HELOC deed of trust to deeds of trust subsequently recorded to secure term mortgage loans. For instance, in 2007, Borrowers' 2002 term mortgage loan came due. They refinanced that debt with a new term mortgage loan, which appeared to be conditioned by the new lender on the 2003 HELOC deed of trust being subordinated to the new 2007 term mortgage loan. Indeed, the record reflects that RBC Centura did subordinate its 2003 HELOC deed of trust to Borrowers' 2007 term loan for Borrowers' benefit. RBC Centura's successor, again, subordinated its 2003 HELOC deed of trust in 2013 when Borrowers again refinanced its term mortgage loan, this time with Carolina Farm Credit.

Further, there is evidence in the record that shows that the proceeds of a previous HELOC loan was satisfied with the 2003 HELOC, representing evidence that Ms. Godfrey benefited from the 2003 HELOC.

Ms. Godfrey does not deny the validity of these other loans.

In sum, we view the evidence as *conclusively* establishing that Ms. Godfrey, through her actions, ratified the 2003 HELOC note and deed of trust, such that she is bound by those documents, notwithstanding that she might not have actually signed those documents herself.

III. Conclusion

We conclude that the superior court erred by failing to find the existence of a valid debt against Ms. Godfrey and of Petitioner's right to foreclose. We, therefore, reverse the order of the superior court and remand with instructions to enter an order authorizing foreclosure under the 2003 HELOC deed of trust.

REVERSED.

Judge TYSON concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

Both the Clerk of Orange County Superior Court and—following a *de novo* hearing in Superior Court—the trial court found there was insufficient evidence to support a conclusion Respondent ratified the Deed of Trust or the HELOC Debt. Properly applying the standard of review in this case, the trial court's findings are supported by evidence in the Record and, in turn, support the conclusion Respondent did not ratify the HELOC Debt. *See In re Garvey*, 241 N.C. App. 260, 263-64, 772 S.E.2d 747, 750 (2015) (Where the trial court properly undertakes a de novo review, "this Court decides only 'whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.' " (quoting *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011)) (internal quotation marks omitted)).

Ultimately, in this case, the dispositive issue is whether there is evidence which supports the trial court's conclusion Respondent did not ratify the HELOC Debt and Deed of Trust. This is so even presuming—without deciding—ratification is validly raised in these proceedings by Petitioner. The trial court directly addressed this very question, finding even if ratification was applicable:

> 11. The doctrine of ratification, raised by [Petitioner], does not bar or preclude [Respondent] from challenging and contesting the validity of the indebtedness evidenced by, and the ability of [Petitioner] to foreclose under, the Loan Documents.
>
> 12. There is no evidence, in the record or otherwise, that [Petitioner] ratified the transaction evidenced by the Loan Documents through her actions, conduct, or otherwise. Specifically, there is no evidence that [Petitioner] (i) received, directly or indirectly, any portion of the proceeds from the Loan, (ii) was aware—and had knowledge—of her forged signature on the Loan Documents prior to the commencement of the above-captioned special proceeding, and (iii) benefitted—directly or indirectly—from the transaction evidenced by the Loan Documents. No portion of the proceeds generated and extended pursuant to the Loan were utilized to purchase the Property.

Indeed, the trial court's Findings generally track similar findings made by the trial court and relied on by this Court in *Espinosa*:

> The superior court found no evidence that any portion of the loan proceeds passed to the Espinosas, or that they knew of the loan transactions until the foreclosure was instituted and those findings are supported by competent evidence. Further, there was no evidence that Charles E. Cagle acted as agent of the Espinosas in obtaining the loan secured by their real property, and no evidence that any legal obligation of the Espinosas was satisfied from the loan proceeds. Further, the trial court found that none of the loan proceeds were used to purchase the real property deeded to the Espinosas, and that they did not directly or indirectly benefit from the loan transactions in any way. Those additional findings are also supported by competent evidence of record. The trial court concluded that the Bank failed to prove by the greater weight of the evidence that "Jaime [sic] and Cheri Espinosa, or either of them, knew all of the facts material to the loans in question prior to the time of the institution of this foreclosure proceeding." Further, the trial court concluded that the Espinosas "did not ratify any of the transactions or documents associated with the loans in question."
>
> . . . .
>
> Here, there is no finding that Charles E. Cagle, or anyone else, acted as an agent for the Espinosas in the loan transactions; nor that they received, directly or indirectly, any of the loan proceeds; nor that they had any knowledge that anyone had signed their names on the loan documents until the foreclosure proceeding was instituted against them.

Espinosa v. Martin, 135 N.C. App. 305, 309-10, 520 S.E.2d 108, 111-12 (1999). There, this Court held these findings—themselves supported by evidence—supported the determination the Espinosas had not ratified the loan transactions in that case. I would conclude, here, the trial court's findings also support its conclusion Respondent did not ratify the loan and deed of trust in this case.

Moreover, the evidence in the Record supports the trial court's Findings in the case *sub judice*. Indeed, the majority takes no direct issue with any of the trial court's Findings in this regard. Instead, the majority points to two items in the Record it asserts are "conclusive proof of ratification." However, reliance on either item is unavailing.

Certainly neither item is conclusive proof—separately or together—justifying overturning the trial court's role as fact-finder.

First, reliance on the subsequent subordination agreements is a red herring. Respondent is not contesting the subsequent loans that were given priority over the HELOC. The Record is clear Respondent was *not* a signatory to the subordination agreements themselves. Petitioner points to no evidence Respondent was even aware of the subordination agreements. Moreover, nothing about the subordination of the HELOC Debt provides any determination as to its validity or demonstrates the unequivocal intent by Respondent to affirm the subordinated Debt. *See Espinosa*, 135 N.C. App. at 309, 520 S.E.2d at 111 ("[T]o constitute ratification as a matter of law, the conduct must be consistent with an intent to affirm the unauthorized act and inconsistent with any other purpose." (internal quotations and citation omitted) (alteration in original)).

Petitioner, and the majority, also relies on the earlier equitable distribution proceedings—such as they were. Petitioner argues those proceedings constitute an affirmation the HELOC Debt was both a valid debt and marital debt. However, the equitable distribution proceedings established no such thing, and this contention is wholly unsubstantiated by the Record.

Again, the trial court also addressed this issue in the context of Petitioner's estoppel claims, in part noting specifically: "The issues [] raised, determined, and actually litigated in the Domestic Action did not include: (1) whether the indebtedness arising under the Loan Documents was valid[.]" The trial court further found Respondent "has not taken any position inconsistent with any position previously taken or maintained in the Domestic Action" and "did not assert, during the Domestic Action or otherwise, that she signed and executed the Loan Documents, or that the Loan Documents and indebtedness arising therefrom, were valid, enforceable, and complied with the applicable requirements of North Carolina law[.]"

Review of the equitable distribution proceeding documents in the Record before us underscores the trial court's findings. First, it is clear there was no allegation, proof, or judicial determination in the equitable distribution proceeding that the HELOC was a "valid" debt. The issue of the debt's validity or invalidity was plainly not at issue.

Crucially, moreover, there is no determination in the equitable distribution proceeding the HELOC Debt is "marital debt." To the contrary, the verified pleading, interim distribution, ultimate equitable distribution judgment, and order transferring the property each only describe

the debt as "jointly held." This is significant because the mere fact debt is "jointly held" does not automatically mean the debt constitutes marital debt. It is fundamental that "[t]itle is not controlling in determining whether an asset is marital property[.]" *Hill v. Hill*, 229 N.C. App. 511, 518, 748 S.E.2d 352, 358 (2013); *Richter v. Richter*, 271 N.C. App. 644, 659, 845 S.E.2d 99, 109 (2020) ("[T]reatment of property for tax purposes or in another legal context may not control its classification for purposes of equitable distribution." (citation omitted)).[1]

To the contrary, the facts of this case all point to the conclusion the "jointly held" HELOC Debt was not, in fact, marital debt. " 'Regardless of who is legally obligated for the debt, for the purpose of an equitable distribution, a marital debt is defined as a debt incurred during the marriage for the *joint benefit* of the parties.' " *Wornom v. Wornom*, 126 N.C. App. 461, 465, 485 S.E.2d 856, 859 (1997) (emphasis in original) (quoting *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987)). Here, there is no evidence of any joint benefit received by the marital estate—or even Respondent herself—from the HELOC Debt. Rather, there have been a number of judicial fact-finding determinations there was no such joint benefit or benefit to Respondent.

Thus, the evidence of Record supports the trial court's factual Findings. Those Findings, in turn, support the trial court's Conclusion Respondent did not ratify the HELOC Debt or Deed of Trust securing the debt. Consequently, the trial court's order denying foreclosure under N.C. Gen. Stat. § 45-21.16(d) on the basis there was insufficient evidence of a valid debt or a right to foreclose under the Deed of Trust is properly affirmed. Accordingly, I respectfully dissent.

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1. This, to be sure, was likely a product of how the equitable distribution proceeding arose in the first place. Respondent's former husband allegedly abandoned her and made his whereabouts unknown contemporaneously to being investigated by the Securities and Exchange Commission for misappropriating funds from his company. Respondent's former husband did not appear in the equitable distribution action. The result was quite limited fact-finding in the equitable distribution action. Respondent required the marital home which secured the debt be distributed to her in order to refinance or extinguish any debts allegedly secured by that property. This is a far cry from ratifying the HELOC Debt. To the contrary, the pleadings and orders in the equitable distribution reflect an intent to expressly not resolve the issue of whether the HELOC was marital debt or not.

IN RE S.W.

[298 N.C. App. 39 (2025)]

IN THE MATTER OF S.W.

No. COA24-737

Filed 5 March 2025

1. Appeal and Error—interlocutory orders—denial of motion to abate action—immediately appealable—related issues reviewed by writ of certiorari

In a termination of parental rights action, although the trial court's orders denying a guardian ad litem's (GAL's) motions to dismiss, transfer venue, and hold the matter in abeyance and denying respondent-mother's motion to dismiss were interlocutory (because they were made during the pendency of the case and did not dispose of the case), the appellate court determined that it would reach the merits of the arguments raised against the trial court's orders. First, a refusal to abate an action was immediately appealable; second, where the GAL challenged the trial court's jurisdiction by raising the prior pending action doctrine, which was interrelated to the GAL's other arguments on appeal, the appellate court elected to treat the GAL's brief and record on appeal as a petition for writ of certiorari and to grant the writ in order to address the merits of all claims raised.

2. Termination of Parental Rights—jurisdiction—underlying juvenile case in different county—statutory requirements met—prior pending action doctrine inapplicable

The Brunswick County district court had jurisdiction over a termination of parental rights action even though an underlying juvenile proceeding remained pending in Cumberland County (where a guardian had been appointed for the minor child). A trial court's jurisdiction over an abuse, neglect, or dependency action is distinct from jurisdiction over a termination of parental rights action and, here, the jurisdictional requirements in N.C.G.S. § 7B-1101 for a termination petition had been met; therefore, Cumberland County did not have exclusive, original jurisdiction over the termination action, which had been filed in Brunswick County where the minor child, the child's guardian, and other witnesses resided. Further, the prior pending action doctrine was inapplicable because the subject matter, issues, and relief sought were different between the underlying juvenile proceeding and the termination proceeding. Therefore, the Brunswick County court did not err by denying the guardian ad litem's motions to dismiss the petition for lack of jurisdiction and to hold the matter in abeyance.

3. Termination of Parental Rights—denial of motion to change venue—trial court's discretion—statutory findings not required

In a termination of parental rights (TPR) matter, the trial court did not abuse its discretion by denying the guardian ad litem's (GAL's) motion to change venue from the county in which the TPR petition was filed (Brunswick) to the county where an underlying juvenile case was pending (Cumberland). Regardless of which transfer of venue provision applied—N.C.G.S. § 7B-900.1(a) in the Juvenile Code for post-adjudication transfers, or N.C.G.S. § 1-83(2) in the Civil Procedure statutes—there was no showing that the ends of justice demanded a change of venue or that failure to transfer venue would deny the GAL a fair trial. The GAL's concerns about having to travel to Brunswick County for the TPR proceedings did not rise to the level of requiring a change of venue and, further, the minor child, the child's guardian, and other witnesses all resided in Brunswick County. Finally, the trial court was not required to make statutory findings when denying a motion to transfer venue.

Appeal by guardian ad litem from orders entered 16 May 2024 by Judge Pauline Hankins in Brunswick County District Court. Heard in the Court of Appeals 12 February 2025.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, and GAL Staff Attorney Hope Connie Wertz, for appellant guardian ad litem.

No brief filed for petitioner-appellee.

No brief filed for respondents-appellees.

FLOOD, Judge.

The guardian ad litem (the "GAL") appeals from the trial court's orders denying the GAL's: motion to dismiss Petitioner's petition to terminate Respondent-Mother's parental rights (the "Petition"), motion to transfer venue, and motion to hold the matter in abeyance. On appeal, the GAL argues: (A) the trial court erred in denying the GAL's motion to dismiss the Petition and motion to hold the matter in abeyance, because Cumberland County maintains exclusive, continuing jurisdiction, and the prior pending action doctrine prevents the Brunswick County trial court (the "Brunswick court") from hearing the Petition; and (B) the trial court abused its discretion in failing to transfer venue

from Brunswick to Cumberland County. Upon review, we conclude the Brunswick court did not err in denying the GAL's motion to dismiss the Petition and motion to hold the matter in abeyance, because Brunswick County properly has jurisdiction over the termination action, and the prior pending action doctrine is inapplicable. We further conclude the Brunswick court did not abuse its discretion in denying the GAL's motion to transfer venue because the Brunswick court was not required to make statutory findings.

I. Factual and Procedural Background

On 4 December 2017, Cumberland County Department of Social Services ("DSS") filed a petition alleging the minor child, S.W. ("Sutton"),[1] was neglected and dependent, and that same day, Sutton was placed in DSS custody. On 6 March 2018, the Cumberland County district court (the "Cumberland court") entered an order adjudicating Sutton a dependent juvenile.

On 15 March 2019, the Cumberland court placed Sutton in the custody and guardianship of Sutton's paternal grandmother. On 27 January 2022, the paternal grandmother filed a motion for review, seeking to dissolve the guardianship and have Petitioner, Sutton's "godmother," be granted guardianship of Sutton. In an order entered 7 June 2022 (the "June 2022 Order"), the Cumberland court appointed Petitioner as Sutton's guardian. The Cumberland court waived further review hearings but retained jurisdiction.

On 9 February 2023, Petitioner filed, in the Brunswick court, the first petition to terminate Respondent-Mother's and Respondent-Father's (collectively, "Respondent-Parents") parental rights in Sutton (the "First Petition"). On 28 August 2023, Respondent-Mother filed a motion to dismiss the First Petition based on a lack of subject matter jurisdiction and improper venue, arguing in relevant part that the June 2022 Order did not terminate the proceedings or transfer jurisdiction to the Brunswick court.[2]

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1. A pseudonym is used to protect the juvenile's identity, pursuant to N.C. R. App. P. 42(b).

2. On 6 September 2023, Respondent-Mother filed a motion for review with the Cumberland court, seeking to modify visitation with Sutton, and on 10 October 2023, filed an amended motion for review with the Cumberland court, alleging Petitioner had misled the trial court and she was not fit to be Sutton's guardian, and requested the guardianship be dissolved. The matter was heard on 7 October 2024, but no written order had been entered by the time the GAL's brief was filed, and no written order is contained in the Record on appeal.

On 11 October 2024, the Brunswick court entered an order denying Respondent-Mother's motion to dismiss the First Petition, finding in relevant part that: Respondent-Parents were properly served with the First Petition; at the time the First Petition was filed, Sutton lived in Brunswick County; Brunswick County had proper subject matter jurisdiction; and Brunswick County was the proper venue for the termination action. On 21 November 2023, DSS filed a motion with the Brunswick court to intervene and change venue to Cumberland County. DSS argued, in relevant part, that there was a pending action pre-existing the First Petition in the Cumberland court over which Cumberland County had jurisdiction, and Petitioner had misinformed the Brunswick court in her First Petition that no other custody order regarding Sutton existed.

The next day, on 22 November 2023, the GAL filed motions with the Brunswick court to be appointed as representative of Sutton, and to consolidate the existing Cumberland court case and the Brunswick court termination action to be heard in the Cumberland court. The GAL argued, in relevant part, that Cumberland County had retained jurisdiction, and no party had sought to transfer jurisdiction or venue. On 13 December 2023, the GAL filed a Rule 60 motion seeking relief from the Brunswick court's denial of Respondent-Mother's motion to dismiss the First Petition.

On 18 December 2023, Petitioner: filed motions to dismiss DSS's motion to change venue and motion to intervene, the GAL's motion to consolidate, and the Rule 60 motion; and filed an amended petition, acknowledging the Cumberland court case concerning her guardianship of Sutton. On 16 January 2024, the GAL was appointed to represent Sutton in the Brunswick court termination action. Subsequently, on 18 January 2024, the GAL filed a motion to change venue to Cumberland County, and filed another Rule 60 motion.

On 7 February 2024, Petitioner took "a voluntary dismissal without prejudice of" the First Petition, and that same day, filed the Petition, which also acknowledged the Cumberland County proceedings. On 20 March 2024, Respondent-Mother filed a motion to dismiss the Petition, and the GAL filed a motion to dismiss the Petition and motion to transfer venue. In their motions, both parties reiterated their prior arguments as to subject matter jurisdiction and venue that they had made in response to the First Petition.

The Brunswick court held a hearing on the motions on 27 March 2024. The GAL argued, in relevant part, that: jurisdiction over the prior pending child welfare action in Cumberland County had not been

terminated, which deprived the Brunswick court of jurisdiction to hear the termination petition; it was in Sutton's best interests to hear the case in Cumberland County; and travel from Cumberland County to Brunswick County would be inconvenient.[3] The GAL requested the Brunswick court hold the termination action in abeyance due to the prior pending action doctrine. In response, Petitioner argued that: guardians frequently move to terminate parental rights in counties other than the county where guardianship is awarded, and it was in Sutton's best interests to hear the termination action in Brunswick County because "[a]ll of the witnesses, all of the individuals that actually have anything to do with" Sutton lived in Brunswick County.

On 16 May 2024, the Brunswick court entered orders denying the GAL's motions to dismiss, transfer venue, and hold the matter in abeyance; and denying Respondent-Mother's motion to dismiss. The GAL timely appealed.

II. Jurisdiction

[1] As a preliminary matter, the orders from which the appeal is taken are interlocutory, because the orders were "made during the pendency of an action and d[id] not dispose of the case, but instead l[eft] it for further action by the trial court in order to settle and determine the entire controversy[.]" *Carriker v. Carriker*, 350 N.C. 71, 73 (1999). "As a general proposition, there is no right of immediate appeal from interlocutory orders and judgments." *Jesse v. Jesse*, 212 N.C. App. 426, 431 (2011) (citation and internal quotation marks omitted).

> A trial court's refusal to abate an action based upon the prior pending action doctrine is . . . immediately appealable. On the other hand, a trial court order's refusal to dismiss a complaint for lack of subject matter jurisdiction is not subject to appellate review on an interlocutory basis as a matter of right.

Id. at 431.

Here, "given the necessity for us to address the 'prior pending action' issue on the merits[,]" and "given the interrelated nature" of the GAL's challenges to the trial court's orders, this Court elects to treat the Record on appeal and the GAL's brief as a petition for writ of certiorari with

3. Respondent-Mother argued that the Petition failed to recognize the Cumberland court case was still pending, and that the law did not allow a private party to file a termination petition in one county while a child welfare case was pending in another county.

respect to the exclusive jurisdiction issue "in order to reach the merits of [Petitioner's] challenges to the trial court's order[s,]" and will address Petitioner's claims on the merits. *See id.* at 431.

III. Analysis

On appeal, the GAL argues: (A) the trial court erred in denying the GAL's motion to dismiss the Petition and motion to hold the matter in abeyance, because Cumberland County maintains exclusive, continuing jurisdiction, and the prior pending action doctrine prevents the Brunswick court from hearing the Petition; and (B) the trial court abused its discretion in failing to transfer venue from Brunswick to Cumberland County. We address each argument, in turn.

A. Motion to Dismiss

[2] The GAL first argues the Brunswick court erred in denying its motion to dismiss and motion to hold the matter in abeyance because the Cumberland court retains exclusive, continuing jurisdiction under the Juvenile Code, and the prior pending action doctrine prevents the Brunswick court from hearing the Petition. We disagree.

"A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461 (2004) (citation omitted). "[T]his Court reviews *de novo* whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted." *Lovett v. Univ. Place Owner's Ass'n*, 285 N.C. App. 366, 368 (2022) (citation omitted) (cleaned up). "This Court considers the allegations in the complaint as true, construes the complaint liberally, and only reverses the trial court's denial of a motion to dismiss if the plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* at 368 (citation omitted) (cleaned up).

"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 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Kassel v. Rienth*, 289 N.C. App. 173, 183 (2023) (citation and internal quotation marks omitted). We first consider the GAL's argument that the Cumberland court retains exclusive, continuing jurisdiction.

1. Exclusive District Court Jurisdiction

Under Chapter 7B of the Juvenile Code, the trial court "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C.G.S. § 7B-200(a)

(2023). Such "jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C.G.S. § 7B-201(a) (2023). Separate and apart from these provisions, the trial court also has "exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in . . . the district at the time of filing of the petition or motion." N.C.G.S. § 7B-1101 (2023); *see also In re O.E.M.*, 379 N.C. 27, 35 (2021) ("A petitioner or movant must satisfy distinct requirements to vest a trial court with jurisdiction to conduct a juvenile proceeding on the one hand and a termination proceeding on the other.").

Our Supreme Court, in recent opinions, has provided that a trial court's jurisdiction over abuse, neglect, or dependency proceedings is distinct from a trial court's jurisdiction over termination of parental rights proceedings. In *In re A.L.L.*, after the Davidson County trial court entered an order adjudicating the minor child a dependent juvenile, the Davidson County trial court appointed the petitioners as the minor child's legal guardians. 376 N.C. 99, 102–03 (2020). The petitioners thereafter "filed a petition seeking to terminate [the] respondent's parental rights in [the trial court.]" *Id.* at 103. On appeal, the respondent-parents argued that the trial court lacked subject matter jurisdiction over the termination of parental rights case, where the Davidson County trial court had previously entered an order establishing the petitioners as the minor child's guardians. *Id.* at 103. Our Supreme Court rejected the respondent-parents' arguments, holding that the requirements of N.C.G.S. § 7B-1101 were satisfied, such that subject matter jurisdiction over the termination of parental rights case was conferred to the trial court. *Id.* at 105. The Court explained that "although the Juvenile Code permits [the] petitioners to seek termination in the same district court that is simultaneously adjudicating an underlying abuse, neglect, or dependency petition, the statutory language does not mandate filing in a single court." *Id.* at 105. The Court then explained that "if the requirements of N.C.G.S. § 7B-1101 have been met in one county, then a district court in that county has jurisdiction, even if an abuse, neglect, or dependency action *is pending in another county*." *Id.* at 105 (emphasis added).

Our Supreme Court reached an identical result in *In re M.J.M.*, 378 N.C. 477 (2021). Relying on its reasoning in *In re A.L.L.*, the Court concluded that: where a termination of parental rights petition was filed in Robeson County, while Wake County "obtained and retained" jurisdiction over the underlying juvenile case, "the requirements of N.C.G.S. § 7B-1101 were satisfied so as to confer jurisdiction over the termination

petition in the [d]istrict [c]ourt in Robeson County." *See In re M.J.M.*, 378 N.C. at 479–81. Finally, in *In re O.E.M.*, our Supreme Court reiterated that a trial court's "jurisdiction does not continue from the underlying juvenile proceeding to a subsequent termination proceeding." 379 N.C. at 37. The Court provided, in relevant part, that "[t]here is nothing anomalous about requiring a party to establish that the trial court possessed jurisdiction to conduct a termination proceeding even when the court previously had jurisdiction to conduct a juvenile proceeding—it is simply what our juvenile code requires." *Id.* at 37.

Here, the facts are analogous to those in *In re A.L.L.* Just like in *In re A.L.L.*, where an abuse, neglect, or dependency action was pending in one county and the petition to terminate parental rights was filed in another county, Petitioner was granted custody of Sutton in Cumberland County, where Sutton's underlying juvenile case is pending, and the Petition was filed in a different county, Brunswick County. 376 N.C. at 102–03. Further, just like in *In re A.L.L.*, the jurisdictional requirements of N.C.G.S. § 7B-1101 were met for Brunswick County to obtain jurisdiction over the Petition.[4] *Id.* at 105; *see also* N.C.G.S. § 7B-1101. Just as our Supreme Court explained that, so long as the requirements of N.C.G.S. § 7B-1101 are satisfied, "a district court in that county has jurisdiction, even if an abuse, neglect, or dependency action *is pending in another county*[,]" so here does Brunswick County have jurisdiction over the Petition, even though the underlying juvenile case is pending in Cumberland County. *See In re A.L.L.*, 376 N.C. at 105 (emphasis added); *see also In re M.J.M.*, 378 N.C. at 479–81.

The GAL, however, cites *McMillan v. McMillan*, 267 N.C. App. 537 (2019), to argue that Brunswick County lacks jurisdiction to hear the Petition because the Cumberland court was required to terminate its jurisdiction under N.C.G.S. §§ 7B-200 and 7B-201(a). The GAL's reliance on *McMillan* is misplaced. In *McMillan*, the issue concerned whether the trial court had jurisdiction over a civil child custody action under Chapter 50 where there was a pending neglect proceeding under Chapter 7B. *Id.* at 542–43. This Court concluded that where the trial court retained jurisdiction over a neglect proceeding, it would need to either terminate jurisdiction under N.C.G.S. § 7B-201, or transfer the Chapter 7B action to a Chapter 50 action under N.C.G.S. § 7B-911, because child custody actions are automatically stayed when there is a pending Chapter 7B juvenile case. *See id.* at 543–46; *see also* N.C.G.S.

4. Brunswick County's jurisdiction over the Petition, pursuant to N.C.G.S. § 7B-1101, is not contested on appeal.

§ 7B-200(c)(1); N.C.G.S. §§ 50-13.1(i), 7B-911(a) (2023) ("Upon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to [Chapter 50].").

Here, unlike in *McMillan*, both the underlying juvenile case and the Petition involve different jurisdictional statutes under Chapter 7B, and do not involve a child custody action under Chapter 50. 267 N.C. App. at 542–43; *see also* N.C.G.S. §§ 7B-200, -1101. As our Supreme Court has established, jurisdiction for the underlying juvenile case is distinct from jurisdiction for the Petition; thus, even had the Petition been filed in the Cumberland court, jurisdiction to hear the Petition would have to have been established separately under N.C.G.S. § 7B-1101. *See In re O.E.M.*, 379 N.C. at 35, 37; *see also* N.C.G.S. §§ 7B-200, -1101; *In re A.L.L.*, 376 N.C. at 105 ("[A] trial court lacks jurisdiction over a termination petition if the requirements of N.C.G.S. § 7B-1101 have not been met, even if there is an underlying abuse, neglect, or dependency action concerning that juvenile in the district in which the termination petition has been filed."). Because the Petition does not involve a Chapter 50 child custody case, there is nothing contradictory in Cumberland County having jurisdiction over the underlying juvenile case while Brunswick County has jurisdiction over the termination action. *See In re A.L.L.*, 376 N.C. at 105. The Cumberland court therefore did not have "exclusive, original jurisdiction" over the termination action stemming from the Petition. *See* N.C.G.S. § 7B-200(a).

2. Prior Pending Action Doctrine

"Under the law of this state, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action." *Eways v. Governor's Island*, 326 N.C. 552, 558 (1990). "The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Cameron v. Cameron*, 235 N.C. 82, 84 (1952); *see also Jesse*, 212 N.C. App. at 438.

Here, there is no basis for requiring the Brunswick court to abate the termination of parental rights case under the prior pending action doctrine. The subject matter and issues are completely different: the underlying juvenile case in Cumberland County involves questions of guardianship for Sutton, while the termination of parental rights

case in Brunswick County involves the question of termination of Respondent-Parents' parental rights. Likewise, the relief demanded is distinct. The relief demanded under the underlying juvenile case involves only who will be the appointed guardian of Sutton; the relief demanded under the Petition involves the termination of all of Respondent-Parents' parental rights in Sutton. Because the subject matter, issues involved, and relief demanded in each action are distinct, the prior pending action doctrine does not serve to abate the termination of parental rights action. *See Cameron*, 235 N.C. at 84; *see also Eways*, 326 N.C. at 558.

Accordingly, because Cumberland County does not have "exclusive, original jurisdiction" over the termination action in Brunswick County, and the prior pending action doctrine is inapplicable under these facts, the trial court did not err in denying the GAL's motion to dismiss the Petition. *See* N.C.G.S. § 7B-200(a); *see also In re A.L.L.*, 376 N.C. at 105; *Cameron*, 235 N.C. at 84.

B. Motion to Transfer Venue

[3] The GAL next argues the Brunswick court abused its discretion in denying its motion to transfer venue because the Brunswick court did not consider the required statutory factors to transfer venue. We disagree.

"Whether to transfer venue . . . is a matter firmly within the discretion of the trial court and will not be overturned unless the court manifestly abused that discretion." *Smith v. Barbour*, 154 N.C. App. 402, 407 (2002) (citation omitted); *see also Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 607 (1979).

The Juvenile Code provides that:

> At any time after adjudication, the court on its own motion or motion of any party may transfer venue to a different county, regardless of whether the action could have been commenced in that county, if the court finds that the forum is inconvenient, that transfer of the action to the other county is in the best interest of the juvenile, and that the rights of the parties are not prejudiced by the change of venue.

N.C.G.S. § 7B-900.1(a) (2023). Similarly, under our Civil Procedure statutes, venue may be changed "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C.G.S. § 1-83(2) (2023). In light of these requirements, an abuse of discretion occurs when "the ends of justice will not merely be promoted by, but in addition demand, the change of venue[,]" or a "failure to grant the change of

venue will deny the movant a fair trial." *See Godley Constr. Co.*, 40 N.C. App. at 608–09 (citing N.C.G.S. §§ 1-84, -85 (2023)).

Here, regardless of whether the post-adjudication transfer of venue provision under our Juvenile Code, or the venue transfer provision under our general statutes, is binding, there is no showing that the "ends of justice . . . demand" a change of venue, nor that a failure to grant the change of venue will deny the GAL a fair trial. *See id.* at 608–09. The GAL's concerns about travel from Cumberland County to Brunswick County being inconvenient do not rise to the level that the "ends of justice . . . demand[ing]" a change of venue, nor is there any indication such inconvenience will deny the GAL a fair trial. *See id.* at 608–09. Further, the trial court's findings that Sutton had lived in Brunswick County for at least two years prior to the Petition, where all of the witnesses resided, and where the trial court could "hear from who's been involved in this child's life in the last two years[,]" supports that the trial court's denial of the GAL's motion to transfer venue does not rise to an abuse of discretion. *See Smith*, 154 N.C. App. at 407.

On appeal, the GAL argues that the Brunswick court did not consider the factors under N.C.G.S. § 7B-900.1(a) as to "whether the forum was inconvenient, whether transfer of the action to the other county was in [] Sutton's best interest, and whether the rights of the parties would not be prejudiced by the change of venue[,]" and did not consider any of the factors under N.C.G.S. § 1-83(2). Under N.C.G.S. § 7B-900.1(a), however, the trial court must make certain findings only if it decides to transfer venue, and not when it denies a motion to transfer venue. *See* N.C.G.S. § 7B-900.1(a). Similarly, N.C.G.S. § 1-83(2) provides for those instances when the trial court "may" change venue, but does not provide for what the trial court must consider when denying a motion to transfer venue. *See* N.C.G.S. § 1-83(2). The GAL's argument, therefore, is without merit.

Accordingly, because there is no showing the "ends of justice . . . demand" a change of venue, nor that a failure to grant the change of venue will deny the GAL a fair trial, and the Brunswick court was not required to make statutory findings, the Brunswick court did not abuse its discretion in denying the GAL's motion to transfer venue. *See Godley Constr. Co.*, 40 N.C. App. at 608–09; *see also Smith*, 154 N.C. App. at 407. We therefore affirm the Brunswick court's orders.

IV. Conclusion

Upon review, we conclude the Brunswick court did not err in denying the GAL's motion to dismiss the Petition and motion to hold the matter in abeyance, because Brunswick County properly has jurisdiction

over the termination action, and the prior pending action doctrine is inapplicable. We further conclude the Brunswick court did not abuse its discretion in denying the GAL's motion to transfer venue because the Brunswick court was not required to make statutory findings. Accordingly, we affirm the Brunswick court's orders.

AFFIRMED.

Chief Judge DILLON and Judge COLLINS concur.

YANLI JAY, Plaintiff-Appellee
v.
GARY WAYNE JAY, Defendant-Appellant

No. COA24-145

Filed 5 March 2025

Domestic Violence—protective order—findings of fact—competency of evidence—trial court's fact-finding duty

The issuance of a one-year domestic violence protective order (DVPO) against defendant on behalf of his ex-wife (plaintiff) was affirmed where competent evidence supported the trial court's findings of fact—which supported its conclusion that defendant committed acts of domestic violence against plaintiff—including that defendant committed second-degree rape when, on at least one occasion, he forced plaintiff to engage in rough sexual intercourse with him that caused her physical injury. When making its findings, the court did not delegate its fact-finding duty to plaintiff by relying on her typewritten statement (describing a violent sexual encounter with defendant) attached to her complaint and an exhibit (showing a text message exchange between the parties) that she introduced at the hearing on her DVPO motion, since the court also heard and considered testimony from both parties at the hearing. Even though plaintiff's exhibit was later determined to have been altered, the court specifically found that it was not done to willfully mislead the court and, even if the exhibit were stricken from the record, there was still ample evidence supporting the entry of a DVPO.

Judge CARPENTER dissenting.

JAY v. JAY

[298 N.C. App. 50 (2025)]

Appeal by defendant from order entered 17 August 2023 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 29 August 2024.

Law Offices of Matthew Charles Suczynski, by Matthew C. Suczynski, for defendant-appellant.

No brief filed for plaintiff-appellee.

ARROWOOD, Judge.

On 17 August 2023, the trial court entered a Domestic Violence Protective Order ("DVPO") in favor of Yanli Jay ("plaintiff") against her husband Gary Jay ("defendant"). Defendant filed notice of appeal on 15 September 2023.

I. Background

The parties were originally married on 15 April 2016 and separated in August 2022. Plaintiff filed a complaint and motion for DVPO on 7 June 2023, complaining of sexual abuse on several occasions, including 2 May and 9 May 2023, April 2023, 28 March 2023, 2 March 2023, and August 2022. A hearing on the motion took place on 17 August 2023, at which both parties testified.

Plaintiff stated that on 28 March 2023, defendant came to her house and without her approval, took his pants off in the living room and said "he was going to have sex with [her]." Plaintiff said "No, you can't do that[,]" but defendant "stuck his hand into [her] vagina[,]" which made plaintiff bleed. Plaintiff further stated that defendant "squeeze[d] [her] nipples[,]" which continued to hurt for two weeks. Plaintiff stated that defendant was violent "[e]very time we had the sex, it wasn't like we were husband and wife. It was like he was venting something, and it makes – it really hurt me." Plaintiff also testified that defendant rarely called her by her name, instead referring to her as "idiot, moron, bullshit, stupid, full of baloney." Plaintiff's Exhibit 1 was admitted as evidence and included the following text message exchange:

Plaintiff:	Celebrate Chinese New Year
Defendant:	You are looking better
	Now if you only really liked learning and were really interested in a real sex life
	See my sentence above- that is what I need aside from the beauty of the woman I married

Defendant testified that he had never sexually assaulted plaintiff in any way. Defendant confirmed that he had been with plaintiff on a number of the aforementioned dates, and that he had sex with her "[t]hree or four" times in the spring of 2023, but he described different circumstances than plaintiff's testimony. Defendant stated that the "[l]ast two years of the marriage were essentially nil. We had had sexual relations . . . six times in a year for two years. That's what, when I talk to patients, we call a dead bedroom." Despite this, defendant testified that he wanted to get back together with plaintiff and took her out to dinner in early April 2023. Defendant stated that after dinner, plaintiff suggested having sex and said "I did not treat you well. I want to treat you better now."

Defendant described subsequent dates in the following weeks: he averred that plaintiff sent him a text after one date "stating that she loved [him] and cherished [him] and all those things[,]" and gave him a pair of slippers after another. On a fourth date, however, defendant stated they did not have sex because he "was very depressed because [he] had been scammed on the computer and . . . lost a good bit of money from it[.]" Defendant stated that on 2 May he "just made love to her; she did not make love to me at all[,]" and on 9 May, plaintiff told him that she did not want to talk to or see him again. Defendant testified that he brought her a bouquet of roses and left.

After closing statements, the trial court found by the greater weight of the evidence that plaintiff had proven her case and subsequently entered the DVPO, effective for one year until 17 August 2024. The order included as attachments a typewritten statement by plaintiff signed on 7 May 2023 and plaintiff's Exhibit 1.

On 28 August 2023, defendant filed a motion to set aside the order and to show cause, arguing that plaintiff had presented altered evidence at trial. Defendant attached a screenshot of the text message exchange between the parties from Exhibit 1 with two messages that had been omitted from the exhibit:

> Plaintiff: Celebrate Chinese New Year
>
> [Smile Emoji]
>
> Defendant: You are looking better
>
> Now if you only really liked learning and were really interested in a real sex life
>
> Plaintiff: Gary, I still love you.
>
> Defendant: See my sentence above- that is what I need aside from the beauty of the woman I married

Following a hearing on 15 September 2023, the trial court denied defendant's motion. In the order denying the motion to set aside, the trial court found that "[i]t does appear that plaintiff's evidence regarding text was not completely accurate. Court is not convinced that it was done by plaintiff to willfully mislead the court. Even if this evidence is stricken, there is still ample evidence for the entry of the DVPO." Regarding defendant's motion to show cause, the trial court found that "[e]ven though the text given by plaintiff and testified to by plaintiff was not a complete and accurate text, the court does not feel the conduct was willful."

Defendant filed notice of appeal on 15 September 2023.

II. Discussion

Defendant argues there was insufficient evidence to support the findings made by the trial court in the DVPO. We disagree.

In reviewing a DVPO, we must determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Burress v. Burress*, 195 N.C. App. 447, 449–50 (2009) (citation omitted).

"To support entry of a DVPO, the trial court must make a conclusion of law 'that an act of domestic violence has occurred.' " *Kennedy v. Morgan*, 221 N.C. App. 219, 223 (2012) (quoting N.C.G.S. § 50B-3(a)). N.C.G.S. § 50B-1(a) defines domestic violence as any of the following acts between parties who have shared a "personal relationship":

> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

N.C.G.S. § 50B-1(a) (2022). Under N.C.G.S. § 50B-3, a trial court judge is required to issue a DVPO whenever it determines an act of domestic violence has occurred. *See D.C. v. D.C.*, 279 N.C. App. 371, 373–74 n.2 (2021) ("[I]f a trial court determines that an act qualifying as domestic violence occurred the trial court is required to issue a DVPO.").

Here, in its DVPO the trial court found that on 2 May 2022, defendant committed acts towards plaintiff satisfying all three categories under G.S. 50B-1(a). The trial court found that on 2 May 2022, defendant caused or attempted to cause bodily injury to plaintiff, placed her in fear as to inflict substantial emotional distress, and that defendant committed acts constituting second-degree rape under N.C.G.S. § 14-27.22.

In making its findings, the trial court relied on plaintiff's written statement attached to her initial complaint, in which she described how defendant forced her against her will to allow him to engage in rough sex with her on 2 May 2022 that left her injured. The trial court attached this written statement to its DVPO as an exhibit. The trial court also considered plaintiff's testimony at trial, in which she described the events. She described a sexual encounter with defendant which occurred on 28 March 2022 which would support the granting of the DVPO, including an act of sexual intercourse with defendant against her will resulting in injury. She also testified that the sex they had was "never normal" and always took a violent form that "really hurt" her and often consisted of acts plaintiff did not want to partake in.

The dissent cites *Hensey v. Hennessy*, 201 N.C. App. 56 (2009) for the proposition that this Court has approved of incorporating by reference allegations from a complaint as findings of fact in an *ex parte* DVPO, but not in a one-year DVPO. The dissent contends that the trial court effectively delegated its fact-finding duty to plaintiff by relying on plaintiff's typewritten statement and Exhibit 1, which was later found to have been altered.

However, in *Hensey*, this Court did address a one-year DVPO, specifically noting that an *ex parte* DVPO and a one-year DVPO were "independent of one another[.]" *Id.* at 66. The Court proceeded to review under N.C.G.S. § 50B-3, and "whether there was competent evidence to support the trial court's findings of fact[.]" *Id.* at 67 (citing *Burress*, 195 N.C. App. at 449–50). This Court reversed the one-year DVPO "as no evidence was presented before the trial court at the 10 March 2008 hearing[.]" *Id.* at 69.

Here, unlike *Hensey*, the trial court *was* presented with evidence to support the findings in the DVPO. In addition to the documentary evidence, the trial court heard testimony from both parties. Plaintiff stated that on 28 March 2023, defendant came to her house and without her approval, took his pants off in the living room and said "he was going to have sex with [her]." Plaintiff said "No, you can't do that[,]" but defendant "stuck his hand into [her] vagina[,]" which made plaintiff bleed.

Plaintiff further stated that defendant "squeeze[d] [her] nipples[,]" which continued to hurt for two weeks. Plaintiff stated that defendant was violent "[e]very time we had the sex, it wasn't like we were husband and wife. It was like he was venting something, and it makes – it really hurt me." Plaintiff also testified that defendant rarely called her by her name, instead referring to her as "idiot, moron, bullshit, stupid, full of baloney."

"Where the trial court sits as the finder of fact, 'and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial [court].' " *Brandon v. Brandon*, 132 N.C. App. 646, 651 (1999) (quoting *Electric Motor & Repair Co. v. Morris & Associates*, 2 N.C. App. 72, 75 (1968)).

> [This Court] can only read the record and, of course, the written word must stand on its own. But the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.

Id. (quoting *State v. Sessoms*, 119 N.C. App. 1, 6 (1995)). The trial court's findings "turn in large part on the credibility of the witnesses, [and] must be given great deference by this Court." *Id.* at 652 (citation omitted). Accordingly, where the trial court's findings of fact are supported by competent evidence, they are binding on appeal. *Id.*

The trial court received evidence and heard testimony from both parties and had ample opportunity to consider the credibility of both parties. Although Exhibit 1 was determined to have been altered, the trial court specifically found that it was "not convinced that it was done by plaintiff to willfully mislead the court[,]" and even if the exhibit were entirely stricken from the record, "there is still ample evidence for the entry of the DVPO."

Based on the foregoing, we conclude that there was competent evidence to support the trial court's findings of fact and order through plaintiff's written statement and testimony at trial.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judge WOOD concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

The events Plaintiff alleged in her typewritten statement are deeply troubling. As deplorable as Plaintiff's allegations are, it remains our duty as an error-correcting court to ensure that our trial courts adhere to established legal principles and faithfully execute their responsibilities. Anything less would be a disservice to the citizens of North Carolina. Were we to approve of the trial court's incorporation and adoption of Plaintiff's unverified statement as its findings of fact, as the majority implicitly does, we will be incentivizing behavior that violates the North Carolina Rules of Civil Procedure. What we permit, we promote. Therefore, I respectfully dissent.

The majority concludes there was competent evidence to support the trial court's findings which, in turn, support the conclusion that an act of domestic violence occurred. In reaching this conclusion, my colleagues place considerable emphasis on Plaintiff's testimony which, in their view, supported issuance of the DVPO (the "Order"). I agree with my colleagues that the evidence, viewed in isolation, could have supported findings identifying the basis for an act of domestic violence. Instead, I take issue with the trial court's purported findings themselves; not in terms of their evidentiary support but rather their sufficiency under Rule 52.

Although this Court has previously approved of a trial court incorporating by reference allegations from a *verified* complaint as findings of fact in an *ex parte* DVPO, due to the need for an expedited resolution, we have yet to address whether this practice is permissible in an order issuing a one-year DVPO. *See Hensey v. Hennessy*, 201 N.C. App. 56, 64, 685 S.E.2d 541, 547 (2009) (emphasis added).

Under the facts and circumstances of this case, the trial court failed to demonstrate that it genuinely engaged in the fact-finding process as dictated by Rule 52. The trial court's incorporation of Plaintiff's allegations from her unverified complaint into the Order constitute an improper delegation of its fact-finding duty, impeding our review under the applicable standard of review. *See In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004), *superseded on other grounds by statute*, 2013 N.C. Sess. Law 129, § 25 (N.C. 2013).

Simply put, the trial court adopted Plaintiff's statement as its findings of fact, instead of making findings of its own based on the evidence. In my view, the trial court's "findings" should not be considered findings at all. Therefore, this Court is not in a position to even consider whether Plaintiff's testimony supports the findings because the trial court improperly delegated its fact-finding duty. Accordingly, I would vacate the Order and remand this matter for additional findings in compliance with Rule 52.

I. Background

On 7 June 2023, Plaintiff sought an emergency *ex parte* DVPO against Defendant by filing an unverified complaint and motion for DVPO for events Plaintiff alleged occurred throughout March and May of 2023. Plaintiff attached to her Complaint a typewritten statement alleging Defendant sexually, physically, and emotionally abused her in the two years before she and Defendant separated, as well as on several occasions in the months before Plaintiff filed her complaint. Specifically, Plaintiff alleged that she and Defendant engaged in non-consensual, violent intercourse on 2 May 2023, which caused Plaintiff physical pain. The trial court issued the *ex parte* DVPO on 7 June 2023. On 17 August 2023, the trial court conducted a hearing to determine whether to issue the one-year DVPO.

Plaintiff sought to admit a screenshot of a text message exchange between Plaintiff and Defendant. While laying the foundation for authentication of the screenshot, Plaintiff testified that the image had *not* been modified in any way and was a fair and accurate depiction of the conversation she had with Defendant. Defense counsel objected, stating, "I'm going to object. I have a transcript of that conversation, and there is a line missing." Counsel consulted regarding the screenshot and then, when Plaintiff's counsel moved to enter the screenshot into evidence, defense counsel objected again stating, "I'm going to object and ask questions later, Your Honor."

The screenshot Plaintiff presented at trial depicted the following text exchange between Plaintiff and Defendant.

> **Plaintiff:** [Image] Celebrate Chinese New Year
>
> **Defendant:** You are looking better
>
> **Defendant:** Now if you only really liked learning and were really interested in a real sex life
>
> **Defendant:** See my sentence above- that is what I need aside from the beauty of the woman I married.

At the close of the hearing, before issuing its final ruling on the matter, the trial court informed the parties that it had "marked up a -- I've got a copy of the findings of fact -- or the facts alleged by the plaintiff I've marked -- Xed out to make additional findings." The trial court orally found, by the greater weight of the evidence, that Plaintiff had proven her case and then stated, "here is the order."

Using a pre-printed form, the trial court entered the Order. In the Order, the trial court concluded, by checking the corresponding boxes, that Defendant committed four acts of domestic violence on 2 May 2023. Specifically, the trial court concluded that Defendant: (1) attempted to cause bodily injury to Plaintiff, (2) placed Plaintiff in fear of imminent serious bodily injury, (3) placed Plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress, and (4) committed second-degree rape as defined in N.C. Gen. Stat. § 14-27.22.

The Order includes a section intended for the trial court to: "describe defendant's conduct." In this section, the trial court made the following finding of fact: "Violent sexual contact. [Defendant] has caused physical injury to [Plaintiff]. Exhibit A is attached for further findings of fact by the court." Using a pen, the trial court struck through various sections of Plaintiff's typewritten statement, leaving the majority of her allegations intact, and purported to incorporate the lined-through typewritten statement by reference.

After the hearing, defense counsel sent Plaintiff's counsel a screenshot of the same text message exchange. Unlike the image Plaintiff offered and authenticated at the hearing, however, this image included an additional message from Plaintiff as well as a response from Plaintiff to Defendant. The screenshot provided by defense counsel depicted the following text exchange:

> **Plaintiff:** [Image] Celebrate Chinese New Year
>
> ***Plaintiff:*** *[Smiley face emoji]*
>
> **Defendant:** You are looking better
>
> **Defendant:** Now if you only really liked learning and were really interested in a real sex life
>
> ***Plaintiff:*** *Gary, I still love you.*
>
> **Defendant:** See my sentence above- that is what I need aside from the beauty of the woman I married.

After receiving this information, Plaintiff's counsel confirmed that Plaintiff had altered the text message exchange before taking the screenshot that she presented to the trial court as Plaintiff's Exhibit 1.

Then, on 28 August 2023, Defendant filed a motion to set aside the Order and to show cause. On 15 September 2023, the trial court conducted a hearing on Defendant's motion. At the hearing, Plaintiff admitted to modifying the text exchange. The trial court denied Defendant's motion to set aside the Order and made the following finding:

> It does appear that plaintiff's evidence regarding text was not completely accurate. Court is not convinced that it was done by plaintiff to willfully mislead the court. Even if this evidence is stricken, there is still ample evidence for the entry of the DVPO.

In the order dismissing Defendant's motion to find Plaintiff in contempt, the trial court made the following finding:

> Even though the text given by plaintiff and testified to by plaintiff was not a complete and accurate text, the court does not feel the conduct was willful.

On 15 September 2023, Defendant filed notice of appeal.

II. Discussion

"When the trial court sits without a jury [regarding a DVPO], the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Hensey*, 201 N.C. App. at 59, 685 S.E.2d at 544 (alteration in original).

As a general rule, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A–1, Rule 52(a)(1) (2023). In *Hensey*, however, this Court determined that an *ex parte* DVPO "need not contain findings and conclusions that fully satisfy the requirements of [Rule 52]." 201 N.C. App. at 63, 685 S.E.2d at 547.

In *Hensey*, the trial court issued an *ex parte* DVPO incorporating by reference the allegations found in the plaintiff's *verified* complaint. *Id.* at 64, 685 S.E.2d at 547 (emphasis added). Although we noted the trial court's "reference" to the plaintiff's complaint was not the preferred practice, we nonetheless determined that the trial court's incorporation was permissible given the "fundamental nature and purpose of an *ex parte* DVPO, which is intended to be entered on relatively short notice in order to address a situation in which quick action is needed in order to avert a threat of imminent harm." *Id.* at 63, 685 S.E.2d at 547.

A one-year DVPO, unlike an *ex parte* DVPO, lacks the same sense of urgency necessitating an expedited and swift decision-making process, as an emergency *ex parte* order "[is] intended to provide a method for trial court judges or magistrates to quickly provide protection from the risks of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." *Id.* at 63, 685 S.E.2d at 546–47 (citing N.C. Gen. Stat. § 50B–2 (2007)). Additionally, a one-year DVPO does not present the same timing constraints as an *ex parte* DVPO. *Id.* at 63, 685 S.E.2d at 547 (noting that for an *ex parte* DVPO "there is simply not sufficient time to enter an order that is fully compliant with the requirements of N.C. Gen. Stat. §1A-1, Rule 52"); *see also* N.C. Gen. Stat. § 50B–3 (providing the trial court is required to conduct a hearing "within 10 days from the date of issuance of the [*ex parte* DVPO] or within seven days from the date of service of process on the other party, whichever occurs later"). Further, *ex parte* orders will generally remain in effect pending a hearing and entry of a one-year DVPO. Finally, when determining whether to issue a one-year DVPO, the trial court conducts a full adversarial hearing; a hearing for which both parties are given advance notice and an opportunity to present evidence. Accordingly, I would conclude that the trial court in this matter, as in any other civil bench trial, was required to comply with the provisions of Rule 52 when issuing the one-year DVPO because the emergent considerations discussed in *Hensey* were not implicated here. *See Hensey*, 201 N.C. App. at 62, 685 S.E.2d at 546 (noting that the Rules of Civil Procedure apply in "all actions and proceedings of a civil nature" including an action brought under Chapter 50B).

In *Hensey*, the one-year DVPO issued by the trial court was also challenged on appeal; a fact which my colleagues correctly acknowledge. *Id.* at 66, 685 S.E.2d at 548. The majority states that *ex parte* DVPOs and one-year DVPOs are "independent of one another[.]" *Id.* at 66, 685 S.E.2d at 548. I do not disagree. But this Court's discussion surrounding the one-year DVPO in *Hensey* did not concern the adequacy of the trial court's findings under Rule 52. Instead, our Court reversed the one-year DVPO because the "plaintiff presented absolutely no evidence before the trial court." *Id.* at 67, 685 S.E.2d at 549. It is on this basis that the majority seeks to distinguish this case from *Hensey*.

I agree with the majority that this case is distinguishable from *Hensey* as far as the one-year DVPO is concerned. Here, unlike in *Hensey*, Plaintiff did present evidence at the DVPO hearing, including testimony concerning the allegations in her complaint. Such evidence could have supported findings describing an act of domestic violence; however, our inquiry under our standard of review does not end with the sufficiency

of the evidence. *See id.*, at 59, 685 S.E.2d at 544. Ultimately, the majority's attempt to distinguish *Hensey*, does not undermine my conclusion that the trial court failed to find the facts in accordance with Rule 52. My discussion of *Hensey* is limited to considering its *ex parte* DVPO reasoning and logically extending it into the one-year DVPO arena.

In light of this preliminary conclusion, I next consider whether the trial court made sufficient findings of fact to support its conclusion that Defendant committed an act of domestic violence. In my view, the answer to this question is no. Rather, the trial court failed to demonstrate that it genuinely engaged in the fact-finding process as dictated by Rule 52. Furthermore, unlike the *ex parte* DVPO in *Hensey*, Plaintiff's complaint was unverified, lacking any guarantee of reliability and trustworthiness.

Specifically, "[t]o support entry of a DVPO, the trial court must make a conclusion of law 'that an act of domestic violence has occurred.' " *Kennedy v. Morgan*, 221 N.C. App. 219, 223, 726 S.E.2d 193, 196 (2012) (quoting N.C. Gen. Stat. § 50B–3(a) (2011)). "The conclusion of law must be based upon the findings of fact." *Id.* at 223, 726 S.E.2d at 196. "While the trial court need not set forth the evidence in detail it does need to make findings of ultimate fact which are supported by the evidence; *the findings must identify the basis for the 'act of domestic violence*.' " *Id.* at 223, 726 S.E.2d at 196 (quoting N.C. Gen. Stat. § 50B–3(a) (2011)) (emphasis added).

In *Coble v. Coble*, the North Carolina Supreme Court emphasized the core rationale behind Rule 52, stating:

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead "to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system."

300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E.2d 26, 29 (1977)). As a result,

> Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial

> judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble, 300 N.C. at 714, 268 S.E.2d at 190.

Therefore, to comply with Rule 52, the trial court is required to "find the ultimate facts essential to support the conclusions of law," by utilizing "processes of logical reasoning, based on the evidentiary facts." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citations omitted). "[B]road incorporat[ion]" of complaints and other written reports from "outside sources as [] findings of fact" potentially usurps this process and may constitute an improper delegation of the trial court's fact-finding duty. *In re J.S.*, 165 N.C. App. at 511, 598 S.E.2d at 660.

Here, the trial judge usurped the process of logical reasoning required by Rule 52 by adopting Plaintiff's statement as its findings of fact. *See* N.C. Gen. Stat. § 1A-1, Rule 52. Instead of reducing its findings to writing, the trial court largely delegated this duty to an "outside source," a party who admittedly altered evidence before presenting it to the trial court and arguably perjured herself by testifying that the screenshot of the text exchange was an accurate representation of the conversation that took place between Plaintiff and Defendant. *See In re J.S.*, 165 N.C. App. at 511, 598 S.E.2d at 660. The typewritten statement attached to the Order as "Exhibit A" did have certain portions struck through, evidencing at least a cursory review. But these minor adjustments, in my view, were not sufficient to demonstrate the process of logical reasoning required by Rule 52. *See Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337. By simply attaching Plaintiff's typewritten statement to the Order, the trial court did not "make findings of these specific facts which support its ultimate disposition of the case." *See Coble*, 300 N.C. at 712, 268 S.E.2d at 189. Moreover, if the trial court had complied with Rule 52, the findings would be phrased in third person from the perspective of the trial court, not in first person from the perspective of Plaintiff.

Compounding the issue, Plaintiff's complaint was unverified. "An unverified complaint is not an affidavit or other evidence," *Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 (1971), and "cannot be relied upon as sworn testimony," *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 705, 709, 582 S.E.2d 343, 345 (2003). Thus, the trial court's reliance on Plaintiff's typewritten statement, which she attached to her

unverified complaint, further undermines the viability of the trial court's purported findings.

These discrepancies illustrate the pitfalls of a trial court simply adopting written allegations prepared outside of court and not admitted into evidence as an exhibit, and thus delegating its fact-finding duty. Ultimately, the trial court's near verbatim reliance on the written statement as its findings of fact does not survive appellate review.

Finally, I note that my colleagues correctly observe that it is the trial court's role, not ours, to consider the credibility of the parties when engaging in the fact-finding process. I wholly agree. If the trial court had made findings in accordance with Rule 52 in the instant case, I would defer to the trial court's credibility assessment, as the majority does. My position is that the trial court's findings are inadequate, and we are unable to reach the question of whether they were supported by competent evidence.

III. Conclusion

In my view, the trial court failed to specifically find the facts in accordance with Rule 52. The trial court's reference-based approach to fact-finding is not only a disfavored practice, it is a shortcut compromising quality and impeding appellate review. It is not unreasonable to require the trial court to take the time necessary to reduce its findings to writing as required by Rule 52. I would hold the trial court's incorporation of Plaintiff's unverified, typed statement in the Order as support for its conclusion that Defendant committed an act of domestic violence was an improper delegation of the trial court's fact-finding duty. The trial court's remaining findings—that Defendant engaged in "violent sexual contact" with Plaintiff and "caused physical injury to [Plaintiff,]"—are conclusory. Without more links in the chain of reasoning, these findings are insufficient to determine whether the Order was warranted. Accordingly, I would vacate the Order and remand for additional findings as required by Rule 52 of the North Carolina Rules of Civil Procedure. I respectfully dissent.

PARADIGM PARK HOLDINGS, LLC, PLAINTIFF
v.
GLOBAL GROWTH HOLDINGS, INC., A DELAWARE CORPORATION,
F/K/A ACADEMY ASSOCIATION, INC., DEFENDANT

No. COA24-482

Filed 5 March 2025

1. Contracts—commercial lease dispute—breach of contract—nonpayment of rent—implied waiver by conduct

In a breach of contract action brought by a commercial landlord (plaintiff) against a business tenant (defendant) for nonpayment of rent, the trial court erred by granting summary judgment to plaintiff where genuine issues of material fact existed regarding whether plaintiff waived its right to collect rent from defendant. Where evidence was presented that plaintiff accepted other payments defendant made on its behalf—including nearly fifty mortgage payments and maintenance and operational expenses—in lieu of formal rental payments for approximately four years, plaintiff's acceptance of the arrangement constituted an intentional, albeit implied, waiver which led defendant to believe that its payments were a satisfactory substitute for monthly rent. Therefore, the trial court erred by granting summary judgment in favor of plaintiff on its breach of contract claim.

2. Unjust Enrichment—counterclaim—commercial lease dispute—nonpayment of rent—extra-contractual payments and services—dismissal inappropriate

In a breach of contract action brought by a commercial landlord (plaintiff) for nonpayment of rent against its tenant (defendant), where the trial court had erroneously granted summary judgment in favor of plaintiff on the breach of contract claim, the trial court also erred by dismissing defendant's counterclaim for unjust enrichment. Although there was a valid contract between the parties, under which defendant was obligated to make monthly rental payments, where defendant alleged that it had conferred benefits on plaintiff—mortgage payments, payment of maintenance and other expenses, and additional services accepted by plaintiff in lieu of rent for nearly four years—beyond what was required by the lease and which, thus, were extra-contractual, in the event defendant was found to be in breach of the lease, it was entitled to present evidence of the benefits accepted by plaintiff in support of the equitable remedy of unjust enrichment.

Appeal by Defendant from judgments entered 1 February 2024 and 13 March 2024 by Judge Brian C. Wilks in Durham County Superior Court. Heard in the Court of Appeals 28 January 2025.

Longleaf Law Partners, by Benjamin L. Worley, for the plaintiff-appellee.

Fox Rothschild LLP, by Matthew Nis Leerberg, and Condon Tobin Sladek Thornton Nerenberg PLLC, by Aaron Z. Tobin and Jared T.S. Pace, Pro Hac Vice, for the defendant-appellant.

WOOD, Judge.

Paradigm Park Holdings, LLC ("Paradigm Park") initiated this action against Global Growth Holdings, Inc. ("Global Growth"), alleging Global Growth did not pay rent according to the parties' lease agreement. Paradigm Park sued for breach of contract, and alternatively, *quantum meruit*. Global Growth asserted defenses and filed a counterclaim for unjust enrichment. Following cross summary judgment motions, the trial court granted Paradigm Park's motion, dismissed Global Growth's counterclaim, and awarded attorneys' fees to Paradigm Park. Global Growth appeals, arguing the trial court erred by granting summary judgment in favor of Paradigm Park and by dismissing its counterclaim for unjust enrichment. For the reasons discussed below, we reverse the trial court's judgment.

I. Factual and Procedural Background

On 9 February 2018, Paradigm Park was formed as a North Carolina limited liability company. Global Growth, previously Academy Association, Inc., is a Delaware corporation with a principal place of business in Durham County, North Carolina. Paradigm Park and Global Growth were affiliated entities, both owned and controlled by Greg Lindberg. Mr. Lindberg was the sole manager of Paradigm Park and was the president of Global Growth.

Paradigm Park was established as a single-purpose entity to own a property comprising two office buildings in Durham County (the "Property"). It existed solely to hold the Property, and the revenue generated from its management. To purchase the Property, Paradigm Park borrowed funds from Fifth Third Bank (the "Bank") and thereafter provided the Bank with a promissory note and Deed of Trust on the Property. At the time of purchase, part of the Property was subject to two leases with existing tenants. As a condition of financing, the Bank

required Paradigm Park to secure an additional tenant. Subsequently, Mr. Lindberg caused Global Growth to enter into a lease agreement for the remaining portion of the Property.

On 11 May 2018, Paradigm Park executed a "Commercial Lease Agreement" (the "Lease") with Global Growth for a five-year term from May 2018 to May 2023. The Lease consisted, *inter alia*, of the following terms: Paradigm Park, as the landlord, would lease 141,441 square feet of the Property to Global Growth; Global Growth, as the tenant, would pay $3,182,422.50 per year, or $265,201.88 per month, in rent to Paradigm Park. Mr. Lindberg signed the Commercial Lease Agreement on behalf of both entities.

Under the terms of the Lease, Paradigm Park was responsible for "capital repairs and replacements" on the Property, including repairs to the roof, foundation, structural supports, and exterior walls. Likewise, Paradigm Park was required to maintain the heating, ventilation and air condition systems, and as necessary, pay for repairs to the units. Global Growth was required, at its expense, to maintain the condition of the Property, including general landscaping. Paradigm Park was also responsible for the payment of taxes on the Property, as well as payment for commercial, general liability, and other necessary insurance. Global Growth was required to reimburse Paradigm Park for the respective insurance payments within fifteen days of receipt of notice of amounts due. The Lease did not specify which entity was responsible for utilities, janitorial services, trash services, the sprinkler system, pest control, or other miscellaneous items for the Property.

During the term of the Lease, Global Growth did not make any rent payments to Paradigm Park. Instead, in lieu of rent payments, Global Growth paid Paradigm Park's monthly mortgage payments to the Bank from approximately May 2018 to April 2022. Additionally, Global Growth paid the Property's operating and maintenance expenses for Paradigm Park, notwithstanding the terms of the Lease agreement. This arrangement continued for several years.

In September 2020, new management took over control of Paradigm Park and the parties to the Lease became unaffiliated entities.[1] Upon

1. On 30 June 2017, PB Life and Annuity Co., Ltd. ("PBLA") created the "PBLA ULICO 2017 TRUST" (the "Trust"), pursuant to a "Reinsurance Trust Agreement" ("RTA"), between PBLA, as the grantor, Universal Life Insurance Company ("ULICO"), as the sole beneficiary, and TMI Trust Company ("TMI") as the trustee. According to the RTA, PBLA was required to maintain a threshold amount of funds in the Trust in order for ULICO to make payments to its policyholders. At that time, PBLA was owned by Mr. Lindberg.

reviewing the Lease and associated records, the new management discovered Global Growth had not been making rent payments. On 24 January 2022, Paradigm Park sent Global Growth a notice of default because of its failure to make rent payments according to the terms of the Lease. The notice acknowledged Global Growth's monthly mortgage payments in lieu of rent, but alleged Global Growth owed an outstanding balance of $9,239,563.89 because the monthly mortgage payment was less than the monthly rent payment. After receiving the notice of default, Global Growth did not make any payments. On 16 February 2022, Paradigm Park notified Global Growth of the termination of the Lease and its intent to take possession of the Property. On 25 March 2022, Durham County Magistrate's Court granted Paradigm Park's motion for summary ejectment, and Global Growth was evicted on 18 April 2022.

On 18 May 2022, Paradigm Park sent another demand for payment, but Global Growth did not respond. On 15 June 2022, Paradigm Park filed the current action, asserting claims for breach of contract, and alternatively, *quantum meruit*. In its breach of contract claim, Paradigm Park alleged Global Growth breached the Lease by failing to pay rent payments totaling $14,308,971.80. In its alternative claim of *quantum meruit*, Paradigm Park alleged Global Growth owed $8,209,325.69 for the value of the services it provided while Global Growth occupied the Property during the period of May 2018 through April 2022. Additionally, Paradigm Park asserted claims for attorney's fees pursuant to the terms of the Lease. On 29 August 2022, Global Growth filed an answer asserting numerous defenses and a counterclaim for unjust enrichment. In its counterclaim, Global Growth asserted it provided benefits valued at $8,200,000.00 to Paradigm Park in the form of mortgage payments, property management costs, and other maintenance expenses for the upkeep of the Property during the time at issue. Accordingly, Global Growth sought to recover from Paradigm Park the full amount of these benefits.

On 8 September 2023, Paradigm Park moved for partial summary judgment on its breach of contract claim and on Global Growth's counterclaim for unjust enrichment. Global Growth filed a cross-motion for summary judgment. By order entered 10 January 2024, the trial court

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In December 2018, the assets in the Trust had taken a loss. To recover, Global Growth conveyed one hundred percent of the common ownership and fifty percent of the preferred equity in Paradigm Park to PBLA. PBLA then transferred its ownership interests in Paradigm Park to the Trust. PBLA subsequently entered liquidation proceedings in Bermuda. The appointed provisional liquidators for PBLA thereafter assumed control of the proceedings and the authority to act on behalf of Paradigm Park.

granted Paradigm Park's partial motion for summary judgment for breach of contract and denied Global Growth's motion for summary judgment. The trial court found Global Growth breached the Lease, there were no material issues of fact concerning Global Growth's liability pursuant to the breach of contract claim, and Paradigm Park was entitled to judgment as a matter of law. The trial court dismissed Global Growth's counterclaim for unjust enrichment.

Subsequently, the parties entered into a consent stipulation regarding damages resulting from Global Growth's breach of contract, with Global Growth reserving its right to appeal from the trial court's judgment. The parties stipulated to damages in the amount of $8,500,000.00. Accordingly, on 1 February 2024, the trial court entered summary judgment awarding Paradigm Park $8,500,000.00, pursuant to the parties' stipulation regarding damages resulting from the breach of contract claim. The trial court further allowed Paradigm Park to notice a motion for consideration of attorneys' fees.

The parties stipulated to reasonable attorneys' fees in the amount of $120,000.00 for Paradigm Park. Thereafter, the trial court entered an amended judgment on 13 March 2024, consistent with the stipulation on attorneys' fees. The amended judgment awarded Paradigm Park $4,860.85 in costs; $120,000.00 in attorney's fees; $1,425,205.48 in pre-judgment interest, accruing at the rate of $1,863.01 per day until judgment is entered; and post-judgment interest at the rate of eight percent per annum from the date of judgment until paid in full.

Global Growth filed written notice of appeal on 1 March 2024 from the trial court's judgment entered on 1 February 2024. On 11 April 2024, Global Growth filed a notice of appeal on the trial court's amended judgment entered on 13 March 2024.

II. Analysis

On appeal, Global Growth challenges the trial court's granting of partial summary judgment in favor of Paradigm Park and dismissal of its counterclaim for unjust enrichment. Specifically, Global Growth argues: (1) summary judgment on Paradigm Park's breach of contract claim was improper because there are material issues of fact as to its affirmative defense of waiver; (2) the trial court erroneously dismissed its counterclaim for unjust enrichment; and (3) the trial court lacked jurisdiction when it entered the amended judgment because it was entered after Global Growth filed notice of appeal to this Court.

"Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citation omitted). A party satisfies this burden by: "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *James v. Clark*, 118 N.C. App. 178, 180-81, 454 S.E.2d 826, 828 (1995) (citation omitted).

A genuine issue of material fact exists when "the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." *Mace v. Utley*, 275 N.C. App. 93, 98-99, 853 S.E.2d 210, 214 (2020) (citations omitted). Stated differently, it is "one which can be maintained by substantial evidence." *Id*. The trial court is not permitted to resolve issues of fact, and the evidence must be viewed in the light most favorable to the nonmoving party. *Neal*, 361 N.C. App. at 524, 649 S.E.2d at 385.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *McLennan v. Josey*, 234 N.C. App. 45, 47, 758 S.E.2d 888, 890 (2014) (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Smith v. Cnty. of Durham*, 214 N.C. App. 423, 430, 714 S.E.2d 849, 854 (2011) (cleaned up).

A. Waiver

[1] Global Growth first argues the trial court erred by granting Paradigm Park's motion for summary judgment when issues of material fact on whether Paradigm Park waived its right to collect rent from Global Growth existed. Global Growth asserts Paradigm Park waived this right by its conduct of accepting mortgage payments, and other payments and services in lieu of formal rent for approximately four years.

Waiver is defined as "an intentional relinquishment or abandonment of a known right or privilege." *Bombardier Cap., Inc. v. Lake Hickory Watercraft, Inc.*, 178 N.C. App. 535, 540, 632 S.E.2d 192, 196 (2006) (cleaned up). This Court has defined the elements of waiver as: "(1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit." *Demeritt v. Springsteed*, 204 N.C. App. 325, 328-29, 693 S.E.2d 719,

721 (2010) (citation omitted). Further, "[a] waiver may be express or implied." *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 11, 558 S.E.2d 199, 206 (2001) (citation omitted). It is undisputed that Paradigm Park did not expressly waive the right to collect rent from Global Growth; rather, the issue here is whether there was an implied waiver by conduct.

Whether a waiver is express or implied, "[t]here must always be an *intention* to relinquish a right, advantage, or benefit." *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 265, 618 S.E.2d 796, 804 (2005). The intention to waive may be implied "when a person dispenses with a right 'by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.' " *Medearis*, at 12, 558 S.E.2d at 206-07 (citation omitted). The elements for implied waiver are:

> (1) The waiving party is the innocent, or non-breaching party, and
>
> (2) The breach does not involve total repudiation of the contract so that the nonbreaching party continues to receive some of the bargained-for consideration. . . .
>
> (3) The innocent party is aware of the breach, and
>
> (4) The innocent party intentionally waives his right to excuse or repudiate his own performance by continuing to perform or accept the partial performance of the breaching party.

Wheeler v. Wheeler, 299 N.C. 633, 639, 263 S.E.2d 763, 766-67 (1980).

Global Growth and Paradigm Park agree that the first three elements of implied waiver are met. Therefore, we turn our attention to whether the fourth element is met, namely did Paradigm Park intentionally waive its right to collect rent payments from Global Growth under the Lease agreement when it accepted Global Growth's payments of mortgage, maintenance and operational expenses in lieu of rent for approximately four years?

In support of its argument, Global Growth cites a recent decision of this Court, *Town of Forest City v. Florence Redevelopment Partners, LLC*, 292 N.C. App. 86, 896 S.E.2d 653 (2024). There, the Town of Forest City ("Town") contracted with Florence Redevelopment Partners ("Florence") to purchase the Florence Mill building, a historic property located in the Town. *Id.* at 88, 896 S.E.2d at 655. The contract contained an "inspection period" provision whereby Florence was required to deliver to the Town

a "Notice of Suitability" prior to the expiration of the inspection period. The Notice of Suitability served as notice to the Town that Florence was satisfied with the results of the inspections of the building. If Florence failed to deliver the Notice of Suitability to the Town prior to the expiration of the inspection period, the contract automatically terminated. Subsequently, Florence delivered its Notice of Suitability twenty-eight days after the "inspection period" contract deadline. Despite Florence's late notice, the Town continued to fulfil its obligations under the contract until more than a year later, it sent Florence a notice of termination.

The trial court granted summary judgment in favor of the Town, reasoning that the contract had automatically terminated upon Florence's failure to deliver timely Notice of Suitability. *Id.* at 91, 896 S.E.2d at 656-57. Florence appealed, and this Court contemplated whether the Town waived the Notice of Suitability deadline when it continued to perform under the contract. This Court first noted, "[i]t has long been the law in North Carolina that '[t]he provisions of a written contract may be modified *or waived* . . . by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived.' " *Id.* at 95, 896 S.E.2d at 658. The undisputed facts in *Town of Forest City* showed that the Town accepted Florence's notice twenty-eight days after the deadline passed; after acceptance, the Town "continued to perform and accept Florence's performance *for more than a year after the deadline*[;]" the parties maintained contact with one another and negotiated matters concerning the building; and more than one year after the Town accepted the untimely notice, the Town sent the notice of termination to Florence. This Court concluded, "The undisputed facts establish conduct that naturally would lead Florence to believe that the Town had dispensed with its right to insist that the Notice of Suitability be delivered by [the expiration of the inspection period]. Accordingly, the trial court erred by granting the Town summary judgment[.]" *Id.* at 96, 896 S.E.2d at 659.

Global Growth argues the present case is analogous to *Town of Forest City*. We agree. First, Paradigm Park did not seek to collect rent from Global Growth per the Lease agreement from May 2018 to January 2022, when it sent the notice of default. During this time, Global Growth made approximately fifty mortgage payments on behalf of Paradigm Park. Second, Paradigm Park was required to keep the building in "good order" and make "capital" repairs; however, because Paradigm Park did not have employees, Global Growth's employees maintained the building and paid for its upkeep. Global Growth paid for the Property's sprinkler system; it paid for pest control; it spent a substantial amount of

money repairing the Property's sewer line; and it installed a security system on the Property. Likewise, Global Growth paid for utilities and service contracts, and other expenses necessary to maintain the Property, even though it was not obligatory.

Lastly, from 2018 to 2022, Paradigm Park appeared to accept this arrangement, as it continuously accepted the benefits provided by Global Growth and never demanded what was agreed upon in the Lease. As in *Town of Forest City*, the undisputed facts establish conduct that naturally would lead Global Growth to believe Paradigm Park had dispensed with its right to collect monthly rent payments. Paradigm Park accepted Global Growth's payments of the mortgage, maintenance and operational expenses, and overall upkeep of the Property in lieu of rental payments for *several years*.

On the other hand, Paradigm Park contends that the record contains no evidence of an intent to waive the right to collect rent. It points to several email exchanges between Mr. Lindberg and other executives, where certain expenses and payments were discussed. Additionally, Paradigm Park directs this Court to its own cash flow statement, which reflected an intercompany receivable in the amount of $265,201.88 per month, the rental payment under the Lease. None of this evidence addresses Paradigm Park's *conduct* of allowing Global Growth to continue making monthly payments on the mortgage, and performing costly maintenance on the Property, for years in lieu of rent.

Contrary to Paradigm Park's position, waiver is "is a question of intent, which may be inferred from a party's conduct." *Harris & Harris Const. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 119, 123 S.E.2d 590, 596 (1962). Here, the evidence tends to show that Paradigm Park, by its conduct, led Global Growth to believe it had dispensed with its right to collect rent. Specifically, Paradigm Park's conduct led Global Growth to believe that payments on the mortgage and payments to upkeep the Property were satisfactory in lieu of monthly rent. *See Medearis*, 148 N.C. App. at 12, 558 S.E.2d at 206-07 (the intention to relinquish a right is implied "when a person dispenses with a right 'by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.' "). Accordingly, the trial court erred in granting summary judgment in favor of Paradigm Park on its breach of contract claim.

B. Unjust Enrichment

[2] Next, Global Growth argues the trial court erred when it dismissed its counterclaim for unjust enrichment, as it made payments and performed services beyond those required under the Lease.

"In order to recover on a claim of unjust enrichment, a party must prove that it conferred a benefit on another party, that the other party consciously accepted the benefit, and that the benefit was not conferred gratuitously or by an interference in the affairs of the other party." *Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330, 572 S.E.2d 200, 206 (2002) (citation omitted). "A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law." *Hinson v. United Fin. Servs., Inc.*, 123 N.C. App. 469, 473, 473 S.E.2d 382, 385 (1996) (citation omitted). This Court has consistently held, "if there is a contract between the parties, the contract governs the claim, and the law will not imply a contract." *Delta Env't Consultants of N. Carolina, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999) (cleaned up). Stated differently, "[o]nly in the absence of an express agreement of the parties will courts impose a quasi-contract or a contract implied in law in order to prevent an unjust enrichment." *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998) (citation omitted). "Therefore, the focus in the *quantum meruit* context is on whether there is an express contract on the subject matter at issue and not on whether there was a contract between the parties." *Cabrera v. Harvest St. Holdings, Inc.*, 284 N.C. App. 227, 234, 876 S.E.2d 593, 599 (2022) (cleaned up).

Global Growth argues it conferred three extra-contractual benefits on Paradigm Park: (1) the payment of the mortgage on the Property; (2) the payment of maintenance, utilities, services, and equipment on the Property; and (3) Global Growth's use of its employees to manage the Property since Paradigm Park had none.

As an initial matter, we observe that the Lease constitutes an express contract between Global Growth and Paradigm Park. It contains provisions for the payment of the services and expenses from which Global Growth seeks to recover. For example, the Lease included the following sections: rental payments and the Lease term; utility bills and service contracts; taxes and insurance; repairs by the landlord and tenant; alterations to the Property; and remedies. *See Gregory v. Pearson*, 224 N.C. App. 580, 586, 736 S.E.2d 577, 581 (2012) ("It is a well-established principle that an express contract precludes an implied contract with reference to the same matter.") (citation omitted).

However, the benefits for which Global Growth's complaint seeks compensation are extra-contractual. The Lease did not obligate Global Growth to make mortgage payments; rather, it required Global Growth to pay $265,201.88 in monthly rent. The Lease did not require Global Growth to pay for utilities and certain services, yet Global Growth paid for these

expenses. Likewise, Paradigm Park was responsible for major repairs and maintenance to the Property but, instead, Global Growth paid for these expenses and utilized its employees to manage and maintain the Property.

We turn now to address the purpose of the equitable remedy of unjust enrichment. "The hallmark rule of equity is that it will not apply 'in any case where the party seeking it has a full and complete remedy at law.' " *Hinson*, 123 N.C. App. at 473, 473 S.E.2d at 385 (citation omitted). "Unjust enrichment has been described as: the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor." *Watson Elec. Const. Co. v. Summit Companies, LLC*, 160 N.C. App. 647, 652, 587 S.E.2d 87, 92 (2003) (citation omitted). The doctrine is "based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another." *Hinson*, 123 N.C. App. at 473, 473 S.E.2d at 385 (citation omitted). Likewise, the remedy is proper "in circumstances such that it would be 'unfair' for the recipient to retain the benefit of the claimant's services." *Watson Elec. Const. Co.*, 160 N.C. App. at 652, 587 S.E.2d at 92 (citation omitted).

It would be inequitable to allow Paradigm Park to retain Global Growth's payments and services, allegedly in the amount of $8,200,000.00, without compensating Global Growth. The mortgage payments, property management costs, and other maintenance expenses were not Global Growth's obligations under the terms of the Lease. Paradigm Park accepted these benefits at the expense of Global Growth without objection for nearly four years. Thus, if Global Growth is found to have breached the Lease Agreement, then it must have its day in court to put forth evidence to support its counterclaim for unjust enrichment. This holding is consistent with the purpose of the doctrine of unjust enrichment. Accordingly, the trial court erred by dismissing Global Growth's counterclaim for unjust enrichment.

III. Conclusion

For the foregoing reasons, we conclude the trial court erred by granting summary judgment on Paradigm Park's breach of contract claim and erred by dismissing Global Growth's counterclaim for unjust enrichment. We reverse the trial court's summary judgment order and vacate the resulting final judgment entered 1 February 2024 and remand to the trial court for further proceedings not inconsistent with this opinion. It is so ordered.

REVERSED, VACATED, AND REMANDED.

Judges COLLINS and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
CYNTHIA ANNE DRISCOL FEARNS, DEFENDANT

No. COA23-650

Filed 5 March 2025

1. Appeal and Error—preservation of issues—criminal case—due process violation—substitute judge's authority to sign written order

In a criminal case where defendant moved to dismiss a charge for embezzlement, arguing that the State's more than ten-year delay in prosecuting her violated her Fifth Amendment due process rights, and where the order denying her motion was signed by a substitute judge after the judge who originally presided over the case had retired, defendant preserved for appellate review: (1) the Fifth Amendment issue, by filing her motion to dismiss, presenting evidence in support of her motion at a hearing, and receiving an oral ruling on the motion (from the original judge); and (2) her argument challenging the substitute judge's authority to sign the order, by filing a "Notice of Exception" to the order, renewing her motion to dismiss at trial, and timely filing her notice of appeal from the order after a final judgment was entered in the case. The State's argument that defendant should have done more to preserve the second issue was meritless, since the original judge had directed the State at the hearing to prepare the written order, which defendant could not have anticipated would later be signed by a different judge without a new hearing.

2. Judges—motion to dismiss criminal charge—orally denied—written order signed by substitute judge—without new hearing—order deemed a nullity

In a criminal case where the presiding trial judge retired nine months after orally denying defendant's motion to dismiss a charge for embezzlement, and where the written order memorializing the oral ruling was signed by a substitute judge, the written order was vacated and the matter was remanded because the substitute judge lacked authority to sign the order without holding a new hearing. Although the substitute judge cited Civil Procedure Rule 63 as authority for signing in place of the now-retired judge, the Rules of Civil Procedure do not apply to criminal cases. Since there was no other legal basis for allowing the substitute judge to sign the order without holding a new hearing, the order was a nullity.

Judge STADING concurring in a separate opinion.

Appeal by defendant from judgment entered 7 April 2022 by Judge John M. Dunlow in Superior Court, Granville County. Heard in the Court of Appeals 12 February 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Drew Nelson for defendant-appellant.

STROUD, Judge.

Defendant appeals her conviction of embezzlement, contending the pre-accusation delay between the time the investigation started and the date she was charged violated her Fifth Amendment right to due process. Defendant also argues the trial court did not have authority to enter the Order denying her motion to dismiss under Rule 63 of the North Carolina Rules of Civil Procedure since the Order was not entered by the superior court judge who held the hearing and rendered a ruling at the hearing. The trial court did not hold a new hearing on Defendant's motions to dismiss but entered a written order including detailed findings of fact and conclusions of law, purporting to rely upon Rule 63 of the Rules of Civil Procedure. Rule 63 of the Rules of Civil Procedure does not apply to criminal cases, so the trial court did not have authority to enter the order based on Rule 63. We have been unable to identify any legal basis for Judge Dunlow's authority to enter the Order on behalf of Judge Fox, so this matter must be remanded to the trial court for a new hearing and entry of a new order making appropriate findings of fact and conclusions of law. We vacate the trial court's Order denying Defendant's motion to dismiss and remand this matter to the trial court for re-hearing of Defendant's motion to dismiss.

I. Background

On or about 9 June 2008, Lieutenant Cates with the Creedmoor Police Department received a report from attorney David Vesel that "an employee that was working for him had embezzled approximately $50,000 from some trust funds." The employee who allegedly embezzled from Mr. Vesel's law firm ("the Law Firm") was Defendant. Lieutenant Cates interviewed Defendant, who explained she recently filed a complaint with the North Carolina State Bar ("State Bar") regarding Mr. Vesel's trust accounting practices in the Law Firm. As Lieutenant Cates

did not have adequate experience dealing with complex financial crimes, he requested help from the North Carolina State Bureau of Investigation ("SBI") and Agent Robin Todd took over the case in July 2008.

For a variety of reasons, including the retirement of the State Bar employee who was first in charge of the trust account investigation; the need to interview Defendant, Mr. Vesel, and other individuals; the process of obtaining records from the State Bar; and the assignment of new prosecutors throughout the case, charges were not brought until 2019. Defendant was indicted for embezzlement on 22 January 2019, over ten years after the Creedmoor Police Department first received the report.

On or about 21 August 2019, Defendant filed a "Motion to Dismiss for Failure of the State to Timely Prosecute: Specifically the Pre-accusation Delay[.]" (Capitalization altered.) Central to Defendant's motion was the claim that many documents related to the case were no longer available and the documents were never in Defendant's possession. The motion was heard on 24 January 2020 before Superior Court Judge Carl Fox. After the hearing, Judge Fox gave an oral rendition of his ruling, stating "there is actual prejudice to . . . Defendant in this case. But what I cannot say is the delay was inexcusable and intentional" and "there's no question that there is delay, but there's just nothing before this [c]ourt . . . that this was done deliberately and unnecessarily and that it was to gain an advantage in this case, and therefore the motion is denied[;]" Judge Fox instructed the State to draft the written order. On 1 October 2020, Judge Fox retired from his position as a superior court judge.[1]

Almost two years after the hearing, on 13 September 2021, the "Order Denying [Defendant's] Motion to Dismiss" ("the Order") was filed. It was signed by Superior Court Judge John Dunlow. Attached to the Order was a page that stated "[t]his Order being issued by the Honorable Carl R. Fox, Jr. on the 21st day of January, 2020 and pursuant to N.C.G.S. 1A-1-Rule 63, signed by the Honorable John M. Dunlow on September 13, 2021."

Defendant's case came on for trial on 28 March 2022. The jury returned a guilty verdict on the embezzlement charge on 5 April 2022. Judgment was entered on 7 April 2022 sentencing Defendant to an

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1. While Judge Fox's exact date of retirement is not in our record, we take judicial notice of this fact as it is "not subject to reasonable dispute" and is both "generally known within the territorial jurisdiction of the trial court" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201 (2023).

active term of imprisonment. Defendant gave oral notice of appeal in open court.

II. Authority of the Trial Judge to Sign the Written Order

Defendant argues "the written order denying the motion to dismiss must be vacated because Judge Dunlow did not have the authority to sign the Order without first holding a hearing on the motion" and "Judge Dunlow erred by issuing written findings of fact and conclusion[s] of law that were not made by Judge Fox." As both Defendant and the State recognize, we review the issue of whether Judge Dunlow had authority to enter the order under Rule 63 *de novo* since it is a question of law. *See In re E.D.H.*, 381 N.C. 395, 398, 873 S.E.2d 510, 513 (2022) ("The North Carolina Rules of Civil Procedure are part of the General Statutes. Accordingly, interpreting the Rules of Civil Procedure is a matter of statutory interpretation. A question of statutory interpretation is ultimately a question of law for the courts. We review conclusions of law de novo." (citations and quotation marks omitted)).

A. Preservation

[1] The State does not present any substantive argument in support of Judge Dunlow's authority to enter the Order without holding a new hearing but instead addresses only whether Defendant properly preserved this argument and Defendant's other arguments regarding the findings of fact and conclusions of law.

The State contends Defendant did not preserve this issue for appellate review. Specifically, the State argues under Rule 10 of our Rules of Appellate Procedure, "a party making a motion in the trial court bears the responsibility of obtaining a ruling sufficient to preserve the matter for review" and "[t]here is nothing in the Record suggesting that [D]efendant sought to have Judge Fox reduce his ruling to writing at any time before his retirement." In her reply brief, Defendant contends she "fully complied with . . . Rule 10. She filed her motion to dismiss, she produced evidence in support of the motion and sought to persuade Judge Fox, and she received a ruling on her motion at the conclusion of the hearing." She also noted her exception to Judge Fox's ruling upon rendition and requested a transcript of the hearing. Judge Fox directed the State to prepare the Order, and the State responded, "Yes, sir, I will."

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states "[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). It is clear Defendant properly objected under the Fifth Amendment to the pre-accusation delay as she filed a motion raising this issue and presented evidence at the hearing on the motion to dismiss. Thus, Defendant's arguments as to the merits of the findings and conclusions of law in the Order are preserved. *See id.*

Further, the State argues "[t]here is nothing in the Record suggesting that [D]efendant sought to have Judge Fox reduce his ruling to writing at any time before his retirement." But as Defendant notes in her reply, at the conclusion of the hearing Judge Fox instructed the State to prepare the Order denying the motion to dismiss and the State accepted that responsibility. The State effectively argues that Defendant should have taken action to make the State fulfill its duty to prepare the Order as directed by Judge Fox; this argument is somewhat ironic since Defendant's motion to dismiss was based on the State's delay in pursuing her prosecution. The State contends that Defendant should have "sought to have Judge Fox reduce his ruling to writing . . . before his retirement." But Defendant cannot be required to object to an issue that has not yet occurred; Defendant would have no way to anticipate that a judge who did not hear the motion would sign an order without requiring a new hearing. On 24 January 2024, Judge Fox directed the State to prepare the Order for his signature, and Judge Fox retired almost 9 months later.

The State also faults Defendant because "in the over two years from January 2020 through trial, [D]efendant did not seek a new hearing or present any additional evidence on her motion as forecast." The State cites no legal basis upon which Defendant may have been able to request that the trial court hold a new hearing on a motion Judge Fox had already heard or Judge Dunlow had already entered an order upon, depending upon the point during the two years it claims Defendant had this option.

Then the State goes further and argues that Defendant did not object properly or sufficiently after Judge Dunlow signed the Order to preserve the issue for appellate review. But Defendant made her intent to appeal the Order clear by filing a "Notice of Exception to Order Entered [September] 13, 2021[,]" (capitalization altered), specifically excepting to the Order "because the [O]rder makes multiple findings of facts contrary to the transcript of the hearing[.]" Defendant also excepted to Conclusion of Law 7, that "Defendant has not established actual and substantial prejudice from the pre-accusation delay" because Judge Fox made "the finding of fact that there is actual prejudice to . . . Defendant

in this case." The State contends that since Defendant did not specifically note her exception based upon Judge Dunlow's lack of authority to enter the Order after Judge Fox's retirement, she has failed to preserve the issue for review. But the State does not identify any statute or case applicable to criminal appeals in support of its argument. Instead, throughout its argument, the State relies in large part on civil cases using Rules of Civil Procedure not applicable to a criminal case. The State has not identified, and we have been unable to find, any law requiring Defendant to file her "Notice of Exception" in this particular situation or requiring that Defendant preserve this issue for appeal in a manner other than filing a timely notice of appeal from the final judgment. *See* N.C. Gen. Stat. § 7A-27(b) (2023) ("[A]ppeal lies of right directly to the Court of Appeals in any of the following cases: (1) From any final judgment of a superior court[.]").

We also note Defendant did renew her motion to dismiss based upon the pre-accusation delay at the close of the State's evidence at trial. The State notes Defendant did not specifically argue that Judge Dunlow had no authority to enter the Order based on Judge Fox's hearing. At trial, Defendant referred to the motion to dismiss she previously filed and relied upon the same legal authorities she had presented to Judge Fox. She also noted some evidence presented at the hearing before Judge Fox, but the evidence addressing the pre-accusation delay was not presented again at the hearing. But the trial court denied the motion, stating as the reason that "[c]ounsel's renewal of the motion to dismiss has previously been ruled upon by Judge Fox."

Defendant was unable to appeal the pre-trial Order denying Defendant's motion to dismiss immediately because it was an interlocutory order. In criminal cases, interlocutory orders are generally not immediately appealable. *See State v. Ward*, 46 N.C. App. 200, 203, 264 S.E.2d 737, 739 (1980) ("Ordinarily in North Carolina an appeal will only lie from a final judgment. In criminal cases, there is no appeal as a matter of right from an interlocutory order. An interlocutory order which does not put an end to the action is not appealable unless it seriously affects a substantial right." (citations omitted)). In *State v. Shoff*, this Court reviewed "our prior decisions regarding the appealability of interlocutory orders in criminal proceedings." 118 N.C. App. 724, 726, 456 S.E.2d 875, 877 (1995). The *Shoff* Court explained that under North Carolina General Statute Section 7A-27(b) and North Carolina General Statute Section 15A-1444(a), "appeals in criminal actions" are limited to "those taken from a final judgment." *Id.* at 725, 456 S.E.2d at 877. Defendant did not have the ability to appeal from Judge Dunlow's Order denying

the motion to dismiss until entry of the final judgment in the criminal prosecution, and she timely gave notice of appeal. This issue was preserved for this Court's review and we will thus discuss the merits of Defendant's argument.

B. Authority to Enter Order

[2] Defendant argues "the written order denying the motion to dismiss must be vacated because Judge Dunlow did not have the authority to sign the Order without first holding a hearing on the motion." Judge Dunlow cited North Carolina Rule of Civil Procedure 63 as authority for signing the Order in place of Judge Fox.

The State acknowledges that if Defendant preserved this issue for appellate review under the Rules of Appellate Procedure, "it is axiomatic that the written order is a nullity[,]" citing *In re K.N.*, 381 N.C. 823, 829-30, 874 S.E.2d 594, 599 (2022), and *State v. Bartlett*, 368 N.C. 309, 313-14, 776 S.E.2d 672, 674 (2015).

Under Rule 63, our Supreme Court has determined

> [o]ne of the duties to be performed by the court under these rules, N.C.G.S. § 1A-1, Rule 63, is finding the facts, stating the conclusions of law, and directing the entry of judgment pursuant to Rule 52. Thus, this Court has interpreted Rules 52 and 63 together to provide that a substitute judge cannot find facts or state conclusions of law in a matter over which he or she did not preside. Conversely, and [the] respondent concedes, if Judge Houston made the findings of fact and conclusions of law that appear in the order before retiring and Chief Judge Byrd did nothing more than put his signature on the order and enter it ministerially, the order is valid.

In re E.D.H., 381 N.C. at 399, 873 S.E.2d at 513 (citation and quotation marks omitted).

But this issue is not governed by Rule 63 because this is a criminal case.[2] The Rules of Civil Procedure, including Rule 63, "govern the

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2. If this issue were governed by Rule 63, the Order would still have to be vacated. It is apparent that the Order includes detailed findings of fact and conclusions of law not rendered by Judge Fox at the hearing and that Judge Fox determined Defendant was prejudiced by the delay. Conclusion of Law 7 made by Judge Dunlow directly contradicts Judge Fox's oral rendering, as Judge Fox unequivocally stated "there is actual prejudice to . . . Defendant in this case" but Judge Dunlow specifically stated "[D]efendant has not established actual and substantial prejudice from the pre-accusation delay."

procedure . . . in all actions and proceedings of a *civil nature*[.]" N.C. Gen. Stat. § 1A-1, Rule 1 (2023) (emphasis added). "A criminal action is – (1) An action prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof." N.C. Gen. Stat. § 1-5 (2023). This case is a criminal action, not a civil action. As a general rule, the Rules of Civil Procedure do not apply in criminal cases. *See State v. Burrow*, 227 N.C. App. 568, 571, 742 S.E.2d 619, 621 (2013) ("The Rules of Civil Procedure cited by Defendant do not apply to criminal cases."). We have been unable to find any case applying Rule 63 in a criminal case.

Since Rule 63 does not provide authority for Judge Dunlow to enter an order on behalf of Judge Fox, we have also considered whether the State has identified any other basis for this authority. The Rules of Criminal Procedure do not address the authority of one judge to enter an order on behalf of another judge in this context and based upon Chapter 15 of the North Carolina General Statutes, *see generally* N.C. Gen. Stat. ch. 15 (2023) ("Criminal Procedure"), we cannot find any statutory authority for Judge Dunlow to enter the Order on behalf of Judge Fox.

In *State v. Bartlett*, Judge Jones held a hearing on the defendant's motion to suppress and "orally granted [the] defendant's motion and asked counsel to prepare a written order reflecting his decision." 368 N.C. at 311, 776 S.E.2d at 673. Judge Jones did not announce an oral ruling with findings of fact resolving a material conflict in the evidence. *Id.* at 311-12, 776 S.E.2d at 673-74. The written order was not prepared until after Judge Jones's term of office expired, and Judge Hudson signed an order granting the defendant's motion to suppress without holding a new hearing. *Id.* This order "found that [the] defendant's expert was credible, gave weight to the expert's testimony, and used the expert's testimony to conclude that no probable cause existed to support [the] defendant's arrest." *Id.* at 311, 776 S.E.2d at 673. The State appealed, and the Supreme Court held that Judge Hudson did not have "the authority to resolve the evidentiary conflict in his written order" since "he did not conduct the suppression hearing" and ordered a new suppression hearing. *Id.* at 313, 776 S.E.2d at 674.

This case deals with a motion to dismiss based on pre-accusation delay, and *Bartlett* addressed a motion to suppress, but this difference in the type of motion does not allow us to overlook *Bartlett*. The Criminal Procedure Act has specific rules addressing orders on motions to suppress, but no similar rule for motions to dismiss. *See id.* ("Section 15A-977 of the General Statutes prescribes the procedure that the superior court must follow to decide a motion to suppress evidence."). But in addition

to North Carolina General Statute Section 15A-977, the Supreme Court noted general principles of law supporting its determination that the judge who presided at the hearing must make the findings of fact:

> The trial judge who presides at a suppression hearing sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. For this reason, our appellate courts treat findings of fact made by the trial court as conclusive on appeal if they are supported by the evidence. The logic behind this approach is clear. In this setting, the trial judge is better able than we at the appellate level to gauge the comportment of the parties and to discern the sincerity of their responses to difficult questions. But a trial court is in no better position than an appellate court to make findings of fact if it reviews only the cold, written record.

Id. at 313, 776 S.E.2d at 674-75 (citations, quotation marks, and ellipses omitted).

The *Bartlett* Court also rejected the defendant's argument for an alternate basis for authority for Judge Hudson to sign the order "on behalf of Judge Jones." *Id.* at 313, 776 S.E.2d at 675. The defendant sought to rely on North Carolina General Statute Section 15A-1224(b), which provides that:

> (b) If by reason of absence, death, sickness, or other disability, the judge before whom the defendant is being or has been tried is unable to perform the duties required of him before entry of judgment, and has not ordered a mistrial, any other judge assigned to the court may perform those duties, but if the other judge is satisfied that he cannot perform those duties because he did not preside at an earlier stage of the proceedings or for any other reason, he must order a mistrial.

N.C. Gen. Stat. § 15A-1224 (2023). The Supreme Court held that "[b]y its plain terms, subsection 15A-1224(b) applies only to criminal trials, not suppression hearings." *Bartlett*, 368 N.C. at 313, 776 S.E.2d at 675. Here, the hearing on Defendant's motion to dismiss, held over two years before the trial, is also not a "criminal trial" so North Carolina General Statute Section 15A-1224(b) also does not provide any authority to Judge Dunlow to enter the Order on behalf of Judge Fox.

III. Conclusion

Because Judge Dunlow had no authority to enter the Order on behalf of Judge Fox, the Order is a nullity and we must vacate and remand for the trial court to conduct a new hearing on Defendant's motion to dismiss due to the pre-accusation delay.

VACATED AND REMANDED.

Judge HAMPSON concurs.

Judge STADING concurs in a separate opinion.

STADING, Judge, concurring, writing separately.

I concur in the decision reached by the majority, particularly since the second trial court judge's written dismissal order contained a conclusion of law directly contradicting the original trial court judge's orally rendered conclusion. I write separately to emphasize a tempered application of *State v. Bartlett* to the present matter. 368 N.C. 309, 776 S.E.2d 672 (2015).

Our Supreme Court's ruling in *Bartlett* heavily relied on the specific mandates contained in our motion to suppress statutes. *See* N.C. Gen. Stat. Ch. 15A, Subch. IX, Art. 53 (2023). The Court determined "[s]ection 15A-977 contemplates that the same trial judge who hears the evidence must also find the facts." *Bartlett*, 368 N.C. at 313, 776 S.E.2d at 674. In reaching its determination, the Court carefully analyzed the language of N.C. Gen. Stat. §§ 15A-974 and -977 (2023). Subsection 15A-974(b) states, "[t]he court, in making a determination whether or not evidence shall be suppressed under this section, shall make findings of fact and conclusions of law which shall be included in the record, pursuant to G.S. 15A-977(f)." Subsection 15A-977(f) requires, "[t]he judge must set forth in the record his findings of fact and conclusions of law."

Defendant's motion to dismiss was filed pursuant to N.C. Gen. Stat. § 15A-954(a)(4) (2023), which does not contain the same express requirements as N.C. Gen. Stat. §§ 15A-974(b) and 15A-977(d), (f). Although instructive, given *Bartlett*'s focus on the motion to suppress statutes, I caution against extrapolating its use to matters outside of the motion to suppress context.

STATE v. GRIFFIN

[298 N.C. App. 85 (2025)]

STATE OF NORTH CAROLINA
v.
JAMAAL GRIFFIN, DEFENDANT

No. COA24-156

Filed 5 March 2025

Jury—juror replacement—before jury was empaneled—jury veniremember selected over alternate juror—no prejudice shown—constitutional argument not preserved

In a prosecution on charges including first-degree murder, where a juror was excused before the jury was empaneled because his wife had unexpectedly gone into labor, the trial court did not err by selecting his replacement from the jury venire instead of using a prospective alternate juror. The court did not violate N.C.G.S. § 15A-1215(a)—which requires an alternate juror to replace a juror who is discharged for any reason before a verdict is rendered—since that statute only applies after a jury is officially empaneled. Rather, the court followed the correct procedure under N.C.G.S. § 15A-1214(g), which governed the jury selection process before empanelment. Further, defendant failed to argue that the juror replacement prejudiced his case, and he could not bypass the requirement to show prejudice by arguing that the court committed error per se or structural error. Finally, defendant failed to preserve his constitutional argument that he was deprived of a fair and impartial jury where he did not raise that argument at trial; moreover, his case did not involve the "manifest injustice" that would justify invoking Appellate Rule 2 to suspend the Rules of Appellate Procedure and decide the constitutional issue on the merits.

Appeal by defendant from judgments entered 18 May 2023 by Judge Patrick Thomas Nadolski in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2024.

Carolina Appeal, by Attorney Drew Nelson, for the defendant-appellant.

Attorney General Jeff Jackson, by Assistant Attorney General Caden W. Hayes, for the State.

STADING, Judge.

Jamaal Griffin ("Defendant") appeals from final judgments entered against him pursuant to jury verdicts finding him guilty of first-degree murder and possession of a firearm by a felon. Defendant was also found guilty of one count of conspiracy to commit robbery with a dangerous weapon; however, the trial court arrested judgment on this conviction at sentencing. For the reasons below, we discern no error.

I. Background

This matter concerns an armed robbery resulting in the killing of Churchill Zoker on 30 June 2018. A grand jury indicted Defendant for multiple offenses, including first-degree murder, possession of a firearm by a felon, and conspiracy to commit robbery with a dangerous weapon. Jury selection for Defendant's trial commenced on 1 May 2023. The parties agreed on twelve prospective jurors—including Mr. Stolz, to be seated as Juror No. 7. Next, the parties began selection of three prospective alternate jurors—Mr. Brent, Mr. Caldwell, and Mr. Spain. After questioning, defense counsel struck Mr. Caldwell but was satisfied with the other two alternates.

The next day, the parties reconvened to select a final alternate juror. But Mr. Stolz's wife had unexpectedly gone into labor, leading the trial court to excuse him from jury service. The State argued that another prospective juror from the jury venire[1] should replace Mr. Stolz since the jury had not yet been empaneled.[2] According to the State, the procedure in N.C. Gen. Stat. § 15A-1214(g) (2023) was controlling:

> If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:
>
> . . . .

1. "Jury venire" is used synonymously with "jury pool" and "jury panel" in North Carolina. *See, e.g.*, *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 530 (2004) (N.C. Gen. Stat. § 15A-1211 "uses the term 'panel' to refer to the entire jury pool or venire . . . .").

2. Courts use both "empanel" and "impanel." *See United States v. Haymond*, 588 U.S. 634, 662–63, 139 S. Ct. 2369, 2388 (2019) (Alito, J., joined by Thomas, J., Roberts, C.J., and Kavanaugh, J., dissenting) ("[T]here is simply no way that the federal courts could empanel enough juries to adjudicate all those proceedings, let alone try all those proceedings in accordance with the Sixth Amendment's Confrontation Clause."); *see also Yeager v. United States*, 557 U.S. 110, 118, 129 S. Ct. 2360, 2366 (2009) (citation omitted) ("Instead, a jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled.").

> (2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.
>
> . . . .
>
> Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.

Counsel for Defendant conceded the applicability of the statute but disputed its outcome. Instead, counsel proposed that Mr. Brent, one of the prospective alternate jurors, take Mr. Stolz's place, and a new alternate juror should be selected from the jury venire. Counsel for Defendant expressed concern that peremptory challenges were exhausted for the prospective twelve jurors, but noted her client retained an additional strike for any new prospective alternate juror.

The trial court ultimately agreed with the State's argument, deciding that another juror would be seated from the jury venire, and the prospective alternate jurors would remain in place. The trial court noted Defendant's objection. Defendant's counsel stated, "[w]e just really wanted to slide [Mr. Brent] over. But I've read the statute. The jury isn't impaneled. It seems like the statute is on point in that." Following this discussion, the clerk called Ms. Nannini as a prospective juror to replace Mr. Stolz as prospective Juror No. 7, and both parties accepted her. Defendant's counsel renewed the objection:

> [DEFENDANT'S ATTORNEY]: Your Honor, just to preserve for the record that defense objects to taking someone f[rom] the general pool and putting them in seat number 7, rather than placing in alternate number 1 in seat number 7, and then replacing the other people. We want to preserve that for the record. I know I have been researching. I haven't found anything, but we think it's necessary to preserve that because the State is supposed to pass to us a set of complete – 12 jurors. Obviously, they passed to us last week. We selected two alternates. What happened this morning happened. And the voir dire was reopened and we had to question – instead of the ones we have -- we have to question one that wasn't passed to us with a complete pool, so we want to preserve that for the record.
>
> THE COURT: All right. Your objection is noted for the record. Anything else?

[DEFENDANT'S ATTORNEY]: No, Your Honor. Thank you.

Later that day, the parties also accepted another prospective alternate juror, Mr. Young. Thereafter, all jurors and alternate jurors were officially empaneled.

During Defendant's case-in-chief, the trial court informed the parties that empaneled Juror No. 1, Ms. Emeram, had a "scheduling conflict," and expressed "trepidation" because this juror could have pressure to reach a verdict on an improper basis. During voir dire, all parties were aware of this possible conflict and agreed to accept Ms. Emeram because they did not foresee the length of the trial. After questioning Ms. Emeram, a bench conference was held, and the trial court excused her without objection from the parties. One of the alternate jurors, Mr. Brent, was then seated as Juror No. 1. Following deliberations, the jury found Defendant guilty of first-degree murder, possession of a firearm by a felon, and conspiracy to commit robbery with a dangerous weapon. Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction is proper with our Court since Defendant appeals from a "final judgment of a superior court," and "entered a plea of not guilty to a criminal charge, and . . . [was] found guilty of a crime." *See* N.C. Gen. Stat. §§ 7A-27(b)(1) (2023) and 15A-1444(a) (2023).

III. Analysis

Defendant asserts a single issue for appeal: whether the trial court committed error by filling Mr. Stolz's seat with someone from the jury venire rather than one of the prospective alternate jurors. He maintains the trial court's decision contravenes N.C. Gen. Stat. § 15A-1215(a) (2023) and amounts to error per se or structural error. After careful consideration, we disagree.

"When an alleged statutory violation by the trial court is properly preserved, either by timely objection or . . . by operation of rule of law, we review for prejudicial error pursuant to N.C. [Gen. Stat.] § 15A-1443(a)." *State v. Austin*, 378 N.C. 272, 276–77, 861 S.E.2d 523, 528 (2021); *e.g.*, *State v. Jaynes*, 353 N.C. 534, 544–45, 549 S.E.2d 179, 189 (2001) ("[W]hen a trial court acts contrary to statutory mandate and the defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.").[3]

3. Defendant properly objected on statutory grounds and later renewed this objection before the jury was empaneled.

"[I]f the [preserved] error relates to a right *not arising* under the United States Constitution, . . . review requires the defendant to bear the burden of showing prejudice." *Austin*, 378 N.C. at 277, 861 S.E.2d at 528 (citations omitted and emphasis added). "[A] new trial does not automatically follow a finding of statutory error." *State v. Garcia*, 358 N.C. 382, 406, 597 S.E.2d 724, 742–43 (2004). Indeed, "[t]his Court has consistently required that defendants claiming error in jury selection procedures show prejudice in addition to a statutory violation before they can receive a new trial." *Id.* at 406, 597 S.E.2d at 743. To show prejudice, a "defendant must prove that a reasonable possibility exists that, had the error not been committed, a different result would have been reached at trial." *Id.* at 407, 597 S.E.2d at 743 (quoting N.C. Gen. Stat. § 15A-1443(a)).

In criminal cases, jurors are selected under N.C. Gen. Stat. § 15A-1214(a) (2023), which provides: "The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called." The trial court may permit the seating of one or more alternate jurors under N.C. Gen. Stat. § 15A-1215(a). Those alternate jurors "must be sworn and seated near the jury with equal opportunity to see and hear the proceedings. . . ." *Id.* And, "[i]f at any time prior to a verdict being rendered, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel." *Id.* But if the judge determines there is a basis for challenge for cause "at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that . . . some . . . good reason exists," "he must excuse the juror." N.C. Gen. Stat. § 15A-1214(g). Ultimately, "[t]he intended result of jury selection is to empanel an impartial and unbiased jury." *Garcia*, 358 N.C. at 407, 597 S.E.2d at 743. Trial judges have "broad discretion to see that a competent, fair and impartial jury is impaneled . . . ." *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979). They also have "the power to regulate and supervise the selection of a jury so that the defendant and the State have the benefit of trial by an impartial jury." *State v. McLamb*, 313 N.C. 572, 575, 330 S.E.2d 476, 478 (1985).

Latching onto the language of N.C. Gen. Stat. § 15A-1215(a)—"any time prior to a verdict being rendered, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror"—Defendant claims that the trial court erred in selecting someone from the jury venire to replace Mr. Stolz, rather than seating one of the prospective alternate jurors. Defendant claims

this subsection is effective after the "initial twelve jurors have been selected." Stated another way, Defendant proffers that the duties of an alternate juror are triggered before the jury is empaneled. This necessarily presents a novel argument for our consideration: whether those prospective, yet-to-be members of the to-be-empaneled jury who have been accepted by each party, are properly classified as jurors or alternate jurors.

The criminal jury selection statutes do not offer a precise definition of "juror" or "alternate juror." *See* N.C. Gen. Stat. Ch. 15A, Subch. XII, Art. 72. We therefore consider the plain meaning of "juror" or "alternate juror" in view of Article 72. *State v. Langley*, 371 N.C. 389, 395, 817 S.E.2d 191, 196 (2018) (internal quotation marks and citation omitted) ("The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish."). The term "juror" "should be distinguished from *potential juror* or[4] *veniremember*." Bryan A. Garner, *Garner's Modern English Usage* 635 (5th ed. 2022) (ellipses omitted). "The difference is that a *potential juror* or *veniremember* hasn't yet been selected to sit on the jury . . . a *juror* is someone who has been empaneled on the jury." *Id.* It follows that a plain-meaning analysis disfavors Defendant's urged position because an alternate juror does not become so until empaneled. This definitional analysis accords with the language of N.C. Gen. Stat. § 15A-1214(g).

Defendant also disputes the applicability of N.C. Gen. Stat. § 15A-1214(g), as he maintains that N.C. Gen. Stat. § 15A-1215(a) is controlling. Subsection 15A-1214(g) discusses discovered concerns regarding a prospective juror amounting to a basis for a challenge for cause after a juror has been accepted, but not yet empaneled. *See* N.C. Gen. Stat. § 15A-1214(g). While the circumstances presented here are unique, this subsection applies since it squarely addresses scenarios within the procedural posture of the present matter and provides the proper course of action. *See id.* ("any time after a juror has been accepted . . . and before the jury is impaneled"; "[a]ny replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror."). A trial court judge is permitted to "excuse a juror without challenge by either party if he determines that grounds for challenge for cause are present." *Id.* § 15A-1211 (2023). The trial

4. "Or" is a disjunctive term, indicating application to one of the two categories listed. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012).

court did not explicitly state he was exercising his statutory authority to challenge this juror for cause, but the record makes that determination readily apparent. *See id.* § 15A-1212(9). In its effort to resolve this quandary, the trial court followed the protocol provided in subsection 15A-1214(g)—he called a replacement juror from the jury venire, and they were "subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror."

In any event, nothing about Defendant's contention shows that he was prejudiced against having a competent, fair, and impartial jury. *See State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000) (holding that no prejudice was shown despite the trial court's direct deviation from statutory jury selection procedures). In fact, in his brief, Defendant does not address prejudice, instead he asserts that the applicable standard of review does not require a showing of prejudice.

To that end, Defendant argues that the violation was error per se or structural error. *See State v. Lawrence*, 365 N.C. 506, 514, 723 S.E.2d 326, 332 (2012) ("Like structural error, error per se is automatically deemed prejudicial and thus reversible without a showing of prejudice."). "In a limited class of cases, the [United States Supreme] Court has . . . held that 'some errors necessarily render a trial fundamentally unfair.' " *Id.* at 513–14, 723 S.E.2d at 331 (quoting *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 3106 (1986)). These types of errors are referred to as "structural" and "require automatic reversal regardless of a showing of prejudice . . . because they 'affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself[.]' " *Id.* (citations omitted).

> 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."

State v. Hamer, 377 N.C. 502, 506, 858 S.E.2d 777, 781 (2021) (citation omitted). "North Carolina courts also apply a form of structural error known as error per se. Like structural error, error per se is automatically deemed prejudicial and thus reversible without a showing of prejudice." *Lawrence*, 365 N.C. at 514, 723 S.E.2d at 331–32.

Contrary to Defendant's argument, our relevant jurisprudence—citing statutory error—does not allow us to dispense of the prejudice

prong. *See, e.g.*, *Garcia*, 358 N.C. at 406, 597 S.E.2d at 743 ("This Court has consistently required that defendants claiming error in jury selection procedures show prejudice in addition to a statutory violation before they can receive a new trial."); *see also State v. Golphin*, 352 N.C. 364, 412, 533 S.E.2d 168, 202 (2000) ("However, assuming, without deciding, that the trial court violated [N.C. Gen. Stat.] § 15A-1214(a), defendants cannot show prejudicial error."); *see also State v. Woodley*, 286 N.C. App. 450, 465–66, 880 S.E.2d 740, 751 (2022) (overruling jury selection argument because defendant failed to show prejudice).

For example, in *Garcia*, our Supreme Court determined that "the procedures employed at trial violated the express requirements of N.C. [Gen. Stat.] § 15A-1214(f)." 358 N.C. at 406, 597 S.E.2d at 742. But since the defendant "made no attempt, either in written brief or at oral argument . . . to show how the identified statutory violation prejudiced his case[,]" the Court overruled his argument. *Id.* at 407, 597 S.E.2d at 743. Similarly, in *State v. Gurkin*, our Court determined that "the trial court violated the statutorily mandated procedure for jury selection." 234 N.C. App. 207, 214, 758 S.E.2d 450, 455 (2014). Yet since the defendant failed to show or argue prejudice, we held "that the trial court's deviation from the statutory procedure does not warrant a new trial." *Id.* at 214, 758 S.E.2d at 456. Since Defendant failed to demonstrate prejudice, his contentions as to statutory error are overruled. *See Austin*, 378 N.C. at 276–77, 861 S.E.2d at 528.

Defendant also contends that the trial court's failure to adhere to N.C. Gen. Stat. § 15A-1215(a) infringed on his constitutional right to a fair and impartial jury. To that end, Defendant argues that the trial court committed either error per se or structural error because he was tried by an improperly constituted jury. *See State v. Poindexter*, 353 N.C. 440, 444, 545 S.E.2d 414, 416 (2001) ("A trial by a jury that is improperly constituted is so fundamentally flawed that the verdict cannot stand."); *see also Garcia*, 358 N.C. at 410, 597 S.E.2d at 745 ("Defendant has shown only a technical violation of the state jury selection statute. Without more, this statutory violation is insufficient to support a claim of constitutional structural error."). Despite Defendant's claim, he did not raise this argument at trial, denying the court the opportunity to pass upon the issue. *See* N.C. R. App. P. 10; *see also*, *e.g.*, *State v. Smith*, 359 N.C. 199, 208, 607 S.E.2d 607, 615 (2005) (overruling defendant's assignment of error because he "failed to object . . . on constitutional grounds"). In fact, when Defendant objected at trial, he only objected on statutory grounds. As a consequence, Defendant failed to preserve his constitutional issue for appellate review. *See State v. Fleming*, 350 N.C. 109,

122, 512 S.E.2d 720, 730 (1999); *see also State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995); *see also State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.").

Defendant implores us to exercise Rule 2 of the Appellate Rules of Procedure to review the merits of this argument. Under Rule 2, this Court may suspend the Appellate Rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C. R. App. P. 2. Case law addresses the appropriateness of discretionarily invoking Rule 2, which "relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *State v. Hart*, 361 N.C. 309, 315–16, 644 S.E.2d 201, 205 (2007) (citations and quotation marks omitted). "[T]he exercise of Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *Id.* at 316, 644 S.E.2d at 205 (citations and internal quotation marks omitted). "This assessment—whether a particular case is one of the rare 'instances' appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether 'substantial rights of an appellant are affected.' " *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (citations omitted). Put another way, "precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *Id.* at 603, 799 S.E.2d at 603.

Defendant urges that we should invoke Rule 2 because allowing his conviction by an improperly constituted jury "would represent manifest injustice." But nothing in the record or Defendant's brief demonstrates "exceptional circumstances" sufficient to justify suspending or varying the rules. *Hart*, 361 N.C. at 315, 644 S.E.2d at 205. Although a constitutional right is a substantial right, Defendant has failed to demonstrate error relating to a substantial right. *Cf. State v. Bursell*, 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019) (determining that "a constitutional right, such as the Fourth Amendment right implicated here, is a substantial right" and since "the State concede[d] that the trial court committed error relating to a substantial right, the Court of Appeals did not abuse its discretion by invoking Rule 2."). Rather, Defendant is no different than other litigants who failed to preserve their constitutional arguments and

failed to specifically argue manifest injustice on appeal. *See*, *e.g.*, *State v. Ricks*, 378 N.C. 737, 742, 862 S.E.2d 835, 839 (2021) (upholding our Court's decision, denying the invocation of Rule 2, "because the defendant was 'no different from other defendants who failed to preserve their constitutional arguments' and failed to argue 'any specific facts' to demonstrate that invoking Rule 2 would prevent 'manifest injustice.' ").

In our discretion, we decline to invoke Rule 2. *See State v. Barnes*, 278 N.C. App. 245, 248, 862 S.E.2d 852, 854 (2021) ("An appellate court's decision to invoke Rule 2 and suspend the appellate rules is always an exercise of discretion."). Consequently, Defendant's unpreserved constitutional argument is dismissed.

IV. Conclusion

For the above reasons, we overrule Defendant's assignment of statutory error. *See* N.C. Gen. Stat. §§ 15A-1211, -1212, -1214, -1215(a) and -1443(a). We hold that Defendant failed to preserve his constitutional argument for our review under N.C. R. App. P. 10. Since the present circumstances do not warrant invoking Rule 2, we decline further review of the matter.

NO ERROR.

Judges STROUD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
EDUARDO JORGE ROJAS

No. COA24-690

Filed 5 March 2025

Sentencing—second-degree murder—aggravated sentence—mitigating factors—no finding of mental illness

In sentencing defendant in the aggravated range after he was convicted of the second-degree murder of his girlfriend (who he stabbed and cut over 160 times), the trial court did not err by declining to find defendant's proposed mitigating factor, pursuant to N.C.G.S. § 15A-1340.16(e)(3), that defendant suffered from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability. Although a forensic psychiatrist testified that he had diagnosed defendant with schizophrenia while evaluating defendant for the sole purpose of determining his competency to stand trial, that evidence did not constitute substantial, uncontradicted, and manifestly credible evidence that, at the time of the murder: (1) defendant suffered from schizophrenia, and (2) that his illness significantly contributed to the murder; therefore, defendant failed to meet his burden.

Appeal by defendant from judgment entered 14 September 2023 by Judge Steve R. Warren in Superior Court, Gaston County, No. 16 CRS 055300. Heard in the Court of Appeals 28 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General T. Hill Davis III, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant.

FREEMAN, Judge.

Eduardo Jorge Rojas ("defendant") appeals his aggravated sentence of 397 to 489 months imprisonment entered and based on his conviction for second-degree murder. Defendant contends the sentencing judge erred in failing to find the statutory mitigating factor that "[t]he defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's

culpability for the offense." N.C.G.S. § 15A-1340.16(e)(3) (2023). After careful review, we conclude the sentencing judge did not err in refusing to find this mitigating factor and we affirm defendant's resentencing.

I. Background

A complete recitation of the facts relevant to defendant's trial and initial sentencing can be found in this Court's prior opinion in this matter. *See State v. Rojas*, No. COA20-810, 2021 WL 5066762 (N.C. Ct. App. Nov. 2, 2021). Because this appeal concerns only defendant's resentencing, a brief overview of the background will suffice.

On 5 May 2016, defendant murdered his girlfriend, Amoritta Starr Costner, and left her body in a bathtub at their shared home. The victim's autopsy revealed 112 stab wounds, 49 cutting wounds, and several blunt trauma injuries. Defendant inflicted these wounds all over the victim's body—including her face, head, neck, wrists, hands, chest, back, stomach, and buttocks—using multiple different weapons.

Three of the numerous stab wounds to the victim's neck nicked her jugular vein and carotid artery. These wounds were fatal, but not immediately so; the victim bled to death over the course of several minutes. According to the responding Crime Scene Investigator, who has processed over 1,000 crime scenes, "[t]his one was the worst as far as I've ever seen, as far as the amount of wounding . . . [t]his is one that never leaves the memory."

After murdering the victim, defendant "contacted his mother to come to his house, pick him up, and take him to the hospital." *Rojas*, 2021 WL 5066762, at *1. Defendant's "clothes were bloody and bleach-stained, and he smelled of bleach." *Id.* (cleaned up). After defendant refused to go inside to change his clothes, his mother transported him to a nearby hospital. *Id.* Defendant's mother then returned to the home where she discovered the victim's body. *Id.* Upon defendant's discharge from the hospital, he was arrested and charged with murder. *Id.*

> After initially being found incapable of proceeding to trial due to psychotic disorders, Rojas received psychiatric hospital care. In three follow-up evaluations over several years, experts found him "barely" competent to stand trial but in a "precarious" situation that would require re-evaluation, particularly once Rojas confronted the stress of a trial. After his final evaluation, more than a year passed before Rojas pleaded guilty to second degree

> murder and then proceeded to a [bench] trial on the sentencing factors without any follow-up evaluation.
>
> . . .
>
> After hearing the evidence, the trial court found two aggravating factors. First, the court found that Rojas took advantage of a position of trust or confidence. Second, the court found that the offense was especially heinous, atrocious, or cruel. The court found that the mitigating factors offered by Rojas were present but were outweighed by the two aggravating factors. The court sentenced Rojas to an aggravated range sentence of 397 to 489 months in prison.

Id. at *1–3.

In his first appeal, defendant argued that the trial court erred "by failing, on its own initiative, to conduct a competency hearing before the sentencing proceeding because there was substantial evidence before the court that raised questions about his competency." *Id.* at *3.[1] This Court agreed with defendant's argument, vacated his criminal sentence, and remanded "for the trial court to conduct a new sentencing proceeding after first evaluating Rojas's capacity to proceed." *Id.* at *4.

On 21 August 2023, after a hearing before Judge Robert C. Ervin, the trial court on remand found "based upon the most recent evaluation" defendant was "mentally competent and capable of proceeding" with a new sentencing proceeding. The new sentencing proceeding took place on 13 and 14 September 2023 before Judge Steven R. Warren in Gaston County Superior Court.

At the sentencing hearing, defendant presented testimony from Dr. Sherif Soliman, a forensic psychiatrist. Dr. Soliman testified on direct examination in part:

> Q. And so in what capacity did you have an opportunity to meet Mr. Rojas?
>
> A. I was asked to evaluate his capacity to proceed, in my role at Broughton Hospital.

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1. Defendant also argued "the trial court erred by allowing him to waive his right to a jury trial on the existence of aggravated sentencing factors." *Rojas*, 2021 WL 5066762, at *5. We rejected this argument under our Supreme Court's controlling precedent. *See id.* (citing *State v. Hamer*, 377 N.C. 502 (2021)).

Q. And in your evaluation, did you have an opportunity to view his medical records?

A. I did.

Q. And in your capacity to proceed, or view his medical records, did you determine if he had a psychiatric diagnosis?

A. I did.

Q. And what was that diagnosis?

A. I diagnosed Mr. Rojas with schizophrenia.

. . .

Q. So looking back over Mr. Rojas' medical records, and the situation that was going on, can you give us a general idea of his symptoms of schizophrenia that might have existed in 2016?

A. Well, I can speak to his current symptoms of schizophrenia. The record wasn't sufficiently detailed to describe his symptoms in 2016. . . .

. . .

Q. Well, let me ask you this. In 2016, a crime of great rage and violence occurred. Is it possible that one suffering from schizophrenia, that could contribute to that kind of behavior?

A. Is it possible? If it's possible, broadly—a lot of things—it's certainly possible. But again, I just want to emphasize that I didn't evaluate whether he did in this case. So I can't testify with reasonable medical certainty that it did or did not, but it's certainly possible.

On cross-examination, Dr. Soliman testified in part as follows:

Q. So, Dr. Soliman—and please correct me if I'm wrong with any of my questions, I want to make sure I understood your testimony.

In this particular case with Mr. Rojas, you were looking at one thing specifically, which was his capacity to proceed; is that correct?

A. That is correct.

Q. And with that, I think you kind of indicated it was a snapshot for at that time was he capable to proceed. And with the capacity to proceed you have to look at certain standards that have been delineated by the Court as to whether or not he can help his attorney with his defense, whether or not he can understand the roles of the different people in the courtroom, things of that nature; is that correct?

A. Yes. All of those are included in the capacity to proceed standard.

Q. All right. And in your report there is not any mention, and none of your testimony can go to how any sort of diagnosis that he may or may not have had could have affected him on May 5th of 2017; is that correct?

A. That's correct. I wasn't asked to evaluate his mental state at the time, so I wasn't asked to evaluate him to offer an opinion on diminished capacity, or an insanity defense.

Defendant also testified on his own behalf at the sentencing hearing. During cross-examination, defendant testified in part as follows:

Q. Mr. Rojas, you have been testifying for about the last 12 minutes; is that correct?

A. Yes. About that, yes.

Q. Okay. And during that whole time you have been blaming Starr for what happened; isn't that right?

A. No, I'm blaming the medication and the negativity in the room and being hallucinating and feeling bothered and not respected, and just—

Q. So you felt bothered and disrespected, and that's why we're here today; is that right?

A. No.

Q. Let's talk about the medications, since you brought that [up].

You indicated that you have been in several hospitals, I think in New York; is that right?

A. Yes.

Q. Okay. And you know that nobody was ever able to get any sort of records from any of those hospitals; did you know that?

A. I didn't know that. I don't know how long they keep their records, but it's been a while since I started.

Q. Okay. And you told the Court that when you first started dating Starr, and the medication went missing, were you aware that when they searched your home after you murdered your girlfriend they found, like, an entire stack of your antipsychotic medicine, not used, in the storage room?

A. No.

Q. So isn't it true that you were just choosing not to take your medication and using drugs like cocaine instead?

A. No, not at all.

Q. Did you or did you not test positive for cocaine the very next day after you murdered Starr when you went to the hospital?

A. Yeah, that was her drug of choice. And when she would warm me up, I guess, or—that was just her daily routine. You know, like, here I got this for you, just do it. She had took my pain medication from being shot and I needed something to feel a little bit relieved, or something.

Q. Okay. So again, this was Starr's fault that you took cocaine. And instead of going back to the doctor, or going to your mom to get the medication you were supposed to be on, you chose to do an illegal substance instead; is that right?

It's a simple yes or no.

A. Not because of that, no.

During the sentencing proceeding, a jury found the existence of two aggravating factors: the offense was especially heinous, atrocious, or cruel, and defendant took advantage of a position of trust or confidence to commit the offense. The trial court found the existence of three mitigating factors: defendant has a support system in the community; defendant has a positive employment history or is gainfully employed; and

defendant has a good treatment prognosis and a workable treatment plan is available.

After finding the aggravating factors outweighed the mitigating factors, the trial court imposed an aggravated sentence of 397 to 489 months imprisonment. Defendant timely appealed to this Court, arguing that the trial court erred in failing to find the statutory mitigating factor that, at the time of the murder, he was suffering from a mental or physical condition that was insufficient to constitute a defense but that nevertheless significantly reduced his culpability for the offense.

II. Jurisdiction

> A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense.

N.C.G.S. § 15A-1444(a1) (2023). Because defendant pleaded guilty, and because his minimum sentence of imprisonment does not fall within the presumptive range for his prior record level and class of offense, this Court has jurisdiction over his appeal of right. *See also* N.C.G.S. § 7A-27(b)(4) (2023) ("[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any other order or judgment of the superior court from which an appeal is authorized by statute.").

III. Standard of Review

Generally, "[t]his Court reviews a trial court's decision to sentence outside of the presumptive range for an abuse of discretion." *State v. Davis*, 206 N.C. App. 545, 548 (2010). However, because this case requires us to determine whether the sentencing judge erred in failing to find a statutory mitigating factor, rather than in weighing properly found aggravating and mitigating factors, we review this issue *de novo*. *See State v. Jones*, 309 N.C. 214, 218–20 (1983).

IV. Analysis

A sentencing judge must "consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." N.C.G.S. § 15A-1340.16(a) (2023).

"The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." *Id.*

"When evidence in support of a particular mitigating or aggravating factor is *uncontradicted*, *substantial*, *and there is no reason to doubt its credibility*," a sentencing judge errs in not finding such factor. *Jones*, 309 N.C. at 218–19 (emphasis added).

> Thus, when a defendant argues, as in the case at bar, that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law.

Id. at 219–20 (cleaned up).

"A trial judge is given wide latitude in determining the existence of . . . mitigating factors, and the trial court's failure to find a mitigating factor is error only when no other reasonable inferences can be drawn from the evidence." *State v. Johnson*, 196 N.C. App. 330, 336 (2009) (quoting *State v. Norman*, 151 N.C. App. 100, 105–06) (2002)). Therefore, "[a]n appellate court may reverse a trial court for failing to find a mitigating factor *only* when the evidence offered in support of that factor is both uncontradicted and manifestly credible." *State v. Mabry*, 217 N.C. App. 465, 471 (2011) (emphasis added) (cleaned up).

Here, defendant argues the trial court erred in failing to find the statutory mitigating factor that, at the time he murdered the victim by stabbing and cutting her over 160 times, he "was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced [his] culpability for the offense." N.C.G.S. § 15A-1340.16(e)(3). To prevail on this issue, defendant must show he offered evidence in support of this factor which was "uncontradicted, substantial," *Jones*, 309 N.C. at 218, "manifestly credible," *Mabry*, 217 N.C. App. at 471, and from which "no other reasonable inferences can be drawn," *Johnson*, 196 N.C. App. at 336. We conclude defendant has failed to meet this high bar.

Defendant argues Dr. Soliman's testimony provided substantial, uncontradicted, and manifestly credible evidence establishing that: (1)

defendant "suffered from the disease of schizophrenia for over twenty years" and (2) "[s]chizophrenia can contribute to crimes such as this one."[2] Defendant's burden, however, was to provide substantial, uncontradicted, and manifestly credible evidence establishing that: (1) he suffered from schizophrenia at the time of the murder and (2) his schizophrenia in fact "significantly reduced [his] culpability" for the murder. N.C.G.S. § 15A-1340.16(e)(3).

Accordingly, our review focuses on whether Dr. Soliman's testimony established that defendant was suffering from schizophrenia at the time of the murder and that such mental condition significantly reduced defendant's culpability. Presuming, without deciding, defendant's evidence established he was suffering from schizophrenia at the time of the murder, Dr. Soliman did not offer substantial and uncontradicted evidence tending to show defendant's schizophrenia significantly reduced his culpability for the offense.

Although Dr. Soliman testified it was "certainly possible" schizophrenia could contribute to the "kind of behavior" defendant displayed when he viciously murdered the victim, he "emphasize[d] that [he] didn't evaluate whether [it] did in this case." Dr. Soliman specifically testified he "wasn't asked to evaluate [defendant's] mental state at the time" of the offense and "wasn't asked to evaluate him to offer an opinion on diminished capacity[.]" Accordingly, Dr. Soliman stated "I can't testify with reasonable medical certainty that it," i.e., defendant's schizophrenia, "did or did not" contribute to the murder.

Our review of the record and transcripts in this case demonstrates that defendant failed to offer substantial, uncontradicted, and manifestly credible evidence that his schizophrenia significantly reduced his culpability for the offense. Defendant's only expert witness could not, and did not, testify with reasonable medical certainty that defendant's schizophrenia contributed to the murder or otherwise significantly reduced defendant's culpability for the offense. Based upon the evidence presented at the re-sentencing hearing, the sentencing judge did

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2. Defendant also argues that portions of his own testimony provide substantial, uncontradicted, and manifestly credible evidence. However, defendant's testimony does not qualify as the kind of "manifestly credible" evidence relevant to our analysis. Though appellate courts do not ordinarily judge the credibility of witnesses, in this case we must determine whether the credibility of defendant's testimony is "manifest as a matter of law." *Jones*, 309 N.C. at 220 (cleaned up). Considering defendant's history of competency issues, the content of his actual testimony, and his obvious self-interest in the outcome of the re-sentencing hearing, we conclude his testimony was not manifestly credible and therefore did not compel a finding of the mitigating factor under section 15A-1340.16(e)(3).

not err in failing to find defendant's proposed mitigating factor under section 15A-1340.16(e)(3) or in imposing an aggravated sentence of 397 to 489 months imprisonment.

V. Conclusion

An appellate court may reverse a trial court's decision not to find a mitigating factor only if the evidence supporting such factor is substantial, uncontradicted, and manifestly credible. Because defendant failed to present substantial, uncontradicted, and manifestly credible evidence supporting his proposed mitigating factor under section 15A-1340.16(e), the trial court did not err in failing to find that mitigating factor.

NO ERROR.

Judges TYSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
ERIC RUFFIN

No. COA24-276

Filed 5 March 2025

1. Drugs—lay witness testimony—visual identification by law enforcement officer—marijuana versus hemp—plain error not shown

In a prosecution on numerous drug-related charges, the trial court did not err, let alone commit plain error, in allowing lay opinion testimony from a law enforcement officer that, based on his training and experience, certain plant material defendant sold to a confidential informant was marijuana rather than legal hemp. The case cited by defendant in support of his position—*State v. Ward*, 364 N.C. 133 (2010)—concerned expert testimony admitted pursuant to Evidence Rule 702 rather than lay opinion testimony admitted pursuant to Evidence Rule 701 (such as the officer's marijuana identification).

2. Drugs—expert testimony—scientific identification of plant material—marijuana versus hemp—plain error not shown

In a prosecution on numerous drug-related charges, the trial court did not commit plain error in allowing expert testimony

from a forensic scientist that certain plant material defendant sold to a confidential informant was marijuana rather than legal hemp. Longstanding precedent held that chemical analysis is not required for the identification of marijuana, and the principles and methods applied by the expert—including weighing, macroscopic testing, microscopic examination, and confirmatory testing—demonstrated sufficient reliability for admission pursuant to Evidence Rule 702(a) (governing expert testimony).

3. Drugs—motion to dismiss—sale and delivery of marijuana—marijuana versus hemp—evidence sufficient

In a prosecution on numerous drug-related charges, the trial court did not err in denying defendant's motion to dismiss the marijuana-related charges for insufficiency of evidence that the plant material defendant sold to a confidential informant was marijuana rather than legal hemp where: (1) a law enforcement officer testified that the material appeared to be marijuana upon visual inspection, he heard defendant use the term "an eighth"—referring to marijuana—and he observed defendant rolling a "blunt"—a marijuana cigarette—via surveillance equipment; and (2) a forensic scientist testified that she performed multiple tests on the material and determined that it belonged "to the genus cannabis containing tetrahydrocannabinol, concentration of cannabinoid not determined." That evidence was sufficient to send the marijuana-related charges to the jury.

4. Drugs—jury instructions—legal definitions of marijuana and hemp—plain error not shown

In a prosecution on numerous drug-related charges, the trial court did not commit plain error in giving the pattern jury instructions for the charges of sale and delivery of marijuana, with the addition of the phrase "the term [marijuana] does not include hemp or hemp products" (as requested by defendant during the charge conference), but without explaining that marijuana has a Delta-9 tetrahydrocannabinoid (THC) content in excess of 0.3%, while hemp has a Delta-9 THC content of 0.03% or less. Appellate courts routinely approve jury instructions that are consistent with the North Carolina Pattern Jury Instructions, and the additional language requested by defendant and given by the court tracked language from the statute defining marijuana (N.C.G.S. § 90-87(16)).

5. Sentencing—marijuana—convictions for both selling and delivering—consolidation and concurrent sentencing—any error harmless

Following defendant's convictions on numerous drug-related charges, arising from defendant selling controlled substances—including marijuana—to a confidential informant, any error in defendant being sentenced for both selling and delivering marijuana as part of the same transaction (a matter the appellate court assumed without deciding) was harmless because the court consolidated those convictions and set their sentences to run concurrently with the longer sentence defendant received on his conviction on a trafficking charge; accordingly, defendant's term of imprisonment was not affected by the sale and delivery sentences.

6. Sentencing—extraneous information from prosecutor—not considered by trial court—permissible considerations

Defendant failed to show that, in sentencing him on convictions for trafficking in heroin by transportation, the trial court considered extraneous information presented by the prosecutor—that someone had died as a result of the drug transaction underlying the trafficking charges—in deciding to impose consecutive, as opposed to concurrent, sentences. During sentencing, the trial court expressly stated that it was not considering the death (or a potential death by distribution charge) in imposing sentences on the trafficking convictions. Further, challenged remarks made by the trial court during sentencing—such as discussing "peddling dope that kills people"—referenced permissible considerations within the court's discretion, such as the societal impact and severity of the crimes.

Appeal by Defendant from Judgments entered 29 March 2023 by Judge Wayland J. Sermons, Jr. in Martin County Superior Court. Heard in the Court of Appeals 6 November 2024.

Attorney General Jeff Jackson, by Assistant Attorney General Alexander H. Ward, for the State.

Shelly Bibb DeAdder for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Eric Ruffin (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of Trafficking in Heroin by Sale of More than 4 but Less than 14 Grams of Heroin, Trafficking in Heroin by Delivery of More than 4 but Less than 14 Grams of Heroin, Trafficking in a Mixture

Containing Heroin by Transporting More than 4 but Less than 14 Grams of a Mixture Containing Heroin, Trafficking in a Mixture Containing Heroin by Possession, Possession with Intent to Sell or Deliver (PWISD) a Controlled Substance (Mixture Containing Heroin), Sale of Marijuana, and Delivery of Marijuana. The Record before us tends to reflect the following:

Defendant was charged with Trafficking in Heroin by Sale; Trafficking in Heroin by Delivery; Trafficking in Heroin by Manufacture; Trafficking in Heroin by Transportation; Trafficking in Heroin by Possession; Possession with Intent to Manufacture, Sell, and Deliver Heroin; Sale of Marijuana; and Delivery of Marijuana on or about 21 April 2021. Following presentation to a grand jury, the charge of Trafficking in Heroin by Manufacture was dismissed. Defendant was indicted for Trafficking in Heroin by Sale, Trafficking in Heroin by Delivery, Trafficking in Heroin by Transportation, Trafficking in Heroin by Possession, Trafficking in a Mixture Containing Heroin by Transportation, Trafficking in a Mixture Containing Heroin by Possession, PWISD a Controlled Substance (Heroin), Sale of Marijuana, and Delivery of Marijuana. On or about 8 August 2022, the State obtained a superseding indictment for PWISD a Controlled Substance (Mixture Containing Heroin) rather than PWISD a Controlled Substance (Heroin).

This matter came on for trial on 27 March 2023. At trial, the State presented evidence tending to show that on or about 8 March 2021, a confidential informant (CI) contacted Detective Justin Harrell of the Martin County Sheriff's Office to arrange a controlled buy of drugs from Defendant. Detective Harrell had used this CI numerous times over a five-year period. At the time of trial, Detective Harrell had been in law enforcement for nearly twelve years and in the narcotics division for nine years.

On 8 March 2021, the CI sent a text message to Defendant stating he wanted buy seven grams of fentanyl "and some marijuana." Defendant quoted the CI a price of "$100 a gram for fentanyl" and "$35 for an eighth of an ounce of marijuana." Defendant then went to the CI's house and waited in his car. The CI paid Defendant $735 through his car window, and Defendant gave him two separate bags containing "the fentanyl and the marijuana." The two spoke briefly before Defendant left. Defendant was arrested shortly after leaving the scene. Police recovered the substances Defendant gave the CI, including a leafy green plant material, following the controlled buy.

Detective Harrell testified that based on his training and experience, the plant material appeared to be marijuana. Detective Harrell

also testified to his observations during the conversation between the CI and Defendant via surveillance equipment. During that conversation, Detective Harrell heard Defendant discuss an "eighth"—a common shorthand for an amount of marijuana—and observed Defendant "rolling a marijuana blunt."

The State also called Lyndsay Cone, a forensic scientist for the North Carolina State Crime Laboratory (Crime Lab) in the drug chemistry section, as an expert witness in drug analysis and identification. Cone testified she used the Crime Lab's procedures to test the plant material and other substances seized and described those tests. Based on that testing, Cone concluded one substance was "plant material belonging to the genus cannabis containing tetrahydrocannabinol [THC], concentration of cannabinoid not determined[.]" On cross-examination, Cone testified to the difference between marijuana and hemp, specifically that "in marijuana, the THC, the psychoactive ingredient, is very, very high, and the CBD is very low whereas in hemp they're reversed[.]" Additionally, Cone stated "at our lab we currently do not have the ability to distinguish between marijuana and hemp because that analysis requires what's called a quantitative analysis which is where you're measuring the percentages of what's present in the plant material[.]" Defense counsel then asked Cone whether the plant material she tested could have been hemp, to which she responded: "It's possible. Yes."

During the jury charge conference, Defendant requested the trial court add the following to the pattern jury instruction for the marijuana-related charges: "the term [marijuana] does not include hemp or hemp products." The trial court read the proposed instruction back to defense counsel who confirmed it was as requested. The trial court allowed Defendant's proposed instruction. Defendant did not otherwise object to the trial court's jury instructions.

On 29 March 2023, the jury returned verdicts finding Defendant guilty of Trafficking in Heroin by Sale of More than 4 but Less than 14 Grams of Heroin, Trafficking in Heroin by Delivery of More than 4 but Less than 14 Grams of Heroin, Trafficking in a Mixture Containing Heroin by Transporting More than 4 but Less than 14 grams of a Mixture Containing Heroin, Trafficking in a Mixture Containing Heroin by Possession, PWISD a Controlled Substance (Mixture Containing Heroin), Sale of Marijuana, and Delivery of Marijuana. The trial court sentenced Defendant to a term of 70 to 93 months of imprisonment for Trafficking in Heroin by Sale and an additional term of 70 to 93 months of imprisonment for Trafficking in a Mixture Containing Heroin by Transportation to run *consecutively*.

Defendant was also sentenced to two terms of 70 to 93 months of imprisonment, one for Trafficking in Heroin by Delivery and the other for Trafficking in a Mixture Containing Heroin by Possession, set to run concurrently with the Trafficking in Heroin by Sale sentence. The trial court sentenced Defendant to a further 8 to 19 months of imprisonment for PWISD (Mixture Containing Heroin). The trial court consolidated the convictions for Sale of Marijuana and Delivery of Marijuana and sentenced Defendant to 8 to 19 months of imprisonment to run concurrently with his sentence for Trafficking in a Mixture Containing Heroin by Transportation. Defendant orally gave Notice of Appeal in open court on 29 March 2023.

Issues

The issues on appeal are whether the trial court erred by: (I) denying Defendant's Motion to Dismiss his marijuana charges; (II) admitting Detective Harrell's testimony; (III) admitting Cone's expert testimony; (IV) instructing the jury using the pattern instruction and Defendant's requested instruction verbatim; (V) sentencing Defendant on consolidated marijuana offenses concurrently with a longer sentence; and (VI) considering the seriousness and impact of Defendant's trafficking heroin offenses in sentencing.

Analysis

I. Detective Harrell's Testimony

[1] Defendant contends the trial court plainly erred by allowing Detective Harrell to testify that the plant material in question was marijuana. Defendant did not object to Detective Harrell's testimony at trial. Thus, our review is limited to plain error. N.C. R. App. P. 10(a)(4) (2023) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional

case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

Under our statutes, at the time of the underlying incident, marijuana was defined as "all parts of the plant of the genus Cannabis . . . not includ[ing] industrial hemp[.]" N.C. Gen. Stat. § 90-87(16) (2021). Industrial hemp was defined under the Industrial Hemp Act as any variety of cannabis which contained no more than 0.3% of THC and was "cultivated or possessed by a grower licensed by the [North Carolina Industrial Hemp] Commission." N.C. Gen. Stat. § 106-568.51(7) (2022).[1]

Our Rules of Evidence provide a lay witness' testimony "in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2023). Generally, "in prosecutions involving controlled substances, the State bears the burden of proving the substance's identity beyond a reasonable doubt." *State v. Teague*, 286 N.C. App. 160, 184, 879 S.E.2d 881, 899 (2022) (citing *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010)). However, this Court has consistently held that "a police officer experienced in the identification of marijuana may testify to his visual identification of evidence as marijuana[.]" *State v. Garnett*, 209 N.C. App. 537, 546, 706 S.E.2d 280, 286 (2011); *see also State v. Johnson*, 225 N.C. App. 440, 455, 737 S.E.2d 442, 451 (2013) ("It is well established that officers with proper training and experience may opine that a substance is marijuana."); *State v. Jones*, 216 N.C. App. 519, 526, 718 S.E.2d 415, 421 (2011) ("[O]ur case law provides that an officer may testify that the contraband seized was marijuana based on visual inspection alone.").

Here, Detective Harrell testified to his training and experience at trial. Detective Harrell testified that at the time of the trial, he had worked for the Martin County Sheriff's Office for nearly twelve years and had worked in the narcotics division for nine years. In that role, he

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1. The Industrial Hemp Act expired on 30 June 2022; however, the General Assembly added the same definition of hemp to N.C. Gen. Stat. § 90-87(13a), which maintained the legal status of hemp while removing a licensure requirement. Further, the General Assembly modified the definition of "marijuana" to not include hemp. N.C. Gen. Stat. § 90-87(16) (2023).

investigated narcotics-related offenses, the transportation of illegal narcotics, and worked with confidential informants. He also stated that he completed yearly narcotics training. After testifying to the events leading up to Defendant's arrest, Detective Harrell testified that, based on his training and experience, the plant material appeared to be marijuana. Consistent with our caselaw, this identification was properly admitted because Detective Harrell is a law enforcement officer with proper training and experience in narcotics.

Defendant points to *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), arguing a law enforcement officer's visual identification is no longer reliable since our General Assembly legalized hemp because hemp and marijuana are indistinguishable without a chemical analysis. In *Ward*, our Supreme Court held "the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." *Id.* at 147, 694 S.E.2d at 747. We believe *Ward* is distinguishable from the case at hand.

First, we note our Supreme Court in *Ward* expressly stated: "This holding is limited to North Carolina Rule of Evidence 702." *Id.* Rule 702 governs expert testimony only. Thus, the standard for lay opinion testimony under Rule 701—including Detective Harrell's testimony—is unchanged in light of *Ward*. Moreover, the contraband substances at issue in *Ward* were pharmaceuticals, not marijuana. *Id.* at 135-39, 694 S.E.2d at 740-42. And our cases following *Ward* have affirmed that law enforcement officers may still offer lay opinion testimony identifying a substance as marijuana. *E.g.*, *Garnett*, 209 N.C. App. at 546, 706 S.E.2d at 286; *Johnson*, 225 N.C. App. at 455, 737 S.E.2d at 451; *State v. Mitchell*, 224 N.C. App. 171, 179, 735 S.E.2d 438, 444 (2012); *State v. Cox*, 222 N.C. App. 192, 198, 731 S.E.2d 438, 443 (2012), *rev'd on other grounds*, 367 N.C. 147, 749 S.E.2d 271 (2013); *Jones*, 216 N.C. App. at 526, 718 S.E.2d at 421. *But see State v. Highsmith*, 285 N.C. App. 198, 199, 877 S.E.2d 389, 390 (2022) (acknowledging the emergence of hemp, "another plant that looks and smells the same as illegal marijuana but is legal in North Carolina," has "brought about speculation and discussion surrounding the ability of law enforcement to use the sight and scent traditionally associated with marijuana" to establish probable cause). Consistent with this caselaw, we conclude the admission of Detective Harrell's opinion testimony identifying the plant material as marijuana was not error. Therefore, the admission was not plain error.

II. Expert Testimony

[2] Similarly, Defendant contends the trial court's admission of Cone's testimony as an expert witness to identify the plant material in question as marijuana was plain error. Defendant did not object to Cone's testimony at trial. Thus, we again apply the plain error standard of review. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Rule of Evidence 702 governs the admissibility of expert testimony. This Rule provides:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2023). Defendant contends none of the three criteria were satisfied in this case.

As our Supreme Court has noted, North Carolina adopted the federal *Daubert* standard for determining whether to admit expert opinion testimony. *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016). Consistent with this standard, a trial court applies the three-pronged reliability test set forth in Rule 702(a). "The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate." *Id.* at 890, 787 S.E.2d at 9 (citations and quotation marks omitted). "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.* (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152-53, 119 S. Ct. 1167, 1176, 143 L. Ed. 2d 238 (1999)). "Trial courts enjoy 'wide latitude and discretion when making a determination about the admissibility of [expert] testimony.' " *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012) (quoting *State v. Wise*, 326 N.C. 421, 432, 390 S.E.2d 142, 149 (1990), *cert. denied*, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990)).

Defendant points to *State v. Teague* for the proposition that the identity of a controlled substance must be proven by "scientifically valid chemical analysis and not mere visual inspection." 286 N.C. App. 160, 184, 879 S.E.2d 881, 899 (2022) (quoting *Ward*, 364 N.C. at 142, 694 S.E.2d at 744). Yet the next sentence of that opinion reads: "However, marijuana has long been excepted from this rule." *Id.* Further, "[n]otwithstanding *Ward*, this Court has 'specifically noted that marijuana is distinguishable from other controlled substances that require more technical analyses for positive identification. In keeping with a long line of cases, we [have repeatedly] held . . . that the State is not required to submit marijuana for chemical analysis.' " *Id.* (quoting *State v. Mitchell*, 224 N.C. App. 171, 179, 735 S.E.2d 438, 444 (2012) (citation omitted), *appeal dismissed and disc. review denied*, 366 N.C. 578, 740 S.E.2d 466 (2013)) (alterations in original). Consistent with our caselaw then, the State was not required to submit the plant material for chemical analysis. The question remaining is whether, although the State did not need to submit a chemical analysis, Cone's expert testimony was otherwise reliable under Rule 702(a).

Cone's procedure substantially matches that approved of by this Court in *State v. Abrams*, 248 N.C. App. 639, 789 S.E.2d 863 (2016). There, as here, the defendant challenged the expert witness' testimony as not based on reliable principles and methods and argued she had not applied the principles and methods reliably to the facts of the case under Rule 702(a). *Id.* at 642-46, 789 S.E.2d at 865-67. At trial, the State's expert witness testified she followed the procedures in place at the Crime Lab for identifying marijuana at the time, including weighing the material, conducting a preliminary color test and microscopic examination, followed by a chemical reaction color test. *Id.* at 644, 789 S.E.2d at 866.

At trial, the State called and qualified Cone, a forensic scientist with the Crime Lab, as an expert in drug analysis and identification. Cone testified she tested evidence submitted by the State in accordance with the procedures for identifying marijuana used by the Crime Lab at the time. Those procedures included weighing the material, a macroscopic test, a preliminary test, a microscopic exam, and a confirmatory test. Based on that testing, Cone concluded the plant material Defendant possessed was cannabis containing THC, "concentration of cannabinoid not determined[.]" This Court has consistently approved of similar procedures in our caselaw. *E.g.*, *Abrams*, 248 N.C. App. at 644-46, 789 S.E.2d at 866-67; *State v. Hall*, 287 N.C. App. 394, *9, 881 S.E.2d 762 (2022) (unpublished). Thus, the expert testimony identifying the plant material as marijuana was sufficiently reliable under Rule of Evidence 702(a). Therefore, the trial court did not plainly err in admitting this testimony.

III. Motion to Dismiss

[3] "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). "Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

Defendant contends the trial court erred in denying his Motion to Dismiss the marijuana-related charges because the State did not present sufficient evidence showing his plant material was marijuana, rather than hemp. The jury found Defendant guilty of both Sale and Delivery of Marijuana pursuant to N.C. Gen. Stat. § 90-95(a)(1).

At trial, the State presented testimony from both Detective Harrell, an experienced narcotics officer, and Lyndsay Cone, a forensic scientist for the Crime Lab, to establish that the plant material was marijuana. First, as discussed previously, Detective Harrell consistently testified he believed the plant material was marijuana "based on [his] training and experience." Further, Detective Harrell testified he heard Defendant discuss an "eighth"—referring to marijuana—and observed Defendant "rolling a marijuana blunt" via surveillance equipment.

Cone, a forensic scientist for the Crime Lab, testified she performed multiple tests and determined the substance belonging to Defendant was "plant material belonging to the genus cannabis containing [THC], concentration of cannabinoid not determined[.]" Cone acknowledged she could not determine the concentration of THC in the sample in the Crime Lab. However, as Defendant concedes, "our courts have never held [a chemical analysis] is necessary" to allow a jury to determine

whether a substance was marijuana or hemp. *State v. Massey*, 287 N.C. App. 501, 511, 882 S.E.2d 740, 749 (2023); *see also State v. Osborne*, 372 N.C. 619, 630-31, 831 S.E.2d 328, 336 (2019). Indeed, our courts have consistently affirmed that testimony identifying a substance as marijuana—from a law enforcement officer as well as a forensic expert—is sufficient to take the matter to the jury. *See State v. Booth*, 286 N.C. App. 71, 78-80, 879 S.E.2d 370, 376-77 (2022); *State v. Massey*, 287 N.C. App. 501, 511, 882 S.E.2d 740, 749 (2023); *State v. Duncan*, 286 N.C. App. 159, *5-*6, 878 S.E.2d 682 (2022) (unpublished); *State v. Johnson*, 225 N.C. App. 440, 455, 737 S.E.2d 442, 451 (2013); *State v. Mitchell*, 217 N.C. App. 401, *3, 720 S.E.2d 29 (2011) (unpublished).

The relevant facts in this case are similar to those in *State v. Booth*, 286 N.C. App. 71, 879 S.E.2d 370 (2022). In *Booth*, a law enforcement officer conducted controlled buys of marijuana using a confidential informant. *Id.* at 72, 879 S.E.2d at 372. The officer recovered a "green leafy substance" which he identified as marijuana based on his training and experience. *Id.* at 73, 79, 879 S.E.2d at 373-74, 376. On appeal, the defendant contended the trial court improperly denied his motion to dismiss the marijuana charges because, in his view, the State had failed to introduce sufficient evidence the substance in question was marijuana rather than hemp. *Id.* at 77, 879 S.E.2d at 375. At trial, the State presented evidence the defendant admitted seized items—including plastic baggies and a scale—belonged to him; defendant had on his person money that had been provided to the confidential informant; and the law enforcement officer's testimony identifying the substance at issue as marijuana based on his training and experience. *Id.* at 79, 879 S.E.2d at 376. This Court determined this evidence was sufficient to survive the defendant's motion to dismiss. *Id.* at 79-80, 879 S.E.2d at 376-77.

Here, the State presented Detective Harrell's testimony identifying the plant material as marijuana based upon his training and experience as a narcotics officer. Detective Harrell also testified to hearing Defendant discussing an "eighth"—a common unit of marijuana for sale—with the CI via surveillance equipment. Detective Harrell also observed Defendant "rolling a marijuana blunt." Further, the State presented the testimony of Lyndsay Cone, an experienced forensic scientist at the Crime Lab, who performed multiple tests on Defendant's plant material and concluded it was marijuana. Thus, based on our caselaw, the State presented substantial evidence the plant material belonging to Defendant was marijuana. Therefore, the trial court properly denied Defendant's Motion to Dismiss.

IV. Jury Instructions

[4] Defendant argues the trial court plainly erred by not instructing the jury on the legal definitions of marijuana and hemp. Because Defendant made no objection to the jury instructions at trial, our review is again limited to plain error. *See* N.C. R. App. P. 10(a)(4) (2023) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)).

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Kuhns*, 260 N.C. App. 281, 284, 817 S.E.2d 828, 830 (2018) (quoting *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973)). "Accordingly, 'it is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence.' " *Id.* (quoting *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988)). "It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety." *Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citation omitted). "This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *State v. Ballard*, 193 N.C. App. 551, 555, 668 S.E.2d 78, 81 (2008) (citation omitted).

Here, during the charge conference discussion on the instructions around the Sale and Delivery of Marijuana charges, Defendant asked the trial court to add the following to the pattern jury instruction: "the term [marijuana] does not include hemp or hemp products." The trial court read the proposed instruction back and defense counsel confirmed that was how he wished it to read. Thus, for Defendant's marijuana charges, the trial court instructed the jury in accordance with the pattern jury instructions, with the only deviation being the inclusion of Defendant's proposed instruction. On appeal, Defendant contends this instruction

was plainly erroneous because it omitted information specifying that marijuana has a Delta-9 THC content in excess of 0.3%, while hemp has a Delta-9 THC content of 0.3% or less.

Our Courts have repeatedly approved of jury instructions that are consistent with the North Carolina Pattern Jury Instructions. *See, e.g.*, *State v. DeCastro*, 342 N.C. 667, 693, 467 S.E.2d 653, 666 (1996) (concluding instructions were "a correct statement of the law" where "[t]he instruction as given was virtually identical to the pattern jury instructions[.]"). The instruction in this case was identical to the pattern instruction with the exception of Defendant's requested instruction, which the trial court gave verbatim. Moreover, Defendant's requested instruction was an accurate statement of the law, as our statutes define "marijuana" as "all parts of the plant of the genus Cannabis. . . . The term does not include hemp or hemp products." N.C. Gen. Stat. § 90-87(16) (2023). Thus, we cannot conclude the omission of the language specifying the THC content in marijuana as opposed to hemp was plain error.

V. Concurrent Sentencing

[5] Defendant asserts he was improperly sentenced for both selling and delivering marijuana as part of the same transaction. Even assuming without deciding that Defendant's marijuana convictions both arose from the same transaction, we conclude any error was harmless.

Defendant correctly cites *State v. Moore*, in which our Supreme Court held "[a] defendant may not, however, be convicted under N.C.G.S. § 90-95(a)(1) of both the sale *and* the delivery of a controlled substance arising from a single transfer." 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990) (emphasis in original). In *Moore*, the defendant was convicted of possession, sale, and delivery of a controlled substance charged in one indictment, as well as possession with intent to sell or deliver, sale of a controlled substance, and delivery of a controlled substance charged in a second indictment. *Id.* at 380, 395 S.E.2d at 125. The trial court consolidated the three counts in each indictment and sentenced the defendant to consecutive sentences of six years of imprisonment. *Id.* at 380, 395 S.E.2d at 126.

This Court recently applied *Moore* in remanding a case for resentencing where the defendant was convicted of two counts each of possession, sale, and delivery of a controlled substance. *State v. Morris*, 288 N.C. App. 65, 88-89, 884 S.E.2d 750, 766-67 (2023). There, the trial court entered judgment on both the sale and delivery charges, sentencing the defendant to two terms of imprisonment of 15 to 27 months. *Id.* at 71, 884 S.E.2d at 755. The instant case is readily distinguishable.

Although Defendant was sentenced for both Sale and Delivery of Marijuana, the trial court consolidated those convictions to run *concurrently* with the longer sentence for Trafficking in a Mixture Containing Heroin by Transportation. Defendant's term of imprisonment would thus be the same even without a sentence for the sale and delivery of marijuana. Indeed, Defendant concedes that even if this matter were remanded for resentencing, the term of imprisonment "might not change" because the sentences run concurrently. Thus, Defendant has not established he was prejudiced by this alleged error. *See State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962) ("A judgment will not be disturbed because of sentencing procedures unless there is a showing of . . . procedural conduct prejudicial to [the] defendant[.]"); *State v. Chivers*, 180 N.C. App. 275, 281, 636 S.E.2d 590, 595 (2006) (overruling assignment of error where trial court improperly calculated defendant's prior record level but defendant was not prejudiced); *State v. Williams*, 65 N.C. App. 472, 478, 310 S.E.2d 83, 87 (1983) ("Upon arrival of the case in the appellate division the burden is upon the criminal defendant not only to show error but to show prejudicial error."). Therefore, we conclude the trial court did not plainly err in sentencing Defendant on the marijuana-related charges.

VI. Sentencing Considerations

[6] Finally, Defendant contends the trial court erred in sentencing because, in his view, the trial court considered extraneous information presented by the prosecutor when imposing two consecutive sentences for Trafficking Heroin by Transportation. We disagree.

Prior to sentencing, the trial prosecutor informed the court, "there are circumstances around this particular sale that didn't come out in the trial. . . that being the death of Tina Harrison . . . I know he hasn't been convicted of that, but the State would ask that you take that into consideration." However, during sentencing, the trial court made the following statements to Defendant: "Well, what do you call peddling dope that kills people?" and "I just can't understand. Marijuana you know . . . Marijuana is marijuana. You jacked it up to heroin and fentanyl" and "we have another proceeding at some point in the future because he's charged with death by distribution. I did not consider that. . . . [T]hat will rise or fall on its own evidence." Defendant argues these comments demonstrate the trial court relied on the prosecuting counsel's remarks, directly impacting the imposition of two consecutive active sentences of 70 to 93 months, as opposed to imposing concurrent sentences.

"When this Court is confronted with statutory errors regarding sentencing issues, such errors are questions of law, and as such, are

reviewed *de novo*." *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) (citation and quotation marks omitted). "When a sentence is within the statutory limit it will be presumed regular and valid unless 'the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence.' " *State v. Davis*, 167 N.C. App. 770, 775, 607 S.E.2d 5, 9 (2005) (quoting *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)). "If the record discloses that the [trial] court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant's rights." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977) (citation omitted). However, where "the record reveals no such express indication of improper motivation," the defendant is not entitled to a new sentencing hearing. *Johnson*, 320 N.C. at 753, 360 S.E.2d at 681. In the present case, we cannot conclude that the trial court improperly considered extraneous information in determining the nature of Defendant's sentence.

This Court has previously analyzed a trial court's sentencing considerations in *State v. Oakes*, 219 N.C. App. 490, 724 S.E.2d 132 (2012). There, the Court observed, "defendant cites no authority—and we know of none—suggesting that a trial court may not take into account the seriousness of a crime and the defendant's criminal record in deciding where within a presumptive range a defendant's sentence should fall." *Id.* at 497, 724 S.E.2d at 137. Indeed, the Court noted, "If a trial court is free to choose 'any' minimum term, we fail to see why a trial court should not be able to take into account the seriousness of the particular offense when exercising its discretion[.]" *Id.* at 498, 724 S.E.2d at 138.

Similarly, in *State v. Butler*, when sentencing the defendant on two drug trafficking charges, the trial court expressly cited the broader impact of drugs on the community as a reason for imposing consecutive, rather than concurrent, active sentences. 147 N.C. App. 1, 13-14, 556 S.E.2d 304, 312 (2001). There, during sentencing, the trial court explained the sentence it imposed as follows: "The primary [reason] is that drugs in the community impact a lot of people, not just individuals who take the drugs. . . . It impacts everybody around you[.]" *Id.* at 14, 556 S.E.2d at 312. On appeal, this Court affirmed the trial court's decision, holding it was not improper for the trial court to consider the general societal impact of drugs when determining sentences, even though it was not specifically related to the defendant's actions. *Id.* at 14, 556 S.E.2d at 313. Finally, in *State v. Juarez*, Defendant appealed consecutive active sentences for Trafficking in Heroin. 270 N.C. App. 202, *1, 837 S.E.2d 724 (2020) (unpublished). Although *Juarez* is unpublished

and thus not controlling legal authority,[2] we find it instructive. There, this Court rejected the defendant's claim, holding "it was not improper for the trial court to consider the impact of drugs when deciding the appropriate sentence for defendant." *Id.* at *3. This is consistent with *Butler*'s holding that a trial court may weigh the broader effects of drugs when imposing sentences for drug-related offenses. Thus, this Court has consistently affirmed a trial court's discretion to consider certain factors beyond the immediate offense, such as societal impact and the severity of the crime, when determining sentences.

Here, Defendant contends the trial court improperly considered extraneous information during sentencing, specifically outside drug charges and a death by distribution charge. Although the trial court acknowledged the prosecutor's request to consider these factors, it expressly said it did not consider the death by distribution charge, stating, "I did not consider that. . . . [T]hat will rise or fall on its own evidence." In the present case, the Record is even clearer than those in *Oakes*, *Butler*, and *Juarez*. Unlike the aforementioned cases, the trial court here expressly rejected the prosecutor's arguments regarding the separate charges on the Record and affirmatively stated that other charges would be considered in separate proceedings. The trial court's unambiguous language reinforces our conclusion the trial court did not rely on the separate charges against Defendant.

Moreover, the challenged statements fall within the bounds of permissible considerations under our caselaw. During sentencing, the trial court made references to the societal impact of drugs and the severity of Defendant's offenses:

> I don't know how in the world you thought that it was anywhere near a good business to be in to sell fentanyl and heroin but fentanyl that kills people just by touching it and you seem like a smart guy, and I'm pretty sure you saw on the news people dying of fentanyl all the time, and it escapes me that you didn't just dismiss that because you were making money with – with getting people hooked on this terrible, terrible drug.

As this Court noted in *Butler*, consideration of the broader societal impact of drug crimes is permissible during sentencing. 147 N.C. App.

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2. Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure provides: "An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority." N.C. R. App. P. 30(e)(3) (2024).

at 14, 556 S.E.2d at 313. Further, as in *Oakes*, it is within the trial court's discretion to consider the severity of the crime itself at sentencing. 219 N.C. App. at 498, 724 S.E.2d at 138.

Defendant points to *State v. Johnson*, 265 N.C. App. 85, 827 S.E.2d 139 (2019), in support of his argument. There, this Court vacated the defendant's sentence after determining the trial court improperly considered offenses for which the defendant had not been charged. *Id.* at 90-91, 827 S.E.2d at 143. In that case, the trial court expressly acknowledged matters outside the record in sentencing, stating they were "even more important[ ] to me." *Id.* at 88, 827 S.E.2d at 141. The present case is distinguishable.

In *Johnson*, "the trial judge did not just consider the impact of [the] defendant's drug offenses on the community, but clearly indicated in her remarks that she was considering a specific offense in her community for which [the] defendant was not charged." *Id.* at 89, 827 S.E.2d at 142. In contrast, here the trial court expressly rejected the prosecutor's arguments regarding other charges, stating: "we have another proceeding at some point in the future because he's charged with death by distribution. *I did not consider that.* . . . [T]hat will rise or fall on its own evidence." The clear rejection of extraneous information rebuts Defendant's claim the trial court relied on impermissible factors in sentencing him.

Thus, there is no indication on this Record the sentence imposed on Defendant was based on improper extraneous information. Therefore, the trial court did not err in sentencing Defendant to consecutive active sentences within the presumptive range set by the sentencing guidelines. Consequently, the trial court properly entered the Judgments on Defendant's convictions.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgments.

NO ERROR.

Judges ARROWOOD and COLLINS concur.

ZIEGLER v. ZIEGLER

[298 N.C. App. 122 (2025)]

A.J.Z., a minor by her Guardian ad Litem DEMI-LEE ZIEGLER, Plaintiff
v.
JAY DEREK ZIEGLER, Defendant

No. COA24-536

L.Z., a minor by his Guardian ad Litem DEMI-LEE ZIEGLER, Plaintiff
v.
JAY DEREK ZIEGLER, Defendant

No. COA24-539

Filed 5 March 2025

Domestic Violence—protective order—personal jurisdiction—sufficient minimum contacts

In a proceeding for a domestic violence protection order—sought by a mother on behalf of her minor children—the trial court had personal jurisdiction over the children's father, a resident of Tennessee, where he had sufficient minimum contacts with North Carolina to satisfy our state's Long Arm Statute (N.C.G.S. § 1-75.4) and his right to due process in that he: (1) participated in a child custody modification action in North Carolina; (2) was alleged to have committed domestic violence against his minor children, who were residents of North Carolina; and (3) contracted with a North Carolina attorney to represent him in the child custody and domestic violence actions.

Appeal by defendant from order entered 8 February 2024 by Judge Melinda H. Crouch in New Hanover County District Court. Heard in the Court of Appeals 30 January 2025.

Rice Law, PLLC, by Richard Forrest Kern, for defendant-appellant.

No brief was submitted for plaintiffs-appellees.

FLOOD, Judge.

Defendant Jay Derek Ziegler appeals from the trial court's order denying Defendant's motion to dismiss for lack of personal jurisdiction and entering a domestic violence protective order (the "DVPO") against

Defendant. On appeal, Defendant argues that visiting his children in North Carolina and participating in his child custody modification action does not grant a North Carolina trial court the power to exercise personal jurisdiction over him. Upon review, we conclude the trial court did not err in finding it had personal jurisdiction over Defendant where, in addition to and in the context of the child custody modification proceeding, Defendant was alleged to have committed domestic violence actions towards his minor children who reside in North Carolina, and Defendant obtained legal representation in North Carolina for the child custody modification and domestic violence actions.

I. Factual and Procedural Background

Defendant is the biological father of Plaintiffs A.J.Z. and L.Z.,[1] both minor children. Defendant and Plaintiffs' mother, who is also Plaintiffs' guardian ad litem (the "GAL") in the present matter, were married and living together along with Plaintiffs in Hamilton, Tennessee, where Defendant was working as a law enforcement officer. In 2021, Defendant and Plaintiffs' mother separated, and Plaintiffs' mother moved with her children to New Hanover, North Carolina, while Defendant remained in Tennessee.

On 20 July 2023, Plaintiffs' mother, as the GAL, filed a petition to register the parties' child custody order, which had been previously granted in Tennessee (the "Tennessee Child Custody Order"), in the New Hanover County District Court. The trial court entered an order confirming the registration of the Tennessee Child Custody Order in North Carolina. On 28 August 2023, the GAL filed a motion in the district court to modify the Tennessee Child Custody Order (the "custody modification action"). Defendant filed a response and a motion to stay the matter pending resolution of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), and filed a motion for communication between the Tennessee and North Carolina courts pursuant to the UCCJEA.

The Tennessee Circuit Court of Hamilton County (the "Tennessee circuit court") held a telephone conference on 26 October 2023 with both parties' counsel present to discuss jurisdiction of the custody matter. On 2 November 2023, the Tennessee circuit court entered an order relinquishing jurisdiction to North Carolina for the custody modification

1. Pseudonyms are used to protect the identity of the minor children and for ease of reading. *See* N.C. R. App. P. 42(b).

action per the UCCJEA, but retaining jurisdiction of the ongoing child support matter.

Following a visitation period that took place in Tennessee, Defendant met with Plaintiffs' mother in Georgia on 26 December 2023 to return the children to her. After exchanging the children, Plaintiffs' mother visited a restroom and later alleged she had discovered, when in that restroom, a "red swollen marking" on her daughter's bottom, and that her son had a "bruise on his face and a burn on his leg." Defendant is also "alleged to have put horrible tattoos all over the children's bodies even after being told by [a] therapist not to do so" and to have "handcuffed" the children in the past.

On 16 January 2024, Plaintiffs' mother, as the GAL, filed a complaint and motion in the district court for an *ex parte* DVPO on behalf of the minor children against Defendant. On 26 January 2024, Defendant filed a motion to dismiss the complaint and challenged the *ex parte* DVPO for lack of personal jurisdiction. Additionally, Defendant also filed motions to compel discovery, a motion for North Carolina and Tennessee Department of Social Services ("DSS") records, and a motion for hospital records.[2]

On 9 February 2024, the trial court made the following pertinent findings with respect to Defendant's activity in and contacts with North Carolina:

> 4. [Plaintiffs] have resided in North Carolina with their mother. . . herein since 2021. [] Defendant has known the children and their mother have been in North Carolina since that time.
>
> 5. North Carolina is the "home state" for purposes of the UCCJEA as the children have resided in North Carolina since 2021 and continue to reside here.
>
> 6. Plaintiff[s' mother] filed a Petition for Registration of a Foreign Custody Order in New Hanover County file number 23 CVD 2432 on July 20, 2023. She filed a Motion to Modify Custody on August 28, 2023[,] and an Order Confirming Registration was entered by [the trial court] on September 14, 2023.
>
> . . . .

2. The trial court noted Defendant had filed these motions, but they are not before us nor further mentioned in the Record.

10. [] Defendant has been to North Carolina on several occasions to visit his children and attend a dance recital.

11. [] Defendant has entered into a contract in North Carolina to hire his attorney to represent him in the custody action and the domestic violence actions.[3]

12. Defendant is aware that the children's doctors and therapist are in North Carolina[.]

13. [] Defendant is aware that the children are in school in North Carolina, and he has access to the schools.

14. Defendant is aware that there is an open [DSS] investigation in North Carolina and Tennessee.

15. Defendant is aware that there is an investigation by law enforcement in North Carolina into Plaintiff[s'] claims concerning domestic violence that is the subject of this action and Defendant testified that law enforcement in Tennessee has conducted prior investigations in Tennessee.

. . . .

17(c). [] Defendant has never lived in the State of North Carolina.

. . . .

19. The only contact that [] Defendant maintains he has had with the State of North Carolina arises from the visits he has made to see his children and of child custody and domestic violence litigation in this State.

20. Witnesses to the alleged incidents of domestic violence may exist in both North Carolina and the State of Tennessee[.]

. . . .

23. Defendant would know or would have reason to know that actions toward his children that could be deemed domestic violence would be fair game for the courts of this state to adjudicate especially since this court has already assumed jurisdiction to determine custody.

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3. The Record does not indicate when this contract was entered or provide further information regarding the contract.

Based on these findings, the trial court concluded:

> 5. Defendant could reasonably foresee that actions that may be deemed domestic violence towards his children would be the subject of his custody action in North Carolina as well as actions under the North Carolina domestic violence statute as this court is required to determine whether the minor children have been subjected to domestic violence in determining the children's best interests.
>
> 6. This [c]ourt can exercise personal jurisdiction over [D]efendant as an out of state defendant based on [D]efendant's awareness and the fact that he could have "reasonably anticipate[d]" his actions would connect him to the state of North Carolina. [*Mucha*], 378 N.C. at 174.

The trial court denied Defendant's motion to dismiss for lack of personal jurisdiction and entered a DVPO against Defendant. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to hear Defendant's appeal pursuant to N.C.G.S. § 1-277(b), which provides that "[a]ny interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the trial court over the person or property of the defendant[.]" N.C.G.S. § 1-277(b) (2023); *see also Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614 (2000) ("The denial of a motion to dismiss for lack of jurisdiction is immediately appealable." (citation omitted)).

III. Standard of Review

"The standard of review on appeal of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record." *Bartlett v. Est. of Burke*, 285 N.C. App. 249, 256 (2022) (citation omitted) (cleaned up). "We review de novo the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over a defendant." *Id.* at 256 (citation omitted) (cleaned up). Under a de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33 (2008). Additionally, "unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *In re R.D.B.*, 274 N.C. App. 374, 379–80 (2020) (citation omitted) (cleaned up).

IV. Analysis

On appeal, Defendant argues the trial court lacked personal jurisdiction over him, contending that by visiting his children in the forum state and participating in the custody modification action, he did not establish sufficient minimum contacts with the State of North Carolina to satisfy due process. We disagree and conclude Defendant's alleged domestic violence towards his children, the alleged violence as it pertains to the custody modification action, and Defendant's representation in both actions in North Carolina, establish sufficient minimum contacts necessary for the trial court's exercise of personal jurisdiction over Defendant.

A. Due Process

"The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021). A trial court must have either general or personal jurisdiction over a defendant in domestic violence actions. *See Mucha v. Wagner*, 378 N.C. 167, 177 (2021). Here, the trial court did not find it had general jurisdiction over Defendant, and thus, we will consider only whether the trial court had personal jurisdiction over Defendant.

For North Carolina courts to exercise personal jurisdiction over a nonresident defendant, "(1) there must be statutory authority for the exercise of jurisdiction, and (2) the nonresident defendant must have sufficient contacts with this State such that the exercise of jurisdiction does not violate the federal due process clause." *Bruggeman*, 138 N.C. App. at 614–15.

North Carolina's Long Arm Statute, N.C.G.S. § 1-75.4 (2023), "grants North Carolina's courts specific personal jurisdiction over defendants to the extent allowed by due process." *Bartlett v. Est. of Burke*, 285 N.C. App. 249, 256 (2022) (citation omitted) (cleaned up). Our Long Arm Statute provides, in relevant part, that a trial court will have personal jurisdiction over a nonresident defendant if that defendant "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d) (2023). "[W]hen evaluating the existence of personal jurisdiction pursuant to [N.C.]G.S. § 1–75.4(1)(d), the question of statutory authorization collapses into the question of whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Bruggeman*, 138 N.C. App. at 617 (citation omitted) (cleaned up).

We therefore proceed to the due process inquiry, considering whether the trial court had personal jurisdiction over Defendant based on his contacts with North Carolina.

B. Personal Jurisdiction and Minimum Contacts

In order to satisfy due process, "the defendant must 'have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Mucha*, 378 N.C. at 171 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Our courts look at the following factors in determining whether minimum contacts exist:

> (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties.

Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 696 (2005) (citation omitted). "To ascertain whether a defendant's contacts are of the frequency and kind necessary to surpass the 'minimum contacts' threshold, courts must first examine whether the defendant has taken 'some act by which [they] *purposefully avail* [themselves] of the privilege of conducting activities within the forum State.' " *Mucha*, 378 N.C. at 171 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

A defendant must be aware that they are "establishing a connection with the State of North Carolina. This awareness—whether actual or imputed—is what permits a court in North Carolina to exercise judicial authority over the nonresident defendant." *Mucha*, 378 N.C. at 172. Our Supreme Court has explained that "[a]t a minimum, there must be some evidence from which the court can infer that in undertaking an act, the defendant purposefully established contacts with the State of North Carolina specifically." *Mucha*, 378 N.C. at 180. We now consider Defendant's contacts in North Carolina as they pertain to the custody modification action and the domestic violence action.

Defendant argues the trial court erred in finding he had sufficient minimum contacts, based on his visitation with his children in North Carolina and participating in the custody modification action in North Carolina, so as to establish a connection with the state that would permit a North Carolina court to exercise judicial authority over him.

Our courts have addressed whether sufficient minimum contacts arise from child custody and visitation actions such that personal jurisdiction is established. In *Miller v. Kite*, our Supreme Court considered

the issue of whether the trial court had personal jurisdiction over a nonresident parent who was visiting his child. 313 N.C. 474, 479 (1985). After the couple's separation, the defendant's ex-wife had moved their daughter from Illinois to North Carolina, and the defendant, who had never lived in North Carolina, sent child support checks to North Carolina and occasionally visited his child in North Carolina. *Id.* at 475-76. Our Supreme Court held the facts did not establish personal jurisdiction over the defendant, explaining that "the child's presence in North Carolina was not caused by the defendant's acquiescence. Instead, it was solely the result of the plaintiff's decision as the custodial parent to live here with the child[,]" and "unilateral acts by the party claiming a relationship with a non-resident defendant may not, without more, satisfy due process requirements." *Id.* at 479.

Our Supreme Court concluded, "[the] defendant did not purposefully avail himself of the benefits and protections of the laws of this State[,] and "[a] contrary conclusion would discourage voluntary child custody agreements and subject a non-custodial parent to suit in any jurisdiction where the custodial parent chose to reside." *Id.* at 479. Further, the Court acknowledged "that the presence of the child and one parent in North Carolina might make this State the most convenient forum for the action[,]" but "[t]his fact . . . does not confer personal jurisdiction over a non-resident defendant." *Id.* at 479. Additionally, a nonresident "defendant's general appearance in the child custody and support action" does not establish sufficient minimum contacts but is a "submission to jurisdiction in that action only and does not waive his right to object to jurisdiction in separate causes of action." *Buck v. Heavner*, 93 N.C. App. 142, 146 (1989).

Here, the trial court made several findings of fact pertaining to Defendant's custody modification action and visitation, which Defendant does not challenge on appeal. Findings of Fact 4, 5, and 6 identify that Plaintiffs' mother unilaterally moved the minor children to North Carolina, they have lived in North Carolina since 2021, and there is an ongoing custody modification action taking place in North Carolina. Findings of Fact 10, 11, and 17 reveal that Defendant, who has never lived in North Carolina, has occasionally visited North Carolina in order to visit with his children, and that he hired a North Carolina attorney to represent him in the custody modification action. Findings of Fact 12 and 13 state Defendant is aware that the children are in school in North Carolina, he has access to the schools, and he is aware the children's doctors and therapist are in North Carolina. Additionally, Finding of Fact 19 reveals that the only contact "Defendant maintains he has had

with the State of North Carolina arises from the visits he has made to see his children and of child custody and domestic violence litigation in this State."

Similar to the situation in *Miller* where "the child's presence in North Carolina . . . was solely the result of the plaintiff's decision as the custodial parent to live here with the child[,]" Defendant's children were present in North Carolina solely as the result of Plaintiffs' mother's decision as the custodial parent to live in North Carolina with the children. *See Miller*, 313 N.C. at 479. Defendant's visitation with his children in North Carolina and his participation in the custody modification action, without more, would fail to establish sufficient minimum contacts to meet due process standards.

Here, however, there is more, where the trial court's consideration of Defendant's interaction with his children was not isolated to the issues of custody and visitation, but rather was in the context of the custody modification action, which necessarily included consideration of the domestic violence action against Defendant. *See Miller*, 313 N.C. at 479; *see also Buck*, 93 N.C. App at 146.

The trial court made multiple findings of fact regarding Defendant's alleged domestic violence, which Defendant left unchallenged. Findings of Fact 11 and 12 show that Defendant hired a North Carolina attorney to represent him in the domestic violence action, and he knows his children's doctor and therapist are in North Carolina, where the children receive medical and emotional care. Findings of Fact 14 and 15 reveal Defendant is aware that there is an open DSS investigation in North Carolina and in Tennessee, and he is aware there is an investigation by North Carolina law enforcement officers into the domestic violence action. Additionally, the trial court found in Finding of Fact 20 that witnesses to actions of domestic violence may exist in both North Carolina and Tennessee, while medical providers in North Carolina could also be witnesses. The trial court further found in Finding of Fact 23: "Defendant would know or would have reason to know that actions toward his children that could be deemed domestic violence would be fair game for the courts of this state to adjudicate especially since this court has already assumed jurisdiction to determine custody."

Based on these unchallenged, and thus binding findings of fact, *see In re R.D.B.*, 274 N.C. App. at 379–80, we discern no error with the trial court's Conclusion of Law 5 because Defendant could "reasonably foresee" that his alleged domestic violence towards his children, in the context of the custody modification action and under North Carolina's domestic violence statute, would be a necessary consideration for the

trial court's best interest of the child analysis. Further, we discern no error with Conclusion of Law 6, where Defendant could have "reasonably anticipate[d]" his actions would connect him to the state. *See Mucha*, 378 N.C. at 174; *see also Int'l Shoe Co.*, 326 U.S. at 316 (establishing the minimum contacts test required for due process). By committing actions that may be deemed domestic violence towards his minor children whose custody modification was under consideration by the trial court in this State, and by hiring a North Carolina attorney to represent him in the domestic violence action, Defendant "purposefully avail[ed]" himself of the benefits and protections of the laws of this State. *See Mucha*, 378 N.C. at 171.

Upon de novo review, we conclude the trial court's findings of fact support its conclusions of law, and Defendant established sufficient minimum contacts with the State to confer personal jurisdiction of the trial court over Defendant, thus satisfying due process. *See Bartlett*, 285 N.C. App. at 256; *see also Mucha*, 378 N.C. at 172; *Int'l Shoe Co.*, 326 U.S. at 316.

V. Conclusion

In the context of his participation in the child custody modification action, Defendant's alleged domestic violence towards his minor children, who reside in North Carolina, and Defendant's representation for custody and domestic violence actions in North Carolina, establish sufficient minimum contacts necessary for the trial court's exercise of personal jurisdiction so as to satisfy due process.

AFFIRMED.

Judges HAMPSON and STADING concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MARCH 2025)

IN RE J.C.M. No. 24-269	Forsyth (22JA86)	Affirmed
IN RE J.D.T.D. No. 24-752	Henderson (20JT000126) (20JT000127)	Affirmed
IN RE M.B. No. 24-694	Cumberland (18JA000337) (24CVD002241)	Affirmed
IN RE PETITION OF OCHSNER No. 24-343	Mecklenburg (23CVS16437)	Affirmed
IN RE W.G. No. 23-775	Union (20JT000022-890) (20JT000023-890) (20JT000024-890)	Remanded
MERRITT v. S&S MGMT. GRP., LLC No. 24-648	Brunswick (22CVS000371)	Affirmed in Part, Vacated in Part, and Remanded
STATE v. DALTON No. 24-662	McDowell (15CRS000440) (15CRS050733) (15CRS051062) (15CRS052019) (15CRS052258) (16CRS000028) (16CRS050062)	Affirmed
STATE v. DUNBAR No. 24-747	Perquimans (22CRS050015) (22CRS050016)	NO ERROR In Part; NO PLAIN ERROR In Part; VACATED In Part; and REMANDED FOR RESENTENCING.
STATE v. FAIR No. 24-385	Lincoln (21CRS50492-93)	No Error
STATE v. MORGAN No. 24-575	Beaufort (22CRS291736)	NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART

STATE v. SMITH No. 24-517	Randolph (20CRS052256) (20CRS052292)	No Error In Part; Remanded For Correction of A Clerical Error.
STATE v. WILSON No. 24-885	Davidson (23CRS225646)	Reversed and Remanded

AYALA v. PERRY

[298 N.C. App. 134 (2025)]

VANESSA AGUILAR AYALA, MARWA SAAD EL METWALLY, KAREEMELDIN ELAZAB, SHARY MARGARITA LEDESMA, PATIENCE IMONI LYNCH, YAQUELIN ESTELA MEDINA, RUBEN MEDINA, ERIKA MARIVEL MEJIA, DESTINY SAMUEL, KRISTIN M. ZEDEK AND CARLOS ALVAREZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
JAMES OTIS PERRY AND WAKE COUNTY, NORTH CAROLINA, DEFENDANTS

No. COA24-251

Filed 19 March 2025

Appeal and Error—statement of grounds of appellate review—appeal from interlocutory order—burden of demonstrating substantial right—not met

In a class action lawsuit filed against a county and a certified nurse assistant (defendants) who worked at two county-owned prenatal care clinics, in which plaintiffs—female patients and their spouses—raised multiple tort claims after the nurse assistant was caught secretly filming patients in various states of undress, plaintiffs' appeal from an order dismissing their claims against the county only (based on lack of personal jurisdiction and the defense of governmental immunity) was dismissed because plaintiffs failed to demonstrate in their statement of the grounds for appellate review that the order affected a substantial right. Specifically, plaintiffs mischaracterized the order as a final judgment and failed to cite precedent to support immediate appellate review based on a substantial right theory.

Judge STADING concurring by separate opinion.

Appeal by Plaintiffs from order entered 5 September 2023 by Judge Claire V. Hill in Wake County Superior Court. Heard in the Court of Appeals 11 September 2024.

Edwards Beightol, LLC, by J. Bryan Boyd, Catharine E. Edwards, and Kristen L. Beightol, for Plaintiffs-Appellants.

Wake County Attorney's Office by Roger A. Askew, Jennifer M. Jones, and Macy B. Fisher; Poyner Spruill LLP by J. Nicholas Ellis and Sydney P. Davis; and Cranfill Sumner LLP, by Patrick H. Flanagan, for Defendants-Appellees.

CARPENTER, Judge.

Vanessa Aguilar Ayala, Marwa Saad El Metwally, Kareemeldin Elazab, Shary Margarita Ledesma, Patience Imoni Lynch, Yaquelin Estela Medina, Ruben Medina, Erika Marivel Mejia, Destiny Samuel, Kristin M. Zedek, and Carlos Alvarez, on behalf of themselves and others similarly situated (collectively, "Plaintiffs") appeal from an order (the "Order") entered on 5 September 2023, granting the motion to dismiss filed by Wake County, North Carolina ("Defendant-County"). On appeal, Plaintiffs argue that the trial court erred by dismissing their claims against Defendant-County under Rules 12(b)(2) and 12(b)(6) because governmental immunity did not apply, and the trial court had personal jurisdiction over Defendant-County. After careful review, we dismiss Plaintiffs' appeal as interlocutory.

I. Factual and Procedural Background

This appeal arises from a class-action lawsuit commenced against two defendants: James Otis Perry ("Defendant-Perry") and Defendant-County. The record on appeal tends to show the following. Defendant-Perry was working as a certified nurse assistant ("CNA") in two prenatal clinics: the Millbrook Clinic, located at 2809 Millbrook Road, and the Sunnybrook Clinic, located at 10 Sunnybrook Road, both in Raleigh, North Carolina (collectively, "the Clinics"). Defendant-County owns and operates the Clinics through its Department of Health and Human Services. The Clinics serve Wake County by offering health care services and education programs for pregnant women, including physical exams such as Pap smears, breast exams, and ultrasounds.

Sometime in September 2021, a female employee found a cell phone left in an exam room at the Sunnybrook Clinic. In an effort to identify the phone's owner, the employee tapped the screen and saw what appeared to be a livestream video of the Sunnybrook Clinic women's bathroom. Once she confirmed that the video was a livestream video of the women's bathroom, the Sunnybrook employees contacted the police.

On or about 13 September 2021, Defendant-Perry was arrested for several crimes relating to his conduct of placing cameras in the women's bathroom "for the purpose of arousing or gratifying the sexual desire . . . with the intent to capture the image of another without their consent." On 7 November 2022, following a police investigation, a Wake County grand jury indicted Defendant-Perry for forty counts of felony secret peeping as well as multiple counts of second-degree and third-degree sexual exploitation of a minor. On 17 January 2023, Defendant-Perry

pled guilty to one count of installing or using a photo device, eighteen counts of felony secret peeping, and three counts of second-degree exploitation of a minor.

Thereafter, on 26 January 2023, Vanessa Aguilar Ayala, Marwa Saad El Metwally, Shary Margarita Ledesma, Patience Imoni Lynch, Yaquelin Estela Medina, Erika Marivel Mejia, Destiny Samuel, and Kristin M. Zedek, women who visited one or both of the clinics as patients, (the "Patient Class Representatives") and their spouses, Kareemeldin Elazab, Ruben Medina, and Carlos Alvarez, (the "Spouse Class Representatives") filed a class-action lawsuit on behalf of themselves and others similarly situated against Defendant-Perry and Defendant-County. The Proposed Patient Class (the "Patient Class"), through the Patient Class Representatives, included "all persons who were secretly recorded by [Defendant-Perry] at any time during visits related to medical care [at] the Sunnybrook Clinic and/or Millbrook Clinic." The Proposed Spouse Class (the "Spouse Class"), through the Spouse Class Representatives, included "all persons whose spouse was secretly recorded by [Defendant-Perry] at any time during visits related to medical care [at] the Sunnybrook and/or Millbrook Clinic."

The complaint alleged ten state law causes of action arising in tort against Defendant-Perry and Defendant-County. As against both Defendants, the Patient Class Representatives and the Patient Class alleged: negligence; or, in the alternative to negligence, medical negligence; invasion of privacy; and negligent infliction of emotional distress. As against Defendant-County, the Patient Class Representatives and the Patient Class alleged: premises liability; corporate negligence; and negligent hiring, retention, and supervision. As against Defendant-Perry, the Patient Class Representatives and the Patient Class alleged intentional infliction of emotional distress. As against both Defendants, the Spouse Representatives and the Spouse Class alleged loss of consortium. Finally, as against both Defendants, all Plaintiffs alleged punitive damages.

To summarize, Plaintiffs' complaint alleged that Defendant-Perry, while working as a CNA at the Clinics, placed hidden cameras in the facility to secretly record prenatal care patients during various stages of undress when they were "being weighed, using the bathroom, and/or being examined." Plaintiffs alleged that Defendant-Perry's conduct caused "them and others similarly situated serious humiliation, embarrassment, reputational harm, emotional distress, mental anguish and other economic and non-economic damages." Plaintiffs also alleged that Defendant-County was vicariously liable for the acts of Defendant-Perry

as he "was acting in the course and scope of [his] employment and/or agency." Additionally, Plaintiffs asserted that Defendant-County was liable in its own capacity, for its separate acts or omissions as Defendant-Perry's employer.

On 4 April 2023, Defendant-County filed an answer and moved to dismiss all claims. On 28 July 2023, Defendant-County filed a notice of hearing. On 10 August 2023, the trial court heard arguments on Defendant-County's motion to dismiss.

At the hearing, Defendant-County primarily argued that Plaintiffs' claims were barred by governmental immunity. Specifically, Defendant-County argued it was entitled to "immunity from torts committed by their employees in the exercise of [] a governmental function." Plaintiffs argued the claims against Defendant-County were not barred by governmental immunity since Defendant-County was engaging in a proprietary, not governmental, function. Defendant-County further argued that since governmental immunity applied, Plaintiffs' claims should also be dismissed for lack of personal jurisdiction.

On 5 September 2023, the trial court granted Defendant-County's motion to dismiss under N.C. R. Civ. P. 12(b)(2) and 12(b)(6) with prejudice. In the Order, the trial court concluded "the court lacks personal jurisdiction over [Defendant-County] and [] the [P]laintiffs' complaint against [Defendant-County] fails to state claims against [Defendant-County] upon which relief may be granted[.]" On 5 September 2023, Plaintiffs filed a notice of appeal from the Order.

II. Jurisdiction

As an initial matter, we must consider whether this appeal is properly before us. As a general rule, this Court only hears appeals after a final judgment. *See Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019) (citations omitted). " '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.' " *Duval v. OM Hosp., LLC*, 186 N.C. App. 390, 392–93, 651 S.E.2d 261, 263 (2007) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (internal citations omitted)). Conversely, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381 (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231, 231–32 (1916)). "Generally, there is 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), predominately because "[t]he allowance of fragmentary and premature appeals from interlocutory orders would encourage and facilitate delays, increase costs and multiply appeals," *Cole v. Farmers Bank & Tr. Co.*, 221 N.C. 249, 249, 20 S.E.2d 54, 56 (1942).

There are exceptions to this rule, however. First, interlocutory orders are "immediately appealable if the order represents 'a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment.' " *Pentecostal Pilgrims & Strangers Corp. v. Connor*, 202 N.C. App. 128, 132, 688 S.E.2d 81, 84 (2010) (quoting N.C. R. Civ. P. 54(b)). Under N.C. R. Civ. P. 54(b), the trial court must "certif[y] there is no just reason to delay the appeal[.]" *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 339, 634 S.E.2d 548, 552 (2006) (quotation marks and citation omitted).

Next, if the requirements of N.C. R. Civ. P. 54(b) are not met, a party may still appeal an interlocutory order "when the challenged order affects a substantial right." *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438; *see* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023) ("[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom an interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [a]ffects a substantial right."). "A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form; a right materially affecting those interests which a [party] is entitled to have preserved and protected by law: a material right." *Pentecostal*, 202 N.C. App. at 132, 688 S.E.2d at 84 (internal quotation marks and citation omitted).

To request appellate review of an interlocutory order, "the appellant must include in [their] opening brief, in the statement of grounds for appellate review, 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438 (quoting *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77, 772 S.E.2d 93, 95 (2015)); *see* N.C. R. App. P. 28(b)(4). Exactly what facts and argument are sufficient, however, depends on the nature of the case before us. *See Denney*, 264 N.C. App. at 17–18, 824 S.E.2d at 438 (explaining there are "different rules concerning *how* a litigant must show that a substantial right is affected") (emphasis in original). Generally, an appellant is required to " 'present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right.' " *Beroth Oil Co. v. N.C. Dep't of Transp.*, 256 N.C. App.

401, 411, 808 S.E.2d 488, 496 (2017) (quoting *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516, *disc. review denied*, 363 N.C. 653, 686 S.E.2d 515 (2009)) (emphasis in original).

For certain issues, however, a demonstration of "*why* the order affects a substantial right," *Beroth*, 265 N.C. App. at 411, 808 S.E.2d at 496 (emphasis in original), although encouraged, is not required to confer jurisdiction, *see Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. Instead, "[s]ome rulings by the trial court affect a substantial right essentially as a matter of law." *Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. For example, "[t]his Court has held that a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable." *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010); *see also McClennahan v. N.C. School of Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006) (noting "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review"). Additionally, we have concluded that "motions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257–58, 625 S.E.2d 894, 898 (2006); *see also Cohen v. Cont'l Motors, Inc.*, 279 N.C. App. 123, 132, 864 S.E.2d 816, 822 (2021).

Bearing these rules in mind, it remains the appellant's burden to raise and sufficiently brief the threshold question of jurisdiction. *See Doe v. City of Charlotte*, 273 N.C. App. 10, 22, 848 S.E.2d 1, 10 (2020) (explaining it is the appellant's burden to " 'construct arguments for or find support for [their] right to appeal from an interlocutory order' ") (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). Specifically, where an appellant seeks review of an interlocutory order on a substantial right theory, she must "show[] that the order appealed from affects a substantial right." *Butterfield v. Gray*, 279 N.C. App. 549, 552, 866 S.E.2d 296, 300 (2021); *see* N.C. R. App. P. 28(b)(4). So, in situations where the issue on appeal arguably affects a substantial right as a matter of law, we consider what the appellant must include in her brief to meet her burden.

If the appeal arguably implicates issues of governmental immunity, sovereign immunity, personal jurisdiction, or another well-recognized category of substantial right, the appellant must include in her brief a "categorical assertion that the issue is immediately appealable." *See Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. She must also "cit[e] to precedent to show that an order affects a substantial right." *See Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10. Although she is not required to

demonstrate "*why* the order affects a substantial right," she must, at a minimum, fulfill these two requirements to meet her burden of providing "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *See* N.C. R. App. P. 28(b)(4).

Here, Plaintiffs sought relief against two Defendants—Defendant-Perry and Defendant-County—based on claims arising from a common set of facts. The trial court dismissed the claims against Defendant-County without dismissing the claims against Defendant-Perry. Therefore, the trial court's grant of Defendant-County's motion to dismiss was a final judgment as to Defendant-County but not as to all parties. As a result, the Order is interlocutory. *See Babb v. Hoskins*, 223 N.C. App. 103, 105, 733 S.E.2d 881, 883 (2012).

Because Plaintiffs appeal from an interlocutory order, it is their burden to sufficiently brief the issue of jurisdiction. *See Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10. Given the trial court did not certify the Order for immediate review, Plaintiffs' only route to immediate review is to assert that the Order affects a substantial right. Accordingly, it is Plaintiffs' burden to categorically assert that the challenged order affects a substantial right, supported by citation to applicable precedent. *See Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. Plaintiffs, however, do not meet their burden.

Although this appeal arguably involves issues of sovereign immunity and personal jurisdiction—issues that may affect a substantial right as a matter of law—Plaintiffs have incorrectly stated the Order from which they appeal is a "final judgment" and that this Court has jurisdiction pursuant to section 7A-27(b). Additionally, Plaintiffs fail to cite to any precedent demonstrating that the challenged Order affected a substantial right. *See Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10.[1] Instead,

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1. When the trial court denies a defendant's motion to dismiss and concludes a party is not entitled to the defense of governmental or sovereign immunity, it is traditionally the defendant who asserts an immediate right of appeal based on a substantial right theory. *See Can Am South, LLC v. State*, 234 N.C. App. 119, 121–22, 759 S.E.2d 304, 307 (2014). Generally, the substantial right at issue is a defendant's right to avoid the time and expense of an unwarranted continuation of proceedings.

Here, the procedural posture is the inverse—*Plaintiffs* appealing a trial court's *grant* of Defendant-County's motion to dismiss. Because Plaintiffs failed to carry their burden to show appellate jurisdiction, we do not opine on their right to appeal assuming they sufficiently asserted governmental immunity as a substantial right in their brief. The question of whether Plaintiffs would have been entitled to appellate review on personal jurisdiction grounds—which would have necessarily involved a determination of whether Defendant-County was immune—is a separate consideration.

Plaintiffs simply include the following in their statement of the grounds for appellate review: "Judge Hill's granting of Defendant County's Motions to Dismiss under rule 12(b)(2) and 12(b)(6) are final judgments, and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)."

In short, Plaintiffs not only fail to assert a substantial right, they do not even mention the interlocutory nature of their appeal. Without at least a "categorical assertion that the issue is immediately appealable," *see Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438, Plaintiffs fail to meet their burden of properly requesting review from an interlocutory order. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980) ("It is well established . . . that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves."). Thus, we dismiss Plaintiffs' appeal as interlocutory.

III. Conclusion

In sum, we lack jurisdiction over this interlocutory appeal because Plaintiffs did not make a categorical assertion that the appeal affects a substantial right. Accordingly, we dismiss Plaintiffs' appeal as interlocutory.

DISMISSED.

Judge FLOOD concurs.

Judge STADING concurs by separate opinion.

STADING, Judge, concurring, writing separately.

I join in the majority opinion in full but write separately to further emphasize that Plaintiffs could provide our Court with appellate jurisdiction upon sufficiently asserting governmental or sovereign immunity as a substantial right in their brief.

Our precedents establish that "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Hines v. Yates*, 171 N.C. App. 150, 156, 614 S.E.2d 385, 389 (2005). *See Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605–06 (2018) (holding that granting a government defendant's motion to dismiss on sovereign immunity grounds affects a substantial right, just as denial does, and thus warrants immediate appellate

review); *see also Denney v. Wardson Constr., LLC*, 264 N.C. App. 15, 18, 824 S.E.2d 436, 438 (2019) ("Some rulings by the trial court affect a substantial right essentially as a matter of law. Sovereign immunity is an example. A litigant appealing the denial of a sovereign immunity defense need only show that they raised the issue below and the trial court rejected it . . . .").

The *Ballard* Court explained that when a trial court *denies* a government defendant's motion to dismiss a tort claim based on the doctrine of sovereign immunity, the State or its subdivisions may seek immediate review as it affects a substantial right as a matter of law. 257 N.C. App. at 564, 811 S.E.2d at 605. But since previous decisions of our Court have "held that the *grant* of a motion to dismiss based on sovereign immunity or governmental immunity is appealable," the *Ballard* Court determined it was bound to hold the same. *Id.* at 564, 811 S.E.2d at 605–06.

Had Plaintiffs carried their burden in demonstrating appellate jurisdiction, as in *Ballard*, precedent would similarly bind us to hold that their interlocutory appeal impacted a substantial right for immediate appellate review. 257 N.C. App. at 564, 811 S.E.2d at 605–06 ("In a series of cases that we are unable to distinguish from this one, our Court has held that the grant of a motion to dismiss based on sovereign or governmental immunity is immediately appealable.") (citing *Greene v. Barrick*, 198 N.C. App. 647, 649–50, 680 S.E.2d 727, 729–30 (2009) and *Odom v. Lane*, 161 N.C. App. 534, 535, 588 S.E.2d 548, 549 (2003)); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that where a court of appeals panel has decided the same issue in a different case, then a subsequent panel of the same court is bound by that precedent unless overturned from a higher court).

IN RE A.J.B.

[298 N.C. App. 143 (2025)]

IN THE MATTER OF A.J.B.

No. COA24-702

Filed 19 March 2025

Termination of Parental Rights—subject matter jurisdiction—failure to provide birth certificate or child's full name—remanded for prejudice determination

The trial court erred by dismissing a mother's petition to terminate the parental rights of her child's father for lack of subject matter jurisdiction where, although the mother failed to comply with the requirements of N.C.G.S. § 7B-1104(1)—because she did not list the child's full name on the petition (instead using the child's first and last name but only an initial for the middle name), did not allege that the child's name was as it appeared on the birth certificate, and did not provide a birth certificate or other supporting documentation to verify the child's legal identity—the mother's technical noncompliance did not automatically deprive the trial court of subject matter jurisdiction absent a finding of prejudice. Therefore, the court's order was vacated and the matter was remanded for the trial court to conduct an inquiry into whether the child's father was prejudiced by the statutory violation.

Chief Judge DILLON concurring in separate opinion.

Judge WOOD dissenting.

Appeal by Jennifer R. Batten from order of dismissal entered 7 May 2024 by Judge C. Renee Little in Mecklenburg County District Court. Heard in the Court of Appeals 14 January 2025.

Weaver, Bennett & Bland, PA, by William G. Whittaker and David B. Sherman, Jr., for Plaintiff–Appellant Mother.

BJK Legal, by Benjamin J. Kull, for Defendant–Appellee Father.

Bollinger Law Firm, by Marjory J. Timothy, for Guardian ad litem–Appellee.

MURRY, Judge.

Plaintiff–Mother (Mother) appeals from an order dismissing her petition to terminate Defendant–Father's (Father) parental rights to her minor child, A.J.B. (Aaron).[1] We vacate and remand for a determination of whether Mother's failure to comply with N.C.G.S. § 7B-1104 prejudiced Father.

I. Background

Mother and Father share one child, Aaron, born 25 April 2018. The parties were never married. Father never established legal paternity of Aaron, who currently lives with Mother in Mecklenburg County, North Carolina. On 17 February 2023, Mother petitioned to terminate Father's parental rights to Aaron under three different grounds: neglect, abandonment, and failure to properly establish or assert paternity. N.C.G.S. § 7B-1111(a)(1), (5), (7). Mother did not allege any facts of neglect or abandonment, simply stating that Father "abandoned and neglected the Minor Child." On 1 March 2023, Father petitioned to establish paternity of Aaron. The trial court stayed the legitimation proceeding on 13 April 2023.

On 26 April 2024, the trial court heard Mother's petition for termination of parental rights. At the hearing, Aaron's guardian *ad litem* (GAL) moved to dismiss the petition as to the neglect and abandonment claims for lack of supporting factual allegations. In response to the trial court's preliminary concurrence, Mother's counsel voluntarily withdrew the neglect and abandonment claims. The GAL then moved to dismiss the entire termination petition because neither Aaron's birth certificate nor any supporting documentation appeared anywhere in the record to verify Aaron's name as stated in the petition, in violation of § 7B-1104. *See* N.C.G.S. § 7B-1104(1). The petition stated Aaron's first and last name and indicated his middle initial, but did not provide his middle name. In response to the trial court's inquiry, Mother's counsel could not produce the birth certificate at any point in the hearing. The trial court declared a recess to research the birth certificate requirement prior to ruling. Following the recess from approximately 10:27 a.m. to 11:21 a.m., the trial court dismissed Mother's termination petition for lack of subject-matter jurisdiction due to Mother's statutory noncompliance and failure to include the birth certificate. Mother timely appealed the ruling on 6 June 2024.

II. Appellate Jurisdiction

Mother appeals by right under N.C.G.S. § 7B-1001 because the trial court's ruling is an "order finding absence of jurisdiction . . . [that] in

1. Pseudonym used for the minor child's privacy and ease of reading.

effect determines the action and prevents a judgment from which appeal might be taken." N.C.G.S. § 7B-1001 (a)(1)–(2) (2023).

III. Analysis

A. Standard of Review

This Court reviews misapprehensions of law and questions of subject-matter jurisdiction *de novo*. *See In re Z.O.G.-I.*, 375 N.C. 858, 861 (2020) (misapprehensions); *In re M.A.C.*, 291 N.C. App. 35, 37 (2023) (subject-matter jurisdiction).

B. Statutory Noncompliance

Under N.C.G.S. § 7B-1104, a petition for termination of parental rights must, "with respect to [unknown] facts[,] . . . state . . . [t]he name of the juvenile as it appears on the juvenile's birth certificate . . . ." N.C.G.S. § 7B-1104(1) (2023). Here, Mother's termination petition listed Aaron's first and last name as listed on his birth certificate but used only a middle initial to indicate his middle name. Mother's termination petition does not indicate whether the listed name matched Aaron's birth certificate or identify anyone who might otherwise know that information. Mother's failure to attach the birth certificate to the petition prevented the trial court from legally verifying Aaron's identity in the record.

Although Mother claims that the termination petition contains all the information that "would have appeared on the birth certificate," the trial court concluded that no additional information was included that could enable it to verify Aaron's name. Because Mother's counsel could not locate the juvenile's birth certificate despite the hour-long recess, the termination petition *prima facie* does not comply with § 7B-1104(1). Thus, we now turn to whether that noncompliance bars this Court from exercising subject-matter jurisdiction over the case.

C. Subject-Matter Jurisdiction

Our district courts have exclusive original jurisdiction over the termination of parental rights unless certain statutory requirements have not been met. N.C.G.S. §§ 7B-200(a)(4), -1101 (2023). Subject-matter jurisdiction "never depend[s] upon the conduct, . . . consent, waiver[,] or estoppel" of the parties. *In re T.R.P.*, 360 N.C. 588, 595 (2006) (quotations omitted). A party's consent to the court's subject-matter jurisdiction or constructive actions taken by the party (*e.g.*, filing responsive pleadings) do not overrule a lack of subject-matter jurisdiction without express statutory authority. Additionally, a court's lack of subject-matter jurisdiction may be raised at any time during a pending case, including for the first time on appeal. *See In re K.J.L.*, 363 N.C. 343, 346 (2009).

Father's responsive pleadings in this case cannot confer subject-matter jurisdiction on this Court or otherwise waive its absence but are "immaterial." 360 N.C. at 595. He infers a general rule from caselaw relating to § 7B-1104 that allows for technical noncompliance if it does not prejudice a party upon consideration of the whole record. *See In re Humphrey*, 156 N.C. App. 533, 539 (2003). In other words, a party who alleges a lack of subject-matter jurisdiction will not be found to be prejudiced if any information required under the statute can still be found within the record as a whole.

We distinguish this case from *In re Humphrey*. In *Humphrey*, the petitioning mother failed to include a statutorily mandated statement that she did not file the petition to otherwise circumvent the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *Id.* at 538-39. This Court affirmed the trial court's holding that her failure to do so did not negate jurisdiction because she conveyed the required information by other means. *Id.* at 539. The trial court found that the petition "did allege the existence of a proceeding in Wake County . . . regarding visitation with this child . . . [which] establish[ed] that the petition was not filed to circumvent the UCCJEA and to cure petitioner's error." *Id.* at 539. On appeal, we found that the technical noncompliance did not prejudice the respondent and therefore found subject-matter jurisdiction. *Id.*

Even if this Court applied the "general rule" proposed above *sub judice*, the information contained in the record does not cure the jurisdictional flaw. *Humphrey* found alternate methods of conveying the required information. Here, neither the petition itself nor the larger record provides enough identifying information to verify Aaron's full name. As noted, the petition gives Aaron's first name, last name, and birthdate, but it offers no supporting documentation to confirm that information and also fails to provide a middle name. Not only is the birth certificate absent, but the petition does not even allege that the stated name matches the birth certificate.

Analyzing other provisions of N.C.G.S. § 7B-1104, this Court has held that "absent a showing of prejudice, failure to comply with . . . § 7B-1104(5) does not deprive the trial court of subject matter jurisdiction." *In re T.M.*, 182 N.C. App. 566, 571, *aff'd per curiam*, 361 N.C. 683 (2007). Because our Supreme Court affirmed *In re T.M.*, we find that it controls the interpretation of § 7B-1104(1) noncompliance.

Based on the Mother's petition and the Father's answer, it is undisputed that Mother and Father agree on the first name, middle initial, last

name, and date of birth of Aaron. It is also undisputed that Aaron was born in and currently lives in Mecklenburg County, North Carolina with Mother. Father did not show prejudice from the failure to include Aaron's middle name as it appears on the birth certificate in Mother's petition and does not allege that the child has not properly been identified. Additionally, the trial court failed to find whether Mother's noncompliance prejudiced him. It is clear that our Supreme Court jurisprudence is moving away from depriving trial courts of subject matter jurisdiction based on technical noncompliance in pleadings. *See Matter of S.C.L.R.*, 378 N.C. 484 (2021), *Matter of C.N.R.*, 379 N.C. 409 (2021) We have found no case law determining that failure to include a middle name deprives a trial court of subject matter jurisdiction over a juvenile. Therefore, we extend that jurisprudence to this case and remand for a determination whether Mother's statutory noncompliance prejudiced Father in these proceedings.

IV. Conclusion

For the reasons above, this Court holds that the trial court erred by dismissing Mother's termination petition for lack of subject-matter jurisdiction and thus vacates and remands for a determination as to whether Mother's N.C.G.S. § 7B-1104 noncompliance prejudiced Father.

VACATED AND REMANDED.

Chief Judge DILLON concurs in a separate opinion.

Judge WOOD dissents in a separate opinion.

DILLON, Chief Judge, concurring.

I concur in the majority opinion. Based on caselaw from our Court and our Supreme Court, a technical violation of N.C.G.S. § 7B-1104 (hereinafter "the statute") regarding the information which "shall be" included in a petition does not deprive the trial court of subject-matter jurisdiction so long as the violation is not prejudicial. For instance, in a 2005 case, a panel of our Court recognized that there were conflicting lines of cases but decided to follow the earlier line which held as we are holding here today, as follows:

[In *In re Humphrey*, from 2003], this Court concluded as follows:

> We find no authority that compelled dismissal of the action solely because petitioner failed to include

> this statement of fact in the petition. While it is a better practice to include the factual statement as stated in the statute, under the facts in this case we find that respondent has failed to demonstrate that she was prejudiced as a result of the omission.
>
> 156 N.C. App. 533, 539 (2003). Although we note that this Court has more recently [in 2005] concluded that failure to attach a custody order results in a "facially defective" petition which "fail[s] to confer subject matter jurisdiction upon the trial court[,]" *In re Z.T.B.*, 170 N.C. App. 564, 570 (2005), we are persuaded by the reasoning as well as precedential authority of our prior decisions regarding the statute. *See In re R.T.W.*, 359 N.C. 539, 542 n.3 (2005) (citing *In re Civil Penalty*, 324 N.C. 373 (1989), in resolving conflict in this Court regarding jurisdiction over termination proceedings and noting that a second panel of this Court should have followed a prior panel's decision, "which [wa]s the older of the two cases. Had it done so, we would not have two conflicting lines of cases to resolve.").

In re B.D., 174 N.C. App. 234, 241–42 (2005) (internal citations cleaned up).

And in a case cited in the majority opinion, our Supreme Court in 2007 affirmed a decision from our Court which held that the failure to include certain information which the statute states "shall be" required in a petition does not deprive a trial court of subject-matter jurisdiction if no prejudice is shown. *In re T.M.*, 182 N.C. App. 566, 571, *aff'd per curiam*, 361 N.C. 683 (2007). I note that the year after *In re T.M.*, our Supreme Court again affirmed an opinion of our Court holding that the failure to include information required by the statute was not fatal to the trial court's jurisdiction to hear the matter where the failure was not prejudicial or otherwise preserved for appellate review. *In re H.L.A.D.*, 184 N.C. App. 381, 391–92 (2007), *aff'd per curiam*, 362 N.C. 170 (2008).

Here, as noted by the majority, there is no question from the petition as to which child is subject to this proceeding, notwithstanding that the child's full name was not listed in the petition. Accordingly, I concur.

WOOD, Judge, dissenting.

I respectfully dissent from the majority opinion holding that the trial court erred by dismissing Mother's petition for termination of parental

rights for lack of subject matter jurisdiction without a determination of prejudice. I agree with the majority that the termination petition *prima facie* does not comply with N.C. Gen. Stat. § 7B-1104(1). However, I disagree with the majority's conclusion that the matter should be remanded to the trial court for a determination of prejudice to Father in deciding whether Mother's failure to comply with N.C. Gen. Stat. § 7B-1104 deprived the trial court of subject matter jurisdiction. I would hold Mother's failure to provide the full legal name of the juvenile as contained on the birth certificate in the petition is jurisdictional, and, therefore, would affirm the trial court's dismissal of the petition for lack of subject matter jurisdiction.

A petition for termination of parental rights must

> be verified by the petitioner or movant and shall be entitled "In Re (last name of juvenile), a minor juvenile", who shall be a party to the action, and *shall set forth* such of the following *facts as are known*; and with respect to the *facts which are unknown* the petitioner or movant *shall* so state:
>
> (1) *The name of the juvenile as it appears on the juvenile's birth certificate*, the date and place of birth, and the county where the juvenile is presently residing.

N.C. Gen. Stat. § 7B-1104 (emphasis added). "Our appellate courts have consistently held that the use of the word "shall" in a statute indicates what actions are required or mandatory." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 233 N.C. App. 23, 28, 755 S.E.2d 75, 79 (2014) (citations omitted). Our Supreme Court has stated, "ordinarily, the word "must" and the word "shall," in a statute are deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action[.]" *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 661-62 (1978); *see also Internet E., Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001) ("The word "shall" is defined as "must" or "used in laws, regulations, or directives to express what is mandatory.").

Here, Mother's petition failed to comply with the *mandatory* statutory requirements, as the petition: (1) listed the juvenile's first and last name, but used an initial for his middle name; (2) did not allege that the juvenile's name was "as it appears on the juvenile's birth certificate[;]" and (3) failed to attach the birth certificate to the petition, in order for the trial court to verify the juvenile's identity. If Mother is indeed the juvenile's mother, she would undoubtedly know the juvenile's full name

as it appears on the birth certificate. In other words, noncompliance with the *mandatory* statutory requirements could have been easily avoided.

Significantly, the juvenile's Guardian ad Litem ("GAL") made the motion to dismiss the termination petition for lack of subject matter jurisdiction and pursuant to North Carolina Rule of Civil Procedure 12(b)(6). N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Mother voluntarily dismissed the allegations of abandonment and neglect following the GAL's arguments. The trial court ultimately dismissed Mother's petition for lack of subject matter jurisdiction after determining, in the absence of a birth certificate in the record, it was unable to verify that the name of the juvenile was as it appears on the birth certificate. Mother could have been seeking to terminate parental rights to Aaron *Joseph* Ball[1] or to Aaron *John* Ball, and given the petition's other serious deficiencies, Respondent may not be the father of the juvenile allegedly at issue, as there could be more than one juvenile with the same or similar name. The majority opines that it is "undisputed" that the parties share only one child; however, that information cannot be known from the petition. In determining jurisdiction, we look to the allegations in the petition. The face of the petition does not conclusively identify the juvenile over which the trial court was to exercise subject matter jurisdiction.

"Under our Juvenile Code, a trial court's subject-matter jurisdiction 'arises upon the filing of *a properly verified juvenile petition* and extends through all subsequent stages of the action.' " *In re M.A.C.*, 291 N.C. App. 35, 38, 893 S.E.2d 556, 560 (2023) (citation omitted) (emphasis added). As discussed *supra*, under N.C. Gen. Stat. § 7B-1104, a petition "*shall* set forth" facts that are known, and those which are unknown, including "the name of the juvenile as it appears on the juvenile's birth certificate."

In reaching its holding, the majority cites *In re T.M.*, 182 N.C. App. 566, 643 S.E.2d 471, *aff'd per curiam*, 361 N.C. 683 (2007). There, DSS failed to attach the order granting DSS custody of the juvenile to the petition; however, the petition alleged DSS had custody of the juvenile and that a copy of the order was attached as an exhibit to the petition, as required under N.C. Gen. Stat. § 7B-1104(5). *Id.* at 572, 643 S.E.2d 475. The trial court took judicial notice of the underlying file, which contained evidence that DSS had custody of the juvenile and that the mother was aware of the juvenile's custody with DSS throughout the case. On appeal, the mother challenged the trial court's exercise of jurisdiction,

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1. A pseudonym is used to protect the identity of the juvenile pursuant to N.C. R. App. P. 42(b).

arguing that the custody order was not attached as statutorily required. The Court in *In re T.M.* held, "absent a showing of prejudice, failure to comply with N.C. Gen. Stat. § 7B-1104(5) does not deprive the trial court of subject matter jurisdiction." *Id.* at 571, 643 S.E.2d at 475. In other words, because the record *clearly* contained evidence that DSS had custody of the juvenile and the mother admittedly was aware of this, the mother was unable to demonstrate prejudice and the trial court properly exercised jurisdiction.

In re T.M. is distinguishable from the present case. The juvenile's name as alleged on the petition—with the middle name as the initial "J."—is not the name of the juvenile as listed on the birth certificate. Further, the petition did not allege that "[t]he name of the juvenile [is] as it appears on the juvenile's birth certificate," as required under N.C. Gen. Stat. § 7B-1104(1). Unlike *In re T.M.*, the record before us is devoid of any evidence sufficient to meet this statutory requirement. The birth certificate does not appear in the record and *nowhere within the record* can the full name of the juvenile, as listed on the birth certificate, be found. Simply stated, there is nothing in the record from which the trial court could determine the juvenile's identity. Thus, the petition's failure to satisfy the requirements of a *properly verified juvenile petition* proves fatal.

The majority further reasons that our Supreme Court jurisprudence is moving away from depriving trial courts of subject matter jurisdiction based on technical noncompliance in pleadings, referring to *In re S.C.L.R.*, 378 N.C. 484, 861 S.E.2d 934 (2021) and *In re C.N.R.*, 379 N.C. 409, 866 S.E.2d 666 (2021) to support its position. However, in *In re S.C.L.R.*, our Supreme Court contemplated N.C. Gen. Stat. § 7B-1104(2), to determine "whether the provision of petitioners' names, address, and other facts in the petition [were] 'sufficient to identify . . . petitioner[s] as . . . one authorized by [N.C.]G.S. [§] 7B-1103 to file a petition [for termination of parental rights].' " *Id.* at 487, 861 S.E.2d at 838. The Court noted that N.C. Gen. Stat. § 7B-1104(2) "does not require specific language for compliance," rather, it requires that the petition allege certain information to reach a threshold level of sufficiency. The Court in *In re S.C.L.R.* held, after an examination of the record, that the allegations in the petition were sufficient to comply with N.C. Gen. Stat. § 7B-1104(2). Due to this compliance, the Court declined to address whether noncompliance would have deprived the trial court of jurisdiction. Meaning, the Court in *In re S.C.L.R.* did not contemplate whether "technical noncompliance" deprives a trial court of jurisdiction, as there, the petition complied with § 7B-1104(2). In the present case, unlike *In re S.C.L.R.*, N.C. Gen. Stat.

§ 7B-1104(1) requires that the petition allege specific language, the name of the juvenile as contained on juvenile's birth certificate, and information for compliance. Moreover, as discussed *supra*, nowhere within the record can such information be found in order to assess compliance.

In *In re C.N.R.* the respondent parents argued the trial court lacked subject matter jurisdiction when it entered its termination order, as the verification form attached to the termination motion did not include the date of verification. *In re C.N.R.*, 379 N.C. at 413, 866 S.E.2d at 670; *see also* N.C. Gen. Stat. § 7B-1104 ("The petition, or motion pursuant to G.S. 7B-1102, shall be verified by the petitioner or movant."). The form stated, "[s]worn to and subscribed before me this ___ day of May, 2020," therefore, neither the director of HSA or the notary public filled the blank into which the date was to be inserted. *Id.* The Court first noted "[t]he Juvenile Code does not prescribe a method for verifying a petition or motion." *Id.*, 379 N.C. at 415, 866 S.E.2d at 671. Further, the Notary Public Act contains a "presumption of regularity," which upholds notarized documents despite minor defects, if there was "substantial compliance with the law." The Court in *In re C.N.R.* ultimately held that despite the failure to date the verification, the termination motion substantially complied with the verification requirement in N.C. Gen. Stat. § 7B-1104. Thus, the trial court properly exercised jurisdiction and the failure to include the date of the verification did not affect the validity of the pleading itself. Similar to *In re S.C.L.R.*, the Court in *In re C.N.R.* contemplated compliance with the statutory language, not whether a "technical noncompliance" deprives a trial court of jurisdiction.

It is true, as the majority notes, our Court has previously held that absent a showing of prejudice, failure to comply with the statute does not *necessarily* deprive the trial court of subject matter jurisdiction. However, the failure to provide the juvenile's full name as contained on the birth certificate, and thus properly identify the child who is the subject of the action, is a fatal defect and renders the petition invalid and robs the trial court of subject matter jurisdiction. Stated differently, we need not consider prejudice under the facts of this case because the petition is invalid as filed.

Furthermore, as discussed *supra*, the juvenile's GAL made the motion to dismiss the termination petition for lack of subject matter jurisdiction, not Father. A GAL is appointed "to represent the juvenile" and advocate on behalf of the juvenile's best interests. *In re R.A.H.*, 171 N.C. App. 427, 429, 614 S.E.2d 382, 383 (2005) (citation omitted). "In furtherance of this responsibility, it is within the purview of a guardian ad litem to stand in for the juvenile and accept service of a petition

on a juvenile's behalf." *In re S.D.J.*, 192 N.C. App. 478, 481, 665 S.E.2d 818, 821 (2008) (citations omitted). The majority's focus on whether Mother's noncompliance prejudiced *Father* is thus misplaced. If it were necessary to contemplate prejudice, the appropriate inquiry would be whether Mother's noncompliance prejudiced the juvenile, the party who made the motion through the GAL who represents the juvenile. *See In re L.T.*, 374 N.C. 567, 569, 843 S.E.2d 199, 200 (2020) ("This Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise.").

"It is well established that fatal defects in an indictment or a juvenile petition are jurisdictional, and thus may be raised at any time[.]" *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 279-280 (2006) (cleaned up). As the petition did not include the juvenile's name as listed on the birth certificate or contain any attachments sufficient to identify the juvenile or verify the juvenile's name, the petition violates N.C. Gen. Stat. § 7B-1104 and is fatally defective. Thus, I would affirm the trial court's dismissal of the termination of parental rights petition.

IN THE MATTER OF B.C., I.C.

No. COA23-830

Filed 19 March 2025

1. Child Abuse, Dependency, and Neglect—adjudication—findings of fact—incorporating language from petitions and evidentiary materials—all but one challenged finding upheld

In respondent-mother's appeal from an order adjudicating her children as abused, neglected, and dependent juveniles, respondent-mother's arguments challenging specific findings of fact were largely rejected. First, the court's incorporation of language from the juvenile petitions and verbatim portions of certain evidentiary materials did not constitute an improper delegation of its fact-finding duty, since the court ultimately made its own independent findings resolving any material disputes in the case. Second, most of respondent-mother's arguments alleging that the court failed to resolve inconsistencies in the evidence appeared to be masked requests to reweigh the evidence or second-guess the trial court's credibility determinations, which could not be done on appellate review. However, a portion of one finding—addressing the parents'

inability to offer appropriate alternative child care options—was not supported by the evidence and was therefore not upheld on appeal.

2. Child Abuse, Dependency, and Neglect—abuse and neglect—allegations of child sexual abuse by father—emotional harm to children caused by mother's response—dependency—alternative child care arrangement

The adjudication of respondent-mother's minor daughters as abused and neglected juveniles was affirmed where, after reporting to police that the children's father had sexually abused them, respondent-mother's subsequent conduct—regardless of whether the abuse allegations were true—caused significant emotional harm to the children, especially where she: systematically alienated the children from their father, even holding a "ceremony" where they burned photographs of him; coached the children regarding the sex abuse allegations, which the children did not corroborate during forensic interviews; recorded them discussing sensitive topics, including embarrassing private behavior; subjected them to repeated medical and forensic evaluations despite professionals advising against it due to the potential trauma caused by the process; and hindered efforts by the department of social services to investigate the abuse allegations. On the other hand, the adjudication of the children as dependent was vacated because there was no evidence showing that respondent-mother lacked appropriate alternative child care options.

3. Child Abuse, Dependency, and Neglect—adjudication hearing—mother's testimony regarding sexual abuse allegations against father—father's stipulation denying the allegations—no due process violation

Respondent-mother's due process rights were not violated during an abuse and neglect proceeding, which arose from petitions by the department of social services alleging that respondent-mother's conduct toward her children—stemming from a belief that their father had sexually abused them—caused significant emotional harm to the children. First, respondent-mother's contention that she was prevented from testifying about the allegations against the father—and therefore was unable to present a full defense by showing that her subsequent reaction was justified—was not supported by the record, which showed that the abuse allegations were discussed extensively at the adjudication hearing and that any objections to testimony referencing those allegations were made for reasons other than to prohibit the topic. Second, the court did not

err in relying on the father's stipulation that allegations of sexual abuse existed but that he denied them, where the stipulation was legally sufficient under N.C.G.S. § 7B-807(a) and clarified the focus of the adjudication hearing, which was on respondent-mother's actions rather than the father's alleged abuse.

Appeal by respondent-mother from orders entered 23 November 2022 by Judge Rebecca Eggers-Gryder and 11 January 2023 by Judge Hal Harrison in Watauga County District Court. Heard in the Court of Appeals 4 March 2025.

di Santi Capua & Garrett, PLLC, by Chelsea Bell Garrett, for petitioner-appellee Watauga County Department of Social Services.

Ellis & Winters LLP, by James M. Weiss and Madeline Pfefferle, for the guardian ad litem.

King Law Offices, P.C., by Patrick K. Bryan, Krista Peace, Erin McCoy, and Michael Ian Maddox, for respondent-appellant mother.

PER CURIAM.

Respondent-Mother challenges the adjudication of her minor children as abused, neglected, and dependent juveniles and the subsequent disposition that the district court entered for the children. After careful review, we affirm the adjudication of the children as abused and neglected juveniles but vacate the adjudication of the children as dependent. The disposition order is left undisturbed.

I. Factual Background and Procedural History

This matter concerns "Ivy" and "Betty,"[1] who were 11 and 10 years old respectively, at the time of the adjudication hearing. The Watauga County Department of Social Services (DSS) became involved after Respondent-Mother reported to the Blowing Rock Police Department (BRPD) on 26 March 2021 that her husband—the children's father—had physically and sexually abused Ivy and Betty, as well as Respondent-Mother. Specifically, Respondent-Mother told a BRPD detective that upon discovering that Ivy and Betty had been masturbating, she became worried about the girls sleeping and snuggling with the father.

1. Pseudonyms are utilized to protect the privacy of the juveniles. N.C. R. App. P. 42(b).

DSS was contacted about Respondent-Mother's report and Respondent-Mother brought Ivy and Betty to the Child Advocacy Center (CAC) for forensic interviews. During the interviews, neither child reported sexual abuse by the father, although Ivy described the father as strict and sometimes accidentally hurting her, while Betty stated that the father did not do anything that made her sad or mad. The girls did not report sexual abuse or domestic violence to the DSS Child Protective Services (CPS) investigator, who formed an opinion that Respondent-Mother's report was not credible. Nevertheless, DSS assisted Respondent-Mother in obtaining a domestic violence protective order (DVPO), asked the father to leave the family home, and entered into a safety plan with Respondent-Mother.

Shortly after making the initial BRPD report, Respondent-Mother made an audio recording of herself talking to the children about the allegations against the father. When Respondent-Mother played the recording for the DSS CPS investigator, he became concerned that Respondent-Mother was coaching Ivy and Betty, and he advised her not to ask them leading questions about any abuse lest the DSS investigation be compromised. Between 31 March and 18 April 2021, however, Respondent-Mother took video recordings of Ivy and Betty masturbating, which she showed to DSS staff members, and then requested another forensic interview of Ivy, claiming that Ivy had disclosed additional abuse by the father. The DSS CPS investigator declined to conduct such an interview, noting that the interview process itself could be traumatic for a child. Regardless, Respondent-Mother took Ivy and Betty to their pediatrician's office to discuss the alleged abuse, which ultimately resulted in a referral to DSS for medical examinations and additional forensic interviews with the children.

On 20 April 2021, during an examination by a nurse practitioner, both children reported their belief that the examination was a result of their parents getting a divorce and denied being touched inappropriately by anyone. Ivy, however, stated that the father would sometimes "rub his private[s]" while she was sleeping with him and that she had begun to sometimes do the same, referring to masturbation. Betty reported that the father sometimes punched or hit her but did not report any sexual acts by herself or the father. For her part, Respondent-Mother denied any physical aggression by the father or other domestic violence in the home, despite a DVPO being in effect.

During its investigation, DSS received materials documenting Respondent-Mother's communications with and payment to a "spiritual advisor" named Tatum Sawyer. Sawyer told Respondent-Mother that Ivy

and Betty had been sexually abused in their past lives and advised that the resulting trauma could only be relieved through orgasm. Those communications took place less than six months before Respondent-Mother's initial report that her children were masturbating, which in turn caused Respondent-Mother to believe that they had been sexually abused by the father.

In July 2021, a forensic custody evaluation by Dr. Jennifer Cappelletty, a licensed psychologist, was ordered in a separate civil custody case between Respondent-Mother and the father. Cappelletty was able to complete a portion of the evaluation, but Respondent-Mother refused to permit Ivy and Betty to participate in a bonding assessment with the father. At that point, Cappelletty became concerned that Respondent-Mother's growing hostility and refusal to comply with the process would taint Cappelletty's ability to evaluate the family. As a result, in June 2022, DSS referred the family for a Child and Family Evaluation which included interviews with the family members by Shonnon Purcell, P.C.

The following month, July 2022, Purcell expressed concerns about the consistency of the allegations of abuse made by Ivy, Betty, and Respondent-Mother, and also about potential damage to the relationship between the children and the father resulting from Respondent-Mother's actions. Later that month, DSS learned of Respondent-Mother's testimony in the civil custody case in which Respondent-Mother described her video recording of Ivy and Betty masturbating as well as a "ceremony" she conducted with the children in which photographs of the father were burned. At that point, although the DSS investigation into the father's alleged sexual abuse remained ongoing, DSS was sufficiently concerned about Respondent-Mother's actions to file juvenile petitions on 25 July 2022 alleging that Ivy and Betty—who had then been in the sole care of Respondent-Mother for a year—were abused, neglected, and dependent juveniles. On the same date, DSS obtained nonsecure custody of Ivy and Betty and placed the children with their paternal cousin.

An adjudication and disposition hearing on the juvenile petitions was held in Watauga County District Court over eight days between August and November 2022. On 23 November 2022, the court entered an order adjudicating both Ivy and Betty to be 1) abused juveniles due to serious emotional damage created or allowed by Respondent-Mother; 2) neglected juveniles due to an injurious living environment created or allowed by Respondent-Mother; and 3) dependent juveniles in that the parents were not able to care for or supervise them and lacked an appropriate alternative child care option. The children remained in

the legal custody of DSS and in a kinship placement with their paternal cousin, with an interim plan of reunification with both parents. On 11 January 2023, the court entered a disposition order continuing legal and physical custody with DSS, the kinship placement, supervised visitation for Respondent-Mother, and a primary permanency plan of reunification with both parents. Respondent-Mother timely filed notice of appeal from the adjudication and disposition orders on 7 February 2023.

II. Analysis

On appeal, Respondent-Mother presents three arguments to this Court: 1) that the district court erred in adjudicating the girls as abused, neglected, and dependent juveniles because the findings of fact supporting the adjudication are improper; 2) that the court violated her due process rights during the adjudication hearing; and 3) that the court's dispositional findings of fact and conclusions of law are erroneous because they "are presupposed upon th[e] findings and conclusions in the adjudication order." As discussed below, we affirm the adjudication order as to abuse and neglect but vacate as to dependency. We affirm the disposition order.

A. Standard of review

In an abuse, neglect, or dependency case, we review a district

> court's adjudication to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding of fact. Where no objection is made to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.

In re G.C., 384 N.C. 62, 65–66, 884 S.E.2d 658, 661 (2023) (cleaned up). We review the court's conclusions of law concerning adjudication de novo, that is, anew and without deference to the lower tribunal. *Id.* at 66, 884 S.E.2d at 661. Finally, where some findings of fact are determined not to be supported by clear, cogent, and convincing evidence, but "ample other findings of fact support an adjudication . . . , erroneous findings unnecessary to the determination do not constitute reversible error." *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

B. Challenged findings of fact in the adjudication order

[1] Respondent-Mother presents two contentions of error regarding the district court's findings of fact: 1) that the "court impermissibly

delegated its fact[-]finding duty" in that it "copy and paste[d]" sources and incorporated them into the findings of fact; and 2) that the court "failed to employ a process of logical reasoning . . . . [or] reconcile fundamental inconsistencies" in the evidence because many of the findings are statements of what was alleged, believed, or testified to in the case. As explained below, neither alleged flaw necessarily invalidates the findings of fact.

Our appellate courts have frequently been asked to address arguments centered on the style and substance of findings of fact in orders entered pursuant to Chapter 7B. As to Respondent-Mother's first argument, in determining whether factual findings taken verbatim (or nearly so) from juvenile petitions and other sources are proper, this Court has held "that it is not per se reversible error for a trial court's findings of fact to mirror the wording of a party's pleading . . . . [or to fail] to eliminate unoriginal prose." *In re J.W.*, 241 N.C. App. 44, 45, 772 S.E.2d 249, 251, *disc. review denied*, 368 N.C. 290, 776 S.E.2d 202 (2015). Instead, a reviewing court

> will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant whether those findings appear cut-and-pasted from a party's earlier pleading or submission.

Id. at 45–46, 772 S.E.2d at 251.

Likewise, as to Respondent-Mother's second contention, our Supreme Court has emphasized that "there is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes." *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (cleaned up). In that case, "[i]n addition to making findings of fact that recited the testimony of various witnesses, the trial court made findings of fact that resolved a number of material disputes in the record evidence." *Id.* at 186, 864 S.E.2d at 496. "As a result, these findings of fact [reciting evidence we]re appropriately considered in evaluating the lawfulness of the trial court's" order. *Id.*

In the instant case, in accordance with this precedent, we consider whether the challenged findings reflect that the district court considered the evidence and made findings consistent therewith. As an initial matter, we note that while Respondent-Mother purports to challenge findings of fact 5–60 as not supported by clear and convincing evidence,

she presents specific arguments directly addressing only a handful of these findings:

Finding of fact 5—This lengthy finding, which includes 35 subparts, begins with the court clarifying the allegation at the heart of the juvenile petitions: whether Respondent-Mother was causing trauma to her daughters by her actions, rather than whether allegations of sexual abuse of the children by the father were true. Accordingly, a number of the subparts of finding of fact 5—a to g, i to y, and aa to ii—are recitations of the allegations that DSS made in the juvenile petitions and related aspects of the ongoing DSS investigation of the family. The district court included explicit credibility determinations in subparts h and z; to wit, that Respondent-Mother's explanation of why she made the March 2021 audio recording of her leading discussion with the children was "not credible" and that the court found "concerning" Respondent-Mother's responses to Cappelletty during the forensic evaluation, including her statement that she was "keep[ing] an open mind" regarding the possibility of her daughters having been sexually abused in past lives. In light of the many independent findings made by the court in resolving disputed material facts as discussed below, finding of fact 5 is proper and was appropriately considered by the court. *See id.* at 186, 864 S.E.2d at 496.

Finding of fact 6—Respondent-Mother contends that this finding "is, in actuality, a conclusion of law": "the children are in an injurious and emotionally abusive environment and . . . it is contrary to their welfare to remain in the custody of either parent at this time." We agree, but as discussed below, Cappelletty's report and expert opinion—as well as other findings of fact—support this conclusion.

Finding of fact 7—Respondent-Mother contends that this finding, listing more than 100 sources—including court orders, interviews with members of the family, photographs, medical records, and affidavits—on which Cappelletty relied in conducting her evaluation and forming her opinion is not proper for two reasons. She maintains first that it is only a "copy and paste" of the list provided in Cappelletty's report, and second, that the sources themselves "were not before the trial court." As explained above, it is not error for a court to include verbatim portions of reports as findings of fact, so long as the findings demonstrate the court's logical reasoning in making the necessary ultimate factual determinations. *See J.W.*, 241 N.C. App. at 45–46, 772 S.E.2d at 251. Nor do the resources that an expert consulted in forming her opinion need to be admitted or admissible at a hearing or trial. *See* N.C. Gen. Stat. § 8C-1, Rule 703 (2023) ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived

by or made known to him at or before the hearing." Further, if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence."). Accordingly, finding of fact 7 is a proper finding of fact.

Finding of fact 8—Respondent-Mother argues that this finding "offers nothing more than the court's *ipse dixit*[2] assertion that 'Dr. Cappelletty was thorough in gathering all this information to formulate her report and the information supports her opinions.' " We must reject her assertion that this finding "cannot be supported by clear and convincing evidence as much of 'the information' referenced in the Adjudication Order was never introduced or presented to the court in any substantive capacity during the proceedings."

As just noted, it was appropriate for Cappelletty, who was admitted as an expert in the field of forensic psychology with a specialty in sexual abuse, to rely on the sources cited by the court in finding of fact 7 in forming her opinion as to whether the children were being traumatized by Respondent-Mother's actions regardless of whether those sources were admitted or admissible. *See id.* Moreover, the district court, in its role as finder of fact, was charged with weighing the evidence and making credibility determinations, and therefore its characterization of Cappelletty as "thorough" was appropriate. *See Nash Cty. Dep't of Social Servs. v. Beamon*, 126 N.C. App. 536, 539, 485 S.E.2d 851, 852 ("[T]he trial court sat as fact[-]finder as well as arbiter of the law. The fact[-]finder has the right to consider all, some or none of a witness'[s] testimony; in addition, the fact[-]finder decides the appropriate weight to place on the testimony."), *disc. review denied*, 347 N.C. 268, 493 S.E.2d 655 (1997).

Finding of fact 10—Respondent-Mother takes issue with the court "cherry pick[ing] parts of Dr. Cappelletty's report" regarding the behavior and statements of Ivy "in such a way that mischaracterizes the evidence in the record." As just noted, however, the district court was entitled to assess witness credibility and weigh the evidence before it, and then to include in this finding of fact the portions of the report that it found credible and relevant. *See id.*

Finding of fact 11—Respondent-Mother first takes issue with the court including "verbatim recitations of Dr. Cappelletty's report," yet she acknowledges the introductory language in this finding in which

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2. "Something asserted but not proved." *Ipse dixit*, Black's Law Dictionary (12th ed. 2024).

the court stated that it was *adopting* the doctor's findings and recommendations. Such language indicates that the court considered the evidence in the report, found it credible, and thus adopted the results. This is a proper exercise of the court's discretion as fact-finder. *See id.* Respondent-Mother also characterizes as "circular" subpart d, incorrectly identified in her brief as subpart a, which states that the "research is clear and, while ignoring a source of trauma can be harmful to a child, treating a child for trauma [he or she] did not actually experience also causes the child harm." We perceive nothing "circular" about this statement and, given that the allegations in the petitions largely concern whether Respondent-Mother was traumatizing the children based upon her *belief* that sexual abuse had occurred *regardless of whether any such abuse had actually taken place*, the court's fact-finding determination that "research is clear" on that point is both relevant and supported by clear, cogent, and convincing evidence in the form of Cappelletty's testimony and report.

Finding of fact 32—Respondent-Mother characterizes this finding as an impermissible delegation of the district court's fact-finding duty, in that the court "transpose[d]" Cappelletty's third recommendation from the report—namely,

> that 'the court consider that [Cappelletty] found evidence of significant parental alienation on the part of [Respondent-Mother] regarding systematic efforts to alienate [Ivy] and [Betty] from their father'. . . , into a finding of fact that, '[t]he recommendation of Dr. Cappelletty's report *provides evidence* that Respondent[-]Mother has systematically made efforts to alienate [Ivy] and [Betty] from [the f]ather.

Again, there is no error in using verbatim language from the report, given the portion of finding of fact 11 in which the court, based on Cappelletty's report, specifically "f[ound] as fact . . . [t]hat there has been significant parental alienation on the part of [Respondent-Mother] regarding systematic efforts to alienate [Ivy] and [Betty] from their father." *See J.W.*, 241 N.C. App. at 45–46, 772 S.E.2d at 251. Further, the court was entitled as fact-finder to determine that the report was credible on the issue in question such that it "provide[d] evidence." *See Nash Cty.*, 126 N.C. App. at 539, 485 S.E.2d at 852.

Finding of fact 54— Respondent-Mother makes only a general argument that "findings 12-60 do not demonstrate a 'process of logical reasoning' . . . as shown by unreconciled inconsistencies of evidence and/or by plain failure of said findings to be supported by clear and convincing

evidence in the record." (Quoting *In re B.P.*, 257 N.C. App. 424, 432, 809 S.E.2d 914, 919 (2018)). Upon review, we agree that one portion of finding of fact 54 is unsupported. This finding states:

> Given the allegations of sex abuse by . . . the[f]ather against the Juveniles, and the allegations that Respondent[-] Mother created an injurious and emotionally abusive environment, there was no other alternative but to place the Juveniles outside the home, with a neutral relative. The Juveniles are dependent in that both the Respondent[-] Parents are unable to provide for the Juveniles[']] care or supervision and *lack appropriate alternative child care.*

(Emphasis added).

No party has cited—and we have not independently located—any evidence before the court at the adjudication hearing concerning either parent's offer, or lack thereof, of an "appropriate alternative child care" option for Ivy and Betty once they were removed from the custody of Respondent-Mother. *See* N.C. Gen. Stat. § 7B-101(9). Rather, the record indicates that the children were in a kinship placement with their paternal cousin at the time of the adjudication hearings,[3] and that placement was continued in both the interim disposition set forth in the adjudication order and later in the disposition order. Given the lack of any record evidence regarding Respondent-Mother's or the father's ability to provide an appropriate alternative child care option—including whether the kinship placement utilized was offered by one or both of the parents—we cannot uphold the part of finding of fact 54 which states that the parents "lack appropriate alternative child care."

Findings of fact 12 through 60—As previously observed, Respondent-Mother makes a general argument that "findings 12-60 do not demonstrate a 'process of logical reasoning' . . . as shown by unreconciled inconsistencies of evidence and/or by plain failure of said findings to be supported by clear and convincing evidence in the record." (Quoting *B.P.*, 257 N.C. App. at 432, 809 S.E.2d at 919). We do not find the examples of purported inconsistencies cited by Respondent-Mother meritorious:

- Whether the BRPD or DSS "set up the forensic interview" conducted with the children on 26 March 2021 is a matter of no seeming relevance to the adjudications here.

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3. The kinship placement appears to date from July 2022, when DSS obtained nonsecure custody of Ivy and Betty.

- The court's failure to "demonstrate how [it] reconciled the inconsistent testimony" made by the children during the forensic interview is not error because a fact-finder is not required to provide such justifications, as evidenced by Respondent-Mother's inability to cite authority for her proposition.
- The court was entitled to make findings of fact based on some portions of a witness's testimony but not on others. *See Nash Cty.*, 126 N.C. App. at 539, 485 S.E.2d at 852.
- The court was not inconsistent in making finding of fact 31—that "Dr. Cap[p]elletty's report and her testimony really provides the entire picture, the entire history of what the Juveniles have endured"—without noting that DSS is still investigating the allegations against the father or that Cappelletty was not able to complete her evaluation. Omission of the former fact is not "inconsistent" as the petitions here concern Respondent-Mother's allegedly traumatizing behavior and not any abuse by the father. The latter omission is not inconsistent given the court's finding that Cappelletty's inability to complete the evaluation was due to Respondent-Mother's failure to cooperate with the process and her efforts to sabotage the DSS investigation.
- Finding of fact 28—that the children were not traumatized by discussing with Cappelletty a bonding assessment at which the father would have been present but "became traumatized when they got home and talked to Respondent[-]Mother"—is supported by testimony elicited from Cappelletty on cross-examination. She explained that the children were not upset about the prospect of the bonding assessment when they left an appointment with her, but that Respondent-Mother told Cappelletty a few weeks later that Ivy and Betty were then experiencing "a great deal of distress" about the bonding assessment.

In sum, many of Respondent-Mother's arguments purporting to challenge the district court's findings of fact as failing to resolve inconsistencies in the evidence appear to be requests that this Court reweigh the evidence or second-guess the district court's credibility determinations, which is not our role. *See In re S.C.R.*, 198 N.C. App. 525, 531–32, 679 S.E.2d 905, 909 ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." (cleaned up)), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). Further, there is no error

in the findings of fact that use the wording of evidentiary materials, because "the trial court employed a process of logical reasoning, which is evidenced through its having made several independent findings of fact." *B.P.*, 257 N.C. App. at 432, 809 S.E.2d at 918–19 (internal quotation marks omitted). However, we conclude that the portion of finding of fact 54 addressing the parents' ability to offer appropriate alternative child care is not supported by clear, cogent, and convincing evidence.

C. Challenged conclusion of law in the adjudication order

We next turn to Respondent-Mother's assertions that the district court's proper findings of fact did not support its conclusion of law that Ivy and Betty were abused, neglected, and dependent juveniles.

1. Abuse and neglect

[2] Pertinent to this case, the Juvenile Code defines an abused juvenile as one whose parent "[c]reates or allows to be created serious emotional damage to the juvenile[, as] . . . evidenced by [the] juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others." N.C. Gen. Stat. § 7B-101(1)(e). Respondent-Mother contends that the findings of fact do not support the district court's conclusion that the children are abused juveniles in that Respondent-Mother "create[d] or allow[ed] to be created serious emotional damage to" Ivy and Betty. *Id.*

A juvenile is neglected under the Code, *inter alia*, if her parent has "[c]reate[d] or allow[ed] to be created a living environment that is injurious to the juvenile's welfare." *Id.* § 7B-101(15)(e). To support a neglect adjudication, a "trial court must find that there were 'current circumstances' that rendered [the juvenile]'s environment unsafe." *In re D.S.*, 286 N.C. App. 1, 16, 879 S.E.2d 335, 345 (2022). "In order to adjudicate a juvenile neglected, our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (cleaned up). Respondent-Mother maintains that the court's factual findings do not show that her actions caused any "physical, mental, or emotional impairment of [Ivy and Betty] or a substantial risk of such impairment," *id.* (citation omitted), and that the district court failed to assess the "current circumstances." *D.S.*, 286 N.C. App. at 16, 879 S.E.2d at 345.

In our view, the court's conclusions of law and the resulting adjudications of neglect and abuse are supported by its proper findings of

fact that: Respondent-Mother had, through systematic efforts, caused "significant parental alienation" between the children and the father; the parental alienation had caused "significant emotional harm to" and "been detrimental to the well-being of" the children; "while ignoring a source of trauma can be harmful to a child, treating a child for a trauma [he or she] did not actually experience also causes the child harm"; during the year in which the children were in the sole care of Respondent-Mother, "their emotional distress ha[d] escalated" because Respondent-Mother was not "able or willing to provide an environment that [wa]s conducive to her daughters['] healing"; Respondent-Mother had failed to cooperate with interested professionals, ignored court orders regarding the evaluation by Cappelletty, and "actively sabotaged DSS'[s] investigation"; Respondent-Mother coached the children regarding allegations of abuse against the father and took actions which subjected them to unnecessary evaluations about the alleged abuse; Respondent-Mother instigated the burning of photographs of the father as part of a "ceremony" with the children, damaging any potential future relationship with the father; Respondent-Mother attempted to record the children masturbating and then discussed this private aspect of the children's behavior with "so many people" that it will be "emotionally scarring to them" if they ever learn of her actions; Respondent-Mother's demeanor indicated that she did not appreciate the import of "what she ha[d] done" or the significance of her actions as they affected the children; and "[w]hether the sexual abuse [alleged to have been inflicted by the father] happened or not, [the children] have been traumatized by the way that Respondent[-] Mother has handled the situation."

These findings show that Respondent-Mother either caused or escalated the emotional distress and harm to and created potential emotional scarring of Ivy and Betty. She sabotaged the investigation into the allegations she initiated. She refused to follow the recommendations of professionals or comply with court orders. Her agenda of alienating the children from their father, along with her poor judgment, lack of truthfulness, and ongoing unwillingness or inability to understand the harm to Ivy and Betty resulting from her actions—regardless of whether the sexual abuse allegations regarding the father are true—continued up until the time of the hearing. These factual findings meet the criteria set forth by statute and precedent regarding the adjudication of children as abused and neglected juveniles. Accordingly, the court's conclusions of law to that effect are fully supported, and the resulting abuse and neglect adjudications are affirmed.

2. Dependency

We do, however, find merit in Respondent-Mother's argument that the district court's conclusion that Ivy and Betty are dependent juveniles cannot be upheld.

A dependent juvenile is defined as a child "in need of assistance or placement because . . . the juvenile's parent . . . is unable to provide for the juvenile's care or supervision *and* lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (emphasis added). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). As discussed above, the portion of finding of fact 54 regarding an appropriate alternative child care arrangement is not supported by any record evidence. The dependency adjudication as to Ivy and Betty must therefore be vacated. *See B.P.*, 257 N.C. App. at 435, 809 S.E.2d at 920.

D. Respondent-Mother's due process rights

[3] In her next argument, Respondent-Mother contends that her due process rights were violated by the district court in two ways: that the court 1) "prohibit[ed her] from presenting a full defense [and] relevant evidence during the adjudication hearing," and 2) "impermissibly relied on [the f]ather's 'stipulation' as a basis for the adjudication of abuse, neglect, and dependency." As just noted, the dependency adjudications are vacated. Regarding the abuse and neglect adjudications, however, Respondent-Mother both misrepresents what occurred at the hearing and misreads the adjudication order.

Respondent-Mother argues that she was not able to present "a full defense" in that she was not able to present evidence that the father had sexually abused Ivy and Betty such that her actions in light of that belief were justified, appropriate, and could not have constituted abuse or neglect of the children. Yet, our review of the hearing transcripts does not support Respondent-Mother's representations that "throughout the adjudication hearing, the trial court repeatedly prohibited [her] from presenting evidence in any way related to alleged sexual abuse perpetrated by [the f]ather upon the subject children."

In support of her position, Respondent-Mother cites four specific objections to testimony at the hearing that were sustained by the court. The first occurred during Respondent-Mother's direct examination when her counsel asked why she made her initial abuse report to

law enforcement. Respondent-Mother was allowed to answer, without objection: "Because of the concerns that I ha[d] of the girls' masturbation, because the sexual abuse that [the father] was doing to me. I ha[d] concerns, just not the—what r[o]se up more about the masturbation of the girls [wa]s—[wa]s the fear that they were having to the father." However, when Respondent-Mother answered a follow-up question about how she knew the children were fearful by saying, "They always expressed fear to the[ir] father," a general objection by the father's counsel was sustained. In context, the objection appears to have been sustained on hearsay grounds, given that moments before, the court had sustained an explicit hearsay objection to a question about what Ivy told Respondent-Mother about bruises she received. In sustaining that objection, the court explained that if Ivy testified, she could be asked, but Respondent-Mother could not repeat what Ivy told her. In this light, it appears that Respondent-Mother was not prohibited from mentioning the alleged abuse; rather, she was simply not allowed to give hearsay testimony about what the children said.

On the second occasion cited, Respondent-Mother's counsel asked her what occurred just before she made the audio recording of the children that led to concerns about coaching. The transcript reflects that the objection was sustained because the question was leading, not due to any reference to alleged sexual abuse by the father. Moreover, once her counsel rephrased the question, Respondent-Mother was allowed to testify regarding the conversations she had with Ivy and Betty both before and during the audio recording.

The third point during the hearing where Respondent-Mother contends her due process rights were violated involved testimony from one of her witnesses, the director of a religious organization. He was asked by her counsel about his opinions "with regard to the connection or any connection between . . . finding out whether the children were actually sexually abused and doing the bonding assessment" and what Respondent-Mother told him "about the bonding assessment and sexual abuse that you already talked about." The court sustained general objections to each question, and in a brief discussion amongst counsel and the court, it was clarified that the objection was on the ground that the question had been "asked and answered." Respondent-Mother's counsel was then allowed to ask a rephrased version of essentially the same question, without objection: "Can you please tell the [c]ourt what—if my client talked to you about this, obviously, what, if anything, was the connection that my client saw between the bonding assessment and finding out whether the girls were actually sexually abused?" Thus, the issue

of the father's alleged sexual abuse was not the basis of the objection, and the topic was not prohibited.

In the final instance identified by Respondent-Mother, the court sustained two objections to questions as to whether Betty had disclosed sexual abuse on the basis that the questions were leading. Once again, it was the *form* of the questions and not their reference to alleged sexual abuse that led to the sustained objections. Further, Respondent-Mother's counsel chose not to return to the topic by asking non-leading questions.

Moreover, the allegations of sexual abuse by the father were referred to and discussed throughout the hearing by virtually every witness, as shown by both explicit and implicit references to those allegations in the majority of the findings of fact in the adjudication order. The court further noted that those allegations were still under investigation by DSS, despite Respondent-Mother's hampering of that process, and specifically found that "Respondent[-]Mother does not appear to understand the nuances of what DSS'[s] investigation entailed and that DSS'[s] role was to monitor and try to create a plan, *whether* [*the f*]*ather has sexually abused these children or not*" and "[*w*]*hether the sexual abuse happened or not*, [Ivy and Betty] have been traumatized by the way that Respondent[-]Mother has handled the situation with [them]."

Respondent-Mother's final due process contention is that the district court erred in relying on the father's stipulation that allegations of sexual abuse by the father existed, although he strongly denied committing such abuse. She argues that "there was never a meaningful, or legally sufficient, stipulation" pursuant to N.C. Gen. Stat. § 7B-807. We are not persuaded.

The relevant statute provides, *inter alia:*

> 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. *A record of specific stipulated adjudicatory facts shall be made* by either reducing the facts to a writing, signed by each party stipulating to them and submitted to the court; or *by reading the facts into the record, followed by an oral statement of agreement from each party stipulating to them.*

Id. § 7B-807(a) (emphases added).

Adjudicatory finding of fact 5 states:

> The issue raised in this [p]etition was not whether [the father] had sexually abused the Juveniles, but whether they were experiencing trauma at the hands of Respondent[-] Mother. At the commencement of the hearing, [the f]ather stipulated in open court, by and through his attorney of record, that the factual *allegations* set forth in the [p]etition are true—that there had been allegations of sexual abuse, but he did deny that the allegations themselves were true. . . . The stipulation of [the f]ather, the previous testimony of Respondent[-]Mother, and the additional facts set forth hereinbelow, establish by clear, cogent and convincing evidence that the Juveniles are Abused, Neglected and Dependent Juveniles . . . .

The hearing transcript reveals that counsel for the father stated for the record in open court that the father "*stipulates to the facts as alleged in the petitions* filed by DSS, and I want to, again, clarify that *we are not disputing the fact that allegations have been made against* [*the father*]. We do wholeheartedly and as vigorously as possible *deny that those allegations are true*." These statements fully comport with the requirements for stipulations set forth in N.C. Gen. Stat. § 7B-807(a), and accordingly, the stipulation was legally sufficient.

Respondent-Mother maintains that "[t]his is not a stipulation that has any credible meaning or value for purposes of an adjudication. Nevertheless, both DSS and the trial court accepted it as a stipulation. This acceptance, naturally created undue implications for the remainder of the proceedings and, ultimately, the adjudication of" Ivy and Betty. Specifically, she asserts that the stipulation "seemingly operated as a de facto alignment of the parties with DSS and the[f]ather on one side and Respondent[-]Mother on the other side" and "it apparently relinquished the trial court of its duty to consider the evidence before it regarding the[f]ather's actions as they related to the 'existence or nonexistence of any of the conditions alleged in a petition.' N.C. Gen. Stat. § 7B-802."

Respondent-Mother's argument reflects her ongoing misapprehension of the factual allegations in the petitions. As the petitions state, the DSS supervisor testified, and the court found, the petitions were filed due to concerns that Ivy and Betty were being harmed by *Respondent-Mother's poor judgment and her noncompliance and interference* with the DSS investigation and the related court orders. Moreover, because Respondent-Mother's noncompliance and interference had—at the time

of the hearing—prevented DSS from fully investigating and resolving the truth or falsity of the allegations against the father, *Respondent-Mother's own actions prevented DSS from being able to file any potential petitions based on abuse by the father*. The meaning and value of the father's stipulation was to clarify the bases of the petitions and thus the focus of the adjudication hearing. The district court did not err in relying on the father's legally sufficient stipulation for that purpose.

In sum, each of Respondent-Mother's due process arguments are overruled.

E. Challenge to the disposition order

Respondent-Mother's sole assignment of error as to the district court's disposition order is that the order was "premised and presupposed" upon the findings of fact and conclusions of law in the adjudication order which Respondent-Mother argued were erroneous and unsupported. As explained above, although we vacate the dependency adjudications, we affirm the adjudications of Ivy and Betty as abused and neglected juveniles. Accordingly, we leave the disposition order undisturbed.

III. Conclusion

We affirm the adjudications of Ivy and Betty as abused and neglected juveniles but vacate the adjudications of the children as dependent juveniles. The disposition order is affirmed.

AFFIRMED IN PART; VACATED IN PART.

Panel consisting of Chief Judge DILLON and Judges ZACHARY and FLOOD.

STATE v. EARLEY

[298 N.C. App. 172 (2025)]

STATE OF NORTH CAROLINA
v.
LAVONDA MARIE EARLEY, DEFENDANT

No. COA24-386

Filed 19 March 2025

1. Appeal and Error—preservation of issues—failure to object to testimony at trial—untimely objection during State's closing—limited review

In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, defendant failed to preserve for appellate review any of her challenges to testimony that was elicited by the State regarding defendant's failure to provide a statement to law enforcement during its investigation of the incident. First, any arguments regarding testimony to which no objections were lodged were waived. Second, defense counsel objected to only portions of the testimony and the same evidence was later introduced without objection. Finally, some of defense counsel's objections did not provide a specific basis for the objection. Thus, review of the challenged statements was limited to plain error analysis. With regard to defendant's failure to preserve for appellate review statements by the prosecutor during closing argument regarding defendant's silence—because defense counsel's objection was not timely—the appellate court undertook to determine whether the challenged statements were grossly improper.

2. Constitutional Law—right to remain silent—prosecutor's questions—defendant's post-arrest silence—no probable impact on outcome

In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, the trial court did not commit plain error by allowing the State to question defendant regarding her failure to make a statement to law enforcement after her arrest, where, in light of the substantial unchallenged evidence that supported the State's version of events and contradicted defendant's, the jury would not have reached a different verdict absent the alleged error.

3. Criminal Law—prosecutor closing argument—defendant's post-arrest silence—not grossly improper

In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, the prosecutor's statements regarding defendant's post-arrest silence and failure to provide a statement to law enforcement were not so grossly improper as to require the trial court to intervene ex mero motu, and the trial court's failure to do so did not constitute an abuse of discretion. The prosecutor's statements were de minimis and, considering the record as a whole, not prejudicial in light of the substantial evidence presented of defendant's guilt.

Judge TYSON dissenting.

Appeal by defendant from judgments entered 8 September 2023 by Judge Jonathan W. Perry in Union County Superior Court. Heard in the Court of Appeals 15 January 2025.

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

Kaelyn N. Sweet for defendant-appellant.

FLOOD, Judge.

Defendant, Lavonda Marie Earley, appeals from the trial court's judgments finding her guilty of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). On appeal, Defendant argues the trial court erred or plainly erred by: (A) allowing the State to repeatedly question Defendant about her failure to make a statement to law enforcement, and (B) allowing the State to reference her silence during closing argument. Upon careful review, we conclude the trial court did not plainly err in allowing the State to question Defendant about her failure to make a statement to law enforcement, because Defendant cannot establish she was prejudiced by the challenged evidence, and the trial court did not abuse its discretion in failing to intervene *ex mero motu* during the State's closing argument, because the statements were not grossly improper.

I. Factual and Procedural Background

On 25 January 2022, shortly before 6:00 p.m., Defendant's husband, John Stacey, returned from work and arrived at their home at 2000 Chandler Forest Court in Indian Trail, North Carolina. Stacey entered the house and saw Defendant "sitting at the desk" in the kitchen, but Defendant did not look up, and Stacey said nothing to Defendant "because [they] don't really talk." Stacey "grab[bed] a beer[,]" then went upstairs to the master bathroom, "turn[ed] on some jazz[,]" took a "scrub brush[,]" and "got in the shower[.]" Stacey left the bathroom door open. Stacey saw Defendant "pulling the [bathroom] door closed[,]" thinking that she had briefly come in to get something and left. Stacey finished showering, stepped out of the shower, and set one foot on the bathroom floor, when Defendant reentered the room and "just started shooting."

Defendant quickly tried to close the bathroom door; however, a hook on the door prevented her from closing the door. Defendant reentered the room, and Stacey asked Defendant, "why are you doing this[?]" Defendant responded: "You fucked her, you die mother fucker[.]" Defendant removed the door hook, took Stacey's phone and wallet that were lying on the bathroom sink, locked Stacey inside the bathroom, and left the home.

Stacey first tried to call out for help through the bathroom window, to no avail. He then "crawled to the door . . . fumbled and [] got it unlocked[,]" then "crawled to the steps." He crawled out of the bathroom, through the master bedroom, down the second-floor hallway, and to the top of the stairs. Stacey then "balled up in a knot and rolled down" the stairs. He unlocked the front door, and then "rolled to the porch" where he called out for help. He then saw his neighbor, Joshua Betts, passing by.

Earlier that same day, Defendant had called Betts. Betts had "never really spoken to [Defendant,]" yet Defendant was very talkative on the phone call, resulting in "the longest conversation [Betts had] ever had with [Defendant.]" On the call, Defendant asked whether Betts and his wife would be home later in the day so that Defendant could return some Tupperware.

Around 5:30 p.m., Defendant knocked on Betts' front door with Tupperware in hand, and Betts' wife opened the door and accepted the Tupperware. Around the time Stacey began taking his shower, Betts and his wife finished their workday and went on their daily walk around the neighborhood. Betts briefly returned to the house and closed their windows because he and his wife "smelled smoke somewhere[,]" but

when they resumed their walk, Betts heard "a lot of loud bangs" coming from Defendant's house. Betts "kept turning around" to look at Defendant's house, and he eventually saw Defendant at the front door, who was "struggling" with the door lock, and "in a hurry." A few minutes later, Betts saw that Defendant's black Mercedez-Benz was gone.

Although Betts wanted to investigate, his wife "held [him] back" and "pulled [him] along for the rest of the walk." Returning in the direction of their house, Betts and his wife walked past Defendant's house. Betts saw Stacey "laying on the front steps . . . just wearing a bath towel[,]" his "head . . . hang[ing] off of some of his brick steps[,]" and "covered in blood[.]" Stacey told Betts: "Call 911 . . . my wife shot me[.]"

Emergency Response, Investigation, and Arrest

Deputy Jason Frazier, with the Union County Sheriff's Office, was dispatched to Defendant's home shortly after 6:00 p.m. Upon arriving at the home, Deputy Frazier saw Stacey in about the same condition as Betts observed him, and observed Stacey "had several gunshot wounds to his lower body." Deputy Frazier entered the home and observed "a blood trail that led from the front door up the stairs" and "a large amount of blood in the bathroom." He observed "busted glass on the floor and . . . [handgun] casings on the vanity and the counter and the sinks." Soon after, Steven Helms, a paramedic with the Union County EMS, arrived on the scene, began treating Stacey, observed several wounds on Stacey, and noticed he "appeared to have lost a good deal of blood." Helms subsequently transported Stacey to the hospital.

Following Stacey's transportation to the hospital, Crime Scene Investigator Paige Eason arrived at the scene. In the master bathroom, Investigator Eason observed the following: "broken glass, a large amount of blood," and "spent casings"; the glass shower door had "extensive damage"; bath towels and robes were located in the bathtub; five 9-millimeter casings located "in the sink[,]" one casing located "on top of the sink vanity[,]" and another "spent casing [] next to the bathtub"; "suspected projectile holes in the metal of the shower door frame[,]" some "on the wall located next to the shower[,]" and one "in the toilet paper holder[.]" Investigator Eason further observed: a "specific drip pattern" of blood next to the open shower door, indicating Stacey was "not moving, [or] . . . not walking at the time"; blood on the bathroom door; blood on the doorhandle; and an absence of blood where the bathmat had been located. Investigator Eason concluded: "Based on all of that information there definitely was a firearm shot in that bathroom"; "[s]omeone was standing within a particularly close distance to the vanity"; and the shooter was probably standing.

Next, Investigator Eason proceeded to the bedroom, where she observed blood stains leading from the bathroom, and through and out the bedroom, indicating movement "consistent with someone who's actively bleeding [and] crawling through that area[.]" Investigator Eason also observed that none of the items on the dresser appeared out of place, none of the bed linens were out of place, and that only one side of the bed appeared to be in use. She further observed: a "handgun box and the magazine" located towards the foot of the bed; that the magazine was loaded; and that it had "seven rounds in an eight[-]round capacity magazine." She did not locate the gun associated with the magazine or any other handguns in the home.

Sergeant Tyler Kell soon arrived at the house, was assigned lead investigator, and searched the house. He found at least two shotguns in the house, including one shotgun "tucked under" the bed, which was not easily reachable, and appeared "still [intact] as if it had just been purchased[.]" Upon inspection, he determined that the shotguns were unloaded. Sergeant Kell had also been notified that Defendant's phone number had called 911 at 6:28 p.m., and Defendant had several times repeated the phrase "[a]mbulance 2000 Chandler Forest Court." Neither Defendant nor her seventeen-year-old son, Ashton—who was not at the home at the time of the events—had been located since that time. It was later determined that Defendant had been traveling to her mother's house on "[t]he west side of Charlotte," and had crossed into Mecklenburg County at the time of the 911 call.[1] Sergeant Kell had tried to call Defendant, but Defendant never "pick[ed] up her phone[.]" Sergeant Kell further observed a "doorbell camera" on the "front side of the house[.]" Defendant had virtual access to the Ring doorbell camera during the time of the responding officers' arrival.

Law enforcement obtained a warrant to arrest Defendant the same night as the shooting. The next day, on 26 January 2022, an attorney contacted Sergeant Kell informing him Defendant would turn herself in, and she did so that afternoon. Although Sergeant Kell had requested Defendant turn in the gun she used to shoot Stacey, Defendant did not bring a gun upon her arrest. At the time of her arrest, Defendant was given *Miranda* warnings and declined to make a statement to law enforcement.

Senior Crime Scene Investigator Chris McTeague entered Defendant's interview room, where she was photographed, and asked Defendant

1. The 911 operators had attempted to transfer Defendant's call to the Union County 911 Center; however, Defendant hung up the phone before the transfer was complete.

whether "she had any injuries[.]" Defendant "indicated that she did not" have any injuries, and Investigator McTeague did not observe bruising; "nicks, cuts, [or] scrapes"; or any other injuries on Defendant.

Three weeks after the shooting, Stacey, who had been in intensive care and on a ventilator, woke up in the hospital, was discharged a few weeks later, and went to live at his daughter's house. Defendant had, by this time, bonded out of jail and returned to the marital home. Stacey was granted a domestic violence protective order ("DVPO") to remove Defendant from the home. Pursuant to the DVPO, Defendant went to the Union County Sheriff's Office "to surrender a firearm[,]" which was a "pink and black Smith & Wesson M&P Shield 9[-]millimeter semiautomatic handgun."

Trial Proceedings

On 4 April 2022, a Union County Grand Jury returned a true bill of indictment, charging Defendant with attempted first degree murder and AWDWIKISI. On 25 August 2023, the matter proceeded to trial, and both parties presented evidence.

The following, relevant testimony was heard at trial. On direct examination of Sergeant Kell, the State asked whether he "g[a]ve [Defendant] an opportunity to give a statement at the time that she turned herself in[.]" Defense counsel objected on the basis "that the State is trying to elicit the information that my client invoked her . . . Fifth Amendment right not to incriminate herself." The trial court overruled Defense counsel's objection, and Sergeant Kell responded affirmatively.

Later, on direct examination of Sergeant Kell, the State asked questions regarding Sergeant Kell's interactions with Defendant on 8 February 2022, where Sergeant Kell testified he had told Defendant over the phone he "didn't want to speak with [Defendant] about the shooting without her understanding that . . . she had the right to not speak with [him] about that without an attorney present[,]" because Defendant, not being in custody, "still had some rights attached to her[.]" Sergeant Kell testified Defendant wanted to discuss other topics. Defense counsel did not object to this line of questioning.

Next, during Defense counsel's cross-examination of Sergeant Kell, Sergeant Kell confirmed he did not know Defendant's version of events, to which Defense counsel responded: "[a]ll right. So you're just going on the only one side that you knew; correct?" Sergeant Kell responded affirmatively. During the State's redirect examination of Sergeant Kell, Sergeant Kell stated: "We were unable to get [] Defendant's version

of events even though we tried." Defense counsel did not object to this exchange.

Defendant thereafter put on her own case, claiming self-defense. The following, relevant testimony was heard. Forensic psychologist Dr. Mina Ratkalkar testified, among other things, that "at the time of the offense[,] it appears that [Defendant] was in a place where she thought that her life was in imminent danger. . . . [Defendant] was afraid that if she did not take action that . . . she would no longer be here." Later, the State cross-examined Deidre Johnson, a real estate broker who knew Defendant for nineteen years, asking in relevant part whether Johnson was "aware that [Defendant] never called [Sergeant] Kell[.]" Johnson replied in the negative. Defendant did not object to this colloquy.

Next, Defendant testified. According to Defendant, two days prior to the shooting, she confronted Stacey about his drug use and about his selling drugs.[2] Defendant had also previously expressed concern with the "young girl" Stacey called his "weed connection" for whom he bought gifts. Defendant would "destroy [Stacey's] weed every time [she saw] it[,]" and "took out" a camera Stacey had installed "so he could stop watching [Defendant] guard his illegal marijuana." Two days before the shooting, Defendant testified she had located, on an iPad, text messages between Stacey and his nephew that "confirm[ed] exactly what [Defendant] was talking about with [Stacey] selling drugs."

Defendant then testified as to her phone conversation with Betts the day of the shooting, explaining she called him "to go over his Trane warranty with him[,]" referring to Defendant and Stacey having previously "installed a full [HVAC] system," and that it was Defendant's "job [] to follow up[.]" Defendant also told Betts she still had to return the "container from the Christmas cookies[.]" After the phone call, Defendant left to go to her great aunt's funeral.

After she returned, Defendant was sitting in the kitchen "working on paperwork . . . that was for the divorce[,]" when Stacey returned home from work.[3] Stacey asked Defendant, "how was the funeral[,]" to which Defendant responded, "what do you care[?]" An argument ensued, with Defendant and Stacey "cursing [] back and forth [and]

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2. When Defendant was served with the DVPO, Defendant produced drug paraphernalia to Sergeant Michael Malloy of the Union County Sheriff's Office, alleging it belonged to Stacey; Defendant, however, had been in sole possession of the home for a little over one month before this interaction.

3. Evidence was presented that Stacey and Defendant had a strained marital relationship and that they had been regularly discussing divorce since at least 2020.

yelling and screaming[.]" Their argument continued upstairs into the bathroom, where Stacey got into the shower, Defendant "put[] eyeliner on[,]" and continued to argue with Stacey about his "selling drugs with [his] nephew[.]"

After Stacey got out of the shower, Defendant "grabbed his phone[,]" and screamed, "I'm going to show you how you're selling drugs[,]" after which Stacey grabbed the phone back from Defendant. They were struggling over the phone, and had moved into the adjacent master bedroom, when Stacey grabbed Defendant "by [the] neck," "pushed [her] on [to her] back onto the bed and slung [her] over the footboard of the bed." Defendant then "slid under the bed," and "[got] the gun[,]" which was already loaded. Stacey then "dragg[ed Defendant] by [her] feet[,]" screaming: "Bitch, you think I'm fucking playing with you, you think I'm fucking playing with you." Stacey "was pulling [Defendant] in that bathroom[,]" and Defendant testified she knew Stacey kept his "OJ Simpson knife" in the "bottom drawer."

At that point, Defendant "started firing everywhere[.]" Defendant testified she "believe[d she] was going to die" because she "didn't know what [Stacey] had done with the gun that he had took from [her]." Defendant grabbed Stacey's phone because it had "all the evidence on it"; she "took his wallet," "pushed [the] bed back over," and "laid the [loaded magazine] . . . in that box along with the gun case." At that point, Stacey "got up," and through tears stated, "baby, I'm so sorry." Defendant next testified she got in her car and left, "not thinking about anything else but getting . . . to safety." She called 911 and "gave the address" before "being disconnected[.]" Later, she retained an attorney and was "given instructions . . . not to say anything" to law enforcement.

On cross-examination, the State asked Defendant: "[I]sn't it correct that the first time the State became aware of your version of events was [twenty-two] days ago when your attorney handed me Dr. Ratkalkar's report here in the courtroom?" Defendant replied in the affirmative. The State next asked: "You never provided a statement to law enforcement in this investigation, did you?" Defendant replied in the negative. Defense counsel only objected to the last question asked by the State: "[Y]ou never provided any outside witnesses who you allegedly told about the abuse?"[4] Defense counsel timely objected but did not provide a basis for the objection, and the trial court overruled the objection.

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4. Defendant testified that, around 2017 and 2018, Stacey began physically abusing Defendant.

The State next asked Defendant if she kept a journal, which she stated she did. Defendant explained, however, that she did not produce the journal for trial or discovery. In response to the State's questioning her about not producing the journal, Defendant responded: "I don't have to make any statements to the State prior to my trial[;] . . . I had an attorney who advised me not to say anything[.]" Defense counsel did not object to this line of questioning.

The State then asked Defendant: "[Y]ou had an opportunity to give a version of your events to law enforcement; correct?" Defendant responded: "I was given instructions by my attorney not to say anything, which is my right to do so." The State replied: "It is your right. It's also your constitutional right to present whatever fabricated defense you want to a jury, isn't it?" Defense counsel objected, and the trial court sustained the objection.

The State later provided to Defendant: "You didn't give any details to the 911 operator because you didn't know what your story was going to be yet." Defendant responded: "I told them where my husband was." The State then asked: "You wouldn't answer the phone for law enforcement trying to find Ashton; correct?" Defendant responded: "I d[id]n't know that law enforcement was calling me." Defense counsel did not object to this exchange.

The State called several witnesses in rebuttal. Betts testified that his phone call with Defendant did not involve "warranty information about that HVAC system[.]" Betts further maintained that the call was "out of place[.]" Sergeant Kell testified that, as to the "scene in that bedroom[,]" nothing "indicate[d] . . . a fight [or a struggle] had occurred there at all." Sergeant Kell further testified that, "comparing the scene I saw to the testimony [Defendant] gave, I would expect to see things . . . disheveled or knocked over. . . . I just did not feel that the scene correctly represented what she alleged happened." Sergeant Kell also testified: "The probability that those [] casings . . . were able to land in that sink while she was being drug so violently that she is kicking and fighting and shooting wherever[;] . . . I find that . . . highly unlikely and improbable[.]" He testified that there were "no [bullets] in the ceiling" or even "above head level." Sergeant Kell finally testified that: "Without a doubt, . . . the physical evidence present in the bedroom and the bathroom [was not] consistent with [] Defendant's version of events[.]"

In its closing argument, the State argued that Defendant's self-defense claim was an after-the-fact creation—calling it "smoke and mirrors." The State indicated "the first mention of self[-]defense c[ame] from [] Defendant . . . the following day." The State continued: "We know that

[] Defendant did not give a statement to law enforcement." The State then argued Defendant provided "repeated fabrications . . . from that witness stand under oath[,]" and created "a story" and a "movie script" in "an attempt to hoodoo [the jury.]" After the State's closing argument, the jury left to deliberate, when defense counsel stated: "I believe it is improper in a closing argument to say that the defense was smoke and mirror." The trial court did not rule on the objection.

On 7 September 2023, the jury found Defendant guilty of both attempted first degree murder and AWDWIKISI. The trial court sentenced Defendant to 157 to 201 months' imprisonment for the attempted first degree murder verdict, and a consecutive sentence of 73 to 100 months' imprisonment for the AWDWIKISI verdict. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review this appeal from final judgments of a superior court, pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

On appeal, Defendant argues the trial court erred or plainly erred by: (A) allowing the State to repeatedly question Defendant about her failure to make a statement to law enforcement, and (B) allowing the State to reference her silence during closing argument. We address each argument, in turn.

A. Preservation Issues

[1] As a preliminary matter, we address whether Defendant has preserved her alleged errors for appellate review.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). "To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *State v. Snead*, 368 N.C. 811, 816 (2016) (citation and internal quotation marks omitted). Rule 10's specificity requirement "prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required." *State v. Bursell*, 372 N.C. 196, 199 (2019).

"It is well settled that an error, even one of constitutional magnitude, that [a] defendant does not bring to the trial court's attention is

waived and will not be considered on appeal." *Id.* at 199 (citation omitted); *see also State v. Ashe*, 314 N.C. 28, 39 (1985) (a "defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal"). Furthermore, "[w]here 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. Alford*, 339 N.C. 562, 570 (1995). "Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*; 365 N.C. 506, 512 (2012); *see also* N.C. R. App. P. 10(a)(4). We first consider whether Defendant has preserved her alleged error for statements made at trial, before closing arguments.

1. Statements made at trial

Here, none of the statements made at trial are preserved for appellate review. Defendant references in her appellate brief several portions of testimony to which no objection was lodged by defense counsel at trial; thus, any errors arising out of any of these portions of testimony, even if they rise to the level of constitutional errors, are deemed waived on appeal. *See Bursell*, 372 N.C. at 199; *see also* N.C. R. App. P. 10(a)(1).

Further, defense counsel objected only to certain portions of testimony. First, defense counsel objected to the colloquy between the State and Sergeant Kell, where the State asked Sergeant Kell whether Defendant had been given "an opportunity to give a statement at the time that she turned herself in[,]" to which Sergeant Kell responded in the affirmative. Although defense counsel timely objected and stated that the basis for the objection was the Fifth Amendment, the State's question did not reference Defendant's silence, but merely her opportunity to give a statement. Even if the State's question could be construed as referencing Defendant's silence, this same evidence was later admitted without objection when the State asked Sergeant Kell about his knowledge of Defendant's version of events, and Sergeant Kell responded that law enforcement was "unable to get [] Defendant's version of events even though [they] tried." Because the same evidence that was previously objected to was later admitted without objection, "the benefit of the objection [was] lost[,]" and any error related to this portion of testimony is waived on appeal. *See Alford*, 339 N.C. at 570; *see also Bursell*, 372 N.C. at 199.

Finally, defense counsel objected to the State's question to Defendant that she "never provided any outside witnesses who [Defendant] allegedly told about the abuse[,]" and later to the State's question to Defendant that "[i]t's also [Defendant's] constitutional right to present whatever fabricated defense [Defendant] want[s] to a jury, isn't it?" Although

defense counsel's objection in both instances was timely, defense counsel did not provide specific grounds for either objection, and because the grounds for both objections are not apparent in their respective contexts—as it is unclear to this Court whether defense counsel was objecting on Fifth Amendment grounds, related to Defendant's silence, or on other grounds—these allegations of error are not preserved for appellate review. *See* N.C. R. App. P. 10(a)(1); *see also Bursell*, 372 N.C. at 199. Next, we consider whether Defendant has preserved her alleged error for statements made by the State during closing argument.

2. Statements made during closing argument

Our Supreme Court has also explained that "[i]t is the general rule that an impropriety in the argument must be brought to the attention of the trial judge in time for it to be corrected[.]" *State v. Smith*, 291 N.C. 505, 521 (1977). "[The] Court is mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor." *State v. Jones*, 355 N.C. 117, 129 (2002). A defendant must object to statements made during closing argument, however, or the error is not preserved for appellate review. *See State v. Parker*, 269 N.C. App. 629, 638 (2020) ("If [a d]efendant or his counsel believes the State's argument [during closing argument] is improper, they are obliged to speak and object to preserve the error for appellate review.").

This Court has held that an untimely objection made during closing argument failed to preserve the issue for appellate review. *See State v. Hurd*, 246 N.C. App. 281, 291 (2016) (concluding that where "the State twice argued [the d]efendant had [the victim] killed before [the d]efendant objected," such objection was untimely under N.C. R. App. P. 10(a)(1)). Similarly, our Supreme Court has concluded that, where a defendant "did not request the judge to stop the argument or to instruct the jury not to consider it[,]" and where the objection only appeared "for the first time in the case on appeal[,]" the defendant "should have excepted and moved for a mistrial before the case went to the jury, rather than wait until after verdict to make complaint[,]" and thus did not preserve the error for appellate review. *State v. Peele*, 274 N.C. 106, 114 (1968), *superseded on other grounds*, *State v. Gillard*, 386 N.C. 797 (2024). Unpreserved error for improper closing arguments is reviewed only for "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133.

Here, defense counsel objected to the State's closing argument only after the State concluded its argument and after the jury left to deliberate

in the jury room, stating: "I believe it is improper in a closing argument to say that the defense was smoke and mirror. . . . That is improper closing argument by the prosecutor." The objection was untimely because defense counsel, objecting only *after* the jury left to deliberate, did not bring the objection "to the attention of the trial judge in time for it to be corrected[.]" *See Smith*, 291 N.C. at 521. Similar to *Peele*, where the defendant failed to object during closing argument and objected only after the case went to the jury, here, defense counsel objected only after the jury left to deliberate. *See* 274 N.C. at 114. Defense counsel "should have excepted . . . *before* the case went to the jury" so as to make a timely objection and preserve the issue for appellate review, rather than wait until after the jury left to deliberate.[5] *See id.* (emphasis added); *see also Hurd*, 246 N.C. App. at 291; *Parker*, 269 N.C. App. at 638. Because defense counsel's objection was untimely, Defendant's related allegation of error is not preserved for appellate review. *See* N.C. R. App. P. 10(a)(1); *see also Smith*, 291 N.C. at 521; *Peele*, 274 N.C. at 114.

Accordingly, none of Defendant's alleged errors are preserved for appellate review, and thus we review the statements made at trial for plain error, and whether the statements made during closing argument were grossly improper. *See Lawrence*; 365 N.C. at 512; *see also Jones*, 355 N.C. at 133; N.C. R. App. P. 10(a)(4).

B. Testimony at Trial

[2] Defendant first argues the trial court plainly erred by allowing the State to repeatedly question Defendant about her failure to make a statement to law enforcement. We disagree.

To demonstrate plain error, Defendant must satisfy a three-factor test:

> First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a "probable impact" on the outcome, meaning that "absent the error, the jury probably would have returned a different verdict." Finally, the defendant must show that the error is an "exceptional case" that warrants plain error review, typically by showing that the error

5. Defense counsel objected after the trial court had instructed the jury, and the jury had left the courtroom, but before the jury commenced deliberations. Defense counsel's objection was untimely, despite having been made before the jury commenced deliberations, because it had not been made during the State's closing argument. *See Parker*, 269 N.C. App. at 638; *see also Hurd*, 246 N.C. App. at 291; *Peele*, 274 N.C. at 114.

> seriously affects "the fairness, integrity or public reputation of judicial proceedings."

State v. Reber, 386 N.C. 153, 158 (2024) (quoting *Lawrence*, 365 N.C. at 518–19). As to the second part of the test, concerning prejudice, "[t]he question is not whether the challenged evidence ma[kes] it more likely that the jury would reach the *same* result. Instead, the analysis is whether, without that evidence, the jury probably would have reached a *different* result." *Id.* at 160 (emphasis in original). "In other words, the test examines the state of all the evidence except for the challenged evidence and asks whether, in light of that remaining evidence, the jury probably would have done something different." *Id.* at 162.

Here, considering only the remaining evidence not challenged on appeal, the jury would probably not have reached a different result. *See id.* at 160, 162. The State presented overwhelming evidence from which a jury could conclude that the State's version, rather than Defendant's version, accurately explained the events. The State presented substantial unchallenged evidence that blood, broken glass, and several 9-millimeter casings had been found in the bathroom. The State's unchallenged evidence provides that: "there definitely was a firearm shot in that bathroom"; "[s]omeone was standing within a particularly close distance to the vanity"; and the shooter was probably standing, which contradicts Defendant's account that she started firing as she was being dragged into the bathroom by Stacey.

Further, the State presented evidence that there were "no [bullets] in the ceiling" or even "above head level[,]" and that "[t]he probability that those [] casings . . . were able to land in that sink while [Defendant] was being drug so violently that she is kicking and fighting and shooting wherever" was "highly unlikely and improbable[.]" The State further presented evidence of a "specific drip pattern" of blood next to the open shower door, indicating Stacey was "not moving [or] . . . not walking at the time[,]" and presented evidence of blood stains leading from the bathroom, and through and out the bedroom, indicating movement "consistent with someone who's actively bleeding [and] crawling through that area[.]" The State's evidence supports a conclusion that Stacey crawled rather than stood up, casting doubt on Defendant's testimony that Stacey stood up and apologized.

The State also presented evidence that nothing appeared out of place in the bedroom, none of the items in the dresser appeared out of place, the linens were not out of place, and only one side of the bed appeared to be in use. The State presented Sergeant Kell's unchallenged testimony that the scene in the bedroom did not indicate that "a fight [or a struggle]

had occurred there at all[,]" directly contradicting Defendant's account that Defendant and Stacey fought and struggled in the bedroom. After Defendant's arrest, she was not observed to have any injuries, further contradicting Defendant's account of the violent fight and struggle. The State's evidence that law enforcement found no loaded guns in the house casts doubt on Defendant's account that she reached under the bed and obtained a loaded gun.

The State also presented uncontradicted evidence that the home had a Ring doorbell camera, to which Defendant had access during the time the responding officers arrived, and that Defendant's phone number had dialed 911 at 6:28 p.m., after emergency responders had arrived. The uncontradicted evidence also demonstrates Defendant did not pick up the phone when called by Sergeant Kell. Further, the State presented Betts' testimony, where he testified that the phone call between him and Defendant did not involve "warranty information about that HVAC system" and that the call was "out of place[,]" again contradicting Defendant's version of events. Finally, the State presented evidence that Defendant did not turn in the gun upon being arrested, but only after being served with the DVPO, from which a jury could question why Defendant did not turn in the gun upon being arrested.

Examining only the unchallenged evidence, there is substantial evidence that supports the State's version of events, in contradiction of Defendant's version of events, such that there is no showing that "the jury probably would have reached a *different* result." *See id.* at 160, 162. Because Defendant has not satisfied the second factor of the three-factor plain error test, Defendant cannot demonstrate plain error. *See id.* at 158. Accordingly, the trial court did not plainly err in allowing the State to question Defendant about her failure to make a statement to law enforcement. *See id.* at 158.

C. Statements During Closing Argument

[3] Defendant next argues the trial court plainly erred by allowing the State to reference her silence during closing argument. We disagree.

"[P]lain error review does not apply to [statements during closing argument] because plain error is reserved for evidentiary or instructional errors." *See id.* at 163.

> Where a defendant fails to object to the closing arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. To establish such an abuse, [the] defendant must show that the prosecutor's

> comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Tart, 372 N.C. 73, 80–81 (2019) (citation omitted) (cleaned up). "[A] new trial will be granted only if the remarks were of such a magnitude that their inclusion prejudiced [the] defendant, and thus should have been excluded by the trial court." *Id.* at 82 (citation and internal quotation marks omitted). As our Supreme Court has explained:

> To warrant a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair. In assessing whether this level of prejudice has been shown, the challenged statements must be considered in context and in light of the overall factual circumstances to which they refer. Thus, only when it finds *both* an improper argument and prejudice will th[e] Court conclude that the error merits appropriate relief.

Id. at 82 (citations omitted) (cleaned up); *see also State v. Ward*, 354 N.C. 231, 265 (2001) ("[S]tatements made during closing arguments will not be examined in isolation. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." (citation and internal quotation marks omitted)). Further, where "evidence is introduced without objection at trial and does not meet the criteria for plain error, it is well within the 'parameters of propriety' for a trial court to permit that evidence to be described in closing arguments." *Reber*, 386 N.C. at 164.

"[A] criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution." *Ward*, 354 N.C. at 266. "A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional." *Id.* at 266.

This Court has held that even where the State unconstitutionally referenced the defendant's silence, when considering the record in its entirety, such reference was not prejudicial and did not require a new trial. In *State v. Adu*, this Court first concluded that where the State referenced the defendant's silence in closing argument, the State's comment violated the defendant's Fifth Amendment right against self-incrimination. 195 N.C. App. 269, 276–77 (2009). This Court next concluded, however, that such error was harmless where the State's statements at trial as to Defendant's silence to law enforcement were

de minimis, and "it d[id] not appear from the record or the transcript that the State attempted to capitalize on Defendant's silence."[6] *Id.* at 277–78. This Court held that "the jury would have reached the same verdict even had the trial court disallowed the contested testimony[,]" because the State presented substantial evidence of the defendant's guilt "other than [the d]efendant's silence to law enforcement," so that the error was not prejudicial. *Id.* at 278.

Here, the State's references to Defendant's silence were *de minimis* and, in context of the Record, do not rise to the level of being prejudicial to Defendant. In its closing argument that lasted for thirty-four pages of the trial transcript, the State referenced Defendant's pre-trial silence to law enforcement only four times. Defendant was not prejudiced, because as previously explained, in addition to providing evidence of Defendant's silence, the State presented substantial evidence of Defendant's guilt. *See Reber*, 386 N.C. at 160, 162. It also does not appear from the Record that the State attempted to capitalize on Defendant's silence. *See Adu*, 195 N.C. App. at 277–78. As in *Adu*, where, despite the State having violated the defendant's Fifth Amendment right against self-incrimination, the defendant was not prejudiced so as to warrant a new trial, here too, the references to Defendant's silence were *de minimis*, and Defendant was not prejudiced because the State presented substantial evidence of Defendant's guilt. *See id.* at 276–77, 278; *see also Reber*, 386 N.C. at 160, 162. Furthermore, the challenged evidence was "well within the 'parameters of propriety' for [the] trial court to permit that evidence to be described in closing arguments" because it did not rise to the level of plain error. *See Reber*, 386 N.C. at 164.

Considering the statements made by the State during closing argument "in context and in light of the overall factual circumstances to which they refer[,]" the statements were not of such "a magnitude that their inclusion prejudiced [D]efendant, and thus should have been excluded by the trial court." *See Tart*, 372 N.C. at 82 (citation omitted). Accordingly, the statements were not so "grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *See id.* at 80–81.

IV. Conclusion

Upon review, we conclude the trial court did not plainly err in allowing the State to question Defendant about her failure to make a

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6. In *Adu*, this Court applied the "harmless error" standard of review because the defendant timely objected during closing argument to the State's reference to the defendant's failure to speak with law enforcement. *See* 195 N.C. App. at 273, 274.

statement to law enforcement, because Defendant has failed to establish she was prejudiced by the challenged evidence. Further, the trial court did not abuse its discretion in failing to intervene *ex mero motu* during the State's closing argument, because the statements were not grossly improper.

NO PLAIN ERROR and NO ERROR.

Judge ZACHARY concurs.

Judge TYSON dissents in separate opinion.

TYSON, Judge, dissenting.

I. Background

This case addresses a Defendant's rights to not answer questions or make statements, and to remain silent upon the advice of counsel and for the State not to comment on, nor to use or challenge, the Defendant's assertion of those rights against them at trial. The State repeatedly violated Defendant's assertion of these rights and belittled her silence and prejudiced her before the jury. I respectfully dissent.

On 26 January 2022, the day after the shooting had occurred, Defendant's retained attorney contacted Sergeant Kell and informed him Defendant would surrender and turn herself in, and she willingly did so that afternoon. At the time of her arrest, Defendant was given *Miranda* warnings, and, on the advice of counsel, she declined to answer questions or to make any statements to law enforcement officers. From that point forward, law enforcement officers and the State were on actual notice with specific knowledge Defendant was represented by counsel and upon his advice, she would not answer questions nor make any statements. Defendant posted bond, was released from jail, and she returned to the marital home.

On direct examination, the State asked Sergeant Kell whether he "g[a]ve [Defendant] an opportunity to give a statement at the time that she turned herself in[.]" Defense counsel immediately objected and asserted "that the State is trying to elicit the information that my client invoked her [Fifth Amendment] right not to incriminate herself." The trial court overruled Defense counsel's objection. Sergeant Kell responded, "She was." Defense counsel timely objected and stated the

basis for the objection was the comment on the assertion of Defendant's Fifth Amendment rights.

Later during direct examination, the State further asked Sergeant Kell about his interactions with Defendant on 8 February 2022. Sergeant Kell testified he had initiated a call and had told Defendant over the phone he "didn't want to speak with [Defendant] about the shooting without her understanding that . . . she had the right to not speak with me about that without an attorney present[,]" because Defendant, not being in custody, "*still had some rights* attached to her[.]" (emphasis supplied). Sergeant Kell testified Defendant wanted to discuss other topics, including the theft of items from her home. Sergeant Kell referred Defendant to a magistrate, and she followed by filing a larceny report. It is uncontradicted Sergeant Kell knew Defendant was represented by counsel when he had called her, and she had been instructed by counsel to not answer questions, to make no statements to law enforcement officers, and to remain silent.

During Defense counsel's cross-examination, Sergeant Kell confirmed he did not know Defendant's version of the events, to which Defense counsel responded: "[a]ll right. So you're just going on the only one side that you knew; correct?" Sergeant Kell responded affirmatively. During the State's re-direct examination of Sergeant Kell, Sergeant Kell stated: "We were unable to get [ ] Defendant's version of events *even though we tried*." (emphasis supplied).

The State also cross-examined Deidre Johnson, a real estate broker and defense witness, who had known Defendant for nineteen years. The State asked whether Johnson was "aware that [Defendant] never called [Sergeant] Kell[.]" Johnson replied in the negative. Again, this was a deliberate comment and disparagement by the State on Defendant's Fifth Amendment right to remain silent, as she had been expressly instructed and advised by her attorney. Defendant had timely and specifically asserted self-defense, and the facts before the jury were disputed.

Substantial and uncontradicted evidence was presented tending to show Stacey and Defendant had a strained marital relationship and had been regularly discussing divorce since at least 2020. Defendant testified Stacey had begun physically abusing her since 2017 and 2018. Defendant timely filed pre-trial notice of self-defense and later asserted self-defense, put on evidence, including expert testimony, and she testified at trial.

Dr. Mina Ratkalkar, a forensic psychologist, qualified as an expert witness and testified, "at the time of the offense[,] it appears that

[Defendant] was in a place where she thought that her life was in imminent danger. . . . [Defendant] was afraid that if she did not take action that . . . she would no longer be here."

Defendant testified she had confronted Stacey, two days prior to the shooting, about his illegal drug use, selling drugs, and his relationship with a young woman. Defendant testified she would "destroy[Stacey's] weed every time [she saw] it[,]" and "took out" a camera Stacey had installed "so he could stop watching me guard his illegal marijuana." When Defendant was served with the DVPO and removed from the marital residence, Defendant surrendered a handgun, a shotgun, and drug paraphernalia to Union County Sheriff's Sergeant Michael Malloy and alleged it belonged to Stacey.

Defendant also testified she had located text messages between Stacey and his nephew on an iPad device two days before the shooting, that "confirm[ed] exactly what [Defendant] was talking about with [Stacey] selling drugs." Defendant also asserted concerns about Stacy's relationship and involvement with the "young girl," Stacey had called his "weed connection," and for whom he had bought gifts.

Defendant testified to a phone conversation with neighbor, Joshua Betts, the day of the shooting, explaining she had called him "to go over his Trane warranty with him[,]" referring to Defendant and Stacey having previously "installed a full [HVAC] system," and it was Defendant's "job [] to follow up[.]" Defendant also told her neighbor, Betts, that she still had to return the "container from the Christmas cookies[.]" After the phone call, Defendant left to attend her great aunt's funeral.

After she returned home, Defendant was sitting in the kitchen "working on paperwork . . . that was for the divorce[,]" when Stacey returned home from work. Stacey asked Defendant, "how was the funeral[,]" to which Defendant responded, "what do you care[?]" An argument ensued, with Defendant and Stacey "cursing [] back and forth [and] yelling and screaming[.]" Their argument continued upstairs into the bathroom, where Stacey got into the shower, Defendant "put[] eyeliner on[,]" and she continued to argue with Stacey about his "selling drugs with [his] nephew[.]"

Defendant testified after Stacey got out of the shower, Defendant "grabbed his phone[,]" and screamed, "I'm going to show you how you're selling drugs[,]" after which Stacey grabbed the phone back from Defendant. The two were struggling over the phone, and had moved into the adjacent master bedroom, when Stacey grabbed Defendant "by [the] neck," "pushed [her] on [to her] back onto the bed and slung [her] over the footboard of the bed."

Defendant testified she "slid under the bed," and "[got] the gun[,]" which was already loaded. Stacey then "dragg[ed Defendant] by [her] feet[,]" screaming: "B*tch, you think I'm f*cking playing with you, you think I'm f*cking playing with you." Stacey "was pulling [Defendant] in that bathroom[,]" and Defendant testified she knew Stacey kept his "OJ Simpson knife" in the "bottom drawer" in the bathroom.

At that point, Defendant stated she "started firing everywhere[.]" Defendant testified she "believe[d she] was going to die" because she "didn't know what [Stacey] had done with the gun that he had took from me." Defendant grabbed Stacey's phone because it had "all the evidence on it"; she "took his wallet," "pushed [the] bed back over," and "laid the [loaded magazine] . . . in the box along with the gun case." At that point, Stacey "got up," and through tears stated, "baby, I'm so sorry[.]"

Defendant next testified she got into her car and left driving toward her mother's home in Charlotte, "not thinking about anything else but getting . . . to safety." She called 911 and "gave the address" of and sent them to the marital home where Stacey was located before "being disconnected[.]" Later, she retained an attorney and was "given instructions . . . not to say anything" to law enforcement.

On cross-examination, the State asked Defendant: "[I]sn't it correct that the first time the State became aware of your version of events was [twenty-two] days ago when your attorney handed me Dr. Ratkalkar's report here in this courtroom?" Defendant replied in the affirmative.

The State next asked: "You never provided a statement to law enforcement in this investigation, did you?" Defense counsel objected to this question. Defendant replied in the negative. The State asked "[Y]ou never provided any outside witnesses who you allegedly told about the abuse?" Defense counsel timely objected, but the trial court overruled the objection.

The State next asked Defendant if she had kept a journal, to which she stated she did. Defendant explained she did not produce the journal for trial or discovery. In response to the State's questioning her about not producing the journal, Defendant responded: "I don't have to make any statements to the State prior to my trial[;] . . . I had [retained] an attorney who advised me not to say anything[.]"

The State continued to pursue this line of questioning on her silence and then asked Defendant: "[Y]ou had an opportunity to give a version of your events to law enforcement; correct?" Defendant responded: "I was given instructions by my attorney not to say anything, which is my right to do so." The State replied: "It is your right. It's also your constitutional

right to present whatever fabricated defense you want to a jury, isn't it?" Defense counsel objected, and the trial court sustained the objection, but it failed to strike this testimony nor offer a curative instruction to the jury.

The State asked Defendant: "You didn't give any details to the 911 operator because you didn't know what your story was going to be yet." Defendant responded: "I told them where my husband was." The State then asked: "You wouldn't answer the phone for law enforcement trying to find Ashton; correct?" Defendant responded: "I d[id]n't know that law enforcement was calling me."

In its closing argument, the State argued Defendant's self-defense claim was fabricated and an after-the-fact creation and lie, calling it "smoke and mirrors[.]" The State asserted "the first mention of self[-] defense c[ame] from [] Defendant . . . the following day." The State continued: "We know that [] Defendant did not give a statement to law enforcement." The State then argued Defendant had provided "repeated fabrications . . . from that witness stand under oath[,]" and created "a story" and a "movie script" in "an attempt to hoodoo [the jury.]"

After the State's closing argument, the jury left to deliberate. Defense counsel objected and stated: "I believe it is improper in a closing argument to say that the defense was smoke and mirror." The trial court failed to rule on the objection or to further address the jury.

II. Preservation

As the majority's opinion correctly notes, North Carolina's appellate courts are "mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor." *State v. Jones*, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (2002). Because of this reluctance, "it is incumbent on the trial court to monitor vigilantly the course of such arguments, to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections." *Id.* If counsel makes improper remarks during closing argument, the trial court should implement remedies, such as "requiring counsel to retract portions of an argument deemed improper or issuing instructions to the jury to disregard such arguments." *Id.*

Defendant's argument regarding the State's improper and prejudicial comments made during closing arguments are properly preserved. Defendant objected immediately after closing arguments, before the jury had begun deliberations, and explained in detail to the court his reasoning for waiting until the prosecutor had finished her arguments:

> MR. OSHO: Yes, your Honor I truly don't like to make any objection during closing argument, but in the past some judges have deemed my objection to be untimely if I make it after the closing. I believe it is improper in a closing argument to say that the defense was smoke and mirror. And you know, I have the case law I just don't have it with me today. But that is improper closing argument by the prosecutor. I don't want to interrupt but I want the record to reflect that I made the objection, I want the court to take judicial notice that it's made timely because I don't want to disrupt closing by jumping up and down while she's making her closing argument.
>
> THE COURT: Sure. So just the record reflect the objection, it was not made during the closing but for the record it's being made.

"If [a d]efendant or his counsel believes the State's argument [during closing argument] is improper, they are obliged to speak and object to preserve the error for appellate review." *State v. Parker*, 269 N.C. App. 629, 638, 839 S.E.2d 83, 89 (2020). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Defendant's counsel timely did so here prior to the jury beginning deliberations. *Jones*, 355 N.C. at 129, 558 S.E.2d at 105.

III. Closing Argument Remarks

A. Standard of Review

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Jones, 355 N.C. at 133, 558 S.E.2d at 107 (citation omitted). A prosecutors' closing argument must avoid appeals to passion or prejudice. *Id*. at 135, 558 S.E.2d at 108.

When opposing counsel objects during a closing argument, we review for abuse of discretion. *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364, *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003). Our Supreme Court also cautioned that an appellate court should "not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976). "[F]or an inappropriate prosecutorial comment to justify a new trial, it must be sufficiently grave that it is prejudicial error." *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487-88 (1992) (citation and internal quotation marks omitted).

B. Analysis

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2023). The State has failed to carry its burden here.

Our General Statutes provide guidance about permissible commentary during a prosecutor's closing argument:

> During a closing argument to the jury an attorney *may not become abusive*, inject his personal experiences, *express his personal belief as to the truth or falsity of the evidence* or as to the guilt or innocence of the defendant, or make *arguments on the basis of matters outside the record* except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2023) (emphasis supplied).

Our Supreme Court has held:

> In North Carolina it is well settled that counsel is allowed wide latitude in the argument to the jury. Even so, counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence. A prosecutor must present the

> State's case vigorously while at the same time guarding against statements which might prejudice the defendant's right to a fair trial.

State v. Hill, 311 N.C. 465, 472-73, 319 S.E.2d 163, 168 (1984) (citations and internal quotation marks omitted).

"The prosecuting attorney should use every honorable means to secure a conviction, but it is his [or her] duty to exercise proper restraint so as to avoid misconduct, unfair methods or overzealous partisanship which would result in taking unfair advantage of the accused." *State v. Holmes*, 296 N.C. 47, 50, 249 S.E.2d 380, 382 (1978).

Our Supreme Court, quoting *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1324 (1935), provided the following warning to prosecutors:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

State v. Smith, 279 N.C. 163, 167, 181 S.E.2d 458, 460 (1971) (quoting *Berger*, 295 U.S. at 88, 79 L. Ed. at 1324).

Although prosecutors are given wide latitude during closing arguments, the deference given to prosecutors making those remarks "is not unlimited." *State v. Hembree*, 368 N.C. 2, 19, 770 S.E.2d 77, 89 (2015) ("Judicial deference, however, is not unlimited.").

Our Supreme Court has "found grossly improper the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation." *State v. Rogers*, 355 N.C. 420, 462, 562 S.E.2d 859, 885 (2002) (citations omitted); *see also State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978) ("It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury

that they should not believe a witness, but he should not call him a liar." (citations and internal quotation marks omitted)).

This Court has also repeatedly warned prosecutors about impermissible statements during closing arguments and cautioned them, like Daedalus warned Icarus, not to "fly too close to the sun":

> Notwithstanding our conclusions that Defendant has failed to object or to show prejudice in the prosecutor's statements and demonstrations to warrant a new trial, we find the prosecutor's words and actions troublesome. Without hesitation, the prosecutor flew exceedingly close to the sun during his closing argument. Only because of the unique circumstances of this case has he returned with wings intact. See BERGEN EVANS, DICTIONARY OF MYTHOLOGY 62-63 (Centennial Press 1970). We emphasize, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict." Rev. R. Prof. Conduct N.C. St. B. 3.8 (Special Responsibilities of a Prosecutor) cmt. [1] (2015).

State v. Martinez, 251 N.C. App. 284, 296, 795 S.E.2d 386, 394 (2016).

The majority's opinion expressly recognizes, "a criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution." *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001). "A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and *any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional*." *Id.* (emphasis supplied).

Defendant argues the prosecutor made repeated and impermissible comments during her direct and cross examinations and closing argument. The State was well aware Defendant had retained an attorney the day after the shooting had occurred. Defendant's retained attorney had contacted Sergeant Kell and informed him Defendant would turn herself in and surrender, and she willingly did so that afternoon.

At the time of her arrest, Defendant was given *Miranda* warnings and, on the advice of her retained counsel, she declined to answer questions or to make any statements to law enforcement officers. Defendant also willingly surrendered the handgun, a shotgun, and evidence of her husband's drug dealing to officers after the DVPO was entered.

The prosecutor first commented on Defendant's failure to speak with law enforcement: "We know that the Defendant, nor her family, returned any calls from law enforcement." The prosecutor later stated Defendant's husband "was willing to speak to investigators." Lastly, the prosecutor argued in closing:

> [Defendant's attorney] also talked about how the State is trying to make this look like we rushed to judgment and we are somehow trying to ask for you to violate the Defendant's constitutional rights of her ability to not provide information. That is her constitutional right, ladies and gentlemen. The State wouldn't contend to you otherwise. *But it is also her right to provide the State with information ahead of time.* The State of North Carolina and the Union County *Sheriff's Office has no interest whatsoever in prosecuting someone who is innocent.* Absolutely not. That is the point that was being made, not asking you folks to violate her constitutional rights. We have afforded the Defendant a fair trial.

(emphasis supplied).

The prosecutor's comments regarding Defendant's "right to provide the State with information ahead of time" implies a duty on Defendant to speak or answer questions. Those repeated comments, coupled with the prosecutor opining Defendant was a liar and the State of North Carolina and Union County Sheriff's Office have "no interest whatsoever in prosecuting someone who is innocent," are particularly troubling. Our General Statutes expressly prohibit a prosecutor from "express[ing] his [or her] personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant[.]" N.C. Gen. Stat. § 15A-1230(a) (2023). Here, the prosecutor did exactly that, while also impermissibly and repeatedly commenting on and denigrating Defendant's constitutional right to counsel's advice and to remain silent, imputing onto her a duty to speak. U.S. Const. amend. V, VI; N.C. Const. art. I § 23.

As our Supreme Court stated in *Hembree*, and even without the benefit of counsel's recorded objection, the "prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*." *Hembree*, 368 N.C. at 20, 770 S.E.2d at 90. Thus, presuming Defendant's counsel failed to timely object by interrupting the prosecutor during closing statements, Defendant was entitled to rulings on her objections and curative instructions, and was nevertheless prejudiced and deprived of a fair trial. *Id.*; *Ward*, 354 N.C. at 266, 555 S.E.2d at 273.

Defendant's prior record level shows one point for operating a vehicle with no insurance over thirty years ago. The record also shows Defendant was gainfully employed and mother to minor children with family in the community. She was nonetheless sentenced in the presumptive range for a minimum of 157 to 201 months for the attempted first-degree murder, and a *consecutive* sentence of a minimum of 73 to 100 months for the assault with a deadly weapon conviction arising out the single same event.

I disagree with the majority's conclusion of no error for Defendant's Constitutional rights being repeatedly violated and prejudiced before the jury in the face of multiple and clear objections. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
DARRICK LORENZO FULLER

No. COA24-471

Filed 19 March 2025

1. Constitutional Law—right to counsel—forfeiture by conduct—disruptive and combative behavior

In a prosecution for obstruction of justice, attempted access of a government computer to defraud, and filing false liens, the trial court did not err by concluding that defendant had forfeited his right to counsel where defendant's actions were sufficiently combative and interruptive so as to frustrate the purpose of the right to counsel, including: repeatedly disrupting the trial proceedings, refusing to sign the waiver of counsel form, giving conflicting answers regarding whether he desired assistance of counsel, refusing to acknowledge or work with appointed counsel, refusing to stop speaking over all parties in the courtroom, arguing with the trial court, and accusing the trial court of lying.

2. Constitutional Law—right to be present in courtroom—forfeiture by conduct—disruptive behavior

In a prosecution for obstruction of justice, attempted access of a government computer to defraud, and filing false liens, the trial court did not err by concluding that defendant had forfeited his right to be present in the courtroom and having defendant removed from the courtroom, where defendant's actions, including in front of the jury pool, were disruptive, abusive, and disrespectful, such as:

repeatedly accusing the State and the trial court of lying, claiming the State had beat him, interrupting, and challenging the trial court's authority. The trial court complied with the procedures in N.C.G.S. § 15A-1032, provided defendant with regular updates on the trial proceedings by written communications, repeatedly gave defendant the opportunity to return to the courtroom and participate in the trial upon improved behavior, and instructed the jury that defendant's removal was not to be considered in their deliberations.

3. Constitutional Law—right to counsel—decision not to appoint standby counsel—no abuse of discretion

In a prosecution for obstruction of justice, attempted access of a government computer to defraud, and filing false liens, the trial court did not abuse its discretion by declining to appoint defendant standby counsel after determining that defendant had forfeited his right to counsel and his right to be present in the courtroom, where the trial court took into account defendant's disruptive and disrespectful behavior and previous refusal to cooperate with his appointed counsel.

4. Sentencing—prior record level—out-of-state conviction—identity theft—lack of substantial similarity—resentencing required

For purposes of sentencing, the trial court erred by concluding that defendant's prior conviction for identity theft in Virginia was substantially similar to a North Carolina offense, where, unlike in North Carolina, Virginia's statute could be violated by using identifying information for a "false or fictitious person." The court therefore erred by treating the Virginia conviction as a Class G felony and assigning four points to defendant's prior record level as a result, which made defendant a prior record level III rather than II. Therefore, the matter was remanded for resentencing.

Appeal by Defendant from Judgments entered 7 September 2023 by Judge Martin B. McGee in Rockingham County Superior Court. Heard in the Court of Appeals 23 October 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.

Darrick Lorenzo Fuller, pro se Defendant-Appellant.[1]

1. Defendant was appointed counsel from the Appellate Defender's office on 28 December 2023. On 2 September 2024, after all briefs were filed, Defendant discharged his counsel. Defendant is now pro se.

HAMPSON, Judge.

Factual and Procedural Background

Darrick Lorenzo Fuller (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of Obstruction of Justice, two counts of Attempting to Access a Government Computer to Defraud, and two counts of Filing False Liens. The Record before us tends to reflect the following:

On 7 February 2022, Defendant was indicted for Obstruction of Justice, two counts of Attempting to Access a Government Computer to Defraud, and two counts of Filing False Liens. On 16 February 2022, Defendant's first appearance on the indictment, Defendant allegedly indicated he was waiving his right to the assistance of counsel but refused to sign the waiver form.

The first pretrial hearing was held on 29 August 2023. At the hearing, Defendant provided conflicting responses as to whether he wanted an attorney:

> [Defendant]: May I have a -- yes, an attorney?
>
> [Trial Court]: You want me to appoint a lawyer for you?
>
> [Defendant]: (Unintelligible)
>
> [Trial Court]: All right. And have you -- is a lawyer representing you in any other cases?
>
> [Defendant]: I never asked being charged, but defendant -- defendant needs one.
>
> [Trial Court]: Okay. So you're not represented by any other lawyer at this time; is that right?
>
> [Defendant]: I've never even seen the charging instruments, you know, commercial bill or allegation, I haven't seen one.
>
> [Trial Court]: Okay.
>
> [Defendant]: I don't know what the charges are.
>
> [Trial Court]: I just told you what the charges are, sir.
>
> . . . .
>
> [Trial Court]: Okay. All right. You want me to appoint you a lawyer; is that what you're telling me?

> [Defendant]: I want you to appoint the defendant a lawyer.
>
> [Trial Court]: And you are the defendant at this point is my --
>
> [Defendant]: I'm a secured-party creditor --
>
> [Trial Court]: All right.
>
> [Defendant]: -- third-party intervenor in this matter over title to the book.

The trial court appointed James Reaves, who had represented Defendant in a separate matter a year prior, to be Defendant's counsel.

At the second pretrial hearing on 31 August 2023, the trial court removed Defendant from the courtroom for being disruptive. Reaves told the trial court he had asked Defendant if he wanted Reaves to represent him, to which Defendant allegedly responded, "[n]o way in hell." Reaves told the trial court he did not believe there was anyone in the county "equipped" to work with Defendant.

The trial court informed Defendant it was going to resume the hearing in the afternoon and Defendant would be allowed back in the courtroom if he would not be disruptive. The trial court also warned Defendant that if he continued "to disrupt and obstruct court proceedings," he may forfeit his right to be present in the courtroom for trial. At the afternoon session of the hearing, the trial court concluded Defendant had forfeited his right to counsel based on "inappropriate behavior" and released Reaves from his appointment as Defendant's counsel.

The case came on for trial on 5 September 2023. Defendant was brought into the courtroom handcuffed to a wheelchair because he had been threatening to remove his clothing. The trial court offered to reconsider whether Defendant had forfeited his right to counsel:

> [Trial Court]: And, Mr. Fuller, sir, I'm Judge Marty McGee. We were introduced last week, and as a result of your conduct, I asked that you be removed from the courtroom. And, ultimately, I had a hearing to determine that you had forfeited your rights to counsel. I want to review where we are at this point. I have found that -- I'm happy to reconsider all of the things that we've gone through at this point, but right now, you are representing yourself.
>
> . . . .
>
> [Trial Court]: . . . I had a hearing in your absence because you were disruptive, as you continue to be disruptive, and

determined that Mr. Reaves went back and talked with you and that you -- he indicated you were dissatisfied with him, not cooperating with him. I understand that at your previous trial he was your standby counsel but not counsel.

[Defendant]: I believe you gave the defendant Mark C. Keeney. I don't know anything about a James Reaves. You gave the defendant Mark C. Keeney -- Kinney or Keeney or whatever his name is. That's who you gave the defendant. You sent James Reaves to talk to the defendant.

[Trial Court]: Well --

[Defendant]: You didn't -- you didn't give the defendant James Reaves.

[Trial Court]: Well, that's who I appointed, so that's why he came to see you. I see --

[Defendant]: How did you appoint him? I --

[Trial Court]: I see you have somebody's card in your hand. That's who I appointed, and that's who came to see you.

[Defendant]: That's not a fact. That's a lie on the record.

[Trial Court]: All right. Well, I'm doing my best to tell you the information that I know that I believe to be true.

[Defendant]: Okay.

[Trial Court]: So I understand you did not want him to represent you. And you --

[Defendant]: I --

[Trial Court]: I understand you're not being generally cooperative with anybody, let alone him or anybody else or the bailiffs or, frankly, me at this point.

[Defendant]: I am a secured party creditor. I don't need representation from anybody. I don't need to be represented by anybody.

. . . .

[Trial Court]: I understand that you told me that you don't want representation. You said you wanted representation, then you say you don't want representation.

> [Defendant]: I said this?
>
> [Trial Court]: Yes, sir. I thought that's what you said.
>
> [Defendant]: When? When?
>
> [Trial Court]: Last -- last time you were speaking.
>
> . . . .
>
> [Trial Court]: So do you want a lawyer?
>
> [Defendant]: The defendant would like a lawyer.
>
> [Trial court]: Okay. You're pointing to the chair with your eyes. Are you saying you want a lawyer?
>
> [Defendant]: I'm saying the defendant would love a lawyer.
>
> [Trial Court]: Would you cooperate?
>
> [Defendant]: The debtor would love a lawyer.
>
> [Trial Court]: Let me say that you have not cooperated with the lawyer that came to you. You haven't cooperated with anyone, it seems, going through this process.
>
> [Defendant]: I haven't spoken to a lawyer, but James Reaves -- I was told from the defendant that James Reaves was not representing.

The trial court again concluded Defendant had forfeited his right to counsel through misconduct:

> [Trial Court]: All right. Well, I have found that you have forfeited your right to counsel due to conduct. I've reconsidered that. Under the circumstances, I find that you -- that through your conduct that you have again forfeited your right to counsel. It is clear to the Court that you don't intend to cooperate with your counsel or anyone else.

The State made Defendant a plea offer. Defendant requested counsel again before rejecting the plea offer. The trial court denied Defendant's requests for counsel, explaining it had already concluded Defendant had forfeited his right to counsel. Defendant continued to assert his right to counsel. While the State attempted to discuss the plea offer, Defendant repeatedly interjected, asking if "a bond [was] present." Defendant also accused the State of lying about Defendant's prior record level and continued to address the State after the trial court admonished him not to. The trial court warned Defendant that if he continued to be disruptive, he would be removed from the courtroom.

The trial court temporarily removed Defendant from the courtroom while it conducted orientation for the prospective jurors. Afterwards, Defendant was brought back into the courtroom. The trial court asked Defendant if he had reconsidered the State's plea offer. Defendant again rejected the plea offer, denying he was "Mr. Fuller" and stating he did not "sign contracts" nor "contract with the government." The trial court reminded Defendant that he could be removed from the courtroom if he was disruptive in front of the jury.

The jury venire was returned to the courtroom for jury selection. The trial court informed the prospective jurors that Defendant was proceeding pro se. During jury selection, Defendant interrupted the State's questioning, so the trial court sent the jury venire out of the courtroom. As the jurors were exiting the courtroom, Defendant made comments that he had been denied his right to counsel:

> [Defendant]: I have the right to speak. That's what they do. Never had the right to an attorney. Ever. Tell them the truth. Tell them how I've been abused.
>
> [Trial Court]: Sir, I asked you to remain quiet.
>
> [Defendant]: Tell them how I've been abused. Tell them how I got these clothes on. You're not talking that. You're not doing that. Hell, no. Hell, no. Huh-uh. You're not telling them the truth. Telling them a bunch of lies.

The State indicated Defendant's outburst was elicited in response to the State asking members of the jury venire whether they were comfortable with the fact that Defendant was representing himself. The State said Defendant made comments to the effect of "Tell them the truth. I haven't been given that opportunity. Tell them about how you beat me." The trial court concluded Defendant had forfeited his right to be present in the courtroom and ordered Defendant be removed, but informed Defendant he could return to the courtroom upon an assurance of improved behavior.

Defendant was brought into the courtroom the next morning of trial. The trial court explained it had instructed the jury not to consider Defendant's removal in determining the issue of guilt. The trial court told Defendant he could return to the courtroom if he followed instructions and assured the trial court he would not "yell[ ] out in front of the jury."

Defendant insisted the trial court provide him "clarity on how you forfeit a right[,]" talked over the trial court, and told the trial court "I don't think you get paid to think. I think you get paid to know law."

The trial court concluded Defendant had continued to forfeit his right to counsel and had not provided any assurances of appropriate behavior. Again, Defendant was removed from the courtroom.

The trial continued with Defendant absent. Because the courtroom was not equipped with audio or video conferencing capabilities, the trial court provided written updates to Defendant as the trial progressed. The updates were written by the trial court and delivered by the bailiff. In the first update to Defendant, the trial court included a copy of the witness list and extended Defendant the opportunity to return to the courtroom "upon assurance of good behavior." The trial court also directed the bailiff to give Defendant the opportunity to respond. The bailiff delivered the documents and reported Defendant had no message for the trial court.

At the end of the morning session on the second day of trial, the trial court provided Defendant with a second update. After receiving the update, Defendant allegedly laughed and said, "I should be over there." The trial court concluded Defendant's comments "[fell] short" of an assurance of good behavior. At the end of the afternoon session, the trial court sent Defendant a third update. After receiving the third update, Defendant allegedly laughed and said "[y]'all are out for vengeance" and "[y]'all are vicious." The bailiff reported Defendant did not say anything about whether he wished to be returned to the courtroom.

Once the State rested its case, the trial court made a motion to dismiss on Defendant's behalf but found there was sufficient evidence to move forward. The trial court sent Defendant a fourth update, along with a draft copy of the jury instructions and the State's request for special instructions. After receiving the fourth update, Defendant allegedly asked when he could return to the courtroom. The bailiff told the trial court he had told Defendant he could return if he behaved. Defendant allegedly responded by asking "What does that mean?" and saying he was "just trying to ask questions." The trial court concluded that because Defendant had not provided any assurance of good behavior, it was not appropriate to return him to the courtroom.

The State made its closing argument to the jury. Immediately thereafter, the jury received instructions and proceeded to deliberations. The trial court sent Defendant a final update explaining that jury deliberations had begun. The trial court indicated it remained concerned about Defendant's potential behavior:

> [Trial Court]: . . . I still am, frankly, concerned that if he's brought over, that he will still be disruptive. I'm concerned of him saying something to the jury and causing a problem

> with a potential mistrial even at this late date. He has not provided those assurances that he would act appropriate. And I still, at this stage, would find the trial cannot proceed in an orderly manner if he is not absent from the Court.

The jury reached a verdict ten minutes later. With Defendant still absent from the courtroom, the jury returned guilty verdicts on all charges. The jury was dismissed, and Defendant was returned to the courtroom for sentencing.

At the sentencing hearing, the trial court concluded Defendant had a prior record level of III, based in part upon a Virginia conviction for Identity Theft. The trial court entered two judgments: both Judgments sentenced Defendant to an active punishment of 17 to 30 months in prison. The trial court ordered the first Judgment to run concurrent to Defendant's current prison sentence on unrelated charges, and the second Judgment to run concurrent to the first Judgment. On 21 September 2023, Defendant timely filed Notice of Appeal.

Issue

The issues on appeal are whether the trial court erred by: (I) concluding (A) Defendant had forfeited his right to counsel, (B) Defendant had forfeited his right to be present in the courtroom for trial, or (C) it would not appoint standby counsel for Defendant; and (II) concluding Defendant's Virginia conviction for Identity Theft under Va. Code Ann. § 18.2-186.3 is substantially similar to the North Carolina offense of Identity Theft under N.C. Gen. Stat. § 14-113.20 (2023) for sentencing purposes.

Analysis

I. Trial Proceedings

Our Courts review alleged violations of a defendant's constitutional rights, including the right to be present during trial and the right to counsel, de novo. *State v. Anderson*, 222 N.C. App. 138, 142, 730 S.E.2d 262, 265 (2012) (citations omitted).

Both the right to be present at trial and the right to counsel may be forfeited. *State v. Montgomery*, 138 N.C. App. 521, 524-25, 530 S.E.2d 66, 69 (2000) (" '[A] defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial[.]' ") and *State v. Blakeney*, 245 N.C. App. 452, 460, 782 S.E.2d 88, 93 (2016) ("The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel.").

" 'Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.' " *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. 1995)).

A. *Forfeiture of Right to Counsel*

[1] "A finding that a defendant has forfeited the right to counsel requires egregious[,] dilatory[,] or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel . . . ." *State v. Smith*, 292 N.C. App. 656, 660, 899 S.E.2d 394, 397 (2024) (alterations in original) (citations and quotation marks omitted). More specifically, forfeiture of the right to counsel can occur when a defendant's conduct "constitutes a '[s]erious obstruction of the proceedings[,]' " *State v. Jones*, 292 N.C. App. 493, 501, 898 S.E.2d 784, 790 (2024) (quoting *State v. Simpkins*, 373 N.C. 530, 538, 838 S.E.2d 439, 447 (2020)), such as when he refuses to confirm his desire for counsel, refuses to participate, or causes significant delays. *Id.* (citation omitted). " 'Even if a defendant's conduct is highly frustrating,' however, 'forfeiture is not constitutional where any difficulties or delays are not so egregious that they frustrated the purposes of the right to counsel itself.' " *Smith*, 292 N.C. App. at 661, 899 S.E.2d at 398 (alterations and internal quotation marks omitted) (quoting *State v. Atwell*, 383 N.C. 437, 449, 881 S.E.2d 124, 132 (2022)).

In *Montgomery*, this Court examined the issue of forfeiture of the right to counsel as an issue of first impression. 138 N.C. App. at 524, 530 S.E.2d at 69. The Court held "forfeiture results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[ ] to justify a forfeiture of [the] defendant's right to counsel[.]" *Id.* (citation and quotation marks omitted).

In *Smith*, this Court affirmed the trial court's determination the defendant had forfeited his right to counsel where the defendant questioned whether the court could be impartial, refused to cooperate with his attorney, and was "combative and interruptive" during his court appearances. *Smith*, 292 N.C. App. at 661-62, 899 S.E.2d at 398. The Court held that causing "six different attorneys to withdraw" and the "inability to work with court-appointed counsel and insistence that the trial court could not be impartial," amounted to obstreperous conduct resulting in forfeiture of the right to counsel. *Id.*

In *State v. Leyshon*, we held the defendant forfeited his right to counsel for obstructing and delaying the trial proceedings. 211 N.C. App. 511,

517, 710 S.E.2d 282, 287, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011). The defendant refused to sign a waiver of counsel form and stated, "I'm not waiving my right to assistance of counsel[,]" but when the trial court appointed counsel, the defendant stated, "I refuse his counsel." *Id.* at 512, 710 S.E.2d at 285 (quotation marks omitted). The defendant also repeatedly challenged the trial court's jurisdiction instead of answering whether he waived or asserted his right to counsel. *Id.* at 513. The Court stated that by "continually refusing to state whether he wanted an attorney or would represent himself when directly asked by the trial court at four different hearings[,]" the defendant "willfully obstructed and delayed the trial court proceedings" such that he forfeited his right to counsel. *Id.* at 519, 710 S.E.2d at 288-89.

By contrast, in *Simpkins*, our Supreme Court held the defendant's conduct did not rise to a forfeiture. 373 N.C. 540, 838 S.E.2d at 449. In doing so, the court recognized

> [i]f a defendant refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and prevent them from coming to completion. In that circumstance, the defendant's obstructionist actions completely undermine the purposes of the right to counsel.

Id. at 538, 838 S.E.2d at 447.

The defendant in *Simpkins* did not obtain counsel before his trial and presented "frivolous legal arguments about jurisdiction" throughout the proceedings. *Id.* at 540, 838 S.E.2d at 448. These actions were not sufficiently egregious to lead the Court to "conclude that the [defendant's] failure to retain counsel was an attempt to delay the proceedings, and certainly not an attempt so egregious as to justify forfeiture of the right to counsel." *Id.* at 540, 838 S.E.2d at 449. The Court also noted that "nothing in the record" suggested the defendant was "rude or disrespectful" to the trial court. *Id.* at 539, 838 S.E.2d at 448.

Here, the Record shows Defendant repeatedly disrupted the trial proceedings. Defendant refused to sign the waiver of counsel form. At the 29 August 2022 pretrial hearing, Defendant repeatedly interrupted the trial court, asking the trial court what kind of law it was practicing, whether the trial court had a claim against him, and demanding that all charges "be dropped immediately." At the 31 August 2023 pretrial

hearing, immediately upon being brought into the courtroom, Defendant again repeatedly asked the trial court if it "had a claim" against him and demanded the charges be dismissed. Defendant refused to stop speaking over all parties in the courtroom, including the trial court.

The trial court appointed Reaves as counsel for Defendant, but Defendant refused to acknowledge or work with him. On the first day of trial, the trial court tried to discuss Defendant's asserted dissatisfaction with Reaves, but Defendant instead argued with the trial court, asserting the trial court had never appointed Reaves as his counsel, and accused the trial court of lying. Defendant later contended Reaves would not "suffice" as counsel and demanded the trial court tell the jury what Reaves had "done." When the trial court asked Defendant to elaborate, Defendant responded, "[Reaves] didn't do anything to me as I stated. It was what [Reaves] done to the defendant."

Although the trial court concluded at the 31 August 2023 hearing that Defendant had forfeited his right to counsel, the trial court gave Defendant the opportunity to have the issue reconsidered. There, Defendant stated "the defendant would like a[n] attorney[.]" Yet, at this same hearing, Defendant stated "I don't need representation from anybody[,]" "I'm the authorized representative for the defendant[,]" and "I'm only here to represent the defendant at this point." Defendant continued to speak in the third person and deny being the defendant on trial, making statements such as "I was told from the defendant[,]" "The defendant would like a lawyer[,]" and "The debtor would love a lawyer."

Like the defendant in *Smith*, Defendant was combative and interruptive—he insisted the trial court could not be impartial, interrupted and spoke out of turn, threatened to remove his clothing, and refused to directly answer the trial court's questions. And like the defendant in *Leyshon*, Defendant provided conflicting answers as to whether he desired assistance of counsel and refused to work with his appointed counsel.

Likewise, when the trial court attempted to clarify whether Defendant was waiving or asserting his right to counsel, Defendant instead challenged the trial court by asking whether there was a bond and whether the trial court or the State had a claim against him. Based upon the evidence in the Record, we conclude Defendant's actions were sufficiently obstructive and egregious such that they frustrated the purpose of the right to counsel itself. *See Smith*, 292 N.C. App. at 661, 899 S.E.2d at 398 (citation omitted). Accordingly, Defendant forfeited his right to counsel, and the trial court did not err by concluding the same.

B. *Forfeiture of Right to be Present During Trial Phase*

[2] However, our inquiry does not end with Defendant's forfeiture of his right to counsel. The trial court also concluded Defendant forfeited his right to be present at trial and had Defendant removed from the courtroom for the remainder of the trial proceedings.

Both the United States Constitution and the North Carolina Constitution guarantee a criminal defendant the right to be present at trial. *See* U.S. Const. amend. VI; N.C. Const. Art. I, §§ 19, 23. The right to be present at trial, like the right to counsel, may be forfeited. *See Montgomery*, 138 N.C. App. at 524-25, 530 S.E.2d at 69 (citation omitted). "[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1060-61, 25 L. Ed. 2d 353, 359 (1970) (footnote omitted).

Defendant cites several cases wherein courts in other jurisdictions have considered the issue of whether a pro se defendant may be removed from the courtroom during trial. We think *United States v. Mack*, 362 F.3d 597 (9th Cir. 2004) and *People v. Cohn*, 160 P.3d 336, 339 (Colo. Ct. App. 2007) are most relevant to our discussion. In *Mack*, the pro se defendant was removed from the courtroom by the trial court due to his disruptive conduct. 362 F.3d at 599. The trial court had offered to appoint standby counsel but the defendant "refused unless he could have appointed counsel of his choice—a person who was not on the court's standard appointment list." *Id.* Holding the defendant had been denied his right to counsel, the United States Court of Appeals for the Ninth Circuit explained "[a] defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding." *Id.* at 601. The Court also observed that when the defendant was allowed to return to the courtroom, "he was required to remain silent and was even told that no objections of his would have any effect whatsoever on the proceedings." *Id.* Thus, "[i]n practical effect, he had been removed as his own counsel and nobody stepped in to fill the gap." *Id.*

Similarly, the defendant in *Cohn* argued his right to counsel was violated when the trial court removed him "from the courtroom at various times during the trial without permitting him to appear by means of video conferencing equipment and without counsel being appointed to

represent him in his absence." 160 P.3d at 339. The Colorado Court of Appeals first determined the defendant had forfeited his right to be present in the courtroom due to his disruptive behavior. *Id.* at 341. The Court then asked "whether the trial court, by excluding the pro se defendant from the courtroom, denied his right to counsel." *Id.* The Court determined that under the facts of the case, the defendant had not waived his right to counsel—expressly or by conduct—and his exclusion during portions of jury selection and denial of the opportunity to exercise peremptory challenges was a violation of his right to counsel. *Id.* at 343. Thus, the defendant was "deprived of the presence of counsel at critical stages of the proceedings" and there was "more than a minimal risk that counsel's absence . . . undermine[d] the defendant's right to a fair trial." *Id.* at 342 (citing *Key v. People*, 865 P.2d 822, 825 (Colo. 1994)).

Here, unlike the defendants in *Mack* and *Cohn*, the trial court concluded Defendant had forfeited his right to counsel and did so prior to removing Defendant from the courtroom. Moreover, the facts before us differ from those in *Mack* that would tend to indicate the trial court effectively removed Defendant as his own counsel; here, the trial court maintained an invitation for Defendant to return to the courtroom and participate in the proceedings so long as he reassured the trial court he would no longer be disruptive.

Relatedly, Defendant argues he was removed from the courtroom for "acting in his capacity as his own attorney." Defendant contends he was removed for "objecting to the prosecutor's characterization to the jury of how [he] came to be representing himself." Our review of the Record shows Defendant was not removed for objecting to the State's questioning, but for disrespectful, abusive, and disruptive behavior. The trial court warned Defendant multiple times prior to his removal that if his behaviors continued, he may forfeit his right to be in the courtroom.

In addition to his outburst in front of the jury pool—in which he accused the State of lying, claimed the State had beaten him, and contended he never had the opportunity to have the representation of counsel—Defendant demonstrated persistent disregard for the trial court's orders.

Despite the trial court's admonitions, Defendant continued his behaviors, accusing the trial court and the State of lying, interrupting, and challenging the trial court's authority. Defendant was, thus, "disruptive, contumacious, [and] stubbornly defiant." *See Allen*, 397 U.S. at 343, 90 S. Ct. at 1061. Therefore, the trial court did not err by concluding Defendant had forfeited his right to be present in the courtroom.

Furthermore, the trial court's actions generally complied with N.C. Gen. Stat. § 15A-1032, which governs the procedures for removing a disruptive defendant from the courtroom:

> (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.

N.C. Gen. Stat. § 15A-1032 (2023). Additionally, "[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." *Id.*

It is true Section 15A-1032 presumes a defendant has counsel: it does not specify how a defendant should be "given the opportunity of learning of the trial proceedings" or who should give the updates if a defendant is pro se. *Id.* Nevertheless, here, the trial court gave Defendant updates on the trial proceedings through written communications. Further, Defendant was routinely apprised of the opportunity to return to the courtroom and participate in the proceedings by assuring the trial court that his conduct would improve and not be disruptive. The Record indicates Defendant chose not to provide any assurances of better behavior. Indeed, when Defendant was first removed from the courtroom he stated, "I'm not here anyway," and when he was brought into the courtroom on the second morning of trial, he commented that he "didn't ask to come here." Additionally, the jurors were instructed that the removal was not to be considered in weighing evidence, and the trial court entered in the Record the reasons for Defendant's removal. Thus, there was no error in the trial court's compliance with N.C. Gen. Stat. § 15A-1032.

C. *Decision Not to Appoint Standby Counsel*

[3] Ultimately, Defendant concedes the trial court "may have been justified" in concluding he forfeited his right to counsel and to be present in the courtroom. Rather, Defendant argues the trial court erred by failing to appoint standby counsel to act on his behalf and/or failing to provide "some other mechanism" to allow Defendant to participate in his trial. Defendant argues this resulted in a complete deprivation of his right to counsel.

In *State v. Mee*, this Court considered whether the defendant's right to counsel was violated after the defendant "refused to be seated or stay in the courtroom, despite being held in contempt three times," and eventually was removed from the courtroom by the trial court. 233 N.C. App. 542, 558, 756 S.E.2d 103, 112 (2014). The defendant said he did not want to "participate" in his trial, and he did not want standby counsel to do anything on his behalf. *Id.* at 557-58, 756 S.E.2d at 111-12.

Standby counsel was sent periodically to speak with the defendant, "informing him of his right to be present in court and asking if he had changed his mind about participating in the trial." *Id.* at 558, 756 S.E.2d at 112. The defendant continued to refuse to participate. *Id.* In concluding "the defendant had a fair trial, free of error," this Court noted the defendant "engaged in 'purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts' that resulted in a forfeiture of his right to counsel." *Id.* at 562-63, 756 S.E.2d at 114-15 (quoting *Montgomery*, 138 N.C. App. at 525, 530 S.E.2d at 69).

Defendant's behavior was similar to the defendant in *Mee*. Although the Court in *Mee* did not address whether the defendant had forfeited or waived his right to be present in the courtroom, we have held there was no error at trial where a defendant voluntarily missed portions of their trial. *See id.*; *State v. Moore*, 290 N.C. App. 610, 893 S.E.2d 231 (2023) (no error where defendant forfeited right to counsel and missed portions of his trial to make phone calls).

Good and prudent practice may necessitate appointing standby counsel in these situations. The role of standby counsel is to assist a pro se defendant, understanding that the defendant "must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial." *McKaskle v. Wiggins*, 465 U.S. 168, 174, 104 S. Ct. 944, 949, 79 L. Ed. 2d 122 (1984).

Indeed, standby counsel was appointed or available in many of our cases where a defendant had forfeited their right to counsel. *See*, *e.g.*, *State v. Boyd*, 200 N.C. App. 97, 682 S.E.2d 463 (2009); *Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66; *State v. Joiner*, 237 N.C. App. 513, 767 S.E.2d 557 (2014). Even in *Mee*, where the defendant adamantly insisted he did not want standby counsel, standby counsel was nonetheless present. *See Mee*, 233 N.C. App. at 550, 756 S.E.2d at 108.

Here, however, we cannot say the trial court prejudicially erred by not appointing standby counsel. N.C. Gen. Stat. § 15A-1032 does not require the trial court to appoint standby counsel when a defendant is removed from the courtroom. Furthermore, a pro se defendant does not possess a right to standby counsel. *See State v. Brooks*, 49 N.C. App. 14, 18, 270 S.E.2d 592, 596 (1980) ("If [the] defendant was not confident of his ability to represent himself, he was entitled to counsel appointed for his defense; but he had no right to standby counsel. The appointment of standby counsel is in the sound discretion of the trial court." (citing *State v. Brincefield*, 43 N.C. App. 49, 258 S.E.2d 81, *disc. rev. denied*, 298 N.C. 807, 262 S.E.2d 2 (1979))).

Moreover, the Record shows the trial court considered appointing standby counsel, but decided against it because of Defendant's behavior:

> [Trial Court]: I don't find at this point appointing counsel to go back and forth would be helpful for a number of reasons, one of which, pretty clear to me, he's not going to cooperate with anyone. And, second, I think it puts a lawyer in a very difficult position as to know what conduct -- what the wishes of the defendant would be.

Consequently, Defendant has failed to show the trial court abused its discretion by not appointing standby counsel for him. *Id.* at 19, 270 S.E.2d at 596; *Brincefield*, 43 N.C. App. at 52, 258 S.E.2d at 83 ("The appointment of standby counsel for a defendant is entirely in the sound discretion of the trial judge." (citation omitted)); N.C. Gen. Stat. § 15A-1243 (2023) ("When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may determine that standby counsel should be appointed[.]").

II. Prior Record Level

[4] Defendant also contends the trial court erred in calculating his prior record level. Specifically, Defendant argues the trial court should not have concluded Virginia's identity theft statute, Va. Code Ann. § 18.2-186.3, is substantially similar to North Carolina's identity theft statute.

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation omitted). "It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Id.* (citations omitted).

A prior record level is determined by calculating the sum of the points assigned to each of the offender's prior convictions. N.C. Gen. Stat. § 15A-1340.14(a) (2023). When a prior misdemeanor conviction is for an offense not substantially similar to an offense defined by North Carolina law, the conviction is treated as a Class 3 misdemeanor and does not carry a prior record point for sentencing purposes. *Id.* § 15A-1340.14(b)(5), (e) (2023). However,

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

Id. § 15A-1340.14(e) (2023).

Virginia's identity theft statute defines the offense as a Class 1 misdemeanor unless certain other criteria are met to elevate the offense to a felony. *See* Va. Code Ann. § 18.2-186.3(D) (2023). The corresponding North Carolina offense is defined as a Class G felony carrying four points for sentencing. N.C. Gen. Stat. § 14-113.22 (2023) ("A violation of G.S. 14-113.20(a) is punishable as a Class G felony[.]"); N.C. Gen. Stat. § 15A-1340.14(b)(3) (2023) (assigning four points to Class G felonies). Thus, to count towards Defendant's prior record level, the State must prove by a preponderance of the evidence the Virginia offense is substantially similar to the North Carolina offense.

"Determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (citing *State v. Hanton*, 175 N.C. App. 250, 254-55, 623 S.E.2d 600, 604 (2006)). "The Court of Appeals has held that, for purposes of determining 'substantial similarity' under N.C.G.S. § 15A-1340.14(e), a party may establish the elements of an out-of-state offense by providing evidence of the statute law of such state." *State*

v. Sanders, 367 N.C. 716, 718, 766 S.E.2d 331, 332 (2014) (citation and quotation marks omitted).

"Further, the Court of Appeals has consistently held that when evidence of the applicable law is not presented to the trial court, the party seeking a determination of substantial similarity has failed to meet its burden of establishing substantial similarity by a preponderance of the evidence." *Id.* (citations omitted).

Here, the Record establishes the State provided the trial court with a prior record level worksheet and a certified copy of Defendant's criminal history. The State also produced a copy of the 2023 version of Virginia's identity theft statute with its statutory history and a copy of the 2023 version of North Carolina's identity theft statute. *See* Va. Code Ann. § 18.2-186.3 (2023) and N.C. Gen. Stat. § 14-113.20 (2023). The trial court found by a preponderance of the evidence the Virginia offense was substantially similar to the North Carolina offense.

Defendant contends the trial court could not have compared the elements of the statutes as required by N.C. Gen. Stat. § 15A-1340.14(e) because the Virginia statute has multiple subsections setting out alternate elements of the offense, and thus "we do not know which elements to use in comparing the Virginia statute to the North Carolina statute." Defendant also argues the trial court erred by concluding the offenses were substantially similar because the State provided the 2023 version of the Virginia statute instead of the 2006 version of the Virginia statute—the year Defendant was convicted of the offense. Consequently, Defendant argues, we do not know whether the trial court compared the North Carolina statute to the elements of the Virginia statute as it was written in 2006.

Defendant's first argument fails because both the prior record worksheet and Defendant's criminal history show Defendant was convicted under subsection (B1) of the Virginia statute—"Identity Theft: Obtain ID to Avoid Arrest." And although the State gave the trial court the 2023 version of the Virginia statute, the 2023 statute included its statutory history, demonstrating the differences between the current version of the statute and the statute at the time of Defendant's conviction in 2006. *See State v. Best*, 230 N.C. App. 410, *5, 753 S.E.2d 397 (2013) (unpublished) (trial court did not err by relying on statute with statutory history showing the statutes "were the same version of the statute which were in effect at the time of" the defendant's conviction to conclude offenses were substantially similar).

However, Defendant further argues the statutes are not substantially similar because Virginia's statute can be violated using the identifying

information of a "false or fictious person" whereas North Carolina's statute requires the offender to have used the identifying information of a "real person." We agree.

Va. Code Ann. § 18.2-186.3(B1), at the time of Defendant's conviction in 2006, makes it unlawful "for any person to use identification documents or identifying information of another person *or of a false or fictitious person*, whether that person is dead or alive, to avoid summons, arrest, prosecution or to impede a criminal investigation." (emphasis added). The corresponding North Carolina statute punishes anyone who

> knowingly obtains, possesses, or uses identifying information of another person, living or dead, with the intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences[.]

N.C. Gen. Stat. § 14-113.20 (2023).

A person in Virginia could be guilty of identity theft for using the identity of a fictitious person, whereas a person in North Carolina could not. *See State v. Faucette*, 285 N.C. App. 501, 505-06, 877 S.E.2d 782, 785 (2022) (reversing denial of motion to dismiss charge of identity theft under N.C. Gen. Stat. § 14-113.20 where the defendant provided a fictitious name and birthdate but there was no evidence he "used the identifying information of any other *actual person*, living or dead." (emphasis added)). Thus, these statutory offenses are not substantially similar for the purposes of N.C. Gen. Stat. § 15A-1340.14(e). *See State v. Davis*, 226 N.C. App. 96, 100, 738 S.E.2d 417, 420 (2013) (holding the Georgia offense of theft by taking is not substantially similar to the North Carolina offense of misdemeanor larceny because a person is guilty of the Georgia offense regardless of whether the taking is permanent or temporary, whereas "temporary deprivation will not suffice" in North Carolina (citation and quotation marks omitted)); *Hanton*, 175 N.C. App. at 258-59, 623 S.E.2d at 606-07 (determining the New York offense of second-degree assault is not substantially similar to the North Carolina offense of assault inflicting serious injury because, unlike the North Carolina offense, the New York offense does not require the defendant cause "serious" physical injury).

The trial court, therefore, erred by concluding the offenses were substantially similar and treating Defendant's Virginia conviction as a Class G felony for purposes of calculating Defendant's prior record level.

Without the four points assigned to this conviction, Defendant would have a prior record level of II rather than III. Consequently, we remand solely for resentencing. "At the resentencing hearing, the trial court may consider additional information presented by the State or by defendant regarding defendant's prior offenses." *State v. Henderson*, 201 N.C. App. 381, 388, 689 S.E.2d 462, 467 (2009).

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and remand for resentencing.

NO ERROR AT TRIAL; REMANDED FOR RESENTENCING.

Chief Judge DILLON and Judge TYSON concur.

STATE OF NORTH CAROLINA
v.
DONNIE MONTE JOHNSON, DEFENDANT

No. COA24-816

Filed 19 March 2025

Criminal Law—multiple convictions—Anders review—no issues of arguable merit

In an appeal after defendant was convicted by a jury of possession of cocaine, felony fleeing to elude arrest, and speeding, in which defendant's appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), the appellate court conducted a full examination of the record and concluded that there were no issues of arguable merit, including the potential issues raised by appellate counsel (regarding the trial court's denial of defendant's motion for substitute counsel, failure to inform defendant of his right to self-representation, admission of testimony that drugs were thrown from defendant's car, and defendant's lack of opportunity to be heard regarding attorney fees that the trial court subsequently remitted).

Appeal by Defendant from judgments entered 22 May 2023 by Judge Marvin K. Blount III in Pitt County Superior Court. Heard in the Court of Appeals 11 February 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Emily E. Sorge, for the State.

Attorney W. Michael Spivey, for the Defendant-Appellant.

STADING, Judge.

Donnie M. Johnson ("Defendant") appeals from final judgments entered against him pursuant to jury verdicts finding him guilty of possession of cocaine and felony fleeing to elude arrest. Counsel for Defendant filed a brief under *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). After careful review, we discern no error.

I. Background

On 10 April 2022, Defendant was charged by indictment with felony possession of cocaine, maintaining a vehicle for the purpose of selling cocaine, and felony fleeing to elude arrest. Defendant was also charged with driving while impaired and speeding seventy miles per hour in a fifty-five miles per hour zone. The offenses arose from an incident in which Trooper Ashley Smith, of the North Carolina Highway Patrol, observed Defendant speeding and activated his blue lights and siren to initiate a traffic stop. Defendant kept driving for several miles, during which time Trooper Smith observed Defendant throwing something out of the car's window. Upon stopping in a convenience store parking lot, Defendant exited the car. A search revealed a plastic bag containing 0.26 grams of cocaine on the driver's seat, digital scales on the passenger seat, and approximately $1,100 in cash in the glove compartment.

At the 22 May 2023 session of Pitt County Superior Court, following his trial, the jury acquitted Defendant of driving while impaired and maintaining a vehicle for the purpose of selling cocaine. But the jury returned verdicts finding Defendant guilty of possession of cocaine, felony fleeing to elude arrest, and speeding.

The trial court sentenced Defendant to a term of five to fifteen months of imprisonment for the felony fleeing to elude arrest conviction. It imposed a consecutive sentence of five to fifteen months for the possession of cocaine conviction, to run at the expiration of the previous sentence; this sentence was suspended for twenty-four months of supervised probation. The trial court imposed a $100 fine for the speeding conviction. Defendant gave his notice of appeal in open court.

II. Jurisdiction

Jurisdiction is proper with our Court since Defendant appeals from a "final judgment of a superior court," and "entered a plea of not guilty to a criminal charge, and . . . [was] found guilty of a crime." *See* N.C. Gen. Stat. §§ 7A-27(b)(1) (2023) and 15A-1444(a) (2023).

III. Analysis

On appeal, Defendant's appellate counsel filed a brief citing *Anders*, indicating an inability "to identify any discernible issue with sufficient merit to support a meaningful argument for relief on appeal," and requesting this Court to "conduct a full examination of the record for any prejudicial error and determine if any issue has been overlooked." Counsel has shown to the satisfaction of this Court that he has complied with *Anders* and *Kinch* by advising Defendant of his right to file his own written arguments with this Court and by providing him with the documents necessary to do so. Defendant himself has not filed a brief with our Court.

Counsel directs our review to four potential issues: (1) denial of Defendant's motion for substitute counsel; (2) failure to inform Defendant of his right to self-representation; (3) admission of testimony that marijuana was thrown from Defendant's car; and (4) lack of opportunity to be heard regarding attorney's fees that were ultimately remitted.

A. Motion for Substitute Counsel

The record reveals that Defendant's appointed trial counsel attempted to negotiate a plea on his behalf that was not acceptable to the trial court. Defendant and his trial counsel then reported "irreconcilable differences." Upon further explanation, trial counsel told the court that Defendant sought to employ defenses that counsel did not think had "any legal or factual basis." However, "[a] disagreement over trial tactics does not, by itself, entitle a defendant to the appointment of new counsel." *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981) (citations omitted).

B. Right to Self-Representation

After Defendant and his trial counsel brought up their concerns of continued representation, the dialogue transitioned to a motion to continue, and the topic of self-representation was not brought up. At no point in time did Defendant express a desire to go forward without his trial counsel. And "[u]nless an accused makes *some* form of an affirmative statement which would amount to a manifestation of a desire to

proceed *pro se*, it cannot be reasonably argued that an accused has been forced to accept representation at trial." *Id.* at 338, 279 S.E.2d at 799.

C. Overruled Objection to Disputed Testimony

At trial, the prosecutor asked Trooper Smith "based on your training and experience, what did you believe was being thrown out the window?" Defendant's trial counsel objected on the basis of speculation. After a bench conference, the question was asked again without objection and Trooper Smith replied, "it appeared to be marijuana." Without analyzing this particular transaction, we note that the record contains ample other instances of testimony concerning evidence of marijuana in the car where no objection was proffered. Yet Defendant waived his prior objection because "[a]dmission of evidence without objection waives *prior* or subsequent objection to the admission of evidence of a similar character." *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) (citations omitted).

D. Waived Attorney's Fees

Defendant also points to a lack of opportunity to address the trial court concerning his trial counsel's fee for appointment and representation. But no such opportunity arose because the trial court remitted the attorney fees. Before imposing a judgment for appointed-counsel fees, under N.C. Gen. Stat. § 7A-455 (2023), "the trial court must afford the defendant notice and an opportunity to be heard." *State v. Friend*, 257 N.C. App. 516, 522, 809 S.E.2d 902, 906 (2018) (citations omitted). Since the trial court in fact remitted such fees, logic dictates that Defendant's need to address this decision became unnecessary. *See id.* at 518, 809 S.E.2d at 904 (emphasis added) (holding that "trial courts must provide criminal defendants, personally and not through their appointed counsel, with an opportunity to be heard *before entering a money judgment* under [section] 7A-455."). In any event, if this was an error of law by the trial court, we must determine whether such error prejudiced Defendant. *See* N.C. Gen. Stat. § 15A-1442 (2023). Here, had Defendant been heard on attorney's fees, the best possible outcome for his cause would have been remission of those fees. Accordingly, Defendant cannot show, but for his opportunity to be heard, a different outcome would have been reached. Any such claimed defect is therefore harmless.

IV. Conclusion

In accordance with *Anders* and *Kinch*, we have fully examined the record for any issue with arguable merit. *See State v. Frink*, 177 N.C. App. 144, 145, 627 S.E.2d 472, 473 (2006) (quoting *State v. Hamby*, 129

N.C. App. 366, 367–68, 499 S.E.2d 195, 195) ("Under our review pursuant to *Anders* and *Kinch*, 'we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous.' "). We therefore conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges WOOD and GORE concur.

STATE OF NORTH CAROLINA
v.
DALLAS JEROME McGIRT, DEFENDANT

No. COA24-551

Filed 19 March 2025

1. Constitutional Law—right to counsel—voluntary waiver—insufficient colloquy by trial court—continued requests by defendant for new counsel

Defendant was entitled to a new trial on multiple counts of sexual offenses against a child where, after conducting a colloquy at a hearing on defense counsel's motion to withdraw, the trial court erred in concluding that defendant voluntarily waived his right to counsel. During the colloquy, the court failed to: inform defendant that he would be waiving his right to counsel if he fired his current attorney; ask defendant whether he wished to represent himself; ensure that defendant understood and appreciated the consequences of waiving his right to counsel; or inform defendant of the full range of permissible punishments for the charges, explaining only the minimum punishment. Further, although defendant had previously fired multiple attorneys and even filed a handwritten motion indicating that he wished to proceed pro se with standby counsel, he repeatedly requested new counsel throughout the proceedings and stated in the handwritten motion that he felt it was "time to move on with a new attorney who is willing to help," thereby contradicting any implication of a knowing waiver of counsel.

2. Constitutional Law—right to counsel—forfeiture—defendant firing multiple attorneys—no evidence of delay tactics

Defendant was entitled to a new trial on multiple counts of sexual offenses against a child where he did not forfeit his right to

counsel by committing egregious misconduct. Firstly, at no point did defendant threaten counsel, disrupt court proceedings, deny the trial court's jurisdiction, or refuse to participate in the judicial process. Secondly, although defendant did fire multiple attorneys throughout the proceedings, the trial court made no findings to support the State's claim that defendant was trying to delay the trial by doing so. Rather, the record showed that defendant's first two attorneys withdrew for reasons unrelated to defendant's conduct, his third attorney withdrew for unexplained "personal reasons," and defendant's dissatisfaction with subsequent attorneys stemmed from disagreements over the preparation of his defense.

3. Constitutional Law—right to counsel—waiver by conduct—warning from trial court required

Defendant was entitled to a new trial on multiple counts of sexual offenses against a child because, although he did fire multiple attorneys throughout the case, he received no warning from the trial court that he was engaging in dilatory conduct and therefore he did not waive his right to counsel through waiver by conduct.

Judge TYSON dissenting.

Appeal by defendant from judgment entered 1 June 2023 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Elizabeth B. Jenkins, for the State.

Mary McCullers Reece for defendant-appellant.

FLOOD, Judge.

Defendant Dallas Jerome McGirt appeals from the trial court's judgment finding him guilty of four counts of statutory sex offense with a child and ten counts of indecent liberties with a child. On appeal, Defendant argues the trial court erred in concluding Defendant voluntarily waived his right to counsel, and in the alternative, forfeited his right to counsel. We likewise address whether Defendant waived his right to counsel by the hybrid situation of waiver by conduct with a warning, which combines aspects of waiver and forfeiture. Upon review, we conclude Defendant did not "clearly and unequivocally" waive his right to counsel,

commit "egregious misconduct" to forfeit his right to counsel, nor waive his right to counsel by engaging in dilatory conduct after receiving a warning. We therefore reverse and remand for a new trial.

I. Factual and Procedural Background

On 8 April 2019, Defendant was indicted by a grand jury for six counts of statutory sexual offense with a child and ten counts of indecent liberties with a child. The trial court found Defendant to be indigent and ordered that Defendant be given court-appointed counsel from the public defender's office. The public defender's office, however, moved to withdraw as counsel for having previously represented one of the victim's mothers, which the trial court granted.

The trial court then appointed outside counsel, ordering James M. Wilson to be Defendant's counsel. Mr. Wilson, however, left private practice to work for the Attorney General's Office and could no longer represent Defendant. The trial court reordered that outside counsel be appointed, and Cindy Popkin-Bradley was appointed as Defendant's counsel on 20 November 2019. On 3 May 2021, Ms. Popkin-Bradley moved to withdraw as Defendant's counsel for "personal reasons," stating that she could "not be effective in defending [Defendant]." The trial court granted the motion and again ordered that Defendant be appointed substitute counsel.

On 19 April 2022, Defendant filed a handwritten motion alleging that Margaret Lumsden had been appointed to represent him in May 2021. Defendant claimed he was dissatisfied with Ms. Lumsden's representation, stating that she had refused to meet his objectives, had lied to him about withdrawing from his case after his request for her to do so, and had lied to him about her being on vacation. Defendant requested that the trial court dismiss her from his case. The trial court did not grant or deny the motion, but entered an order providing that because Defendant had filed this request pro se, but was still under representation by Ms. Lumsden, "the [trial c]ourt must conduct an in-person colloquy in open court before the [trial c]ourt will grant [Defendant's] request[,]" pursuant to N.C.G.S. § 7A-457. The trial court stated that if Defendant wished for this hearing to be held, "[Defendant] may request that [his] attorney schedule a hearing[.]"

On 16 May 2022, Defendant filed another handwritten motion, requesting that the trial court grant him a hearing date on the matter, and further explaining that Ms. Lumsden "went missing [in] September 2021," returned 29 March 2022, and "has been missing since." Defendant lamented in his motion that "May 2022 makes one year that she has been

on my case and has not accomplished any of my objectives or anything at all. Once again, I feel it's time to move on with a new attorney who is willing to help." Defendant wrote, "[a]t this time, I would like to go *pro se* and have court appointed counsel on stand-by."

On 3 June 2022, the trial court granted Defendant's motion in part, allowing his counsel to be withdrawn, but ordered again that outside counsel be appointed. The trial court appointed Charles Christopher, Jr. to be Defendant's counsel.

On 18 August 2022, Defendant again wrote a handwritten letter to the trial court, requesting Mr. Christopher to be fired, alleging that Mr. Christopher "has yet to come and see me." On 24 April 2023, Mr. Christopher moved to withdraw as Defendant's counsel, stating that "Defendant refuses to discuss his case with this attorney or assist this attorney in any way" and that Defendant refused to meet with him on 21 April 2023.

On 4 May 2023, three weeks before the matter was set for trial, counsel's motion to withdraw came on for hearing. At the hearing, the trial court pointed out that Mr. Christopher had attempted to meet with Defendant, and Defendant responded that Mr. Christopher "wanted to play word games," and that Defendant would have one of his family members "buy [Mr. Christopher] a Scrabble game for Christmas."

The trial court granted Mr. Christopher's motion to withdraw, and then addressed Defendant:

> We need to consider if you have effectively waived your right to the assistance of court-appointed counsel anyway and that you need to represent yourself or if we need to appoint standby counsel to assist you with this case. What are you asking to do, just so I have an understanding of that first?

Defendant replied: "Your Honor, I've been held almost [fifty] months, and it doesn't make sense. From my third attorney, Cindy Bradley, sat on my case [eighteen] months, provided no assistance, had no communication with her. She didn't even request the motion for discovery. She never requested one." The trial court asked whether the State had anything to say about Defendant's counsel history. The State's attorney responded:

> The State has every single time tried to get this to trial, and so he has continued to behave in ways that are making that impossible. The State is ready to proceed on May 30th. This has been set for several months, and I would ask that

> we either appoint somebody, potentially Mr. Christopher, as standby since he is aware of this case. Every single lawyer that he has had, I have given discovery, full discovery to. I actually recopied discovery for Mr. Christopher so I know he had all of it, so I would submit that that would make the most sense, to do standby counsel with somebody who is aware of the case and proceed.

The trial court then asked Defendant a series of questions: whether there was anything impairing Defendant's ability to understand what was happening in his case, to which Defendant responded there was nothing to impair him; whether Defendant could read, write, hear, and understand, to which Defendant responded in the affirmative; and whether Defendant understood the minimum statutory sentencing, to which Defendant responded in the affirmative. The trial court next asked Defendant: "[Y]ou do understand that you have had the right to have attorneys represent you, but it seems as though you've five times not been satisfied with counsel that's been provided[?]" Defendant acknowledged he had not been satisfied with counsel.

The trial court then stated to Defendant, "I'm going to find that you have -- that you have waived your right to the assistance of counsel. I will not assign a sixth attorney to represent you on these matters. The case -- the case can still move forward to trial. I will assign standby counsel." Defendant did not object.

The trial court entered an order, finding Defendant was waiving counsel, and ordering standby counsel be appointed by the public defender's office. Additionally, the trial court ordered that Defendant have access to the law library so that he could prepare for trial.

On 22 May 2023, Defendant requested court-appointed counsel, and the trial court denied his request, stating in an order:

> Defendant currently represents himself (case is already set for trial) and would like court appointed counsel; the court finds [] Defendant has previously waived his right to court appointed counsel and can still have Mr. Liles as stand-by; Defendant can hire an attorney but the motion to get court appointed counsel is denied.

On 30 May 2023, the matter came on for trial, and the State filed a motion to have standby counsel, rather than Defendant, examine the prosecuting witnesses. Defendant did not object, and the trial court granted the motion.

At trial, standby counsel questioned the prosecuting witnesses, and otherwise, Defendant represented himself. At the close of all evidence, the jury convicted Defendant of four counts of statutory sex offense with a child and ten counts of indecent liberties with a child. The trial court then sentenced Defendant to minimum sentences totaling seventy-five years of imprisonment. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review an appeal from a final judgment by a superior court, pursuant to N.C.G.S. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Standard of Review

This Court reviews de novo a criminal defendant's appeal regarding waiver of counsel. *See State v. Jenkins*, 273 N.C. App. 145, 150 (2020). Under a de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33 (2008) (citation omitted).

IV. Analysis

On appeal, Defendant argues the trial court erred in concluding (A) he voluntarily waived his right to counsel, and in the alternative, (B) he forfeited his right to counsel. We address each argument, in turn. We likewise address (C) whether Defendant waived his right to counsel through the hybrid situation of waiver by conduct with a warning.

A. Voluntary Waiver of Counsel

[1] Defendant first argues the trial court erred in concluding he voluntarily waived his right to representation. Specifically, Defendant contends he "did not 'clearly and unequivocally' request to proceed pro se at the 4 May 2023 hearing where the trial court found voluntary waiver of counsel." We agree.

Criminal defendants have a constitutional right to the assistance of counsel under both the United States Constitution and the North Carolina State Constitution. *See* U.S. Const. amend. VI.; *see also* N.C. Const. art. I, §§ 19, 23; *Powell v. Alabama*, 287 U.S. 45, 66 (1932); *State v. McFadden*, 292 N.C. 609, 611 (1977). "Criminal defendants also have the absolute right to waive counsel, represent themselves, and make trial strategy decisions without the assistance of counsel." *State v. Jones*, 292 N.C. App. 493, 497 (2024) (citation omitted).

Before a defendant may waive this right, however, "a trial court must conduct a statutorily-required colloquy to determine that 'constitutional

and statutory safeguards are satisfied.' " *Id.* at 497 (quoting *State v. Moore*, 362 N.C. 319, 322 (2008)). During this colloquy, the trial court must determine "whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Moore*, 362 N.C. at 322. "[A] criminal defendant's election to proceed *pro se* must be 'clearly and unequivocally' expressed." *State v. Watlington*, 216 N.C. App. 388, 393 (2011).

The trial court may enter an order to allow a defendant to waive their right to counsel only after being satisfied the defendant:

> (1) has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled; (2) understands and appreciates the consequences of the decision; and, (3) comprehends the nature of the charges and proceedings and the range of permissible punishments.

Jones, 292 N.C. App. at 498 (citation omitted); *see also* N.C.G.S. § 15A-1242 (2023) (codifying this procedure). We have held that during a trial court's inquiry as to a defendant's understanding of the decision to proceed pro se, "[t]he trial court must specifically advise a defendant of the possible maximum punishment, of the range of permissible punishments, and of the consequences of representing himself. Failing to advise a defendant of any of these requirements renders the subsequent waiver invalid." *State v. Lindsey*, 271 N.C. App. 118, 127 (2020) (cleaned up); *see also State v. Frederick*, 222 N.C. App. 576, 583 (2012) (holding the trial court inadequately advised the defendant of the range of permissible punishments by telling the defendant "you can go to prison for a long, long time," and "if you're convicted of these offenses, the law requires you get a mandatory active prison sentence").

"A written waiver is important evidence to show a defendant wishes to act as [his] own attorney." *Jenkins*, 273 N.C. App. at 151. "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *Id.* at 151 (citation omitted). A written waiver, however, "is something in addition to the requirements of N.C.G.S. § 15A-1242, not an alternative to it." *Id.* at 151 (citation omitted) (cleaned up). "Any waiver of counsel shall be effective only if the court finds of record that at the time of waiver the [] person acted with full awareness of his rights and of the consequences of the waiver." N.C.G.S. § 7A-457(a) (2023).

Looking to our case law, we have held a defendant has "voluntarily, knowingly and intelligently" waived his right to counsel where a

defendant: has made explicit statements such as, "I'll represent myself," after being directly asked multiple times if he wanted to represent himself and being explained the difference between standby counsel and court-appointed counsel, *see State v. Bannerman*, 276 N.C. App. 205, 207–09 (2021); has refused to answer any of the questions presented to him by the trial court, *see Jones*, 292 N.C. App. at 498; has executed multiple waivers of counsel and no contra evidence existed that the initial waiver was insufficient, *see State v. Harper*, 285 N.C. App. 507, 517 (2022); and where the trial court has thoroughly explained to the defendant the consequences of a potential conviction of the crime he is charged with. *See State v. Moore*, 290 N.C. App. 610, 633 (2023); *see also State v. Seraphem*, 90 N.C. App. 368, 371 (1988) (holding the defendant intelligently waived counsel after the "trial judge explained to the defendant the maximum penalties for the charges against her and emphasized the seriousness of her plight").

We find *Moore* to be particularly helpful in highlighting what is required by a trial court before finding a defendant has waived his right to counsel. In *Moore*, we concluded the defendant, charged with first degree murder, waived his right to counsel where the trial court had conducted two separate colloquies into the defendant's waiver of counsel. *See Moore*, 290 N.C. App. at 632–33. The record revealed "[the d]efendant executed a written waiver of court-appointed attorney . . . after the trial court had conducted a colloquy[,]" and the "trial court conducted a similar colloquy when [the d]efendant sought to remove [another attorney] as his counsel during trial." *Id.* at 632. The trial court directly explained to the defendant that if the defendant fired his court-appointed counsel during the middle of trial, "you're going to be forfeiting your right to have an attorney[,]" and the defendant responded, "[t]hat's fine." *Id.* at 633. The trial court explained to the defendant that he "would not have the right to another appointed attorney, and [the d]efendant would have to hire his own attorney or represent himself[, and the d]efendant stated he understood." *Id.* at 633.

On appeal, after reviewing the record, we held the defendant waived his right to counsel "knowingly, intelligently, and voluntarily," and in making this holding explained:

> At each colloquy, the trial court advised and counseled [the d]efendant about his right to an attorney, including his right to appointed counsel. The trial court counseled [the d]efendant on the complexity of handling his own jury trial and the fact the judge would neither be able to offer legal advice nor excuse non-compliance with any rules of evidence or procedure.

> The trial court addressed the seriousness of the first-degree murder charge. The trial court advised a conviction by the jury of first-degree murder carried a life sentence without the possibility of parole. The trial court further told [the d]efendant that no other appointed counsel would be able or willing to immediately step into the middle of an ongoing trial. After being fully advised, [the d]efendant proceeded to fire [his counsel] and was left to acquire his own counsel or proceed *pro se*.

Id. at 633.

Alternatively, we have held a defendant does not waive his right to counsel where the defendant "repeatedly requested new counsel" even where he has signed a waiver of court-appointed counsel. *See In re S.L.L.*, 167 N.C. App. 362, 364–65 (2004).

Our review of the Record in the instant case reveals that, during the hearing on Mr. Christopher's motion to withdraw as counsel for Defendant, the following sole colloquy occurred between the trial court and Defendant regarding potential waiver of counsel:

> THE COURT: All right. Well, [Mr. Christopher's] motion to withdraw is allowed. The question now, sir, is whether or not we've come to a point where you have, in essence, waived your right -- well, you said you have a waiver?
>
> THE DEFENDANT: Yeah, that's what I -- I filed it just to get him off my case.
>
> THE COURT: We're somewhat coming to a point where we need to consider if you have effectively waived your right to the assistance of court-appointed counsel anyway and that you need to represent yourself or if we need to appoint standby counsel to assist you with this case. What are you asking to do, just so I have an understanding of that first?
>
> THE DEFENDANT: Your Honor, I've been held almost 50 months, and it doesn't make sense. From my third attorney, Cindy Bradley, sat on my case 18 months, provided no assistance, had no communication with her. She didn't even request the motion for discovery. She never requested one. She filed a motion to withdraw and got my charges wrong, stood here and stated that she was working on my case the whole time. If you was working on my case the whole time, how you getting my charges wrong?

> THE COURT: All right. Thank you.
>
> . . . .
>
> THE COURT: And you do understand that you have had the right to have attorneys represent you, but it seems as though you've five times not been satisfied with counsel that's been provided so you've fired -- you just mentioned you fired Ms. Lumsden; you wanted Mr. Christopher gone; you were dissatisfied with Ms. Bradley, and there were two other attorneys before that[.]
>
> THE DEFENDANT: Theodore Dardess -- Theodore Dardess, he withdrew immediately, and the second one was Ryan Willis, who stated he had a overloaded caseload or something so he wouldn't be able to take my case.
>
> THE COURT: All right. And then there were the next three that -- where there have been complications at least one time when it was set for trial. And you do understand that this case is headed for trial?
>
> THE DEFENDANT: Oh, yes.
>
> . . . .
>
> THE COURT: All right, sir, *I'm going to find that you have -- that you have waived your right to the assistance of counsel*. I will not assign a sixth attorney to represent you on these matters. The case -- the case can still move forward to trial. I will assign standby counsel. Mr. Christopher, do you have any -- anything that you would add as it relates to being available as standby counsel in the event that [Defendant] would need assistance?
>
> THE DEFENDANT: Appoint anybody but him. I'll take him. (Indicating to the bailiff.) Anybody but Mr. Christopher.

Unlike the defendant in *Moore*, where the trial court directly explained to the defendant that he would be forfeiting his right to counsel if he fired his attorney, Defendant was not told by the trial court that he would be waiving his right to counsel if he fired Mr. Christopher. *See Moore*, 290 N.C. App. at 633. After the trial court granted Mr. Christopher's motion to withdraw, the trial court *told* Defendant, "I'm going to find that you have -- that you have waived your right to the assistance of counsel[,]" but that it would appoint standby counsel.

There is nothing in the colloquy with the trial court to indicate Defendant "expressly and voluntarily" waived his right to counsel, *see In re S.L.L.*, 167 N.C. App. at 364, nor did Defendant "clearly and unequivocally" express his decision to proceed pro se. *See Watlington*, 216 N.C. App. at 393; *see also State v. Blakeney*, 245 N.C. App. 452, 460 (2016) ("[O]ur own review of the transcript fails to reveal any evidence that [the] defendant indicated, much less 'clearly and unequivocally' requested, that he be permitted to proceed *pro se*."). The trial court never asked if Defendant wished to represent himself, *cf. Moore*, 290 N.C. App. at 633, nor did Defendant make an explicit statement that he would represent himself. *See Bannerman*, 276 N.C. App. at 207–09.

The trial court further failed to determine whether Defendant "underst[ood] and appreciat[ed] the consequences of the decision[,]" as it did not inquire whether Defendant understood the difference between a court-appointed counsel versus standby counsel, such that Defendant was now proceeding pro se. Although Defendant wrote in a previous letter that he "would like to go pro se and have court[-]appointed counsel on stand-by[,]" the trial court did not make a determination that Defendant understood the consequences of that decision as required by N.C.G.S. § 15A-1242. *See id.* at 207–09; *see also* N.C.G.S. § 15A-1242. In fact, Defendant unequivocally stated, "[a]ppoint anybody but [Mr. Christopher]."

The trial court also failed to thoroughly advise Defendant of the consequences of a conviction, as required, advising Defendant only as to the minimum punishment:

> THE COURT: Okay. And so, sir, for each of the statutory sex offenses, you recognize that there is the possibility of life -- not life, but 25 years minimum for each of those six?
>
> THE DEFENDANT: I'm very well aware, Your Honor.

See Moore, 290 N.C. App. at 633 (upholding a waiver where the trial court addressed the seriousness of the charge and advised the defendant that a conviction carried a maximum of a life sentence without the possibility of parole); *see also Seraphem*, 90 N.C. App. at 371 (upholding a waiver where the trial court explained to the defendant the "maximum penalties for the charges against her and emphasized the seriousness of her plight"); *Lindsey*, 271 N.C. App. at 127 (requiring a trial court to "specifically advise a defendant of the possible maximum punishment, of the range of permissible punishments, and of the consequences of representing himself").

In *State v. Gentry*, this Court explained that "a mistake in the number of months which a trial judge employs during a colloquy with a defendant contemplating the assertion of his right to proceed *pro se*" does not constitute a *per se* violation of N.C.G.S. § 15A–1242 unless "there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about the range of permissible punishment." 227 N.C. App. 583, 599–600 (2013) (internal quotation marks omitted). We did so, however, only *after* concluding "[t]he record . . . clearly reflect[ed] that the trial court made a substantially proper inquiry into the extent to which [the d]efendant's waiver of counsel was knowing and voluntary." *See id.* at 598. In *Gentry*, "[t]he only component of the trial court's discussion with [the d]efendant [with] which [the d]efendant [took] issue [was] the information concerning 'the range of permissible punishments' that the trial court provided." *Id.* at 598. We reviewed the trial court's failure to properly state the maximum number of months to see whether the error prejudiced the defendant in his "otherwise knowing and voluntary waiver of counsel." *See id.* at 600.

Here, however, this Court must consider whether Defendant "has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled[,]" "understands and appreciates the consequences of the decision[,]" and "comprehends the nature of the charges and proceedings[,]" such that we are not looking at whether this one failure to properly state "the range of permissible punishments" *prejudiced* Defendant, but whether in the context of the requirements stated above, Defendant knowingly and voluntarily waived counsel. *See Jones*, 292 N.C. App. at 498.

Further, although Defendant captioned his request to remove Mr. Christopher and others as "Waiver of Counsel" and wrote that he wished to represent himself, he expressed that he requested this because he felt it was "time to move on with a new attorney who is willing to help." Such evidence, expressing he wished to move on to a new attorney and requesting someone else be appointed to him, is "contra" to a clear waiver of counsel. *See Harper*, 285 N.C. App. at 517 (holding the defendant's multiple written waivers were enough to establish he had waived his right of counsel where "no evidence *contra* exist[ed]"). Additionally, Defendant's handwritten document filed on 16 May 2022—the sole time he wrote "[a]t this time, I would like to go *pro se* and have court appointed counsel on stand-by[,]" after lamenting he "feel[s] it's time to move on with a new attorney who is willing to help"—was not written in the presence of the trial court for the trial court to determine if Defendant, "at the time of the waiver . . . acted with full awareness of his

rights and of the consequences of the waiver." Additionally, during the colloquy with the trial court, Defendant never asked to proceed pro se nor did Defendant request standby counsel. Thus, this waiver cannot be deemed effective. *See* N.C.G.S. § 7A-457(a).

Like in *In re S.L.L.*, the trial court here erred in finding Defendant waived his right of counsel where, although he once "wrote he would like to go pro se," he "repeatedly requested new counsel," and even stated in that very handwritten note that he felt like it was "time to move on with a new attorney who is willing to help." *See In re S.L.L*, 167 N.C. App. at 365. A fulsome review of the Record overcomes the presumption that a written waiver of counsel by Defendant was done "knowing[ly], intelligent[ly], and voluntar[ily]." *See Jenkins*, 273 N.C. App. at 151; *see also Harper*, 285 N.C. App. at 517; N.C.G.S. § 7A-457(a).

Accordingly, we conclude Defendant did not "clearly and unequivocally" waive his right to counsel, *see Watlington*, 216 N.C. App. at 393, the trial court failed to determine whether Defendant "underst[ood] and appreciat[ed] the consequences of the decision[,]" and thus the trial court erred in entering an order stating that Defendant waived this right. *See Jones*, 292 N.C. App. at 498; *see also* N.C.G.S. § 15A-1242.

B. Forfeiture of Counsel

[2] Defendant next argues that, even though the trial court spoke in terms of waiver, he also did not forfeit his right to counsel. Defendant contends "the trial court made several references to his having been represented by five different attorneys, the implication being that [Defendant] was unreasonable in his dissatisfaction and should therefore be deemed to have forfeit[ed] his right to counsel." Defendant argues "there was no showing, nor any finding by the trial court, that [his] requests for new counsel arose from anything other than real efforts to prepare for a trial on the serious charges pending against him." We agree.

This Court has explained that "[t]he second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel." *Blakeney*, 245 N.C. App. at 460; *see also State v. Simpkins*, 373 N.C. 530, 535 (2020) ("[I]n situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel."). In *Simpkins*, our Supreme Court explained:

> [I]n rare circumstances a defendant's actions frustrate the purpose of the right to counsel itself and prevent the trial court from moving the case forward. In such

> circumstances, a defendant may be deemed to have forfeited the right to counsel because, by his or her own actions, the defendant has totally frustrated that right. If one purpose of the right to counsel is to justify reliance on the outcome of the proceeding, then totally frustrating the ability of the trial court to reach an outcome thwarts the purpose of the right to counsel.

Id. at 536 (internal citations and quotations marks omitted). We have previously explained that, although there is no "bright-line definition of the degree of misconduct that would justify forfeiture[,]" the following conduct is usually a cause for forfeiture of the right to counsel:

> (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

Blakeney, 245 N.C. App. at 461–62.

"[E]ven if a defendant's conduct is highly frustrating, forfeiture is not constitutional where any difficulties or delays are not so egregious that they frustrated the purposes of the right to counsel itself." *State v. Atwell*, 383 N.C. 437, 449 (2022) (citation omitted) (cleaned up). Additionally, where a trial court makes "no factual findings about the circumstances which led to the withdrawal," there is "no inference that [the] defendant was attempting to delay h[is] case." *Id.* at 451.

Here, Defendant did not threaten counsel or disrupt any court proceedings, nor did he refuse to acknowledge the trial court's jurisdiction. Defendant participated in the judicial process and did not insist on nonsensical or nonexistent legal rights. *See Blakeney*, 245 N.C. App. at 461–62. The only potential misconduct is as to whether Defendant used flagrant or extended delay tactics by "repeatedly firing a series of attorneys." Thus, we now look to our Courts' previous cases regarding defendants firing their attorneys, as a basis for forfeiting their right to counsel.

Our Supreme Court has previously held a defendant does not forfeit his right to counsel where a defendant fires court-appointed counsel "due to differences related to the preparation of [the] defendant's defense rather than [the] defendant's refusal to participate in preparing a defense." *State v. Harvin*, 382 N.C. 566, 590 (2022) (cleaned up). A defendant likewise does not forfeit his right to counsel where he fires

his counsel for failing to pursue a non-frivolous jurisdictional issue that the defendant desired. *See Atwell*, 383 N.C. at 451–52.

Alternatively, we have held a defendant forfeits his right to counsel when he "refuse[s] to cooperate" with his counsel and "assault[s] him," *see State v. Montgomery*, 138 N.C. App. 521, 525 (2000), and where he "insist[s] that his attorneys pursue defenses that [are] barred by ethical rules" and "refus[es] to cooperate when they [do] not comply with his requests." *See State v. Smith*, 292 N.C. App. 656, 661 (2024).

In the present case, Defendant's first two court-appointed counsel withdrew immediately for conflicts of interest, one having represented the mother of one of Defendant's victim's before, and one having left private practice to work at the Attorney General's office. Defendant's third court-appointed counsel withdrew as Defendant's counsel for "personal reasons."[1] Defendant's fourth court-appointed counsel was Ms. Lumsden, who Defendant claimed "went missing [in] September 2021," returned 29 March 2022, and "has been missing since." Defendant lamented he was dissatisfied with Ms. Lumsden's representation because she had refused to meet his objectives, lied about withdrawing from his case after his request for her to do so, and lied to him about her being on vacation.[2] Defendant's fifth and final court-appointed counsel was Mr. Christopher, whom Defendant requested to fire in August 2022 because Mr. Christopher "ha[d] yet to come and see [him]." Seven months later, Mr. Christoper moved to withdraw, claiming "Defendant refuse[d] to discuss his case with this attorney or assist this attorney in any way," although Mr. Christopher provided only one date that Defendant refused to meet with him, which was 21 April 2023, three days before Mr. Christopher moved to withdraw.

We can ascertain from the Record: Defendant's first two attorneys withdrew for reasons outside of Defendant's conduct; Defendant fired his third attorney for reasons not stated in the Record, only that she withdrew for "personal reasons," and thus we cannot say this was done as a delay tactic, *see Atwell*, 383 N.C. at 451; Defendant fired his fourth attorney over disagreements on objectives of the case, which is not a delay tactic, "rather than [D]efendant's refusal to participate in

1. There is no hearing transcript in the Record, and thus we are left only with the knowledge that the third court-appointed counsel, Ms. Popkin-Bradley, withdrew for "personal reasons."

2. There is no motion from Ms. Lumsden to withdraw nor a hearing transcript in the Record; there is only an order from the trial court granting the motion, and thus, we are unable to ascertain the reasons for Ms. Lumsden's withdrawal.

preparing a defense," *see Harvin*, 382 N.C. at 590; and the trial court did not make any findings regarding the withdrawal of Defendant's fourth attorney. Nothing in the Record indicates Defendant's objectives were unethical. *See Smith*, 292 N.C. App. at 661. Defendant fired his fifth attorney after claiming the attorney "ha[d] yet to come and see [him]." The Record indicates that Defendant's fifth attorney described Defendant as "refus[ing] to discuss this case with" him after Defendant had already filed a pro se motion to have him fired seven months before.

Unlike the defendant in *Montgomery*, Defendant never assaulted his attorneys. *See Montgomery*, 138 N.C. App. at 525. Defendant only refused to discuss the case with his last attorney after indicating he wished to fire that attorney for previously failing to come to see him regarding his case. *Cf. id.* at 525.

The only negative Record evidence of Defendant's actions is found in the trial transcript, before the trial court's colloquy with Defendant, where the State lamented:

> This defendant has literally, every single time something starts to get towards a trial, has done some kind of thing with his attorney to get them to withdraw. We were set for trial with Ms. Bradley and he did the same kind of stuff and she was able t[o] withdraw the week before trial.
>
> . . . .
>
> The State has every single time tried to get this to trial, and so he has continued to behave in ways that are making that impossible. The State is ready to proceed on May 30th. This has been set for several months, and I would ask that we either appoint somebody, potentially Mr. Christopher, as standby since he is aware of this case. Every single lawyer that [Defendant] has had, I have given discovery, full discovery to. I actually recopied discovery for Mr. Christopher so I know he had all of it, so I would submit that that would make the most sense, to do standby counsel with somebody who is aware of the case and proceed.

The trial court, however, did not make any findings regarding Defendant's alleged actions by the State, and thus, we cannot make any inference that Defendant's actions were an attempt to delay the trial. *See Atwell*, 383 N.C. at 451.

Based on the Record evidence, we cannot say Defendant's firing of his attorneys was "egregious misconduct" or a flagrant delaying tactic.

See Harvin, 382 N.C. at 590; *see also Smith*, 292 N.C. App. at 661; *Atwell*, 383 N.C. at 451; *Blakeney*, 245 N.C. App. at 461–62; *Simpkins*, 373 N.C. at 535. Accordingly, the trial court erred in concluding Defendant forfeited his right to counsel.

C. Hybrid: Waiver of Counsel by Conduct with Warning

[3] We also consider the State's argument that, in addition to voluntary waiver and forfeiture, Defendant exhibited a "hybrid" form of waiving one's right to counsel, waiver by conduct. We conclude he did not.

In *Blakeney*, this Court provided:

> Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since *a waiver by conduct requires that a defendant be warned about the consequences of his conduct*, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel.

Blakeney, 245 N.C. App. at 464–65, (citation and internal quotation marks omitted) (cleaned up) (emphasis added). In *Blakeney*, the defendant was not given a warning that, should he continue in his conduct, he would be required to proceed *pro se*. *See id.* at 464. In holding that the defendant did not waive his right to counsel by conduct, this Court explained: "[W]e find it very significant that [the] defendant was not warned or informed that if he chose to discharge his counsel but was unable to hire another attorney, he would then be forced to proceed *pro se*. Nor was [the] defendant warned of the consequences of such a decision." *Id.* at 464.

Here, like the defendant in *Blakeney*, Defendant received no warning that he was "engag[ing] in dilatory tactics" of any sort; instead, in

the colloquy, the trial court stated: "All right. Well, [Mr. Christopher's] motion to withdraw is allowed. The question now, sir, is whether or not we've come to a point where you have, in essence, waived your right[.]" *See id.* at 464. There is nothing in the Record to indicate the trial court ever warned Defendant that any of his conduct was dilatory. *See id.* at 464. Because waiver by conduct "requires that a defendant be warned about the consequences of his conduct," and there is no Record here that the trial court provided Defendant with any warning regarding his conduct, nor does the State argue there was any warning, we hold Defendant did not waive his right to counsel by conduct. *See id.* at 465.

Because we conclude Defendant did not knowingly and voluntarily waive his right to counsel, forfeit his right to counsel by engaging in egregious misconduct, nor waive his right to counsel by engaging in dilatory conduct after receiving a warning, we hold the trial court erred in concluding Defendant waived his right to counsel.

V. Conclusion

Upon our de novo review, *see Jenkins*, 273 N.C. App. at 150, we conclude the trial court erred in concluding Defendant voluntarily waived his right to counsel, where Defendant requested new counsel and did not "clearly and unequivocally" express his decision to proceed pro se, and the trial court did not determine Defendant understood the consequences of proceeding *pro se*. The trial court likewise erred in concluding Defendant forfeited his right to counsel where the Record lacks evidence that Defendant fired multiple attorneys to delay his trial, and thus Defendant did not commit "egregious misconduct," nor did Defendant waive his right to counsel by engaging in dilatory conduct after receiving a warning. We therefore vacate and remand for a new trial. *See State v. Sorrow*, 213 N.C. App. 571, 579 (2011) (vacating and remanding where the trial court erred in concluding a defendant waived his right to counsel).

VACATED AND REMANDED.

Judge ZACHARY concurs.

Judge TYSON dissents in separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously concludes Defendant did not voluntarily waive and/or forfeit his right to counsel. Defendant's actions also present a "hybrid" waiver/forfeiture situation from *State v. Blakeney*, 245 N.C. App. 452, 464-65, 782 S.E.2d 88, 96 (2016). There is no prejudice shown and no error in the judgment. I respectfully dissent.

I. Background

Defendant was indicted for six counts of statutory sex offense with a child and ten counts of indecent liberties with a child on 8 April 2019. The trial court initially appointed the public defender's office to represent Defendant. However, the public defender's office withdrew because of its prior representation of one of the victim's mothers. The trial court next appointed attorney James M. Wilson to represent Defendant. Wilson left private practice to work for the North Carolina Department of Justice, and he was allowed to withdraw.

The trial court next appointed attorney Cindy Popkin-Bradley on 20 November 2019. Popkin-Bradley moved to withdraw due to "personal reasons" the week before the matter was set for trial. The trial court allowed her motion and then appointed attorney Margaret Lumsden to represent Defendant in May 2021.

Defendant filed a handwritten motion alleging he was dissatisfied with Lumsden's representation, and he requested the trial court to dismiss her from the case. Defendant alleged Lumsden had refused to meet his objectives, had lied to him about withdrawing from the case, and had lied about going on vacation.

The trial court did not either grant or deny Defendant's motion, however, it entered an order advising Defendant "the [trial] court must conduct an in-person colloquy in open court before the [trial c]ourt will grant [Defendant's] request." The trial court further advised Defendant, if he wanted this hearing to be held, Defendant was to "request that [his] attorney schedule a hearing."

Defendant filed a handwritten motion to remove Lumsden on 16 May 2022 alleging she "went missing September 2021," returned 29 March 2022, and "has been missing since." Defendant asserted: "At this time, I would like to go *pro se* and have court appointed counsel on stand-by." The trial court allowed Defendant's motion for Lumsden to withdraw, but it ordered outside counsel to be appointed instead of allowing Defendant to proceed *pro se*. The trial court appointed Charles Christopher, Jr. as Defendant's fifth appointed counsel.

Defendant wrote another handwritten letter to the trial court requesting for Christopher to be replaced on 18 August 2022. Defendant also filed a *pro se* document with the Court entitled "Waiver of Counsel." Attorney Christopher moved to withdraw as Defendant's counsel on 24 April 2023, alleging, "Defendant refuses to discuss his case with this attorney or assist this attorney in any way." Christopher also stated Defendant had refused to meet with him on 21 April 2023.

Three weeks before the matter was set for trial, Christopher's motion was heard on 4 May 2023. In open court, the trial court heard from both Defendant and Christopher. The State opposed Defendant's motion and alleged Defendant had previously filed speedy trial motions. The State further asserted every time the State was prepared to bring the case to trial, Defendant acted in a manner to cause his attorney to withdraw. The State also asserted the victims had experienced emotional troubles from being prepared for trial multiple times, only to then have the trial again delayed.

The trial court and Defendant entered into the following colloquy:

> THE COURT: We're somewhat coming to a point where we need to consider if you have effectively waived your right to the assistance of court-appointed counsel anyway and that you need to represent yourself or if we need to appoint standby counsel to assist you with this case. What are you asking to do, just so I have an understanding of that first?
>
> DEFENDANT: Your Honor, I've been held almost 50 months, and it doesn't make sense. From my third attorney, Cindy Bradley, sat on my case 18 months, provided no assistance, had no communication with her. She didn't even request the motion for discovery. She never requested one. She filed a motion to withdraw and got my charges wrong, stood here and stated that she was working on my case the whole time. If you was [sic] working on my case the whole time, how [are] you getting my charges wrong?
>
> . . .
>
> THE COURT: Well, I have some of the documents. I'm waiting for additional files to come up. All right, sir, I am going to find that you have waived – well, actually, let me ask a couple more questions. It seems as though you – do you have any difficulty being able to hear or understand?

DEFENDANT: No, Your Honor.

THE COURT: It seems like you're well versed in – well, I know you're able to read and write because you've clearly been reading and you've written the Court, so that's true, correct?

DEFENDANT: Yes, it is. Also, Your Honor, I would like to state last year on June 3rd, upon firing my fourth attorney, Ms. Margaret Lumsden, the judge that presided over my case that day stated to me that she wanted to see my motion for discovery and granted me a court date for July 5th, the following month, which is the same day Mr. Christopher was appointed to me.

THE COURT: All right.

. . .

DEFENDANT: They refused to bring me in.

THE COURT: So you're able to hear and understand me and you understand the right that you do have the ability to plea not guilty, obviously, correct?

DEFENDANT: Yes.

THE COURT: I know you're in custody, but have you been using – has anybody allowed or have you used any alcohol or any drugs, narcotics or anything that would intoxicate you?

DEFENDANT: No, Your Honor.

THE COURT: So nothing in the past 50 months?

DEFENDANT: No, Your Honor.

THE COURT: And you do understand that you have had the right to have attorneys represent you, but it seems as though you've five times not been satisfied with counsel that's been provided so you've fired – you just mentioned you fired Ms. Lumsden; you wanted Mr. Christopher gone; you were dissatisfied with Ms. Bradley, and there were two other attorneys before that that you –

DEFENDANT: Theodore Dardess – Theodore Dardess, he withdrew immediately, and the second one was Ryan

Willis, who stated he had a overloaded caseload or something so he wouldn't be able to take my case.

THE COURT: All right. And then there were the next three that – where there have been complications at least one time when it was set for trial. And you do understand that this case is headed for trial?

DEFENDANT: Oh, yes.

THE COURT: You understand that – what's the minimum for a statutory – I'm trying to recall –

[THE STATE]: They are all – all six of those are the 25-year minimums.

THE COURT: Okay. And so, sir, for each of the statutory sex offenses, you recognize that there is the possibility of life – not life, but 25 years minimum for each of those six?

DEFENDANT: I'm very well aware, Your Honor.

THE COURT: Are there any – are you aware of each – the elements in each part of the offenses against you?

DEFENDANT: Yes, I am.

THE COURT: All right, sir, I'm going to find that you have – that you have waived your right to the assistance of counsel. I will not assign a sixth attorney to represent you on these matters. The case – the case can still move forward to trial. I will assign standby counsel. Mr. Christopher, do you have any – anything that you would add as it relates to being available as standby counsel in the event that Mr. McGirt would need assistance?

DEFENDANT: Appoint anybody but him. I'll take him. (Indicating to the bailiff.) Anybody but Mr. Christopher.

THE COURT: All right. I'll ask that the Public Defender's Office assign someone to serve as standby counsel in your matter. It is still continuing for trial. Yes, I will order that the Public Defender's Office still assign someone as standby counsel in this matter.

II. Waiver of Counsel

Both the Constitution of the United States and the North Carolina Constitution recognize a criminal defendant's right to the assistance of

counsel. U.S. Const. amend. VI.; N.C. Const. art. I, §§ 19, 23; *see also Powell v. Alabama*, 287 U.S. 45, 66, 77 L. Ed. 158, 169 (1932); *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977). Criminal defendants also have the absolute right to waive or forfeit counsel, represent themselves, and handle their case without the assistance of counsel. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972).

The majority's opinion incorrectly concludes Defendant did not waive or forfeit his right to counsel. Before a defendant is allowed to waive the right to counsel, a trial court must conduct a statutorily-required colloquy to determine that "constitutional and statutory safeguards are satisfied." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (citation omitted). Courts "must determine whether the defendant knowingly, intelligently and voluntarily waives the right to in-court representation by counsel." *Id.* (citation omitted).

N.C. Gen. Stat. § 15A-1242 (2023) governs the procedure to be used for a defendant to waive counsel. Courts may only enter an order to allow a defendant to waive their right to counsel after the court is satisfied and the record shows the movant: (1) has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled; (2) understands and appreciates the consequences of the decision; and, (3) comprehends the nature of the charges and proceedings and the range of permissible punishments. *Id.* The record clearly shows compliance with all three statutory factors.

Our Supreme Court has held a "trial court must obtain a written waiver of the right to counsel." *State v. Thomas*, 331 N.C. 671, 675, 417 S.E.2d 473, 476 (1992) (citation omitted). The record does not indicate whether Defendant executed a written waiver of court-appointed attorney after the trial court had conducted a colloquy into Defendant's present mental state. The trial court questioned Defendant about whether he was under the influence of any drugs or intoxicants, whether he understood the charges and its possible punishments, his level of education, his right to appointed or retained counsel, his right to represent himself, and Defendant's obligations and responsibilities if he decided to represent himself.

Written waivers of counsel, certified by the trial court, create a rebuttable presumption the waiver was executed knowingly, intelligently, and voluntarily pursuant to N.C. Gen. Stat. § 15A-1242. *See State v. Kinlock*, 152 N.C. App. 84, 89, 566 S.E.2d 738, 741 (2002) (citation omitted), *aff'd per curiam*, 357 N.C. 48, 577 S.E.2d 620 (2003).

The record does not include a signed waiver and certification by the superior court judge that a proper inquiry and disclosure was made in compliance with the statute. N.C. Gen. Stat. § 15A-1242 (2023). There is no mention of a signed waiver in the transcript of the hearing wherein the trial court conducted the statutory colloquy.

This absence in the record does not invalidate Defendant's waiver. *See State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996) (holding *inter alia* the lack of a written waiver neither alters the conclusion that the waiver was knowing and voluntary, nor invalidates the defendant's waiver of counsel); *State v. Fulp*, 355 N.C. 171, 176, 558 S.E.2d 156, 159 (2002) (affirming *Heatwole* holding "that a waiver was not invalid simply because there was no written record of the waiver" (citation and internal quotation marks omitted)).

The majority's opinion incorrectly concludes the trial court failed to ascertain whether Defendant had "expressly and voluntarily" waived his right to counsel. It also incorrectly concludes the trial court failed: to determine whether Defendant had "clearly and unequivocally" expressed his decision to proceed *pro se*, to determine whether Defendant "underst[ood] and appreciate[d] the consequences of the decision[,]" and to advise Defendant of the consequences of a conviction to the charges.

The majority's opinion holds the trial court did not ascertain whether Defendant had "expressly and voluntarily" waived his right to counsel. The record shows Defendant had filed two separate motions entitled "Waiver of Counsel" with the trial court on 16 May 2022 and again on 4 April 2023. The majority's opinion further holds Defendant did not "clearly and unequivocally" express his decision to proceed *pro se*. This is also error. Defendant clearly and unambiguously stated in his 16 May 2022 motion: "At this time I would like to go Pro Se and have Court Appointed Counsel on stand-by." During the colloquy, Defendant again requested stand by counsel, which the trial court clearly allowed.

The majority's opinion also asserts Defendant was not advised of the consequences of being convicted of the crimes charged because Defendant was only advised of the minimum punishment for each of the charges. The majority's opinion uses a string citation with accompanying parentheticals of this Court's prior opinions in *State v. Moore*, 290 N.C. 610, 893 S.E.2d 231, *appeal dismissed*, 385 N.C. 624, 895 S.E.2d 402 (2023), *State v. Seraphem*, 90 N.C. App. 368, 368 S.E.2d 643 (1988), and *State v. Lindsey*, 271 N.C. App. 118, 843 S.E.2d 322 (2020). All of these cases assert the trial court's responsibility to inform a criminal defendant seeking to proceed *pro se* with the maximum sentence.

However, this case is more analogous to "calculation errors" in informing defendants of the maximum sentence they face if convicted. A "calculation error" in the maximum sentence a criminal defendant is facing violates N.C. Gen. Stat. § 15A-1242, only "if there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about the 'range of permissible punishments.' " *State v. Gentry*, 227 N.C. App. 583, 600, 743 S.E.2d 235, 246 (2013) (internal quotation marks omitted). *See State v. Fenner*, 290 N.C. App. 553, 892 S.E.2d 111 (2023) (unpublished). Defendant has failed to make that required showing here.

In *Gentry*, the trial court had incorrectly informed the defendant he could be sentenced to a maximum sentence of 740 months when he actually faced a 912 months active sentence. *Gentry*, 227 N.C. App. at 599, 743 S.E.2d at 246. This Court found no prejudicial error had occurred and held the defendant:

> waived his right to counsel knowingly and voluntarily as the result of a trial court's failure to comply with N.C. Gen. Stat. § 15A-1242, it does not have such an effect in this instance given that either term of imprisonment mentioned in the trial court's discussions with [the defendant] was, given [the defendant's] age, *tantamount to a life sentence*.

Id. at 600, 743 S.E.2d at 246-47 (emphasis supplied).

Here, Defendant was born in 1970 and was charged with six counts of class B1 felonies, which each charge carries a minimum of 300 months and a maximum of 420 months. During the colloquy the State asserted, "[t]hey are all -- all six of those are the 25-year minimums." The trial court asked: "Okay. And so, sir, for each of the statutory sex offenses, you recognize that there is the possibility of life -- not life, but 25 years minimum for each of those six?" Defendant responded: "I'm very well aware, Your Honor."

Defendant was ultimately tried and convicted of four of the six counts of statutory sex offense. A single conviction would cause Defendant to be over seventy-five years old upon completion of a single sentence. Defendant was sentenced to a minimum of 100 years and a maximum of 140 years for only his B1 convictions. Presuming he only serves the minimum sentences imposed, he would be over 150 years old upon completion of his B1 convictions' sentences. Defendant was clearly informed and acknowledged these charges each carry a minimum sentence of

twenty-five years, or 300 months. These sentences are "tantamount to a life sentence" given the Defendant's advanced age upon expiration of his sentences. *Id.* at 600, 743 S.E.2d at 246-47. The record does not contain evidence tending to show Defendant was prejudiced or would have made a different choice had he been further told he could be sentenced to a maximum of 35 years imprisonment for each charge instead of the minimum 25 years. *Id.*

The majority's opinion seeks to differentiate this analysis by boldly stating, without citation to any authority, "[S]uch that we are not looking at whether this one failure to properly state the 'range of permissible punishments' *prejudiced* Defendant, but whether in the context of the requirements stated above, Defendant knowingly and voluntarily waived counsel." This statement is an incorrect application of both our General Statutes and our case law. The case cited prior to the statement, *State v. Jones*, 292 N.C. App. 493, 498, 898 S.E.2d 784, 788 (2024) (citing *State v. Thomas*, 331 N.C. 671, 675, 417 S.E.2d 473, 476 (1992)), includes the correct requirement from N.C. Gen. Stat. § 15A-1242 that a defendant "comprehends the nature of the charges and proceedings and the range of permissible punishments." N.C. Gen. Stat. § 15A-1242 (2023).

III. Hybrid Waiver and Forfeiture

In *State v. Moore*, this Court examined a mixture of waiver and forfeiture of counsel as described in *State v. Blakeney*. *Moore*, 290 N.C. App. at 628, 893 S.E.2d at 244. In *Blakeney*, this Court held:

> Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel.

Blakeney, 245 N.C. App. at 464-65, 782 S.E.2d at 96 (citation, ellipses, and quotation marks omitted).

Defendant moved for a speedy trial and, as the trial dates approached, was dilatory and refused to engage with, or otherwise fired, his three appointed attorneys. Defendant also filed two written notices to represent himself preceding the trial court's finding that he had waived his right to counsel and allowed him, *as he had requested in writing*, to proceed *pro se* with appointed standby counsel. *Id.* Defendant cannot now be heard to complain about the consequences directly resulting from his own requests and actions. *Id.*

IV. Conclusion

Defendant has not shown prejudicial errors, and his convictions and sentences should lawfully remain undisturbed. He knowingly waived and/or forfeited his right to a further appointed sixth counsel and proceeded with standby counsel, as he had requested. *Moore*, 290 N.C. App. at 628, 893 S.E.2d at 244.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. There is no reversible error in the jury's verdicts or in the judgments entered thereon.

The majority's opinion erroneously vacates Defendant's jury convictions and remands for a new trial. The sexual assault victims are unnecessarily traumatized once again. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
DEREK JVON MILLER, DEFENDANT

No. COA24-72

Filed 19 March 2025

Constitutional Law—right to a public trial—courtroom closure during two witnesses' testimonies—Waller four-part test

At a trial for attempted first-degree murder and related charges arising from an incident where defendant fired a gun at a group of individuals from inside a moving car, the trial court's partial courtroom closure during the testimony of two men from the group—including one who was shot in the back—did not violate defendant's constitutional right to a public trial. Specifically, the court properly determined—at a remand hearing on the issue—that the closure was justified under the four-part test in *Waller v. Georgia*, 467 U.S. 39 (1984), in that: (1) the closure advanced an overriding interest in witness safety supported by competent evidence, including social media posts in which defendant directed threatening messages at the witnesses, along with other intimidating conduct by defendant and members of the gallery; (2) the closure was narrowly tailored to address witness safety concerns, since it was limited to the testimony of just two witnesses and defendant's direct relatives were allowed to remain in the courtroom; (3) the court properly considered and ruled out reasonable alternatives, such as banning cell phones in the courtroom; and (4) the court made sufficient findings of fact based on competent evidence to support the closure.

Appeal by Defendant from judgment entered 5 June 2023 by Judge Jonathan W. Perry in Union County Superior Court. Heard in the Court of Appeals 15 May 2024.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

Attorney General Jeff Jackson, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.

STADING, Judge.

Derek Jvon Miller ("Defendant") appeals from a final judgment entered against him pursuant to jury verdicts finding him guilty of attempted first degree murder, going armed to the terror of the people, and possession of a handgun by a minor. After careful consideration, we affirm the trial court's order.

I. Background

On 19 August 2018, Neqayvius McClendon ("McClendon"), Nyhiem Kendall ("Kendall"), and O.S.[1] (collectively, "the group") walked to a local basketball court together. On their way to the basketball court, the group was accosted by D.G., E.G., K.H., and Defendant, who were riding together in a car. D.G. was driving the car, and all of the occupants were in possession of guns. D.G. pulled up next to where the group was walking, and the car's occupants "flash[ed]" their guns at the group. As D.G. began driving away, testimony revealed that Defendant fired his gun at the group—striking McClendon in his back.

On 8 July 2019, Defendant was indicted for attempted first degree murder, possession of a handgun by a minor, discharging a firearm in city limits, and going armed to the terror of the people. Before Defendant's trial, on 24 November 2021, the State moved for closure of "the courtroom . . . to the public" while McClendon and Kendall testified, arguing that it was justified under *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984) and N.C. Gen. Stat. § 15A-1034 (2023) ("Controlling access to the courtroom."). The State argued that closing the courtroom was warranted because of "concerns for the safety of the witnesses." The State reasoned that closure was justified since Defendant previously attempted to intimidate the witnesses via social media. Defendant objected, arguing that closing the courtroom would amount to a Sixth Amendment violation, or in the alternative, that it was unnecessary given that other "reasonable alternatives" were available.

The parties then conferred in "the back hallway" with the trial court to "briefly talk about a possible solution to closing the court[room] . . . ." Upon returning, the trial court recounted the conversation on the record:

> THE COURT: Madam Court Reporter, for the record, we stepped to the back. And the inquiry was about what the Court was inclined to do for the State's motion to close the courtroom.

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1. The record is unclear whether certain individuals involved are juveniles. We therefore use pseudonyms to protect their anonymity as a precautionary measure.

> What I indicated to both parties is what I was thinking, as they could pick up, was my — my resolution at this point, unless circumstances change, is for direct relatives of Mr. Miller to stay in the courtroom during those two witnesses. Anybody not directly related to him will be outside the courtroom. And deputies, after my admonition for no cell phone use, will keep an eye on anybody in the courtroom and their use of cell phones. And that will be true for any State witnesses as well, Mr. Collins, or speculators. So anybody who's not a direct relative of Mr. Miller or Mr. Purser, they will be asked to step outside during those two witnesses' examinations.

In this context, the trial court defined "direct relatives" as "blood" relatives, including Defendant's "mother, brother, sister, [and] father." Thereafter, Defendant's case proceeded to trial and a jury found Defendant guilty of all charges. Following entry of judgment, Defendant gave notice of appeal in open court.

In *State v. Miller*, 287 N.C. App. 660, 662, 884 S.E.2d 175, 177 (2023) (hereinafter "*Miller I*"), Defendant argued that the trial court's order, closing the courtroom, violated his constitutional right to a public trial for failure to "engag[e] in the four-part test set forth in *Waller* . . . ." He also asserted "that the charge of discharging a weapon within . . . city limits should have been dismissed because neither the arrest warrant nor the indictment contained the caption of the ordinance and the State failed to prove the ordinance at trial." *Id.* at 665, 884 S.E.2d at 179. A prior panel from our Court held that "the trial court failed to utilize the *Waller* four-part test and make adequate findings of fact in an order to support closing the courtroom to the public," and thus remanded the case "for a hearing on the propriety of the closure." *Id.* at 666, 884 S.E.2d at 180. The Court held,"[i]f the trial court determines that the closure was not justified, then Defendant is entitled to a new trial." *Id.* However, "[i]f the trial court determines that the closure was justified, then Defendant may seek review of the trial court's order by means of an appeal from the judgment that the trial court will enter on remand following resentencing." *Id.* The Court also held that "the trial court erred by denying Defendant's motion to dismiss the charge of discharging a weapon within city limits" and therefore, "vacate[d] Defendant's conviction . . . and remand[ed] for resentencing." *Id.*

On remand, the trial court entered an order decreeing that closure of the courtroom during the testimony of McClendon and Kendall was warranted under *Waller*. The trial court concluded: "the State has an

overriding interest in having its witnesses and victims in cases testify, and [to] be safe while doing so–which is likely prejudiced if there is intimidation, or unauthorized recording of court proceedings occurring"; its decision was "**no broader than necessary** to protect the interest of the State having its witnesses and victims testify"; and it "**considered reasonable alternatives to closure**, including allowing relatives of Defendant to remain in the courtroom, which it did." The trial court also made "its own observations of the situation, including noting the relatively young age of the witnesses/victims as well as the violent nature of the offenses at issue." The following exhibits were reviewed in reaching this decision:

> (1) State Exhibits [#]1-4 are individual pictures of the Defendant on a social media page holding large sums of money in stacks of currency (bills), flashing gang signs, and holding a firearm – a pistol – pointed while appearing to aim towards something off screen[.]
>
> (2) State Exhibit [#]5 are several photos . . . with the Defendant flashing gang signs, and the caption underneath the pictures of "Let him keep on talking he's a dead man . . . ."
>
> (3) State Exhibit #6 is another picture of the Defendant . . . with the same caption of "Let him keep talking he's a dead man . . . ."
>
> (4) State Exhibit #7 is a pair of pictures, one of which is the Defendant with a mask, flashing a gang sign, with stacks of cash in his hand and all around him while sitting on a staircase, along with a different picture of three individuals (not including the Defendant) – one with hands over his ears, one with his hands over his eyes, and one making a shushing gesture, indicating to the Court something along the lines of hear nothing, say nothing, see nothing[.]
>
> (5) State Exhibit #8 is a pair of pictures with the Defendant flashing gang signs, with a caption reading "I'ma Pull Up In Style, We Gon Do A Drive By In The Wraith" and displaying a countdown clock with the caption "Trial Date" and showing hours, minutes, and seconds[.]
>
> (6) State Exhibit #9 is a set of lyrics partially referenced in State Exhibit #8 that reference additional lyrics

> from the same song, including "I'll shoot him right up in his face" and references to carrying guns and "beat[ing] the case" as referenced in Exhibit #8 as well.

The day after entry of the trial court's order on remand, the State filed a dismissal of Defendant's charge for discharging a firearm in city limits. The trial court resentenced Defendant, and he entered his notice of appeal in open court.

II. Jurisdiction

This court has jurisdiction to consider Defendant's appeal under N.C. Gen. Stat. §§ 7A-27(b)(1) (2023) ("From any final judgment of a superior court . . . .") and 15A-1444(a) (2023) ("A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.").

III. Analysis

Defendant asks us to consider whether, on remand, the trial court's order closing the courtroom during the testimony of McClendon and Kendall was entered in error. Defendant maintains that: (1) the State failed to advance an overriding interest that would be prejudiced if the courtroom was kept open; (2) the trial court's findings of fact concerning the State's overriding interest were not supported by competent evidence; (3) the trial court's findings of fact concerning the State's overriding interest do not support its conclusion of law; and (4) the trial court's order was broader than necessary because it failed to consider other reasonable alternatives.

A. Standard of Review

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Rollins*, 231 N.C. App. 451, 453, 752 S.E.2d 230, 233 (2013) (citation omitted) (hereinafter, "*Rollins II*"). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (2016) (citation omitted). The trial court's findings of fact "have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*." *Rollins II*, 231 N.C. App. at 454, 752 S.E.2d at 233 (citation omitted). Our previous decisions reflect that an alleged

violation of the constitutional right to a public trial is reviewed under a *de novo* standard. *See State v. Spence*, 237 N.C. App. 367, 372, 764 S.E.2d 670, 675 (2014); *see also Miller I*, 287 N.C. App. at 662, 884 S.E.2d at 177. "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) (internal quotation marks and citations omitted). "The violation of the constitutional right to a public trial is a structural error, not subject to harmless error analysis." *State v. Rollins*, 221 N.C. App. 572, 576, 729 S.E.2d 73, 77 (2012) (hereinafter, "*Rollins I*").

B. Right to a Public Trial

"The Sixth Amendment of the United States Constitution and Article I, Section 18, of the North Carolina Constitution guarantee a criminal defendant the right to a public trial." *Miller I*, 287 N.C. App. at 662, 884 S.E.2d at 177. "[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly . . . ." *Waller*, 467 U.S. at 46, 104 S. Ct. at 2215 (citation omitted). The right to a public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270, 68 S. Ct. 499, 506 (1948).

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . .

Rollins I, 221 N.C. App. at 576, 729 S.E.2d at 77 (citations and internal quotation marks omitted).

"Although there is a strong presumption in favor of openness, the right to an open trial is not absolute." *State v. Comeaux*, 224 N.C. App. 595, 599, 741 S.E.2d 346, 349 (2012) (citations and quotation marks omitted). "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Rollins I*, 221 N.C. App. at 576, 729 S.E.2d at 77 (citations and internal quotation marks omitted). In accordance with these principles,

a trial court "may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present." N.C. Gen. Stat. § 15A-1034(a). "Additionally, the trial court may order that all persons in the courtroom 'be searched for weapons or devices that could be used to disrupt or impede the proceedings[,]' but such order 'must be entered on the record.' " *Miller I*, 287 N.C. App. at 662, 884 S.E.2d at 177 (quoting N.C. Gen. Stat. § 15A-1034(b)). Circumstances meriting closure of the courtroom, "will be rare, however, and the balance of interests must be struck with special care." *Rollins I*, 221 N.C. App. at 576, 729 S.E.2d at 77 (citations and internal quotation marks omitted).

Pursuant to *Waller*, the closure of a public trial in whole or in part must satisfy the following four-part test: (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced", (2) "the closure must be no broader than necessary to protect that interest", (3) "the trial court must consider reasonable alternatives to closing the proceeding, and" (4) "it must make findings adequate to support the closure." 467 U.S. at 48, 104 S. Ct. at 2216; *accord State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625 (1994).

1. Overriding Interest; Competent Evidence

Defendant first contends that the trial court committed error because "the State failed to advance an overriding interest that would be prejudiced if the courtroom was kept open." Defendant maintains, as to the overriding interest element of *Waller*, that "[t]he findings were not supported by competent evidence, nor were they sufficient to justify the closure." We disagree.

"[W]hen review[ing] a trial court's decision to remove certain spectators from the courtroom, . . . [the] transcript is an imperfect tool for conceptualizing the events of a trial." *State v. Register*, 206 N.C. App. 629, 635, 698 S.E.2d 464, 469 (2010) (citation and internal quotations omitted). This Court "must leave much . . . to the judgment and good sense of the judge who presides over [the trial]." *Id.* (citations and internal quotation marks omitted). To that end, "[t]he trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom." *Spence*, 237 N.C. App. at 372, 764 S.E.2d at 675 (2014) (citation omitted). In addition, "[f]indings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *State v. Salter*, 264 N.C. App. 724, 732, 826 S.E.2d 803, 809 (2019) (citation omitted). "[W]hile the trial court need not make exhaustive findings

of fact, it must make findings sufficient for this Court to review the propriety of the trial court's decision to close the proceedings." *Rollins I*, 221 N.C. App. at 579, 729 S.E.2d at 79 (citation omitted).

On remand, the trial court's findings of fact were made pursuant to a battery of competent evidence including: (1) nine exhibits from the State; (2) photographs from Defendant's social media demonstrating intimidation; (3) the "violent nature" of the charges; (4) "the relatively young age of the witnesses [and] victims"; (5) "concerns" of the testifying witnesses and their parents; (6) the prior intimidating conduct of Defendant at his bond hearing; and (7) the prior intimidating conduct of members of the gallery during Kendall's testimony. Based on these findings, the trial court concluded that "the State had an overriding interest in having its witnesses and victims in cases testify, and be safe while doing so–which is likely prejudiced if there is intimidation, or unauthorized recording of court proceedings occurring."

The exhibits introduced by the State, included in the trial court's findings of fact, demonstrated that Defendant had previously made threats to potential witnesses on three occasions:

> State Exhibit [#]5 are several photos . . . with the Defendant flashing gang signs, and the caption underneath . . . "Let him keep on talking he's a dead man . . . ."
>
> State Exhibit #6 is another picture of the Defendant with his hands in a clawing pose, with the same caption of "Let him keep on talking he's a dead man . . . ."
>
> State Exhibit #7 is a pair of pictures, one of which is the Defendant with a mask, flashing a gang sign, with stacks of cash in his hands and all around him while sitting on a staircase, along with a different picture of three individuals (not including the Defendant) – one with his hands over his ears, one with hands over his eyes, and one making a shushing gesture, indicating the Court something along the lines of hear nothing, say nothing, see nothing[.]
>
> State Exhibit #8 is a pair of pictures with the Defendant flashing gang signs, with a caption reading "I'ma Pull Up In Style, We Gon Do A Drive By In The Wraith" and displaying a countdown clock with the caption "Trial Date" and showing hours, minutes, and seconds[.]

The trial court found that "[a]s a whole, these social media materials with multiple images of guns and allusions to violence are potentially

intimidating, and certainly would seem concerning to a potential victim and . . . witness taking the stand." When viewing these exhibits in conjunction with the other findings made by the trial court, there is competent evidence on the record to warrant the conclusion that there were genuine safety concerns for the testifying witnesses. Contrary to Defendant's assertion, this evidence is competent because "a reasonable mind might accept" these photos and other evidence "as adequate to support the finding." *Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176 (citation omitted).

For example, the trial court found that:

> [D]uring a prior hearing, someone present in the audience had taken a video of the witness . . . Kendall on the stand and put in on a social media website subsequently. This according to the State had led the witnesses and their parents to express concerns about their personal safety and testifying in the trial.

A reasonable mind might accept this as being adequate to support the finding because being filmed while testifying will likely prejudice the testimony that a witness is willing to give out of fear for their safety; especially when coupled together with the intimidating nature of the social media posts previously described. *See Comeaux*, 224 N.C. App. at 601, 741 S.E.2d at 350 (finding an overriding interest on behalf of the State where the defendant's wife "engaged in behavior designed to intimidate the minor victim" while the minor victim was giving testimony). When discussing this previous incident, counsel for the State noted that Kendall "was concerned about" being filmed and it "bothered him." Further, at the pretrial hearing, counsel for the State provided that when speaking with the witnesses and their family members, they expressed concerns for their safety while testifying:

> In speaking to our witnesses last week, in discussing this matter coming up this week for trial, there was concern by them as well . . . by the family, the dad did most of the talking, Mr. Chris Kendall, about the safety and well-being of his family if any of them, specifically the boys, testify in this matter. And I know the Court is an open forum. It's supposed to be open. But, Judge, we would ask that you would close it based on that, based on the concerns that they have, concerns that I have based on what they say about their safety. . . . [T]here is concern that might happen again as far as somebody posting something,

> recording something, them being intimidated as far as coming forward and being able to testify openly and truthfully in this matter.

Shortly after, counsel for the State added:

> We would state that we have in that the interests of our witnesses being safe outside of the courtroom as well as being . . . able to go forward with this case without there being any type of intimidation of them while they are possibly on the stand is the prejudice that we are trying to overcome or want to overcome.
>
> . . . .
>
> But, again, the main thing, Judge, is for their safety. They are concerned about their safety as far as testifying in this matter, like I said.

Contrary to Defendant's urging, the State adequately advanced the overriding interest of witness safety, and that interest was likely to be prejudiced by the intimidation tactics of Defendant and members of the gallery filming. Accordingly, the trial court adhered to the first and fourth *Waller* elements in reaching its decision on remand. 467 U.S. at 48, 104 S. Ct. at 2216. Moreover, the competent findings in the trial court's order adequately support its conclusion—that the State had an overriding interest in having its witnesses and victims testify, which is likely prejudiced if there is intimidation or unauthorized recording of court proceedings occurring. *Rollins II*, 231 N.C. App. at 453, 752 S.E.2d at 233.

Defendant further contends that the trial court's findings were not supported by competent evidence because neither of the witnesses themselves testified to being fearful; rather, these assertions were made by the prosecutor. Defendant cites non-binding case law to advance his proposition. *See State v. Turrietta*, 2013-NMSC-036, 308 P.3d 964 (2013); *see also Longus v. State*, 416 Md. 433, 7 A.3d 64 (2010); *see also Woods v. Kuhlmann*, 977 F.2d 74 (2d Cir. 1992); *see also Guzman v. Scully*, 80 F.3d 772 (2d Cir. 1996); *see also United States v. Simmons*, 797 F.3d 409 (6th Cir. 2015). In his brief, Defendant contends that "concerns for safety have to be specific and be based on something more than a prosecutor's perfunctory statement . . . ." We disagree.

Upon review of our case law, "in certain pretrial motions, 'evidence at the hearing may consist of oral statements by the attorneys in open court in support and in opposition to the motion . . . .' " *State v. Williams*, 232 N.C. App. 152, 165, 754 S.E.2d 418, 427 (2014) (citation

omitted) (ellipses in original), *disc. rev. denied and appeal dismissed*, 367 N.C. 784, 766 S.E.2d 846 (2014). In *Williams*, 232 N.C. App. at 160, 754 S.E.2d at 424, our Court was faced with the same task of determining whether the trial court made the requisite findings to support its decision to close the courtroom under *Waller*. The defendant similarly contended that the findings of fact were not supported by competent evidence "because they were based solely upon the prosecutor's arguments at the . . . hearing." *Id.* at 165, 754 S.E.2d at 426. In response, the Court determined that a pretrial motion to close a courtroom "can be disposed of on affidavit or [by] representations of counsel." *Id.* at 165, 754 S.E.2d at 427 (citations omitted); N.C. Gen. Stat. § 15A-952 (2023). The Court reasoned as follows:

> In *Pippin*, we noted that the Official Commentary to N.C. Gen. Stat. § 15A-952, a statute addressing pretrial motions, specifically provides that " 'pretrial motions . . . can be disposed of on affidavit or representations of counsel.' " 72 N.C. App. at 397, 324 S.E.2d at 907. We believe the same is true here given that the State's motion to temporarily close the courtroom was a pretrial motion. Thus, even though the . . . hearing took place well after the trial ended, it was simply a rehearing of the original motion, and—for this reason—we believe that N.C. Gen. Stat. § 15A-952 is applicable. As such, the trial court did not err in basing its findings . . . on the prosecutor's arguments.

Williams, 232 N.C. App. at 165–66, 754 S.E.2d at 427. For the reasons noted in *Williams*, Defendant's assignment of error is overruled. *Id.*

2. No Broader Than Necessary; Reasonable Alternatives

Defendant next contends that the closure was broader than necessary because banning cell phones would have addressed the State's concerns. Defendant submits that since this reasonable alternative was available, the trial court's order on remand was broader than necessary. We disagree.

The trial court adequately adhered to the second and third *Waller* elements by ensuring that closure of the courtroom was no broader than necessary and *considering* reasonable alternatives. *See Bell v. Jarvis*, 236 F.3d 149, 169 (4th Cir. 2000) ("*Waller* counsels trial courts to consider alternatives to a complete closure of a public proceeding. But . . . *Waller* does not require a trial court . . . to invent and reject alternatives to the proposed closure."); *see also Williams*, 232 N.C. App. at 167, 754 S.E.2d at 428 ("[T]he trial court's supplemental findings do indicate

that it *considered* these options. *Waller* does not require more."). The trial court noted the importance of having the family members of Defendant present while testimony was being elicited from McClendon and Kendall. Thereby, it considered and ordered the reasonable alternative of allowing "direct relatives of [Defendant] to stay in the courtroom during those two witnesses." *Williams*, 232 N.C. App. at 167, 754 S.E.2d at 428. More importantly, the trial court only closed the courtroom during the testimony of two witnesses—McClendon and Kendall—to counter the likely prejudice at hand. The trial court's decision was therefore narrowly tailored to achieve the State's overriding interest of witness safety. *See Waller*, 467 U.S. at 45, 104 S. Ct. at 2215 ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."). Further discounting Defendant's argument on this basis, even after the trial court banned cell phones in the courtroom, one of Defendant's relatives "still had possession of one during [Kendall's] testimony." Accordingly, the trial court appropriately considered the second and third *Waller* elements in rendering its decision on remand. *Id.* at 48, 104 S. Ct. at 2216.

IV. Conclusion

Our review leads us to hold that the trial court's order, on remand, complied with the requirements set forth in *Waller*, 467 U.S. at 48, 104 S. Ct. at 2216. The order contained findings of fact supported by competent evidence, and those findings, in turn, adequately underpin its conclusion of law. *Rollins II*, 231 N.C. App. at 453, 752 S.E.2d at 233.

AFFIRMED.

Judges HAMPSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
TELLY SAVALES PARKER

No. COA24-230

Filed 19 March 2025

1. Criminal Law—prosecutor's closing argument—references to not guilty plea and cross-examination of victim's mother—not grossly improper

In a trial for murder and possession of a firearm by a felon, brought after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, where the victim's mother gave eyewitness testimony identifying defendant as her son's shooter, the trial court did not err in declining to intervene ex mero motu during closing arguments when the prosecutor stated that defendant "not only refuse[d] to take responsibility" but also "attacked," "harassed," and "yelled at" the victim's mother when cross-examining her. Taken together, these references to defendant's plea of not guilty and cross-examination of the mother were not grossly improper, since they came after defendant attacked the validity of the mother's testimony during his closing argument, and therefore they could be considered part of a strategy to restore the mother's credibility.

2. Criminal Law—prosecutor's closing argument—reference to co-defendant's plea deal—possible misstatement of law—no prejudice shown

In a trial for murder and possession of a firearm by a felon, brought after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, where a co-defendant (a member of the group that accompanied defendant to the home) testified for the State after entering a plea deal that reduced his initial charge of first-degree murder to involuntary manslaughter, the trial court did not err in declining to intervene ex mero motu during closing arguments when the prosecutor—in referring to the co-defendant's plea deal—described manslaughter as a lesser-included offense of second-degree murder. Even presuming that the prosecutor misstated the law, the trial court provided curative instructions to the jury distinguishing between first-degree and second-degree murder, as well as instructions regarding how to evaluate the testimony of a witness who had secured a plea deal from the State.

3. Constitutional Law—effective assistance of counsel—timely objection to line of witness questioning—no other action taken—no prejudice shown

In a trial for murder and possession of a firearm by a felon after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, defendant did not receive ineffective assistance of counsel where his attorney objected on Fifth Amendment grounds after the prosecutor questioned a police detective about defendant's silence when surrendering himself to law enforcement. Although defendant's attorney raised the objection fairly late into the line of questioning, it was still a timely objection, which the court sustained. Further, although the attorney neither moved to strike the line of questioning from the record nor requested a curative instruction regarding the detective's testimony—a choice that may have been part of a reasonable trial strategy—these omissions did not prejudice defendant where the State presented overwhelming evidence that he committed the charged crimes.

4. Sentencing—second-degree murder—sentenced as Class B1 felony—supported by jury verdict

After defendant was convicted of second-degree murder for going to a young man's home and shooting him in front of the man's mother and five-year-old brother, the trial court properly imposed a Class B1 sentence where the evidence at trial only supported one of the two theories of malice identified in N.C.G.S. § 14-17(b)—in this case, the malice attributed to Class B1 felonies (requiring intent to harm) and not the malice attributed to Class B2 felonies (involving reckless behavior or inherently dangerous acts)—thereby removing any question as to whether the jury rendered an ambiguous verdict. Additionally, a Class B1 sentence was appropriate where the jury found as an aggravating factor that defendant committed the crime in the presence of a minor.

Appeal by defendant from judgment entered 3 February 2023 by Judge L. Lamont Wiggins in Wilson County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Isham Faison Hicks, for the State.

Michele Ann Goldman, Attorney at Law, by Michele Ann Goldman, for the defendant-appellant.

TYSON, Judge.

Telly Savales Parker ("Defendant") appeals from judgments entered upon a jury's verdicts finding him guilty of second-degree murder and possession of a firearm by a felon. We find no error.

I. Background

Defendant shot and killed twenty-one-year-old Amaru Carroll-Lee ("Lee") on the evening of 2 May 2020. Lee had attacked Defendant's son on 1 May 2020. Defendant was upset and sought retribution.

Lee lived with his mother and five-year-old brother. Defendant and several others went to Lee's home. A man in the group knocked on Lee's mother's door and asked her if she knew about any altercations between her son and Defendant's son. Lee's mother explained she was unaware of any altercations, but a man in the group accused her of lying. A few minutes later, the same man who had accused her of lying returned to her door along with Defendant. Defendant and the man pushed their way into the home. Defendant brandished a weapon.

Lee came out of his bedroom and was standing next to his mother when he was shot. His younger brother was also present. After the shooting, Defendant said, "I had to do what I had to do for my son."

Defendant was indicted for first degree murder, first degree burglary, and possession of a firearm by a convicted felon on 12 April 2021. A trial was held on 30 January 2023.

The State called numerous witnesses. Among them was Lee's mother, who testified she had seen Defendant with a gun prior to the shooting, and Defendant was the one who had shot Lee during the confrontation inside her home. Defense counsel, on cross examination, attempted to impeach Lee's mother by highlighting discrepancies between what she had testified to in open court and the notes taken by the detective, who had interviewed her.

The State additionally called for the testimony of one of the other men involved in the encounter, Terry Parker, who had entered into a plea deal with the State. As a part of his plea deal, the witness' initial charge of first-degree murder was reduced to involuntary manslaughter. During cross examination, Defendant's counsel attempted to impeach Terry Parker's character by questioning him about the specifics of his plea deal and how it had reduced his charge and sentence.

Detective Bradshaw ("Det. Bradshaw") also testified. During direct examination, the prosecutor asked Det. Bradshaw about what had occurred when Defendant had surrendered himself to police. During the questioning, the prosecutor asked Det. Bradshaw whether Defendant had spoken to police officers. Defendant's counsel objected to the question for impermissibly commenting on Defendant's silence, and the objection was sustained.

In closing statements, the prosecutor attempted to rehabilitate Lee's mother's testimony by showing video footage of Lee's mother positively identifying Defendant as the man who shot her son within a few hours of the incident. The prosecutor also referenced the manner in which Lee's mother was questioned during cross examination, saying she was "attacked," "harassed," and "yelled at." In doing so, the prosecutor also referenced Defendant's not guilty plea. These comments occurred without objection from defense counsel and without intervention or correction from the trial judge.

At the conclusion of closing arguments, the trial court delivered pattern jury instructions about Defendant's decision not to testify, the jury evaluating a witness's credibility, evaluating testimony from witnesses who testified pursuant to an agreement with the State for a charge reduction, first-degree murder where a deadly weapon was used, with the lesser-included of second-degree murder, first-degree burglary, with the lesser-included crimes of second-degree burglary and felonious breaking and entering, and how the jury may find the presence of an aggravating factor, if they find the crime was committed in the presence of a person under the age of eighteen.

The jury returned verdicts of guilty for second-degree murder and possession of a firearm by a convicted felon. The jury also found the presence of the aggravating factor of the presence of a minor for the second-degree murder conviction. The jury acquitted Defendant of first-degree burglary or any of its lesser-included offenses. The trial court stated the jury had convicted Defendant of a Class B1 Felony and sentenced him accordingly.

Defendant was sentenced as a prior record level III offender in the aggravated range to a minimum of 397 months and a maximum of 489 months imprisonment for his second-degree murder conviction. He was also sentenced to a consecutive minimum term of 17 months and a maximum of 30 months for his conviction of possession of a firearm by a convicted felon, which was in the presumptive range and set to run upon completion of Defendant's sentence for second-degree murder. Defendant appealed in open court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1), 15A-1444 (2023).

III. Issues

Defendant asserts multiple errors at trial. First, Defendant asserts the trial court erred by failing to intervene *ex mero motu* during the State's closing arguments. The Defendant also asserts, in the alternative, his counsel's failure to object during the State's closing arguments constitutes ineffective assistance of counsel. Finally, Defendant asserts the trial court erred in sentencing him to a Class B1 sentence for second-degree murder because of a lack of support for such a lengthy sentence in the jury's verdicts.

IV. Failure to Intervene *Ex Mero Motu*

Defendant argues the trial court erred by not intervening *ex mero motu* during the State's closing argument. In the alternative, he asserts he had received ineffective assistance of counsel for the trial counsel's failure to object during closing arguments. As part of his ineffective assistance of counsel claim, he argues his counsel was deficient by failing to object to certain portions of the State's cross-examination and closing.

A. Standards of Review

> The standard of review when a defendant fails to object at trial is whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." In determining whether the statement was grossly improper, we must examine the context in which it was given and the circumstances to which it refers.

State v. Trull, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998) (internal citations omitted). We first review the transcript to determine if the State's closing arguments are so grossly improper to be prejudicial.

For review of Defendant's ineffective assistance of counsel claim, we apply a two-pronged analysis:

> First, the defendant must show his counsel's performance was deficient, such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Second, the defendant must show counsel's alleged errors prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698.

State v. Lane, 271 N.C. App. 307, 317, 844 S.E.2d 32, 41 (2020).

B. Analysis

Defendant asserts the State prejudiced him during closing arguments by making references to Defendant's plea of not guilty, criticizing the manner in which Defendant's counsel had cross-examined Lee's mother, and equating his trial to the charges the State's co-defendant witness had pled guilty to. We review each component in turn for purported and prejudicial errors by the trial court before proceeding to the claim of ineffective assistance of counsel.

1. Reference During Closing Argument to the Defendant's Cross-Examination of Carroll-Lee's Mother and Defendant's Not Guilty Plea

[1] In closing, the prosecutor for the State said:

> Ladies and gentlemen of the jury, we are here because the Defendant not only refuses to accept responsibility, the consequences of his actions, we are here because he has the audacity, the audacity, to look that mother in the face, kill her son in front of her and come to court this week and say it's her fault. The audacity.
>
> Ladies and gentlemen, you heard and you saw her attacked on that stand. She was harassed. She was yelled at. A lie can shout as loud as it wants. A lie can bully. It can be loud. It can be aggressive. It can say look over here. Look over there. Maybe this. But the truth is quiet. The truth has been sitting with you this week. The truth has been sitting over there. You heard the truth when that mom told you how her son was executed in front of her. You heard the truth in her sobs. You saw the truth in her tears. And no amount of shouting will change that.

It is wholly impermissible to reference a criminal defendant's exercise of their right to remain silent during trial or closing argument. *State v. Grant*, 293 N.C. App. 457, 458, 900 S.E.2d 408, 410 (2024) (citing N.C. Gen. Stat. § 8-54 (2023)). If the State does reference a defendant's silence, the trial court can and should take measures to cure such comments. *See id.*, 293 N.C. App. at 461, 900 S.E.2d at 412 (citing *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993)).

"The prosecutor may, however, appropriately respond to comments critical of the State's investigation and witnesses made by defense counsel in closing argument in order to restore the credibility of the State's witnesses, . . . and to 'defend [the prosecutor's] own tactics, as well as those of the investigating authorities, when challenged.' " *Trull*, 349 N.C. at 453, 509 S.E.2d at 194 (citations omitted).

Here, the challenged portions of the State's closing argument came after Defendant had delivered his closing arguments. In those closing arguments, Defendant attacked the validity of Lee's mother's testimony. The State's closing arguments were not prejudicial comments on Defendant's execution of his right to remain silent, but could be considered instead a defense of the State's strategy and "to restore the credibility of the State's witnesses." *Id.*

2. Reference to Witness's Plea Deal and Potential Misstatement of Law

[2] In its closing arguments, the State made the following claim regarding Terry Parker's acceptance of a plea deal:

> [T]here's a reason why Terry pled to manslaughter.
>
> > Under the law if you play a role in someone getting hurt, then you're responsible even if you didn't do the hurting, and that makes sense because if a pack of wolves comes together, then they share in the kill, and we apply that through our laws as well. So Terry has made it seem like he got some sweetheart deal. What Terry pled guilty to is actually what he's legally guilty of. He didn't plead to anything that he's not guilty of. So manslaughter is a charge when you are responsible for someone's death but you didn't commit first degree murder, so that's the difference here. So what he pled to is what he is literally guilty of.

The State was explaining manslaughter, the charge Terry Parker pled guilty to, is a lesser-included charge to second-degree murder. Presuming, *arguendo*, this was a misstatement of law, the trial court

provided curative instructions to the jury about what constitutes both first-degree and second-degree murder. *Grant*, 293 N.C. App. at 461, 900 S.E.2d at 412. Furthermore, the trial court also provided the jury with instructions regarding how to evaluate the testimony of a witness who had secured a plea deal from the State.

The jury is presumed to follow the law as provided in the instructions, and the trial court's instructions empowered the jury to evaluate the witness' credibility regardless of any purported misstatement of law. *State v. Young*, 291 N.C. 562, 573, 231 S.E.2d 577, 584 (1977) ("Ordinarily, the effect of improper argument may be removed by curative instructions by the trial court, *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970), since it is presumed that jurors will understand and comply with the instructions of the court." (citing *State v. Long*, 280 N.C. 633, 187 S.E.2d 47 (1972))). Defendant's argument is overruled.

3. Ineffective Assistance of Counsel

[3] The Sixth Amendment of the Constitution of the United States guarantees the right to counsel for all criminal defendants. *State v. Oglesby*, 382 N.C. 235, 242, 876 S.E.2d 249, 256 (2022). In protecting this right, we have adopted the two-prong test of *Strickland*. *Id.* The test is as follows:

> 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).

Because we hold the trial court did not err by failing to intervene *ex mero motu* during portions of the State's closing argument, we do not address whether his counsel's failure to object during those portions of the State's closing argument constituted ineffective assistance of counsel. *Id.*

We now address Defendant's IAC claim regarding the State's questioning of Det. Bradshaw. In this instance, the witness was a police detective, who had investigated the case. The State's district attorney asked:

Q: Were you present when he was arrested?

A: I was.

Q: When he was arrested did he say anything?

A: He did not.

Q: Did he make any statements?

A: He did not.

Q: Did the Defendant indicate that he wanted to talk to you at all?

A: He did not.

Q: What did he do?

A: Him turning himself in was arranged with his attorney, Mr. Sallenger, so they came to the police department at a prearranged time.

Q: Okay. So he was there with his lawyer?

A: Yes.

Q: And neither of them wished to speak to you about this matter?

A: No.

Q: At any time between when the Defendant was arrested and today, have you spoken to the Defendant?

A: No.

This line of questioning was interrupted by Defendant's counsel:

MR. SALLENGER: Objection, Your Honor. My client, under our constitution, under the Fifth and Sixth Amendments to the constitution, has an absolute right not to make a statement. That is our law. We believe that this line of questioning is attempting –

THE COURT: Objection is sustained.

Defendant asserts that defense counsel acted deficiently by raising the objection later in the line of questioning, and for not making a motion to strike the line of questioning from the record nor asking for curative instructions.

For the first prong, we evaluate whether the conduct of Defendant's trial counsel was reasonable by the norms of the profession. *State v. Todd*, 369 N.C. 707, 711, 799 S.E.2d 834, 838 (2017). Defendant asserts that the objection in question was not timely. Additionally, Defendant now asserts his trial counsel should have also moved to strike and requested curative instructions. We evaluate these assertions with a rebuttable deference to the counselor's trial strategy. *Oglesby*, 382 N.C. at 243, 876 S.E.2d at 256.

Counsel's objection was made in the jury's presence, while the witness was still present on the witness stand. Presuming it may have been made more immediately, it was still timely. *See State v. McIver*, 285 N.C. App. 205, 211-12, 876 S.E.2d 857, 862 (2022) (discussing preservation issues).

As to the lack of curative instruction, the record supports a conclusion this may have been a reasonable trial strategy choice. *See Strickland*, 466 U.S. at 699, 80 L. Ed. 2d at 701-02. At trial, defense counsel focused their efforts on discrediting the State's witnesses and denying Defendant had the murder weapon in his possession at the time of Lee's homicide. Defense counsel properly ceased the State's offensive line of questioning, and he may have wished to not draw further attention to the issue. These conclusions are not dispositive. Ultimately, we turn to the second prong.

Presuming Defendant's trial counsel's decision to not move to strike and ask for curative instruction was not reasonable, trial counsel's omission did not prejudice Defendant. The State provided overwhelming evidence through the testimony of two eyewitnesses to the shooting, the detective who had interviewed Lee's mother, as well as other witnesses, who had interacted with Defendant. The results of the forensic pathology were also admitted. Defendant has failed to show the properly objected-to testimony in question without additional motions was prejudicial to award a new trial. Defendant's IAC claim lacks merit and is overruled.

V. The Sentence Imposed

A. Standard of Review

"We review *de novo* whether the sentence imposed was authorized by the jury's verdict." *State v. Lail*, 251 N.C. App. 463, 471, 795 S.E.2d 401, 408 (2016) (internal citations omitted).

B. Analysis

[4] North Carolina's statutes state Class B1 and B2 felonies are to be differentiated by the type of malice involved. N.C. Gen. Stat. § 14-17(b) (2023). This differentiation is as follows:

> Any person who commits second degree murder shall be punished as a Class B1 felon, except that a person who commits second degree murder shall be punished as a Class B2 in either of the following circumstances:
>
> (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. . . .

N.C. Gen. Stat. § 14-17(b) (2023).

We have held ambiguous verdicts, using the same pattern jury instruction as used in the case at bar, cannot support a class B1 sentence. *State v. Mosley*, 256 N.C. App. 148, 149, 153, 806 S.E.2d 148, 366-67, 369 (2017). In doing so, this Court stated:

> [When] there [i]s evidence presented which would . . . support[] a verdict on second degree murder on more than one theory of malice, and because those theories support different levels of punishment under N.C. Gen. Stat. § 14-17(b), the verdict rendered . . . [i]s ambiguous. When a verdict is ambiguous, 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.

Id. at 153, 806 S.E.2d at 369. In *Mosley*, we determined there was adequate evidence presented to satisfy the two forms of malice as outlined in N.C. Gen. Stat. § 14-17(b). *Id.* at 153, 806 S.E.2d at 368-69.

In the present case, there is no such evidence. The State presented substantial evidence tending to show Defendant was in unlawful possession of a deadly weapon and was intent on causing harm and revenge, saying afterwards, he "had to do it" for his son. The State's case was predicated on first-degree murder, burglary, and illegal possession of a firearm by a felon. The jury also found the aggravating factor of the crime was committed in the presence of a person under the age of eighteen, the five-year-old brother of the victim.

The State did not present evidence, nor did it make any alternative argument, indicating Defendant was engaged in an inherently dangerous act or was acting recklessly. Defense counsel did not argue Defendant was acting reckless, but instead argued throughout the course of the trial Defendant did not have possession of a gun when Lee was shot. Following our analysis in *Mosley*, we hold the trial court could conclude an aggravated B1 sentence on the jury's verdict is supported under these facts. *Id.*

VI. Conclusion

In the absence of an objection, the trial court did not prejudicially err by failing to intervene *ex mero motu* and interject during the State's closing argument. We again strongly caution the State against comments on a defendant's silence, right to counsel, and assertion of his constitutional rights during closing arguments. *Grant*, 293 N.C. App. at 458, 900 S.E.2d at 410 (citing N.C. Gen. Stat. § 8-54 (2023)).

The trial court did not err in imposing a Class B1 sentence. N.C. Gen. Stat. § 14-17(b) (2023). Defendant has failed to demonstrate he received ineffective assistance of counsel at trial or prejudice. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693.

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

NO ERROR.

Judges WOOD and MURRY concur.

STATE OF NORTH CAROLINA
v.
DAVID LEE ROWLAND

No. COA24-274

Filed 19 March 2025

Drugs—maintaining a dwelling to keep controlled substances—evidence of residency

The trial court properly denied defendant's motion to dismiss a charge of keeping or maintaining a dwelling for the purpose of keeping or selling controlled substances where the State presented substantial evidence from which a jury could find the element of the offense that defendant kept or maintained a dwelling, including: defendant's admission that he had "been" at his parents' home for more than fifteen years, defendant's identification of an upstairs bedroom in his parents' house as his bedroom, a piece of mail with defendant's name and his parents' address on the dresser of his bedroom, defendant's admission to having used heroin "on and off" for more than twenty years, and defendant's acknowledgment that he used heroin after being asked about the heroin (approximately sixty-nine grams) and drug paraphernalia that had been found in his bedroom.

Appeal by Defendant from judgments entered 16 March 2023 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 28 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Yvonne B. Walker, for the State-Appellee.

Jarvis John Edgerton, IV, for Defendant-Appellant.

COLLINS, Judge.

Defendant David Lee Rowland appeals from judgments entered upon guilty verdicts of various crimes, including keeping or maintaining a dwelling for the keeping or selling of controlled substances. Defendant argues that the trial court erred by denying his motion to dismiss the charge of keeping or maintaining a dwelling. We find no error.

I. Background

On 7 June 2021, a grand jury indicted Defendant on charges of possession of a firearm by a felon, trafficking in heroin by possession, and keeping or maintaining a dwelling. On 13 March 2023, Defendant's case came on for jury trial. The evidence at trial tended to show the following: Detectives with the Raleigh Police Department received information from an informant that Defendant was "selling bundles of heroin from his residence," which prompted them to initiate an investigation and conduct "trash pulls at the defendant's residence." On 22 January and 5 February 2021, the detectives searched the trash left outside Defendant's parents' home, wherein they discovered "suspected empty heroin bindles" and documents bearing Defendant's name and parents' address.

On 11 February 2021, the detectives executed a search warrant at Defendant's parents' home. During the execution, the detectives searched Defendant's bedroom and found one handgun; three "long guns"; 3,299 "bindles" or "little blue envelopes" of heroin; a digital scale; and a piece of mail addressed to Defendant at his parents' address. At trial, a forensic chemist presented expert testimony that the substance found in Defendant's room was approximately sixty-nine grams of heroin. Detective Martucci testified that the amount of heroin found in Defendant's bedroom was not consistent with personal use.

Defendant gave a voluntary interview to law enforcement on 11 February 2021, which was recorded and played for the jury. When asked by a detective how long he had stayed at his parents' home, Defendant responded, "I have been there for, uh, on and off since 2005." The detective then asked Defendant, "You said your room is upstairs to the left, right?" and Defendant replied, "Yes."

At the close of the State's evidence, Defendant moved to dismiss all charges and argued specifically in part that, as to the charge of keeping or maintaining a dwelling, the State failed to meet its burden to show that "the dwelling has been kept or maintained over time for purposes of controlled substances." The trial court denied Defendant's motion. The jury found Defendant guilty on all charges. On 16 March 2023, the trial court entered two Judgments and Commitments, sentencing Defendant to two consecutive sentences totaling 240 to 310 months' imprisonment. Defendant gave oral notice of appeal in open court on 16 March 2023 and written notice of appeal on 20 March 2023.

II. Discussion

Defendant argues that the trial court erred by denying his motion to dismiss the charge of keeping or maintaining a dwelling because there

was insufficient evidence of the "keeping or maintaining" element of the offense.

A. Standard of Review

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Crockett*, 368 N.C. 717, 720 (2016) (quotation marks and citations omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Miller*, 363 N.C. 96, 99 (2009) (quotation marks and citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Austin*, 279 N.C. App. 377, 382 (2021) (quotation marks and citation omitted). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Crockett*, 368 N.C. at 720 (citation omitted).

B. Element of Keeping or Maintaining

N.C. Gen. Stat. § 90-108(a)(7) governs the crime of keeping or maintaining a dwelling and provides that it is unlawful for any person

> [t]o knowingly keep or maintain any . . . dwelling house . . . or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article.

N.C. Gen. Stat. § 90-108(a)(7) (2023). To survive a motion to dismiss, the State must present substantial evidence that a defendant did (1) intentionally (2) keep or maintain (3) a dwelling (4) which is used for the keeping or selling (5) of controlled substances. *State v. Mitchell*, 336 N.C. 22, 31 (1994), *overruled in part on other grounds by State v. Rogers*, 371 N.C. 397 (2018). The element of keeping or maintaining "refers to possessing something for at least a short period of time . . . for a certain use." *Rogers*, 371 N.C. at 402 (a receipt found within the vehicle bearing defendant's name and a date from two and a half months prior to his arrest was substantial evidence that defendant "kept or maintained" the vehicle pursuant to N.C. Gen. Stat. § 90-108(a)(7)).

While mere *occupancy* of a property, without more, will not support the "keeping or maintaining" element, "evidence of *residency*, standing

alone, is sufficient to support the element of maintaining." *State v. Spencer*, 192 N.C. App. 143, 148 (2008) (emphasis added and citations omitted) (defendant's admission that he "resided at the home . . . was substantial evidence that defendant maintained the dwelling"); *see State v. Moore*, 188 N.C. App. 416, 424 (2008) (evidence supported residency where "defendant used, treated, and perceived the dwelling as his residence and not merely as a place he occupied . . . from time to time" (quotation marks and citation omitted)). Proof of residency may be established by a defendant's admission. *Spencer*, 192 N.C. App. at 148. Proof of residency may also be shown through circumstantial evidence. *See State v. Williams*, 242 N.C. App. 361, 371-72 (2015) (evidence supported residency where the defendant received mail at the house, kept personal effects at the house, and referred to the property as "his house").

Here, the State presented substantial evidence that Defendant kept or maintained a dwelling, because the evidence shows that Defendant was a resident of his parents' home. First, Defendant admitted during his interview with detectives that he had "been" at his parents' home "on and off since 2005," a period of more than fifteen years. This admission of residency, "standing alone, is sufficient to support the element of maintaining." *Spencer*, 192 N.C. App. at 148 (citations omitted).

Furthermore, the State presented the following evidence that Defendant "used, treated, and perceived [his parents' home] as his residence and not merely as a place he occupied . . . from time to time," *Moore*, 188 N.C. App. at 424 (quotation marks and citation omitted): When directly questioned by a detective, Defendant admitted that an upstairs bedroom in his parents' home was his room; detectives found a piece of mail on a dresser in Defendant's bedroom bearing his name and parents' address; detectives found a basket of men's clothing in Defendant's bedroom, along with "bindles and bundles of . . . heroin" inside a grocery bag that was located inside of the basket; detectives "found a Newport cigarette box that contained bindles of heroin," a digital scale, and a package of Narcan on Defendant's bedside table, and they "found a Smith & Wesson handgun on [Defendant's] bed"; Defendant admitted during his police interview that he had used heroin "on and off" for more than twenty years; and when questioned by a detective about the heroin found in his bedroom, Defendant responded "uh-huh" to using the heroin but denied selling it. This evidence further supports that Defendant kept or maintained a dwelling for the purposes of keeping or selling controlled substances. *See State v. Frazier*, 142 N.C. App. 361, 365-66 (2001).

As Defendant admitted to residing at his parents' home on and off for more than fifteen years, and there was abundant other evidence that

Defendant resided at his parents' home, the State presented substantial evidence of the "keeping or maintaining" element of N.C. Gen. Stat. § 90-108(a)(7).

III. Conclusion

Because the State presented substantial evidence that Defendant kept or maintained a dwelling for the purposes of keeping or selling controlled substances, the trial court properly denied Defendant's motion to dismiss.

NO ERROR.

Judges WOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
JOSHUA DUANE WILSON

No. COA24-442

Filed 19 March 2025

Sentencing—prior record level—calculation—point erroneously assigned to exempt traffic violation—prejudicial error

Where the trial court miscalculated defendant as a prior record level (PRL) III based on 6 points by erroneously assigning one point to defendant's prior conviction of driving while license revoked for impaired driving, a traffic offense that is exempt from inclusion in a prior record level calculation pursuant to N.C.G.S. § 15A-1340.14(b)(5), the error was prejudicial—even though his sentence was within the presumptive range of either a PRL II or PRL III—because the minimum sentence for a PRL II is lower than that for a PRL III and, thus, defendant could have received a lesser sentence if the correct PRL had been calculated. Defendant's judgment was vacated and the matter was remanded for the trial court to sentence defendant as a PRL II based on 5 points.

Judge MURRY dissenting.

Appeal by defendant from judgment entered 31 October 2023 by Judge Theodore W. McEntire in Watauga County District Court. Heard in the Court of Appeals 14 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Brent D. Kiziah, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant-appellant.

DILLON, Chief Judge.

Defendant Joshua D. Wilson pleaded guilty to possession of a stolen firearm. During sentencing, the trial court determined Defendant's prior record level ("PRL") to be Level III with 6 points. And after finding a mitigating factor, the trial court sentenced Defendant to 6 to 17 months, within the PRL Level III mitigating range.

On appeal, Defendant argues that the trial court should have calculated his PRL as a Level II with 5 points. Specifically, he argues that, in calculating Defendant's PRL, the trial court erroneously assigned 1 point for a Class 1 misdemeanor conviction on driving while license revoked for impaired driving ("DWLR-Impaired Revocation"). For the reasoning below, we agree and, therefore, vacate the judgment and remand for resentencing.

I. Analysis

At the outset, we note there is a question as to whether Defendant properly gave notice of his appeal. To the extent that Defendant's notice was not sufficient to invoke jurisdiction over this appeal, we grant Defendant's petition for writ of *certiorari* to aid our jurisdiction. *See* N.C.G.S. § 7A-32(c).[1]

During sentencing, a defendant may stipulate to a prior conviction, relieving the State from its burden of producing other evidence of that conviction. *State v. Arrington*, 371 N.C. 518, 522 (2018). However, it is a question of law as to how many points to assign any said prior conviction. *Id.* at 524 ("Once a defendant [stipulates to a prior offense], the trial court then makes a legal determination by reviewing the proper classification of [said] offense so as to calculate the points assigned to that prior offense.").

For prior convictions of traffic offenses, our General Assembly has directed that a sentencing court allocate 1 point for any Class 1

1. We note that Defendant also filed a Motion for Appropriate Relief with our Court, in which he seeks the same relief that he seeks on appeal. Based on this opinion, we render his motion moot.

or A1 misdemeanor, defined as "impaired driving, impaired driving in a commercial vehicle, and misdemeanor death by vehicle, *but no[ ] . . . other misdemeanor traffic offense*[.]" N.C.G.S. § 15A-1340.14(b)(5) (emphasis added).

Here, the trial court calculated 6 points arising from Defendant's prior record, which included 1 point for his prior DWLR-Impaired Revocation conviction. On appeal, Defendant does not challenge that conviction. Rather, he correctly argues that DWLR-Impaired Revocation is an "other misdemeanor traffic offense" expressly exempted from PRL determinations. During sentencing, Defendant bound himself to only the factual stipulation of this conviction, not any legal stipulation arising from that conviction. Accordingly, we hold that the trial court should have only assigned 5 points to Defendant's prior record. As such, Defendant should have been sentenced as a PRL II, rather than a PRL III. *See* N.C.G.S. § 15A-1340.14(c)(2), (3) (defining the PRL II range as 2 to 5 points and the PRL III range as 6 to 9 points).

The State argues that any error by the trial court in sentencing Defendant as a PRL III was not prejudicial. Specifically, the State argues essentially as follows: Defendant was sentenced for a Class H felony to a minimum term of 6 months. The mitigated range for a Class H felony with a PRL III is 6 to 8 months. The mitigated range for a Class H felony with a PRL II is 4 to 6 months. *See* N.C.G.S. § 15A-1340.17(c). The minimum sentence here of 6 months is within the mitigated range for both PRL II and PRL III. Accordingly, the State reasons that Defendant cannot show prejudice.

As the State has pointed out, our Court has held that a defendant suffers no prejudice when a trial court assigns him the wrong PRL where his sentence "is within the presumptive range at the correct record level." *See*, *e.g.*, *State v. Ballard*, 244 N.C. App. 476, 481 (2015). In another case, our Court found no prejudicial error where a defendant's minimum sentence fell within both the PRL [VI] applied by the sentencing judge and the lower PRL [V] that the judge should have applied:

> The presumptive range of minimum sentences for a [PRL] V offender convicted of a Class C felony is between 101 and 127 months' imprisonment, and the presumptive range of minimum sentences for a [PRL] VI [ ] is between 117 and 146 months[.] Defendant was sentenced to a minimum of 117 months[,] which is within the presumptive range of minimum sentences for both a [PRL] V and VI offender. Therefore, the trial court's error, if present, was harmless.

State v. Harris, 255 N.C. App. 653, 663 (2017) (internal citations omitted). *See also State v. Ledwell*, 171 N.C. App. 314, 321 (2005).

However, our Supreme Court has held that a defendant *is* entitled to be re-sentenced where he was sentenced at an incorrect PRL, *even if* his sentence was within the proper PRL. *See State v. Williams*, 355 N.C. 501 (2002). In holding such, our Supreme Court reasoned that prejudice occurs because the trial court may have sentenced the defendant to less time had the court applied the correct PRL:

> Under the State's theory, 145 months falls within the range for minimum presumptive sentences for class C felonies at a prior record level V, and therefore, the trial court may have been somewhat lenient in the Crump assault case. Thus, the State contends that defendant has not suffered any harm in the sentence for the Crump assault from the trial court's error finding defendant to have a prior record level of VI. We disagree.
>
> Defendant was sentenced at an incorrect prior record level, and the trial court sentenced defendant according to this incorrect prior record level. We are not persuaded by the State's contention that defendant was not harmed *because the trial court could have sentenced defendant to lesser time for the Crump assault if the proper prior record level had been calculated.* If the trial court was lenient with regard to sentencing defendant in the Crump assault case, as the State contends, then that is for the trial court to determine, not the State. Therefore, we remand this case for resentencing on only the noncapital felony convictions at a prior record level V.

Id. at 587 (emphasis added).

Our Supreme Court's 2002 decision in *Williams* has not been overruled by that Court. And decisions from our Court holding that a defendant is *not* prejudiced do not cite to *Williams*. Accordingly, we conclude we must apply our Supreme Court's holding in *Williams* and hold that Defendant has been prejudiced. Indeed, perhaps on remand the trial court may sentence Defendant to a minimum sentence of four months, which is at the bottom of the sentencing range for a PRL II offender and which is below the six-month minimum sentence the trial court imposed on Defendant as a PRL III offender.

In conclusion, we hold that the trial court erred in assigning a point for Defendant's prior DWLR-Impaired Revocation offense and, therefore, sentencing Defendant as a PRL III. Accordingly, we vacate the judgment and remand. On remand, the trial court shall sentence Defendant as a PRL II.

VACATED AND REMANDED.

Judge WOOD concurs.

Judge MURRY dissents by separate opinion.

MURRY, Judge, dissenting.

I agree with the majority that the trial court erred when it sentenced Defendant as prior record level (PRL) III instead of a PRL II. However, I disagree that this error requires a remand for resentencing under *State v. Williams*. Accordingly, I respectfully dissent in part.

Pursuant to his plea agreement, Defendant was sentenced to 6 to 17 months suspended for 18 months of supervised probation. As part of the plea negotiation, Defendant stipulated to being a PRL III. Additionally, the State dismissed the charges of felony possession of methampheamine, misdemeanor possession of drug paraphernalia, and three traffic offenses.

On appeal, Defendant argues that the trial court erred by sentencing him as a PRL III with six points. He asserts that he would "have received lesser time" had the trial court "properly calculated" him as a PRL II with only five points. Stipulations to convictions are questions of fact left undisturbed absent an abuse of discretion; however, assignments of PRLs are questions of law reviewed *de novo*, *State v. Wingate*, 213 N.C. App. 419, 420 (2011), that "[do] not bind[ ] . . . appellate" courts. *State v. Prevette*, 39 N.C. App. 470, 472 (1979). Based on a *de novo* substitution of judgment for that of the trial court, *State v. Williams*, 362 N.C. 628, 632–33 (2008), I would hold that the sentencing error is not prejudicial because the Defendant's sentence is "still within the . . . range [of either] record level[ ]." *State v. Ballard*, 244 N.C. App. 476, 477 (2015).

Under N.C.G.S. § 15A-1443, a trial court's error prejudices a defendant "unless the appellate court finds" the resulting violation of his constitutional rights "harmless beyond a reasonable doubt," which the State bears the burden of showing. N.C.G.S. § 15A-1443(b) (2015).

> The rules for determining harmless error vary depending on whether a defendant has asserted the denial of a constitutional right or a statutory right. . . .When a defendant requests relief for the denial of a statutory right, N.C.G.S. § 15A-1443(a) places the burden of demonstrating prejudice squarely on the defendant. N.C.G.S. § 15A-1443(a). In most circumstances, satisfying this burden requires the defendant to show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

State v. King, 386 N.C. 601, 609 (2024) (internal citations omitted).

I would find that Defendant has not carried his burden of proving that a different result would have been reached had Defendant been sentenced as a PRL II instead of a PRL III.

When analyzing "improper calculations of [PRL] points," *State v. Lindsay*, 185 N.C. App. 314, 315 (2007), this Court has "repeatedly . . . held that an erroneous . . . calculation does not prejudice the defendant if [his] . . . sentence is [still] within the presumptive range at the correct record level." *Ballard*, 244 N.C. App. 476, 477 (2015).

The majority invokes *State v. Williams*, 355 N.C. 501 (2022), to assert our Supreme Court's "express[ ] reject[ion]" of harmless-error analysis of a defendant's purportedly incorrect PRL sentencing. In *Williams*, the defendant was sentenced to death and eight other non-capital sentences, each of which ran concurrently with the death sentence itself but consecutively to one another. *Id.* at 565. The Court acknowledged the trial court's failure to "sentence[ ] defendant according to [ ]his [ ]correct [PRL]." *Id.* at 587. On appeal, the State conceded the necessity of a resentencing hearing for every non-capital sentence except the contested one within an allegedly correct range for its minimum presumptive sentence. *Id.* The Court held that this outstanding sentence still prejudiced the defendant "because the trial court could have sentenced [him] to lesser time" had it properly calculated defendant's PRL. *Id.* As a result, the Court remanded all eight non-capital offenses for resentencing. *Id.* at 590.

Unlike *Williams*, Defendant's sentence does not involve intertwined sentences for which the State conceded a common prejudicial error. Defendant's sentence does not run consecutively or concurrently to any other prejudicial sentences. Further, a one-point miscalculation in PRL does not automatically prejudice a defendant under

N.C.G.S. § 15A-1443(b), thereby invalidating the judgment. Rather, N.C.G.S. § 15A-1443(b) directs "the appellate courts" to make a "find[ing]" as to whether the State has met its burden of demonstrating that the error was harmless. The Supreme Court in *Williams* was "not persuaded" that the error was harmless; the Court of Appeals in *Ballard* and *Harris* were. *Ballard*, 244 N.C. App. 476, 781 S.E.2d 75 (2015); *State v. Harris*, 255 N.C. App. 653, 662-63 (2017). I find *Ballard* and *Harris* more analogous to the present case. Both *Ballard* and *Harris* are published opinions and I would follow the precedent established regarding harmless error when analyzing PRL errors and sentencing.

In *Ballard*, this Court held that the trial court harmlessly erred when it calculated the defendant's sentence as a PRL II instead of a PRL I. This Court reasoned that a defendant's "sentence was within the presumptive range at both [the correct and incorrect] record levels," and thus "d[id] not prejudice the defendant." *Id.* at 481. Here, Defendant's mitigated 6 to 17 month sentence similarly falls "within the range" at both PRL II and III in the mitigated range. N.C.G.S. § 15A-1340.17. Our Supreme Court denied discretionary review of *Ballard*.

Additionally, in *Harris*, this Court held that the trial court's error of sentencing a defendant as the wrong PRL level was harmless because the sentence was within the correct PRL range. *Harris*, 255 N.C. App. at 663. In *Harris*, the trial court committed error in finding defendant's PRL to be a VI instead of a V. *Id.* at 663-64. The *Harris* Court noted that "precedent compel[led] [it]" to hold harmless error if the trial court's sentence stayed "within the presumptive range at the correct record level." *Id.* at 663.

> The State concedes the mathematical error in Defendant's prior record level calculation, but argues the error was harmless. *See Lindsay*, 185 N.C. App. at 315 ("This Court applies a harmless error analysis to improper calculations of prior record level points." (citations omitted)). Our precedent compels us to agree. "[T]his Court repeatedly has held that an erroneous record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct record level." *Ballard*, 244 N.C. App at 481 (citing *State v. Ledwell*, 171 N.C. App. 314, 321 (2005)); *see also State v. Rexach*, 240 N.C. App. 90, WL 1201250, at *2 (2015) (unpublished) ("An error in the calculation of a defendant's prior record level points is deemed harmless if the sentence imposed by

> the trial court is within the range provided for the correct prior record level.").

Id. (cleaned up).

I would similarly hold the trial court's error harmless because Defendant's sentence remained within the mitigated range for both PRL II and PRL III. Therefore, the trial court's error did not prejudice Defendant.

I. Conclusion

For the reasons discussed above, I would hold that the trial court's error was harmless and did not prejudice Defendant. Thus, I respectfully dissent in part.

STATE OF NORTH CAROLINA
v.
DAVID ADAM WINDSETH, DEFENDANT

No. COA24-718

Filed 19 March 2025

1. Evidence—authentication—still frames from ATM videos—business record—subset of data collected—no plain error

There was no plain error in defendant's trial for felony obtaining property by false pretenses and felony identity fraud by the admission of still photos extracted from ATM videos showing defendant withdrawing funds from his mother's account. The still photos were properly admitted as a business record where the State laid a proper foundation for the videos—to which defendant did not object—by declaring them as business records that had not been edited and that were true and correct copies of records maintained by the bank that operated the ATM, and where the proper admission of the videos impliedly included their constituent frames, which were a subset of data from the overall videos.

2. Identification of Defendants—lay opinion testimony of officer—person depicted in ATM videos—prior interactions with defendant—no abuse of discretion

The trial court did not abuse its discretion in defendant's trial for felony obtaining property by false pretenses and felony identity

theft by allowing the lay opinion testimony of a law enforcement officer that defendant was the person depicted in still frames from ATM videos who withdrew funds from defendant's mother's account. The officer had previously interacted with defendant multiple times as part of an investigation into the disappearance of defendant's mother, and those interactions gave the officer a sufficient level of familiarity with defendant's appearance to be helpful to the jury.

Appeal by David A. Windseth from judgment entered 4 January 2024 by Judge Gregory R. Hayes in Jackson County Superior Court. Heard in the Court of Appeals 11 February 2025.

Attorney General Jeff Jackson, *by Assistant Attorney General Kristin Cook McCrary, for the State.*

Attorney Stephen D. Fuller, *for Defendant–Appellant.*

MURRY, Judge.

Defendant appeals from judgment entered upon jury verdicts finding him guilty of felony obtaining property by false pretenses and felony identity fraud under N.C.G.S. §§ 14-100 and 14-113.20, respectively. For the reasons below, we affirm.

I. Background

David A. Windseth (Defendant) appeals his jury convictions for one count of felony obtaining property by false pretenses under N.C.G.S. § 14-100 and felony identity fraud under N.C.G.S. § 14-113.20. N.C.G.S. § 14-100(a) (false pretenses); *id.* § 14-113.20(a) (identity fraud).

On or about January 2022, Defendant's mother, Joanna Windseth, went missing. Sergeant Ronald E. Ferris ("officer" or "Ferris") of the Jackson County Sheriff's Office soon began investigating her disappearance. As part of the investigation, Ferris reviewed visual information about her immediate family (including Defendant) and went so far as to set up a camera just outside her driveway in July 2022. The officer contemporaneously subpoenaed Ms. Windseth's bank, Wells Fargo, for her account information in the hopes of electronically tracking her possible whereabouts. In response, Wells Fargo returned a "business records declaration" detailing this information alongside certain relevant boilerplate language:

BUSINESS RECORDS DECLARATION

I, [internal authenticator], . . . declare that I am employed by Wells Fargo . . . and . . . certify that the attached records:

A) Were prepared by personnel of Wells Fargo in the ordinary course of business at or near the time of . . . events described [there]in . . . ;[ ]

B) [Were made in] the ordinary course of business [by] Wells Fargo employees . . . with knowledge of the . . . event[ ] . . . recorded . . . [; and]

C) . . . [A]re true and correct copies of the business records as maintained by Wells Fargo.

The records produced are described as follows:

Document Type	**Account #**
. . . .	
Video ATM / DVD	XXXXXX4130
. . . .	
Video ATM / DVD	XXXXXX2831
. . . .	

I declare under penalty of perjury under the law(s) of the state of North Carolina that the foregoing is true and correct according to my knowledge and belief. Executed on . . . [1 September 2022][ ] in . . . Charlotte, [N.C.].

Upon reviewing the two ATM videos showing Defendant withdraw money from his mother's bank accounts, Ferris recognized and began searching for Defendant. The Sheriff's Office eventually found Defendant camping on 20 August 2022, at which point they discovered on his person multiple credit and debit cards belonging to his mother.

At trial, the State offered as evidence several still-shots from the videos. Officer Ferris identified Defendant as the individual withdrawing his mother's funds in these videos, both of which he testified to leaving unaltered. The officer also identified Franklin, N.C. as their locations. Defendant's counsel did not contemporaneously object to either the evidentiary authentication or testimonial admission. On 1 January 2024, the jury found Defendant guilty on both felony counts. On 5 January 2024, Defendant timely appealed to this Court.

II. Jurisdiction

This Court has jurisdiction to hear Defendant's appeal of his jury-trial convictions because they arose after he first "entered . . . plea[s] of not guilty to [the] criminal charge[s]." N.C.G.S. § 15A-1444(a) (2023).

III. Analysis

Defendant argues on appeal that the trial court plainly erred (1) by admitting ATM videos of Defendant even though the State failed to properly authenticate them and (2) by permitting Officer Ferris to offer his own lay-opinion testimony as to Defendant's identity in those videos. In the alternative, Defendant argues that his counsel's failure to object to either alleged error amounted to ineffective assistance of counsel (IAC) so egregious as to violate his right to counsel under the federal Sixth Amendment. We hold the trial court did not err for the reasons discussed below. We affirm the trial court on both counts and thus decline to reach the merits of his IAC claim.

A. Video Authentication

[1] First, Defendant argues that the trial court plainly erred by ruling that the State properly authenticated the video evidence of his ATM usage mid-theft. We disagree. Because the proper admission of a full evidentiary video impliedly admits its constituent frames, this Court holds that the trial court did not err by admitting the ATM video still-shots.[1]

Under N.C.G.S. § 8-97, the State may introduce a recorded video "as substantive evidence" if it can first "lay[ ] a proper foundation and meet [ ] other applicable evidentiary requirements." N.C.G.S. § 8-97 (2023). It may lay a proper foundation in relevant part by adducing "testimony that the videotape had not been edited[ ] and that the picture fairly and accurately recorded the actual appearance of the area photographed."

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1. We note an apparent conflict among our precedents on whether to review issues of evidence authentication *de novo* or for an abuse of discretion. *State v. Hollis*, 905 S.E.2d 265, 267 (N.C. App. Ct. 2024). *Compare State v. Jones*, 288 N.C. App. 175, 187 (2023) (reviewing *de novo*), *and State v. Clemons*, 274 N.C. App. 401, 409 (2020) (Murphy, J., unanimous in result only) (holding that "appropriate standard of review for authentication of evidence is *de novo*"), *with In re Goddard & Peterson, PLLC*, 248 N.C. App. 190, 198 (2016) (reviewing for abuse of discretion), *and State v. Mobley*, 206 N.C. App. 285, 288–89 (2010) (affirming trial court's denial of defendant's "objection to the evidence on the grounds . . . [of] authenticat[ion]" despite noting how our previous "cases . . . conflict[ ] as to the appropriate standard of review"). Because the trial court here did not err, however, we need not attempt to resolve that intra-panel split now. *See In re Lucks*, 369 N.C. 222, 231 (2016) (Hudson, J., concurring) (declining to further opine on "which standard of review should apply because the result would be the same under either standard").

14 N.C. Index 4th *Evidence* § 1635 (2024). The North Carolina Rules of Evidence (Rules) specify certain types of evidence and procedures that may satisfy any additional requirements. *E.g.*, N.C. R. Evid. Rule 803(6) (business records); *id.* 902 (self-authenticating documents).

Specifically, Rule 901 is a "main evidentiary requirement" that permits admission with a showing of "evidence sufficient to support a finding that the matter in question is what the proponent claims." *State v. Jones*, 288 N.C. App. 175, 187 (2023) (quoting N.C. R. Evid. 901(a)). "Records of [r]egularly [c]onducted [a]ctivity," N.C. R. Evid. 803(6), "made under penalty of perjury" also "fulfill the purpose of authentication," *State v. Hollis*, 905 S.E.2d 265, 271 (N.C. App. Ct. 2024). Because Rule 803 and 901's languages match those of their federal counterparts in all material respects, *see* N.C. R. Evid. 803 cmt.; *id.* 901 cmt., federal courts' interpretations of the latter may inform our interpretations of the former, *see State v. Thompson*, 332 N.C. 204, 219 (1992). *Cf.*, *e.g.*, *State v. Collins*, 216 N.C. App. 249 (2011) (finding certain "federal court cases persuasive" because federal Rule 701 "is indistinguishable from . . . [N.C. R. Evid.] Rule 701").

Faced with no controlling precedent for these facts, we instead look to an analogous *State v. Jackson*, 229 N.C. App. 644 (2013), to better frame the issue here. In *Jackson*, this Court addressed whether the trial court properly admitted a "video file plotting the data from [an] electronic monitoring device" worn by the defendant the night of his crimes. *Id.* at 650. At trial, the State introduced as unobjected evidence both "the specific electronic monitoring device" "and the data [it] produced." *Id.* at 648. On appeal, the defendant argued that the State failed to "properly authenticate[ ]" the derivative tracking data. *Id.* at 649. This Court rejected his claim and affirmed the trial court's admissions. *Id.* at 650. In so doing, we characterized the video file as "merely an *extraction of* that data compiled in the device." *Id.* (emphasis added). The "extraction was admi[ssible] as a business record" so long as its underlying "data was recorded in the regular course of business near the time of the incident" and laid upon "a proper foundation." *Id.* (emphasis added) (referencing N.C. R. Evid. 803(6)). As a threshold matter of principle, we see little difference between *Jackson*'s admission of specific location data points drawn from an unobjected GPS-monitoring device and this case's admission of specific still-shots drawn from an unobjected security video.

We find persuasive the otherwise noncontrolling reasoning of *United States v. Clotaire*, 963 F.3d 1288 (2020), which addressed this precise issue upon near-identical facts. In *Clotaire*, the defendant regularly withdrew funds from various PNC Bank ATMs with debit cards he

fraudulently opened in the victims' names. *Id.* at 1292. Noticing common traits between the identity thefts, the investigating officer subpoenaed each card's "ATM withdrawal history" and "surveillance from the bank branches" to identify and arrest the defendant. *Id.* The trial court later admitted "PNC Bank's *full* surveillance videos a[s] business[-] records" evidence under Fed. R. Evid. 803(6) without objection. *Id.* at 1293 (emphasis added). The defendant instead challenged the discrete "photo stills pulled from the video" as "not business records within the meaning" of that rule. *Id.* The Eleventh Circuit disagreed, holding that a "format change[ ]from video to photograph" does not render "an otherwise-admissible business record . . . a new, inadmissible record merely because [of] its . . . adapt[ation] for trial display." *Id.* at 1293. That appellate court reasoned that this "technical format change" requires "little human discretion or judgment" and does not alter in any way the data's "communicative content" for the jury. *Id.* at 1294. "[A]s a general rule, the format of an extracted dataset has nothing to do with whether it qualifies as a business record. What matters is whether the *original* record met the requirements of [federal] Rule 803(6)." *Id.* In reaching this conclusion, the *Clotaire* Court articulates the presumption of "a foundation . . . laid for each individual frame" of an "entire videotape . . . admitted into evidence" without objection. 44 Am. Jur. *Trials* § 79.

Here, Defendant contests on appeal only the individual still-shots from the ATM videos—not the videos themselves. We reject his challenge because those shots are just "a subset of available data" found in the larger videos. *Clotaire*, 963 F.3d at 1294. The State merely "extract[ed] . . . that data" from the Wells Fargo videos, which the trial court "properly admitted as a business record" in accordance with Rule 803(6). *Jackson*, 229 N.C. App. at 650. *First*, the State laid the proper foundation for the videos by introducing a formal "business records declaration" that the attached ATM-video files "[we]re true and correct copies of the business records as maintained by Wells Fargo." (Capitalization omitted.) The State adduced Ferris's testimony that he "made [no] alterations to the[ ] [videos]" "since [he] received th[em]." Ferris also located the ATMs seen in the video to their purported locations. *Second*, the State adhered to its "main evidentiary requirement" by adducing without objection Wells Fargo's business-records declaration "made under penalty of perjury." *Hollis*, 905 S.E.2d at 269. Black-letter law permits "the authentic[ation] of business records . . . by a witness who is familiar with them and the system under which they were made." *State v. Rupe*, 109 N.C. App. 601, 611 (1993). Thus, this Court holds that the trial court properly authenticated the ATM videos as admissible evidence because their derivative photos were "nothing more than a series of static images appearing at a given frame rate." *Clotaire*, 963 F.3d at 1294.

B. Lay-Opinion Testimony

[2] Second, Defendant argues that the trial court plainly erred by allowing Ferris to testify as to Defendant's identity in the ATM videos still-shots. To support this assertion, Defendant analogizes his situation to the defendant in *State v. Belk*, 201 N.C. App. 412 (2009). There, this Court overturned a conviction on appeal because the testifying officer had "limited contact with" the defendant prior to his arrest, thus violating Rule 701. *Id.* at 417. We review admissions of lay-opinion testimony only for an abuse of discretion absent here. *Id.* Because this case is instead more analogous to *State v. Collins*, 216 N.C. App. 249 (2011) (distinguishing *State v. Belk*), this Court holds that the trial court did not err by admitting Ferris's lay-opinion testimony.

Under Rule 701, an officer may testify as a layman only if his testimony is "(a) rationally based on [his own] perception . . . and (b) help[s] to . . . determin[e] . . . a fact in issue." N.C. R. Evid. 701. Not so in *Belk*. There, this Court reversed a defendant's felony convictions after the trial court erroneously admitted the arresting officer's lay testimony. *Id.* at 414. The State indicted the defendant for several robberies allegedly caught on camera. *Id.* At trial, the arresting officer identified the defendant in the surveillance video despite having had "limited contact with [him] and his 'very distinctive profile' " prior to testifying. *Id.* at 417. Despite the jurors' "opportunity to view the video footage on a [PC]," the officer further acknowledged the video resolution's qualitative decline from the "desktop computer in the police station" to the "large projection screen [shown] to the[m]." *Id.* In remanding for a new trial, we reasoned from these facts that the trial court had "no basis" to conclude that the officer would be "more likely than the jury" to "correctly . . . identify [the] [d]efendant as the individual in the surveillance footage." *Id.* at 418.

In *Collins*, the defendant asserted plain error in the admission of the arresting officer's lay-opinion testimony that he "was the person depicted" in an incriminating videotape. *Id.* at 254. Comparing his situation to that in *Belk*, the *Collins* defendant suggested that his own officer "was in no better position than the jury to identify [him] as the person in the surveillance video." *Id.* at 255 (quoting *Belk*, 201 N.C. App. at 414). At trial, the arresting officer testified to "recogniz[ing] [the] defendant in the video" as a direct result of "prior dealings with him." *Id.* at 251. This Court rejected the defendant's argument and upheld the testimonial admission. *Id.* at 257. We reasoned that the officer's " 'dealings' with [the] defendant . . . mean[t] more than [the] minimal contacts" found in *Belk*. Much like those with Officer Ferris here, the *Collins* officer's multiple

interactions with the defendant amounted to "a sufficient level of familiarity with [his] appearance to aid the jury in its determination." *Id.*

The superior pretrial knowledge of the *Collins* defendant's personal appearance cleared Rule 701's testimonial threshold to the same degree as with Defendant here. Officer Ferris had already dealt with Defendant prior to his investigation because his mother had gone missing on or about January 2022 —six months before Ferris received the ATM video from Wells Fargo. By the time he first saw the ATM video, Ferris had interacted with Defendant on multiple occasions as part of that preexisting investigation. These repeated interactions "mean more than [the] minimal contacts" that would otherwise not "be helpful to the jury." *Collins*, 216 N.C. App. at 257. Thus, this Court holds that the trial court did not abuse its discretion by admitting Officer Ferris's lay-opinion testimony because doing so did not "invade the province of the jury" as factfinder. *Id.* at 255 (quoting *State v. Fulton*, 299 N.C. 491, 494 (1980)).

C. Ineffective Assistance of Counsel

Finally, Defendant argues that he received constitutionally defective assistance because his counsel failed to object to the trial court admitting ATM videos of Defendant and permitting Officer Ferris to offer his own lay-opinion testimony as to Defendant's identity in those videos. Defendant argues that counsel's failure to object to either alleged error amounted to IAC so egregious as to violate his Sixth Amendment right to counsel. Because the trial court did not err either by admitting the ATM videos or allowing Officer Ferris to offer his lay opinion, this Court dismisses Defendant's IAC claim for lack of merit.

IV. Conclusion

For the reasons discussed above, this Court holds that the trial court did not err either by holding as authenticated the ATM videos of Defendant or by admitting Officer Ferris's lay-opinion testimony as to his identity in them. This Court also dismisses Defendant's IAC claim as meritless.

NO ERROR.

Judges ZACHARY and CARPENTER concur.

WEISS v. CONT'L AEROSPACE TECHS., INC.

[298 N.C. App. 293 (2025)]

JAN WEISS, Administrator CTA of the Estate of Dennis Alan O'Neal, and JAN WEISS, Administrator CTA of the Estate of Debra Dee O'Neal, Plaintiffs
v.
CONTINENTAL AEROSPACE TECHNOLOGIES, INC. (f/k/a CONTINENTAL MOTORS, INC.); and AIRCRAFT ACCESSORIES OF OKLAHOMA, INC., Defendants

No. COA24-701

Filed 19 March 2025

1. Statutes of Limitation and Repose—statute of repose—product liability—defective aircraft maintenance and overhaul manual—separate product—independent claim allowed

In a suit initiated on behalf of the estates of a husband and wife (plaintiffs), after the couple's private plane fatally crashed due to engine failure, the appellate court rejected an argument by the manufacturer of the plane's engine and of the maintenance and overhaul manual (defendant) that plaintiffs' product liability and negligence claims were barred by the six-year statute of repose (pursuant to now-repealed N.C.G.S. § 1-50(a)(6)). While acknowledging contrary holdings from federal courts that distinguish between flight manuals and maintenance or overhaul manuals, the Court of Appeals followed the reasoning in *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519 (1993) (which involved a flight manual), and held that a maintenance and overhaul manual is a separate product that may support an independent claim for product liability if the manual was obtained separately from the aircraft and the claim stemmed from an alleged defect in the manual.

2. Products Liability—defective aircraft maintenance and overhaul manual—sufficiency of pleadings—barred by statute of repose

In a suit initiated on behalf of the estates of a husband and wife (plaintiffs), after the couple's private plane fatally crashed due to engine failure, the trial court properly granted summary judgment in favor of the manufacturer of the plane's engine and of the maintenance and overhaul manual (defendant) where plaintiffs' complaint did not sufficiently plead a product liability claim based on an alleged defect in the maintenance and overhaul manual—which, unlike claims about the aircraft and engine, would not have been barred by the applicable statute of repose. The complaint asserted liability based on defective engine components and alleged that defendant failed to provide proper maintenance instructions, but did not allege that the maintenance and overhaul manual was a

separately defective product and, thus, did not put defendant on notice that it was required to defend a product liability claim based on the defective manual as a product separate from the aircraft. Based on the purchase date of the engine, the statute of repose had expired before plaintiffs brought suit.

Appeal by Plaintiffs from Order entered 7 June 2023 by Judge James L. Gale in Nash County Superior Court. Heard in the Court of Appeals 6 November 2024.

Poyner Spruill LLP, by N. Cosmo Zinkow and Andrew H. Erteschik, for Plaintiffs-Appellants.

Williams Mullen, by Alexander M. Gormley, and Cunningham Swaim, LLP, by Ross Cunningham and Steven D. Sanfelippo, appearing Pro Hac Vice, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Jan Weiss as Administrator of the Estate of Dennis Alan O'Neal and the Estate of Debra Dee O'Neal (collectively, Plaintiffs) appeals from the trial court's Order granting Summary Judgment to Continental Aerospace Technologies, Inc. (Continental), based on the statute of repose N.C. Gen. Stat. § 1-50(6).[1] The Record on Appeal tends to reflect the following:

On 31 March 2013, Dennis and Debra O'Neal were flying in their Lancair LC42-550FG airplane (the Aircraft), traveling from Wilkes County Airport in North Wilkesboro to Warren Field Airport in Washington, North Carolina. The O'Neals were licensed and experienced pilots; Debra piloted the Aircraft. After climbing to 5,000 feet, at 12:46 p.m. "the pilot declared an emergency and reported: 'low fuel pressure—engine's quitting.' " The pilot reported smoke in the cockpit and that the engine was barely producing power. At 12:50 p.m. the Aircraft made a forced landing and collided with trees and terrain. The O'Neals died as a result of the crash.

Data from the accident revealed the engine failure was caused by a faulty engine starter adapter: the adapter's oil plug became dislodged

1. Fred Cohen was originally named as the Executor of both Estates. On 14 August 2023, Jan Weiss was substituted as Administrator of the Estates by Order of the trial court.

during flight, releasing engine oil. The Aircraft's engine starter adapter had been replaced approximately seven weeks before the crash, on 11 February 2013.

On 13 March 2015, the executor of the O'Neals' estates filed suit, asserting claims against several defendants. While the Complaint addresses additional related entities, it asserts claims against three separate defendants: Continental, the manufacturer of the engine and remaining defendant on appeal; Aircraft Accessories of Oklahoma (Aircraft Accessories), which overhauled the replacement engine starter adapter and sold it prior to installation; and Air Care Aviation Services (Air Care), the maintenance company that installed the starter adapter. The Complaint asserted claims for product liability, negligence, breach of warranty, and negligent representation, among others.

Evidence in the Record reveals the history of the Aircraft's engine and the faulty starter adapter. Continental originally manufactured the engine on 29 March 2002 and sold it to Lancair International, the manufacturer of the Aircraft. Lancair installed the engine in the Aircraft, which the O'Neals acquired in 2010. In January 2013, they noticed a problem with their engine starter adapter and brought it to Air Care for maintenance. On 11 February 2013, Air Care replaced the engine starter adapter with an overhauled adapter it had purchased from Aircraft Accessories on 29 January 2013. Aircraft Accessories performed an overhaul on this adapter in January 2013, using a 2011 maintenance and overhaul manual published by Continental (the Maintenance and Overhaul Manual). The resulting engine failure and crash occurred the month after the overhauled adapter was installed, on 31 March 2013.

The Complaint was filed in March 2015, and Aircraft Accessories moved to dismiss for lack of personal jurisdiction. The trial court denied this motion, and this Court affirmed that denial in a previous decision. *Cohen v. Continental Motors, Inc.*, 253 N.C. App. 407, 799 S.E.2d 72, 2017 WL 1632643 (unpublished). Continental likewise moved to dismiss for lack of personal jurisdiction, and we reversed the trial court's grant of that motion. *Cohen v. Continental Motors, Inc.*, 279 N.C. App. 123, 864 S.E.2d 816 (2021).

On 15 September 2022, Continental moved for Summary Judgment, arguing that all of Plaintiffs' claims were barred by the applicable statute of repose. The trial court granted this motion on 2 June 2023. On 30 June 2023, Plaintiffs filed written Notice of Appeal. We dismissed that appeal without prejudice as interlocutory, as Plaintiffs' claims against all defendants had not been resolved. *Cohen v. Continental Aerospace*

Technologies, *Inc.*, 294 N.C. App. 315, 901 S.E.2d 271, 2024 WL 2828596 (unpublished). Plaintiffs had at that time voluntarily dismissed their claims against Air Care and Teledyne Technologies (an associate corporation of Continental's) but their claims against Aircraft Accessories remained. On 11 June 2024, Plaintiffs voluntarily dismissed their claims against Aircraft Accessories. With Judgment now final with respect to all defendants, on 10 July 2024, Plaintiffs timely refiled their Notice of Appeal from the 2 June 2023 Order granting Summary Judgment to Continental. *See* N.C. Gen. Stat. § 1A-1, Rule 54 (2023); N.C. Gen. Stat. § 7A-27(b)(1); N.C. R. App. P. 3 (2024).

Issues

The dispositive issues in this case are whether: (I) the Maintenance and Overhaul Manual used in overhauling the engine starter adapter can be considered a separate product that supports an independent claim for product liability arising within the statute of repose provided by now-repealed N.C. Gen. Stat. § 1-50(a)(6); and (II) Plaintiffs properly pleaded a claim for product liability arising from the allegedly defective Maintenance and Overhaul Manual in their Complaint.

Analysis

The trial court granted Continental's Motion for Summary Judgment, holding Plaintiffs' claims were barred by the six-year statute of repose applicable to the Aircraft under then-N.C. Gen. Stat. § 1-50(a)(6) (2007).

Summary judgment based on a statute of repose is appropriate when "the pleadings or proof show without contradiction that the statute of repose has expired." *Bryant v. Don Galloway Homes*, *Inc.*, 147 N.C. App. 655, 657, 556 S.E.2d 597, 600 (2001). This is a question of law that we review *de novo* when the relevant facts are not in dispute. *Udzinski v. Lovin*, 159 N.C. App. 272, 273, 583 S.E.2d 648, 649 (2003).

Under Section 1-50(a)(6), "No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption." Section 1-50(a)(6) was repealed in 2009 and replaced with N.C. Gen. Stat. § 1-46.1, extending the time to file a claim to twelve years for causes of action accruing on or after 1 October 2009. S.L. 2009-420, § 1, 2009 N.C. Sess. Laws 808. Under both the current and repealed statute, the repose period begins to run on "the date of initial purchase for use or consumption." N.C. Gen. Stat. §§ 1-46.1(1); 1-50(a)(6). For products first delivered or purchased before 1 October 2009, the

six-year statute of repose applies. *See, e.g.*, *Robinson v. Bridgestone/Firestone N. Am. Tire, LLC*, 209 N.C. App. 310, 315, 703 S.E.2d 883, 886-87 (2011). *See also Colony Hill Condominium I Ass'n v. Colony Co.*, 70 N.C. App. 390, 394, 320 S.E.2d 273, 276 (recognizing that a statute of repose grants the defendant a vested right not to be sued which cannot be impaired by the retroactive effect of a later statute).

Continental contends because it sold the Aircraft engine in 2002, the statute of repose expired prior to the filing of the Complaint in 2015. Thus, Continental contends Plaintiff's claims against it alleged in the Complaint are barred by the expiration of the six-year statute of repose.

On appeal, Plaintiffs argue the trial court erred in concluding their claims were barred by Section 1-50(a)(6) because they contend their product liability claim is based—in part—on a defect in the 2011 Maintenance and Overhaul Manual published by Continental and used in the overhaul of the engine starter adapter, rather than the Aircraft engine itself. Plaintiffs claim the Maintenance and Overhaul Manual erroneously instructed maintenance personnel to coat the threads of the oil plug in aviation oil in addition to a sealing agent prior to installing it, which proximately caused the plug to come loose. Thus, Plaintiffs contend under this theory of the case, the defective product was not the engine, but rather the Maintenance and Overhaul Manual. Therefore, Plaintiffs assert the applicable date for purposes of the statute of repose is the date of sale of the 2011 Maintenance and Overhaul Manual.

I. Maintenance and Overhaul Manual as Separate Product

[1] Plaintiffs argue our decision in *Driver v. Burlington Aviation* requires their claims be allowed to proceed. 110 N.C. App. 519, 430 S.E.2d 476 (1993). In *Driver*, the plaintiff was injured when riding as a passenger in an aircraft that lost power and crashed. *Id.* at 521, 430 S.E.2d at 479. The complaint alleged the aircraft's flight information manual, which had been relied upon by the pilot, contained insufficient information concerning carburetor icing: it failed to warn about weather conditions that could cause icing and failed to advise pilots to activate carburetor heat during slow-flight operations to prevent this. *Id.* at 522, 430 S.E.2d at 479. It alleged this omission from the flight manual proximately led to the crash. *Id.* at 523, 430 S.E.2d at 479.

The aircraft manufacturer argued the action was based in product liability and, since the aircraft was sold in 1978, eleven years before the crash, the claim was barred by the statute of repose. N.C. Gen. Stat. § 1-50(6). However, the plaintiff did not allege the aircraft itself was defective in any way and conceded that carburetor icing is a common

condition that occurs in any aircraft under certain conditions. 110 N.C. App. at 528-29, 430 S.E.2d at 483. Accordingly, we held the defective product at issue was the manual, not the aircraft. *Id.* As the manual was sold to the pilot separately, the date of that sale was "the crucial event triggering the statute of repose." *Id.* Because neither party had pleaded that date, the trial court had insufficient information to dismiss the action. *Id.*

Plaintiffs argue this case is analogous to *Driver* in that the alleged defect lies only in the Maintenance and Overhaul Manual, a separate product from the Aircraft, and the statute of repose should run from its date of sale rather than that of the Aircraft. Continental argues *Driver* is distinguishable because it involves a flight manual, as opposed to the Maintenance and Overhaul Manual in this case. It argues even if a flight manual can support a separate product liability claim, the Maintenance and Overhaul manual is issued by Continental in its role as a manufacturer of the Aircraft components. Thus, Continental contends a maintenance manual cannot be considered a separate product establishing an independent product liability claim.

A. Manuals as Aircraft Components under GARA

In support of its argument, Continental raises as persuasive authority several federal cases interpreting provisions of the General Aviation Revitalization Act (GARA). This federal statute creates an 18-year statute of repose for civil actions against manufacturers of general aviation aircraft and component parts. GARA, § 2(a)(2); 49 U.S.C. § 40101 Note.

This 18-year period contains a "rolling" provision, which causes the 18-year period to begin anew if a plaintiff's injury is caused by any "new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft." *Id.* While federal courts have held flight manuals are "parts" of the aircraft for the purposes of that statute, they have distinguished maintenance manuals from that consideration. Continental argues we should likewise distinguish between these types of manuals. However, the distinction made by federal courts is inapposite to this case.

Federal courts have held that a flight manual is so intrinsic to the aircraft as to be a "part" of it under GARA, and a reissue of the manual can trigger the statute's rolling provision. In *Caldwell v. Enstrom Helicopter Corp.*, the plaintiff alleged a helicopter's flight manual was defective because it did not include a warning that the last two gallons of fuel in the helicopter's tanks could not be used, leading to a crash

when the aircraft ran out of fuel. 230 F.3d 1155 (9th Cir. 2000). Although the helicopter had been purchased 23 years before the crash in that case, the flight manual had been revised several times within the previous 18 years. *Id.* at 1156.

That court held a flight manual is a "part" of the aircraft:

> Federal regulations require that manufacturers of helicopters include a flight manual with each helicopter and require that the manual contain "information that is necessary for safe operation because of design, operating, or handling characteristics." 14 C.F.R. § 27.1581(a)(2). The manual specifically must include information about a gas tank's unusable fuel supply, if the unusable portion exceeds one gallon or five percent of the tank capacity. *See id.* § 27.1585(e). In the face of these requirements, there is no room to assert that a helicopter manufacturer's manual is a separate product. By the rule of the excluded middle, then, it must be part of the aircraft.
>
> In other words, a flight manual is an integral part of the general aviation aircraft product that a manufacturer sells. It is not a separate, general instructional guide (like a book on how to ski), but instead is detailed and particular to the aircraft to which it pertains. The manual is the "part" of the aircraft that contains the instructions that are necessary to operate the aircraft and is not separate from it.

Id. at 1157. Accordingly, if the manufacturer had, within the past 18 years, made a substantive revision or deletion to the instructions regarding fuel tanks and that revision proximately caused the crash, the plaintiffs' claim would not be barred by GARA. *Id.*

The Ninth Circuit distinguished this from prior cases in which plaintiffs alleged defective manuals to assert claims that manufacturers had failed to warn of latent defects in the aircraft itself. *See, e.g.*, *Alter v. Bell Helicopter Textron, Inc.*, 944 F.Supp. 531, 538-39 (S.D. Tex. 1996) (holding GARA barred claim that maintenance manual failed to provide inspection instructions that would have allowed detection that defective component was failing); *Schamel v. Textron-Lycoming*, 1 F.3d 655, 657 (7th Cir.1993) (holding action for failure to warn of a defective component barred by Indiana statute of repose). Unlike these cases, the claim in *Caldwell* was not an attempt to circumvent the statute of repose by implying an ongoing duty to warn of a design or manufacturing defect in the aircraft. Instead, the defect was entirely within the revised flight

manual, which failed to properly instruct how to operate the aircraft. *Caldwell*, 230 F.3d at 1157; *see also Crouch v. Honeywell Int'l, Inc.*, 720 F.3d 333, 342 (6th Cir. 2013) ("If claims for negligently *failing* to warn in manual revisions were not barred by GARA's period of repose, plaintiffs could artfully plead suits arising out of design defects as 'failure to warn' claims, thereby defeating Congress's intent." (emphasis in original)).

In applying this precedent, federal courts have distinguished between flight and maintenance manuals. In *Colgan Air, Inc. v. Raytheon Aircraft Co.*, the Fourth Circuit rejected the district court's holding that a maintenance manual was, as a matter of law, a "part" of an aircraft for the purpose of interpreting a warranty provision. 507 F.3d 270, 280 (2007). The plaintiff alleged it relied upon the maintenance manual and improperly installed a component in the aircraft, causing the aircraft to crash, and asserted a claim for breach of warranty. *Id.* at 274. The express warranty agreement disclaimed all other warranties and warranted "each part of the Aircraft" was free from defects in workmanship, materials, or design for a period of ninety days. *Id.* at 273. The defendant argued the manual was a part of the aircraft, citing *Caldwell*, and as the crash had occurred outside the 90-day window no express or implied warranty applied.

The court rejected this argument. Unlike a flight manual, a maintenance manual is not required to be kept onboard the aircraft and is not "necessary to operate the aircraft" in the way a flight manual is. *Id.* at 276-77.[2] Accordingly, whether the maintenance manual was a part of the aircraft subject to the warranty provision was a question of fact, and evidence as to how the plaintiff obtained the manual—whether it came with the aircraft or was purchased separately and paid for with a subscription—was relevant to resolving this question. *Id.* at 277-78.

The Sixth Circuit's approach to overhaul manuals like the Maintenance and Overhaul Manual at issue in this case mirrors this treatment of maintenance manuals. In *Crouch*, the plaintiffs alleged an engine failure occurred due to a separation of components installed during an overhaul performed according to instructions in a manual published by the manufacturer. 720 F.3d at 336-37. They argued the overhaul manual was a part of the aircraft, and revisions to the manual triggered GARA's rolling provision for replacement parts. *Id.* at 341. The court rejected this argument, as the overhaul manual, unlike a flight manual,

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2. *But see Rogers v. Bell Helicopter Textron*, 185 Cal. App. 4th 1403, 1410, 112 Cal. Rptr. 3d 1, 2 (2010) (disagreeing that federal regulations require flight manuals to be carried onboard aircraft).

was not "originally in, or . . . added to, the aircraft." *Id.* at 342. Thus, federal courts consider maintenance and overhaul manuals as less integrated into the aircraft than flight manuals.

B. Flight, Maintenance, and Overhaul Manuals under Driver

Continental essentially argues that, because federal courts treat flight and overhaul manuals differently from each other when determining if they are "parts" under GARA, we should also treat them differently when determining if the manual can be considered a separate product for the purpose of our statute of repose. This argument ignores the reasoning underlying the distinction made by federal courts: that a maintenance or overhaul manual is not by law considered a "part" by federal courts because it is *less* integrated into the aircraft than a flight manual. Our decision in *Driver* held that a flight manual is a separate product. Applying the reasoning of the federal cases Continental cites, the Maintenance and Overhaul Manual in this case is at least as much a separate product from the Aircraft as a flight manual, if not more so.

We first note, as federal courts have acknowledged, our holding in *Driver* is at odds with these federal cases: "The reasoning of the state court of appeals in *Driver* is inconsistent with that of the other courts faced with similar claims." *Alter*, 944 F. Supp. at 540. "The sole case holding that an airplane manual is a separate product from its corresponding aircraft is *Driver v. Burlington Aviation, Inc.*" *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 404 F.Supp.2d 893 (E.D. Va. 2005) (*rev'd*, 507 F.3d 270). While federal caselaw regards a flight manual as a part of the aircraft as a matter of law, for the purpose of North Carolina's statute of repose a flight manual is a separate product that can support a product liability claim as long as (1) the defect exists only in the manual and (2) the manual was obtained in a separate transaction from the purchase of the aircraft. *Driver*, 110 N.C. App. at 528-29, 430 S.E.2d at 483. We are bound by this interpretation made in a prior decision of another panel of this Court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Accordingly, the persuasiveness of these federal cases to support Continental's argument is mitigated. Moreover, the cases cited by Continental distinguish between (1) flight manuals and (2) maintenance or overhaul manuals based on a determination the latter are *less* integrated into the aircraft itself. In *Colgan*, the court held the maintenance manual was not as a matter of law a part of the aircraft and explicitly rejected the trial court's conclusion that the manual and the aircraft were a "single, integrated product" as, unlike a flight manual, the maintenance manual was not necessary to operate the aircraft. 507 F.3d at

276-77. Similarly, in *Crouch* the Sixth Circuit concluded that, unlike a flight manual, an overhaul manual "is not a replacement part of the aircraft." 720 F.3d at 342. These cases do not persuade us that we should consider a maintenance manual more integrated into the aircraft than a flight manual and thus unable to support a claim like the one made in *Driver*.

Continental contends some of the specific language used in *Crouch* implies an inverted analysis of this distinction, arguing the Sixth Circuit "recognized that the overhaul manual was not a separate product because 'production of the manual is an essential element in the overall process of creating a product that satisfies FAA regulations.' " *Id.* at 339. Continental misunderstands the reasoning of that court, which at no point in its opinion determines the overhaul manual is not a "separate product." Continental's analysis of *Crouch* conflates two separate issues dealt with in the opinion. The first is a threshold issue: GARA's 18-year statute of repose only applies to suits brought against an aircraft manufacturer for actions performed "in its capacity as a manufacturer." 49 U.S.C. § 40101 Notes, § 2. The court determined the defendant was acting in its capacity as a manufacturer in publishing the manual, in part because it had a duty to disclose maintenance information to the FAA, before moving on to the second issue: determining whether the manual should be considered a part of the aircraft. 720 F.3d at 340-41.

While the Sixth Circuit recognized in its analysis of this second question "the duty of a manufacturer to publish and update manuals derives from its manufacturing of the original aircraft or part," *id.* at 342, it does not follow that the overhaul manual is therefore more tightly integrated into the aircraft than a flight manual. The court in *Crouch* unequivocally held "the revised overhaul manual relied on by Jewell Aircraft is not a replacement part of the aircraft." *Id.* Under the federal caselaw cited by Continental, if a manual is not a part, it is a separate product. *Caldwell*, 230 F.3d at 1157 ("As a matter of logic, there are only two possibilities. Either an aircraft's flight manual is a part of the aircraft, or it is a separate product."). Under *Driver*, we treat flight manuals as a separate product for the purpose of the statute of repose if the manual was obtained separately from the aircraft and the claims stem from defects in the manual. Continental has presented no reason we should not apply that same analysis to overhaul manuals.

Accordingly, Plaintiffs can make a product liability claim based on defects in the Maintenance and Overhaul Manual as long as: (1) the manual was purchased separately from the Aircraft and within the applicable statute of repose; (2) their claim is based entirely upon defects in the manual and not design or manufacturing defects in the Aircraft or

its components; and (3) the defects in the manual proximately caused harm to Plaintiffs. *See Driver*, 110 N.C. App. at 528-29, 430 S.E.2d at 483.

[2] Continental argues, however, Plaintiffs failed to properly plead their claim that the Maintenance and Overhaul Manual was itself a defective product—separate from the Aircraft and its engine—and proximately caused the crash.

Under our Rules of Civil Procedure:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain
>
> (1) A short and plain statement of the claim sufficient to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and
>
> (2) A demand for judgment for the relief to which he deems himself entitled.

N.C. Gen. Stat. § 1A-1, Rule 8(a) (2023). Under this notice theory of pleading, "a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) (citations omitted). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Pyco Supply Co., Inc. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988).

"While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim[.]" *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988). It should "give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial." *Murdock v. Chatham County*, 198 N.C. App. 309, 317, 679 S.E.2d 850, 855 (2009).

Plaintiffs argue Continental had sufficient notice of their theory the defective Maintenance and Overhaul Manual proximately caused the engine failure. In their Complaint, they allege Continental "fail[ed] to

properly provide maintenance instructions for the starter adapter" and that it provided "defective and inadequate instructions, warnings and information regarding the operation and maintenance of the aircraft engine and its systems, components, accessories, and hardware."

Outside of these two allegations, the Complaint primarily asserts liability based on defective components, including alleging engine components were defectively designed. It alleges the defendants failed to properly design and manufacture the Aircraft engine and various components and that the engine and starter adapter were not constructed to function safely.

The Complaint in this case differs significantly from that in *Driver*, in which there were "no allegations in plaintiffs' amended complaint contending the aircraft was in any way defective." 110 N.C. App. at 528-29, 430 S.E.2d at 483. The plaintiffs in that case conceded the carburetor icing that led to the crash was a common condition that could occur in any aircraft, and did not argue the aircraft functioned defectively or improperly. *Id.* at 529, 430 S.E.2d at 483. Instead, their entire claim as pleaded addressed the failure of the flight information manual to properly instruct a pilot regarding this issue. Accordingly, we held "the 'defective' product at issue is the manual, not the aircraft." *Id.*

In this case, there is no separate mention of the Maintenance and Overhaul Manual in the Complaint. It is not alleged to be a separately defective product. As such, unlike in *Driver*, there is no claim that the Maintenance and Overhaul manual was defective. The allegations Continental "fail[ed] to properly provide maintenance instructions for the starter adapter" and provided "defective and inadequate instructions, warnings and information regarding the operation and maintenance of the aircraft engine and its systems, components, accessories, and hardware" give no notice of the factual theory that a maintenance worker improperly performed the overhaul based on faulty instructions from a defective Maintenance and Overhaul Manual. Instead, the Complaint alleges defects in the design and manufacture of components of the Aircraft engine. The Complaint did not give Continental notice that it was required to defend a product liability claim asserting the Maintenance and Overhaul Manual as an independent defective product, separate from the Aircraft and its engine.

Thus, the Complaint did not state a claim for liability based on a defective manual as a product separate from the Aircraft. Therefore, the six-year statute of repose provided by now-repealed N.C. Gen. Stat. § 1-50(a)(6) was properly calculated from the date of the initial purchase of the Aircraft's engine in 2002. Consequently, the trial court did not err

in granting Summary Judgment to Continental based on the applicable statute of repose.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's 3 June 2023 Order granting Summary Judgment in favor of Continental.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

LEILEI ZHANG, PLAINTIFF
v.
CARY ACADEMY, DEFENDANT

No. COA24-744

Filed 19 March 2025

1. Contracts—breach—school enrollment—mootness—student graduated

Plaintiff's breach of contract claim against her daughter's school (defendant) for failing to modify a re-enrollment agreement, which was dismissed by the trial court, was moot because plaintiff's daughter graduated from the school and was no longer attending and, therefore, the relief requested (the daughter's unenrollment) had been achieved. Further, there was no basis for granting plaintiff's ancillary requests for relief where plaintiff did not allege any damages, financial or otherwise, caused by her daughter's enrollment.

2. Parent and Child—claim against school—alleged violation of Parental Bill of Rights—no private cause of action

The trial court properly dismissed plaintiff's claim against her daughter's school (defendant) for allegedly violating the Parental Bill of Rights (N.C.G.S. § 114A-10) where the statute did not create a private cause of action, either express or implied, against non-parent third parties such as defendant in this case.

3. Aiding and Abetting—claim against school—enrollment of daughter—aiding breach of separation agreement—no merit

The trial court properly dismissed plaintiff's claim against her daughter's school (defendant) for allegedly aiding and abetting

her daughter's father in breaching the parents' separation agreement by declining to unenroll the daughter at plaintiff's request. First, North Carolina does not recognize as a valid cause of action aiding and abetting a breach of contract. Second, plaintiff's complaint lacked sufficient facts to support a colorable claim for tortious interference with a contract.

Appeal by Plaintiff from order entered 3 April 2024 by Judge Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 12 February 2025.

Leilei Zhang, pro se Plaintiff-Appellant.

Parker Poe Adams & Bernstein, LLP, by Tory Ian Summey and Zachary S. Anstett, for Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff Leilei Zhang appeals from the trial court's order granting Defendant Cary Academy's motion to dismiss Plaintiff's complaint. Plaintiff contends, by allowing her daughter, Emily,[1] to remain enrolled, Cary Academy: (1) breached the terms of their enrollment agreement; (2) violated Plaintiff's statutory right to control her daughter's education; and (3) aided and abetted the violation of her separation agreement with Emily's father. We disagree and hold the trial court properly dismissed Plaintiff's complaint.

I. Factual and Procedural Background

Emily was a minor child who first enrolled at Cary Academy in 2016, and eventually graduated in 2024. Plaintiff and Emily's father separated in August 2021 and eventually divorced in October 2022. Plaintiff and Emily's father entered a joint custody agreement stating Emily would remain in Cary with her father for school purposes, but would spend school holidays with Plaintiff in California. In February 2023, Emily's father and Plaintiff both executed a Re-enrollment Agreement for Emily to complete her senior year of high school at Cary Academy. The Re-enrollment Agreement stated that the agreement "may not be amended or modified except in a written document signed by all parties that expressly acknowledges such amendment or modification."

1. We use a pseudonym to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b).

On 6 March 2023, Plaintiff emailed Cary Academy attempting to withdraw her portion of the Re-enrollment Agreement. However, Emily's father did not consent to withdrawing Emily from Cary Academy. Cary Academy informed Plaintiff that without the consent of both parents, the school could not unenroll Emily.

On 29 August 2023, Plaintiff filed a complaint against Cary Academy in Wake County superior court. Plaintiff brought claims for breach of contract, violation of parental rights, and aiding and abetting. Cary Academy moved to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Their motion came on for hearing in the Wake County superior court on 16 January 2024. Following the hearing, the court granted Cary Academy's motion and dismissed Plaintiff's complaint in its entirety. Plaintiff timely appeals.

II. Analysis

Plaintiff argues the trial court erred by dismissing her claims. Plaintiff contends she adequately stated claims asserting Defendant: (1) breached the Re-enrollment Agreement signed by Plaintiff and Emily's father; (2) violated Plaintiff's parental right to control and direct Emily's education; and (3) aided and abetted the violation of a separation agreement between Plaintiff and Emily's father. We disagree.

We review a trial court's decision on a motion to dismiss de novo. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). A motion to dismiss pursuant to Rule 12(b)(6) is properly granted if "one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citations and internal marks omitted). We construe the complaint liberally in favor of the non-moving party and review "the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Id.* at 74, 752 S.E.2d at 664 (citations and internal marks omitted). However, a complaint must "state enough to give the substantive elements of a *legally recognized claim*." *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 111, 868 S.E.2d 5, 17 (2022) (citation and internal marks omitted).

A. Breach of Contract

[1] Plaintiff contends the trial court erred by dismissing her claim for breach of contract. Specifically, Plaintiff argues Cary Academy breached

the Re-enrollment Agreement by failing to modify the agreement after Plaintiff's unilateral request to unenroll Emily. We hold this claim is moot.

North Carolina courts decline to make determinations on questions that have become moot as an exercise of judicial restraint. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). "A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (internal citations omitted). Further, if during "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." *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131 (1994) (citations and internal marks omitted).

Here, Plaintiff's complaint, filed on 25 August 2023, asked the court to order Cary Academy to pause Emily's school activity until further notice from the Plaintiff. However, Emily successfully graduated from Cary Academy in May of 2024. Since the filing of the complaint, Emily is no longer attending Cary Academy and the exact relief Plaintiff initially sought has been achieved outside of the judicial process. As such, we cannot entertain or proceed with this cause merely to determine abstract propositions of law. *See McAdoo v. Univ. of N.C. at Chapel Hill*, 225 N.C. App. 50, 67–68, 736 S.E.2d 811, 823 (2013) (holding a breach of contract claim premised upon a scholarship agreement moot because the student-athlete graduated and matriculated to the NFL).

Moreover, Plaintiff's ancillary requests for relief are not supported by law because she did not sufficiently allege any damages, financial or otherwise, caused by Emily's attendance at Cary Academy. For example, Plaintiff admits Emily's father would have withheld Emily from her regardless of Emily's attendance at Cary Academy. She also admits that she did not pay for Emily's tuition—rather, Emily's father paid her tuition to Cary Academy. Accordingly, Plaintiff's breach of contract claim is moot.

B. Violation of Parental Rights

[2] Plaintiff alleges section 114A-10 of the North Carolina General Statutes, the Parental Bill of Rights, creates a private cause of action against non-parent third parties which Cary Academy violated. N.C. Gen. Stat. § 114A-10 (2023). We disagree.

The General Assembly can create a private cause of actions by statute. *See Sykes v. Health Network Sol., Inc.*, 372 N.C. 326, 338, 828 S.E.2d 467, 474 (2019) (holding statutes may create a private cause of action). Generally, for a private cause of action to exist, the "the legislature [must have] expressly provided a private cause of action within the statute." *Id.* However, in limited circumstances, a statute may not expressly create a cause of action but may imply one. *Id.* North Carolina has established that "an implicit right of a cause of action exists when a statute requires action from a party, and that party has failed to comply with the statutory mandate." *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 356, 673 S.E.2d 667, 673 (2009).

The Parental Bill of Rights enumerates the various rights, which parents have related to the education and upbringing of their children. *See* N.C. Gen. Stat. § 114A-10 ("A parent has the right to . . . direct the education and care of his or her child."). Here, we are unable to identify anything in section 114A-10 which explicitly authorizes the assertion of a private cause of action for the purpose of enforcing the Parental Bill of Rights. *Id.*

Moreover, we do not discern an implied private cause of action in section 114A-10 either. *Id.* North Carolina has established that "an implicit right of a cause of action exists when a statute requires action from a party, and that party has failed to comply with the statutory mandate." *United Daughters of the Confederacy v. City of Winston-Salem by & through Joines*, 383 N.C. 612, 637–38, 881 S.E.2d 32, 52 (2022) (quoting *Sugar Creek*, 195 N.C. App. at 356, 673 S.E.2d at 673). Here, the Parental Bill of Rights codifies the rights a parent has but does not require any action from a party—as such, there is no implied private cause of action.

Because the Parental Bill of Rights does not explicitly state that there is a private cause of action or imply one exists, we hold the trial court properly dismissed Plaintiff's claim brought under section 114A-110.

C. Aiding and Abetting

[3] Plaintiff also alleges the trial court erred by dismissing her claim for aiding and abetting. Specifically, she alleges Cary Academy aided and abetted Emily's father in breaching a separation agreement between Plaintiff and Emily's father. We disagree.

North Carolina has never recognized aiding and abetting a breach of contract as a valid cause of action. Rather, North Carolina recognizes tortious interference with a contract. *Intersal, Inc. v. Hamilton*, 373

N.C. 89, 100, 834 S.E.2d 404, 413 (2019). To state a colorable claim for tortious interference with a contract, a plaintiff must allege facts sufficient to support the following elements:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

Id. However, even construing Plaintiff's Complaint liberally, she failed to allege facts sufficient to support a claim for tortious interference with a contract. *Id*. Thus, the trial court properly dismissed Plaintiff's claim.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not err by granting Defendant's motion to dismiss pursuant to Rule 12(b)(6).

AFFIRMED.

Judges TYSON and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 MARCH 2025)

BEACON POINTE OWNERS ASS'N, INC. v. CORRIGAN No. 24-294	Iredell (20CVS2678)	Dismissed
FEHL v. APPALACHIAN STATE UNIV. No. 24-845	Office of Admin. Hearings (23OSP005125)	Affirmed
IN RE A-A.H-T. No. 24-530	Pitt (23JA000150)	Affirmed
IN RE B.M. No. 24-728	Greene (22JA000025) (22JA000026)	Affirmed
IN RE E.B. No. 24-705	Surry (23JA000056)	Affirmed
IN RE J.F. No. 24-553	Cumberland (22JA000121)	Affirmed in Part, Vacated in Part, and Remanded
IN RE R.X.F. No. 23-547	Buncombe (19JT222) (19JT223) (19JT224)	
MUSE v. DAIMLER TRUCKS N. AM. No. 23-1038	N.C. Industrial Commission (19-050540)	Affirmed
SHERRILL v. SIMPSON No. 23-667	Cabarrus (20CVS2064)	Affirmed
STATE v. BAILEY No. 24-324	New Hanover (22CRS51379)	No Error
STATE v. EVANS No. 24-774	Davidson (23CRS484064) (24CRS000046)	Affirmed
STATE v. HATCHER No. 24-555	Moore (21CRS050700)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

STATE v. JACKSON No. 24-421	Guilford (20CRS88477)	No Prejudicial Error
STATE v. KEMPTON No. 24-400	Pender (21CRS51080)	No Error
STATE v. LAWRENCE No. 24-558	New Hanover (17CRS060189) (17CRS060191) (17CRS060193) (17CRS060195) (17CRS060290)	Vacated and Remanded for Resentencing.
STATE v. MEJIA No. 24-216	Cleveland (23CRS331184)	Remanded
STATE v. MURPHY No. 24-182	Randolph (16CRS235) (18CRS64)	No Error
STATE v. OLLISON No. 24-499	Craven (20CRS052626)	No Error
TOWNSEND v. N.C. DEP'T OF ADULT CORR. No. 24-659	N.C. Industrial Commission (TA-28672)	Affirmed

ARRINGTON v. ARRINGTON

[298 N.C. App. 313 (2025)]

TAMMY EDWARDS ARRINGTON, PLAINTIFF
v.
JAMES GREGORY ARRINGTON, DEFENDANT

No. COA24-631

Filed 2 April 2025

Divorce—equitable distribution—unequal distribution—no abuse of discretion

In plaintiff wife's action for equitable distribution (in which she specifically sought an unequal distribution), although the trial court entered default against defendant husband for failure to respond in the early stage of the proceedings, the trial court did not abuse its discretion by granting an unequal distribution and awarding a greater share of marital assets to defendant (in particular, the marital home and the value of defendant's 401(k) account). The entry of default did not affect plaintiff's burden or the court's analysis regarding distribution; the court appropriately considered and weighed each distributional factor set forth in N.C.G.S. § 50-20(c); and the court's findings—none of which were challenged by plaintiff—were binding and supported by competent evidence.

Appeal by Plaintiff from order entered 11 August 2022 by Judge Dorothy Hairston Mitchell in Durham County District Court. Heard in the Court of Appeals 25 February 2025.

Bourlon & Davis, P.A., by Camilla J. Davis, for plaintiff-appellant.

No brief filed for defendant-appellee.

WOOD, Judge.

Tammy Edwards Arrington ("Plaintiff") appeals from the trial court's 11 August 2022 order of equitable distribution awarding an unequal distribution of the marital estate to Defendant. We hold the trial court did not abuse its discretion and affirm the trial court's order.

I. Factual and Procedural Background

Plaintiff and Defendant married on 30 March 2013 and separated on 30 March 2020. There were no children born of the marriage. On 14 October 2020, Plaintiff filed a complaint for equitable distribution seeking, *inter alia*, the distribution of all marital assets, property,

income, resources, and other holdings. She specifically sought an unequal distribution.

Defendant did not file a responsive pleading to Plaintiff's complaint. On 16 December 2020, Plaintiff filed a motion for entry of default, seeking an entry of default for failure to respond. On 26 January 2021, Plaintiff filed an inventory affidavit, listing all assets and liabilities as of the date of separation, or acquired thereafter. A hearing on Plaintiff's motion was scheduled for 10 February 2021.

On 5 February 2021, a motion to schedule a judicial settlement conference was filed and subsequently calendared for 27 April 2021. That same day, a discovery conference order was entered, which outlined discovery deadlines and obligations on behalf of each party. Defendant was ordered to file an inventory affidavit by 26 February 2021. On 10 February 2021, the trial court entered default against Defendant for his failure to respond.

The judicial settlement conference was continued to 28 May 2021. The day prior to the conference, Defendant's attorney filed a motion to continue and a motion to withdraw. The trial court granted the motion to withdraw. The day of the conference the trial court entered an order reporting that the judicial settlement conference had not been held and found: "Defendant has failed to participate in any fashion in this case. He [has] not filed an answer, has not filed an [equitable distribution inventory affidavit], nor has he responded to discovery submitted to him by Plaintiff's attorney. [Alternative dispute resolution] is not appropriate."

A pre-trial conference was held on 3 June 2021 and Defendant was not present. An order was entered scheduling the final pre-trial conference and the hearing for equitable distribution. At the final pre-trial conference on 7 July 2021, the trial court continued the hearing to 3 September 2021, finding that Defendant needed additional time to consult with an attorney and "apprise himself of local rules." Defendant obtained new counsel on 23 July 2021.

On 3 September 2021, Defendant's counsel filed a motion to continue, as Defendant failed to bring the correct documents to the hearing. The motion was granted, and the final pre-trial hearing was continued again to 1 October 2021. Defendant filed an inventory affidavit that same day. The final pre-trial hearing was held as scheduled, and the trial court filed the resulting order.

On 1 November 2021, Plaintiff's counsel filed a motion to continue the hearing, alleging that Defendant's inventory affidavit and discovery responses failed to disclose certain assets. The trial court granted Plaintiff's

motion and scheduled a hearing for 13 December 2021. Subsequently, the hearing was continued an additional time to 6 April 2022.

On 6 April 2022, the trial court held the equitable distribution hearing. Both parties were present at trial and presented evidence to the court. By order entered 11 August 2022, the trial court made findings based on the parties' stipulations and evidence, and classified Plaintiff's and Defendant's assets and liabilities, covering the period from before their marriage through the date of separation.

The trial court found that the "distributional factors set forth in N.C. [Gen. Stat.] Section 50-20(c) apply to the facts and circumstances of this case and that an equal distribution is not equitable." The trial court distributed Plaintiff's and Defendant's assets and liabilities as follows:

Plaintiff and Defendant were each entitled to their own 401(k) retirement accounts, with a balance of $6,650.32 and $13,449.75, respectively. Plaintiff's vehicle, a Jeep bought for her son, valued at $3,058.94, and the loan balance for the vehicle of $5,213.21, was distributed to Plaintiff. The debt labeled "wedding receipt" and secured through North Carolina State Employees Credit Union (NCSECU) totaled $14,998.92, and each party was ordered to pay half. Defendant was ordered to pay his share of the debt directly to Plaintiff over the course of seven years in eighty-four monthly payments of $131.85. The debt owed to Lendmark, which was used for the payment of household and marital bills, totaled $6,021.44. Although the Lendmark account was solely in Plaintiff's name, the debt was distributed to Defendant who was ordered to make the monthly payments on the loan directly to Plaintiff over a seven-year period in eighty-four monthly payments of $71.68. Debt acquired through One Main Financial was $7,053.38 at the date of separation and was distributed to Defendant. Student loan debt acquired during the marriage for Plaintiff's son, in the amount of $45,193.69, was stipulated to be marital debt, although the loan was solely in Plaintiff's name. Each party was ordered to pay half of the debt. Defendant was ordered to pay his share of the debt directly to Plaintiff over the course of seven years in eighty-four monthly payments of $269.01.

Lastly, the trial court found that although Defendant had acquired the home prior to their marriage, in which the parties resided during their marriage, Defendant had gifted the home to the marriage one month prior to separation causing the home to become marital property. The only evidence about the value of the home presented to the court was a tax value of $166,516.00 and a payoff statement showing Defendant had paid $151,520.69 on 1 November 2021, after the parties' separation. The trial court found the home had a net value of $14,995.31 and distributed

the marital home to Defendant. The trial court gave Plaintiff one hundred twenty days to vacate the former marital home.

Plaintiff owned a home acquired prior to the parties' marriage. During the marriage, the parties acquired a loan jointly using the home Plaintiff acquired prior to their marriage as collateral. The trial court determined Plaintiff had not gifted the home to the marriage and the home remained Plaintiff's separate property. The trial court ordered Plaintiff to refinance the loan to remove Defendant's name from the Deed of Trust within twelve months.

On 12 September 2022, Plaintiff filed a notice of appeal from the 11 August 2022 equitable distribution order.

II. Analysis

Plaintiff argues the trial court erred in its equitable distribution order by distributing a greater share of the marital assets to Defendant, when Defendant did not have a pending claim for an unequal distribution and an entry of default had been entered against him. Plaintiff specifically contends the trial court erred by distributing to Defendant the marital home and the value of his 401(k) retirement account, an amount larger than fifty percent of the marital estate.

This Court reviews an equitable distribution order for a "clear abuse of discretion." *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009) (citation omitted). "The division of property in an equitable distribution is a matter within the sound discretion of the trial court." *Id.* at 197, 680 S.E.2d 897-98 (citation omitted). Thus, "[t]he trial court's decision 'will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Khajanchi v. Khajanchi*, 140 N.C. App. 552, 558, 537 S.E.2d 845, 849 (2000) (citation omitted). We uphold the trial court's findings of fact if the findings are supported by competent evidence in the record. *Britt v. Britt*, 168 N.C. App. 198, 204, 606 S.E.2d 910, 914 (2005).

The distribution of "marital and divisible property" is found under N.C. Gen. Stat. § 50-20. "In making an equitable distribution of marital assets, the trial court is required to undertake a three-step process: '(1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner.' " *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 418, 588 S.E.2d 517, 520-21 (2003) (citation omitted). Pursuant to N.C. Gen. Stat. § 50-20(c), the marital property must be divided equally, "unless the [trial] court determines that an

equal division is not equitable." *Smith v. Smith*, 292 N.C. App. 443, 450, 899 S.E.2d 1, 6 (2024) (citations omitted).

If an equal division is not equitable, the trial court may elect to make an unequal distribution. However, "[w]hen making an unequal distribution, the trial court must consider the factors enumerated in [N.C. Gen. Stat.] § 50–20(c) and must make findings which indicate that it has done so." *Britt*, 168 N.C. App. at 204, 606 S.E.2d at 914. The factors include, *inter alia*,

> (1) The income, property, and liabilities of each party at the time the division of property is to become effective.
>
> (2) Any obligation for support arising out of a prior marriage.
>
> (3) The duration of the marriage and the age and physical and mental health of both parties.
>
> (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.
>
> (5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.
>
> (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.
>
> (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.
>
> (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.
>
> (9) The liquid or nonliquid character of all marital property and divisible property.
>
> (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.

> (11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.
>
> (11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.
>
> . . .
>
> (12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c)(1)-(12) (2023).

The trial court is not required to make "exhaustive findings of the evidentiary facts, but must include the ultimate facts considered." *Mosiello v. Mosiello*, 285 N.C. App. 468, 471, 878 S.E.2d 171, 175 (cleaned up). Stated differently, the trial court is given broad discretion to assess and weigh each distributive factor under N.C. Gen. Stat. § 50-20(c), and "there is no need to show exactly how the trial court arrived at its decision regarding unequal division, but an appellate court must be able to review and conclude the statutory factors were followed." *Id.* at 471, 878 S.E.2d at 176 (cleaned up). "A single distributional factor may support an unequal division." *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010) (citation omitted).

As a preliminary matter, Plaintiff argues that the trial court erred by distributing a greater share of the marital assets to Defendant, when Defendant had an entry of default entered against him and therefore, had no pending claim for unequal distribution. Plaintiff's argument is misplaced.

"The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint, and is prohibited from defending on the merits of the case." *Hartwell v. Mahan*, 153 N.C. App. 788, 791, 571 S.E.2d 252, 253-54 (2002) (citations omitted); *see also Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 751, 670 S.E.2d 604, 609 (2009) ("When default is entered due to a defendant's failure to answer, the substantive

allegations contained in plaintiff's complaint are no longer in issue, and for the purposes of entry of default and default judgment, are deemed admitted." (citation omitted)). Meaning, Defendant lost his right to assert counterclaims or defenses in response to Plaintiff's complaint.

However, the entry of default does not "dispose of the underlying action" because "[i]n North Carolina, a plaintiff cannot obtain judgment by default in a divorce proceeding." *Adair v. Adair*, 62 N.C. App. 493, 498, 303 S.E.2d 190, 194 (1983). Further, even though the allegations in the plaintiff's complaint are deemed admitted, this "does not relieve plaintiff of the burden of appearing in court to prove the grounds alleged in the complaint." *Id.*

While the entry of default prohibited Defendant from asserting a response to Plaintiff's complaint, it did not alter the scope of the trial court's obligations during an equitable distribution proceeding. Notwithstanding an entry of default, the trial court was still required to determine which property was marital property; calculate the net value of the property; and distribute the property in an equitable manner. *Fitzgerald*, 161 N.C. App. at 418, 588 S.E.2d at 520-21. Consequently, contrary to Plaintiff's argument, the default judgment does not affect the trial court's distribution award.

Furthermore, the party seeking an unequal distribution must prove, by a preponderance of the evidence, that an equal distribution would be inequitable. *See Khajanchi*, 140 N.C. App. at 558, 537 S.E.2d at 849 ("[T]he party who desires an unequal division bears evidentiary burdens concerning the relevant statutory factors . . . [this] burden[] become[s] even more significant when we consider the fact that the trial court has *broad discretion* in . . . distributing the marital estate." (citation omitted)). Once the trial court concludes that an equal distribution is not equitable, it has the discretion to distribute the property accordingly, regardless of which party made the request. *See Mugno*, 205 N.C. App. at 278, 695 S.E.2d at 499 ("Where the trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution." (citation omitted)); *see also Montague v. Montague*, 238 N.C. App. 61, 70-71, 767 S.E.2d 71, 78 (2014) ("[T]he trial court is not required to show how it balanced the factors; the weight given to each factor is in the trial court's discretion; and there is no need to show exactly how the trial court arrived at its decision regarding unequal division." (citation omitted)). Thus, Plaintiff's argument that the trial court erred by awarding a greater share of the marital assets to Defendant, despite Defendant having no pending claim for unequal distribution, is without merit.

Plaintiff moved for an unequal distribution and thus bore the burden of proving that an equal distribution would not be equitable. However, once the trial determined that an equal distribution was not equitable, it had the discretion to allocate the marital assets as it saw fit, by weighing and balancing each statutory factor. Therefore, the trial court was permitted to award a larger share to Defendant, rather than Plaintiff, even though the distribution ultimately granted was originally sought by Plaintiff.

Plaintiff next argues the trial court erred by distributing to Defendant the marital home and the value of the marital portion of his 401(k) retirement account. However, Plaintiff failed to challenge any of the trial court's findings in the 11 August 2022 equitable distribution order. Thus, all of the findings are deemed binding on appeal and "supported by competent evidence." *In re A.M.L.*, 377 N.C. 1, 4, 855 S.E.2d 439, 443 (2021) (citation omitted); *see also Khajanchi*, 140 N.C. App. at 565, 537 S.E.2d at 853 ("Where no exceptions have been taken to the findings of fact, such findings are presumed to be correct and are binding on appeal." (citation omitted)).

Because the undisputed findings of facts are binding and supported, we hold the trial court complied with the requirements under N.C. Gen. Stat. § 50-20(c) as previously set forth. The trial court outlined the assets and liabilities of both Plaintiff and Defendant. While Plaintiff and Defendant equally shared the debt obligations from their "wedding receipts" and Plaintiff's son's student loans, Defendant was ordered to pay the balance of the marital Lendmark and One Main Financial debts. Further, each party was entitled to the value of the marital portion of their respective 401(k) accounts. *See* N.C. Gen. Stat. § 50-20(c)(1) (2023) ("The court shall consider . . . The income, property, and liabilities of each party at the time the division of property is to become effective.").

Additionally, the trial court found that of the marital property Defendant only wanted the marital home, did not request credit towards the post-date of separation payments made to the mortgage or debt, and had allowed Plaintiff to live in the home since the date of separation. The trial court acknowledged that while Defendant paid the mortgage and household bills on the marital home after separation, Plaintiff had maintained the home while living there. *See* N.C. Gen. Stat. § 50-20(c)(11a) ("Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.").

The trial court found that Defendant paid monthly payments to Plaintiff to pay towards the marital debt and that Defendant was a "generous financial provider." It further found that "there was no evidence the marriage had suffered financially" from Defendant's adulterous affairs, and that "[a]ll of the household bills and obligations were paid and as such there was no waste of marital assets." *See* N.C. Gen. Stat. § 50-20(c)(12) ("Any other factor which the court finds to be just and proper.").

As discussed *supra*, this Court cannot overrule the trial court's decision absent a determination that it is so arbitrary or capricious that it could not have been the result of a reasoned decision. *Khajanchi*, 140 N.C. App. at 558, 537 S.E.2d at 849. This Court "give[s] great discretion to the trial court's consideration of facts, as the trial court is the fact finder in equitable distribution cases and has the 'right to believe all, none, or some of a witness' testimony.' " *Smith*, 292 N.C. App. at 453, 899 S.E.2d at 8.

We conclude the trial court complied with the requirements set forth in N.C. Gen. Stat. § 50-20(c) and, in its discretion, determined an unequal distribution in favor of Defendant was equitable. After careful review of the record, we cannot conclude the trial court's determination is so arbitrary that it cannot be the result of a reasoned decision. Thus, we affirm the trial court's 11 August 2022 order.

III. Conclusion

The trial court did not err by distributing a greater share of the marital assets to Defendant, although Defendant had an entry of default entered against him and had not requested an unequal distribution. An entry of default does not dispose of the underlying equitable distribution action. Notwithstanding which party requests an unequal distribution, once the trial court makes a determination that an unequal distribution is equitable under N.C. Gen. Stat. § 50-20(c), the trial court has broad discretion in making the distribution, including to the non-moving party. The trial court complied with the requirements set forth in N.C. Gen. Stat. § 50-20(c) and, in its discretion, determined an unequal distribution in favor of Defendant was equitable. Accordingly, the trial court's equitable distribution order is affirmed.

AFFIRMED.

Judges TYSON and MURRY concur.

BILFINGER INC., PLAINTIFF
v.
CARGILL, INCORPORATED, DEFENDANT

No. COA24-320

Filed 2 April 2025

1. Civil Procedure—trial court's discretion—consideration of untimely affidavit—in opposition to motion to compel arbitration

In a contract dispute between two companies over the validity of an arbitration clause, where defendant moved to compel arbitration and plaintiff—on the same day as the hearing on defendant's motion—moved to supplement the record with an additional affidavit in support of its own cross-motion to stay arbitration, the trial court did not abuse its discretion in admitting the affidavit where, even though it was not timely served pursuant to Civil Procedure Rule 6(d), the affidavit was clearly supplemental and was used to rebut a new argument raised by defendant in its memorandum opposing plaintiff's cross-motion to stay arbitration.

2. Arbitration and Mediation—arbitration clause—in project-specific contract—preemption by dispute resolution terms in broader contract—motion to compel arbitration denied—appeal dismissed

In a dispute between a construction company (plaintiff) and a facility owner (defendant), where the parties executed a Master Services Agreement (MSA)—providing the general contract framework for all projects they entered into—and agreed to supplement the MSA with project-specific contracts, after which they entered into one such contract ("Construction Contract") for mechanical piping services at defendant's Charlotte facility, the trial court in plaintiff's breach of contract lawsuit properly denied defendant's motion to compel arbitration, which relied upon the Construction Contract's arbitration clause. The MSA's plain language explicitly provided that to the extent a project-specific contract addressed a topic also addressed in the MSA, the MSA's terms would control and render any corresponding terms in the project-specific contract null and void. Both the MSA and the Construction Contract addressed the topic of dispute resolution, and therefore the MSA's terms—which allowed the parties to pursue court action—nullified the Construction Contract's arbitration clause. Further, because there

was no valid arbitration agreement between the parties, defendant's appeal of the interlocutory order denying his motion to compel arbitration was dismissed as not affecting a substantial right.

Judge TYSON dissenting.

Appeal by Defendant from Order entered 29 November 2023 by Judge George C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 October 2024.

Bell, Davis & Pitt, P.A., by Joshua B. Durham and Edward B. Davis; Eversheds Sutherland (US) LLP, by Lee C. Davis, pro hac vice, and Tracey K. Ledbetter, pro hac vice, for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by Edward F. Hennessey, IV; Faegre Drinker Biddle & Reath LLP, by Aaron Van Oort, pro hac vice, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Cargill, Incorporated (Defendant) appeals from an Order denying its Motion to Compel Arbitration and granting Bilfinger Inc.'s (Plaintiff) Motions to Stay Arbitration and to Supplement the Record entered on 29 November 2023. The Record before us tends to reflect the following:

Defendant owns facilities across the country, including a facility located in Charlotte, North Carolina. At the Charlotte facility, Defendant refines, packages, and ships edible vegetable oil and shortening products. Plaintiff is an international contractor and construction company. On or about 26 March 2021, Plaintiff contracted with Defendant to provide mechanical and piping services on Defendant's projects throughout the country. The parties executed a Master Services Agreement (MSA), the general contract framework for all projects entered into between the parties. For individual projects over $250,000, the parties agreed to supplement the MSA with project-specific contracts. The MSA provides that if a project-specific contract addresses a topic addressed by the MSA, the MSA will render those terms null and void:

> 7(d). . . . Notwithstanding any terms in the [project-specific contract] documents, to the extent that a topic is addressed or a remedy is provided for in this Agreement,

> corresponding terms or remedies set forth in the [project-specific contract] documents are null and void and of no [e]ffect as to the rights or obligations of either [Defendant] or [Plaintiff]. To the extent that a topic is not addressed or a remedy is not provided for in this Agreement, then the terms of the [project-specific contract] shall control for that specific topic or remedy.

Plaintiff began a project at Defendant's Charlotte facility to construct two new hydrogenation towers and expand its processing operations. The contract price for the project exceeded $250,000, so the parties entered into a project-specific agreement to supplement the MSA; the project-specific agreement expressly incorporates by reference another document, the "General Conditions" of the agreement (collectively, Construction Contract). Both the MSA and the Construction Contract contain sections titled "Dispute Resolution", which discuss the procedures to be undertaken in the event a dispute arises between the parties. Under MSA Section 26, if a dispute arises, the parties must first attempt to resolve it by reporting it in writing to senior management representatives. If senior management does not resolve the dispute within twenty days of receiving notice, then the parties may agree to mediate the dispute, but "regardless whether mediation has occurred, either party may pursue court action":

> 26(b). After [twenty days] and upon mutual agreement of the parties, either party may submit the Dispute to a third party mediator recognized in the field of alternative dispute resolution, and acceptable to the other party. The mediation will be non-binding, and occur at a time and place acceptable to both parties with each party bearing its respective costs. After [twenty days], regardless whether mediation has occurred, either party may pursue court action pursuant to the requirements and limitations set forth in this Agreement. Notwithstanding any other provision of this Agreement, each Party is entitled to immediate access to the courts to: (i) toll any statute of limitation or (ii) seek appropriate injunctive relief or other equitable remedy if, in such party's sole discretion, such action is deemed necessary to avoid irreparable damage or preserve the status quo.

By contrast, under Article 16 of the Construction Contract, "[a]ll claims arising out of the Contract Documents shall be subject to arbitration[.]"

Indeed, disputes eventually arose between the parties. The parties referred the disputes to senior management, as contemplated by the MSA. Senior management did not resolve the disputes within twenty days. In accordance with MSA Section 26, Plaintiff brought an action against Defendant in Mecklenburg County Superior Court on 26 May 2023, alleging a claim for Breach of Contract and seeking foreclosure of a mechanic's lien. On 24 July 2023, Defendant filed a Demand for Arbitration with the American Arbitration Association. On 26 July 2023, Defendant filed Motions to Compel Arbitration and Stay Judicial Proceedings, relying on the arbitration clause contained in Article 16 of the Construction Contract. Plaintiff filed a Cross-Motion to Stay Arbitration on 5 September 2023. The Motions were heard before the trial court on 12 September 2023. The same day, Plaintiff filed a Motion to Supplement the Record with an additional affidavit (Second Affidavit), which it had served on Defendant the night prior.

On 29 November 2023, the trial court denied Defendant's Motion to Compel Arbitration and granted Plaintiff's Motion to Supplement the Record and Motion to Stay Arbitration. On 12 December 2023, Defendant timely filed Notice of Appeal.

Appellate Jurisdiction

"[A]n appeal from the trial court's denial of a motion to compel arbitration is an interlocutory order." *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289, 681 S.E.2d 512, 513 (2009) (citation omitted). Generally, "a party has 'no right of immediate appeal from interlocutory orders and judgments.' " *Bartels v. Franklin Operations, LLC*, 288 N.C. App. 193, 195, 885 S.E.2d 357, 359 (2023) (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)). However, " 'an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.' " *Brown v. Centex Homes*, 171 N.C. App. 741, 743, 615 S.E.2d 86, 87 (2005) (quoting *Prime S. Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991)); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023) (appeal lies of right directly to the Court of Appeals from any interlocutory order or judgment of a superior court in a civil action or proceeding which affects a substantial right); N.C. Gen. Stat. § 1-569.28(a)(1) (2023) (appeal may be taken from an order denying a motion to compel arbitration).

However, we have also held that where no arbitration agreement is found to exist, the interlocutory appeal does not affect a substantial

right and is subject to dismissal.[1] *See JRM, Inc. v. HJH Companies, Inc.*, 287 N.C. App. 592, 598, 883 S.E.2d 217, 221 (2023). Here, the trial court concluded there was no agreement to arbitrate because any arbitration agreement was null and void. Thus, if a valid agreement to arbitrate does

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1. Our dissenting colleague—who authored *JRM, Inc.*—now takes issue with the approach that case requires us to employ. Indeed, prior to *JRM, Inc.*, we have also simply affirmed in other similar instances. *See, e.g.*, *Register v. Wrightsville Health Holdings, LLC*, 271 N.C. App. 257, 843 S.E.2d 464 (2020) (affirming trial court's denial of motion to compel arbitration); *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 562 S.E.2d 64 (2002) (same); *Kennedy v. Branch Banking & Trust Co.*, 165 N.C. App. 275, 600 S.E.2d 520 (2004) (unpublished) (same).

Under N.C. Gen. Stat. § 1-569.6(b) (2023), "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." On the motion of a person showing an agreement to arbitrate, the court shall order the parties to arbitrate unless it finds there is no *enforceable* agreement to arbitrate. N.C. Gen. Stat. § 1-569.7(a)(2) (2023) (emphasis added). Previously, our statute governing proceedings on a motion to compel or stay arbitration considered whether the party opposing the motion to compel arbitration denied the *existence* of an agreement to arbitrate. *See* N.C. Gen. Stat. § 1-567.3 (repealed 2004) (emphasis added).

Thus, the language surrounding whether an arbitration agreement "exists" when reviewing a motion to compel or stay arbitration appears to be an artifact of caselaw applying old statutory language. *See e.g.*, *Sciolino*, 149 N.C. App. at 645, 562 S.E.2d at 66 ("When a party disputes the existence of a valid arbitration agreement, the trial judge must determine whether an agreement to arbitrate exists." (citing N.C. Gen. Stat. § 1-567.3(a) (1999) (repealed 2004)); *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citing N.C. Gen. Stat. § 1-567.3 (2001) (repealed 2004)); *Evangelistic Outreach Ctr. v. Gen. Steel Corp.*, 181 N.C. App. 723, 726, 640 S.E.2d 840, 843 (2007) ("If a party claims that a dispute is covered by an agreement to arbitrate but the adverse party denies the existence of an arbitration agreement, the trial court shall determine whether an agreement exists." (quoting *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580)).

Where the existence of an arbitration agreement is solely at issue, such as in *JRM, Inc.*, the proper approach may be to treat the appeal as interlocutory and determine whether the appeal should be dismissed or not based on a review of the merits. *See* 287 N.C. App. at 597-98, 883 S.E.2d at 220-21. Where the enforceability of an existing arbitration agreement is at issue, however, the more appropriate approach may be to accept the matter as involving a substantial right and decide the case squarely on the merits. *See Pressler v. Duke Univ.*, 199 N.C. App. 586, 685 S.E.2d 6 (2009). *See also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 628-29, 129 S. Ct. 1896, 1900-01, 173 L. Ed. 2d 832 (2009) (holding the underlying merits of an appeal from an order denying a stay pending arbitration are irrelevant in determining whether an appellate court has jurisdiction over the appeal).

Nonetheless, where a panel of the Court of Appeals has decided the issue, albeit in a different case, we are bound by that precedent. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). As such, we faithfully apply *JRM, Inc.*'s rubric to this matter. Moreover, the effect of the mandate is the same: in the absence of an agreement to arbitrate, the trial court's order denying arbitration will be upheld and the appeal dismissed as interlocutory.

not exist, Defendant has failed to show a substantial right is affected and this Court lacks jurisdiction to review the trial court's interlocutory order denying Defendant's motion to compel arbitration. *See id.*

Issues

The issues on appeal are whether the trial court: (I) abused its discretion by admitting Plaintiff's Second Affidavit; and (II) properly denied the Motion to Compel Arbitration on the basis there was no agreement to arbitrate between the parties because the MSA rendered the alleged arbitration clause null and void.

Analysis

I. Admission of Second Affidavit

[1] As a threshold matter, Defendant contends the trial court erred by granting Plaintiff's Motion to Supplement the Record and admitting the Second Affidavit. This Court reviews a trial court's ruling on an untimely affidavit for abuse of discretion. *Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180, 184, 609 S.E.2d 456, 458-59 (2005).

Rule 6(d) of the North Carolina Rules of Civil Procedure generally requires affidavits in support of a motion be served with the motion and—unless otherwise provided—affidavits in opposition to a motion be served at least two days before the hearing on the motion. N.C. Gen. Stat. § 1A-1, Rule 6(d) (2023). However, even "[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 continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require." *Id.*

Here, Plaintiff served the Second Affidavit on Defendant less than two days before the hearing on the Motion to Compel Arbitration. Nonetheless, the trial court, in its discretion, accepted the Second Affidavit as part of the Record. Specifically, the trial court noted the Second Affidavit was submitted in response to an argument first raised by Defendant in its memorandum opposing Plaintiff's Motion to Stay Arbitration.

In particular, the trial court relied on the Second Affidavit solely for determining the purpose of the MSA's preemption clause and to find—counter to Defendant's argument—the parties did not specifically negotiate any of the terms in Article 16 of the Construction Contract:

> 7. Section 7(d) of the MSA provides that "to the extent that a *topic* is addressed or a remedy is provided for in this Agreement [the MSA], corresponding terms or remedies set forth in the [Construction Contract] are null and void and of no affect as to the rights or obligations of either [Defendant] or [Plaintiff]" . . . The purpose of this language was to spare the parties the effort of reviewing the lengthy form contracts to determine each and every way that some clause might cover the same topic already addressed by and agreed to in the MSA. ([Second Affidavit], filed on September 11, 2023 . . . at ¶¶ 3-5.)
>
> . . . .
>
> 10. The parties did not specifically negotiate any of the terms in Article 16 of the general conditions of the [Construction Contract]. ([Second Affidavit] at ¶¶ 4-5.)

There is no indication the trial court relied on the Second Affidavit in specifically concluding MSA Section 7(d) rendered Article 16 of the Construction Contract null and void. To the contrary, the trial court concluded the MSA rendered the Construction Contract's Dispute Resolution provisions null and void by its own terms, reasoning that because MSA Section 26 and Article 16 of the Construction Contract cover the "exact same" topic, the terms contained in the Construction Contract are null and void.

Thus, the trial court's consideration of the late-filed affidavit was solely supplemental in purpose and used to rebut an argument newly raised by Defendant in Defendant's own opposition to Plaintiff's motion. *See Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 216, 341 S.E.2d 61, 63 (1986) (no abuse of discretion in admitting untimely affidavit where "affidavit was clearly supplemental in that it did no more than explain the transactions referred to in the earlier affidavits filed by the parties and provide copies of the documents involved in those transactions."). Therefore, Defendant has not demonstrated any abuse of discretion by the trial court in admitting and considering the Second Affidavit. *See Lane*, 169 N.C. App. at 184-85, 609 S.E.2d at 458-59 (finding trial court did not err in allowing affidavit to be admitted after motion was filed where "[p]laintiffs have failed to show abuse of discretion in the trial court's decision to deny plaintiffs' request to strike [the] affidavit."). Consequently, the trial court did not commit reversible error in allowing Plaintiff to supplement the Record with the Second Affidavit.

II. Motion to Compel Arbitration

[2] Defendant contends the trial court erred in concluding there was no valid agreement to arbitrate. Under N.C. Gen. Stat. § 1-569.7 (2023),

> (a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> . . . .
>
> (2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

This Court has elaborated "the trial court must perform a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *U.S. Trust Co., N.A.*, 199 N.C. App. at 290, 681 S.E.2d at 514 (citation and quotation marks omitted). " '[T]he trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary.' " *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 633-34, 610 S.E.2d 293, 296 (2005) (citations omitted). We review the trial court's conclusions of law de novo. *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 354-55, 826 S.E.2d 567, 571 (2019) (citation omitted).

The parties do not contest that "to the extent that a topic is addressed or a remedy is provided for" in the MSA, it renders corresponding contents in the Construction Contract null and void. The parties disagree, however, as to what the language "to the extent" contemplates in this context. Defendant argues MSA Section 26 "did not prescribe terms for arbitration" and thus "addressed dispute resolution only to the extent it involved senior management, mediation by mutual agreement, and access to the courts for the limited purpose of tolling the statute of limitations and to avoid irreparable damage or preserve the status quo[.]" In other words, Defendant contends, because the MSA does not expressly say anything about arbitration, it does not "address" arbitration and thus does not render Article 16 of the Construction Contract null and void. Consequently, according to Defendant, Article 16 of the Construction Contract requires the parties to arbitrate their dispute.

The MSA provides

> [n]otwithstanding any terms in the [Construction Contract] documents, to the extent that a topic is addressed or a remedy is provided for in this Agreement, corresponding terms or remedies set forth in the [Construction Contract] documents are null and void and of no [e]ffect as to the rights or obligations of either [Defendant] or [Plaintiff].

The MSA also provides "[t]o the extent that a topic is *not* addressed or a remedy is not provided for in [the MSA]," then the terms of the Construction Contract shall control on that specific topic or remedy (emphasis added). Both the MSA and the Construction Contract contain sections with the heading "Dispute Resolution". Within those sections, each discusses the procedures for resolving a dispute, with the MSA allowing for court action and the Construction Contract requiring all disputes to be arbitrated.

In denying Defendant's Motion to Compel Arbitration, the trial court concluded:

> 5. Section 7(d) of the MSA provides that "to the extent that a *topic* is addressed *or* a remedy is provided for in this Agreement [the MSA], corresponding terms or remedies set forth in the [Construction Contract] documents are *null and void and of no [e]ffect* as to the rights or obligations of either [Defendant] or [Plaintiff]." (Emphasis added). Thus, the parties agreed in advance that if the MSA and the [Construction Contract] cover the same topic, the provisions of the MSA apply and the provisions of the [Construction Contract] are "null and void and of no [e]ffect."
>
> 6. Because MSA § 26 and [the Construction Contract] § 16 cover the exact same "topic" of dispute resolution, the terms of the [Construction Contract] on the topic of dispute resolution are "null and void" under the MSA.
>
> 7. The dispute resolution section of the [Construction Contract] General Conditions, including the delegation clause, therefore never governed the rights or obligations of [Plaintiff] or [Defendant] (on the topic of Dispute Resolution), the parties never agreed to arbitration as a matter of the plain language of the contracts, and the parties never agreed that the arbitrator would decide arbitrability.

(emphasis in original). In support of these conclusions, the trial court made specific findings, including the following:

> 7. Section 7(d) of the MSA provides that "to the extent that a *topic* is addressed *or* a remedy is provided for in this Agreement [the MSA], corresponding terms or remedies set forth in the [Construction Contract] are *null and void and of no [e]ffect* as to the rights or obligations of either [Defendant] or [Plaintiff]" . . . .
>
> 8. The MSA contains a section on the topic of (and is specifically titled) "Dispute Resolution," which provides that disputes will be resolved first by negotiation among senior management representatives of the parties; thereafter, "either party may pursue court action." (MSA § 26.)
>
> 9. The general conditions to the [Construction Contract] also contain a section on the topic of (and specifically titled) "Dispute Resolution" which states that the parties will resolve disputes through arbitration ([Construction Contract], General Conditions § 16.)

(emphasis in original). These findings accurately recite the relevant provisions of each agreement and are, therefore, supported by the evidence.

Defendant argues "having the same heading or touching the same topic is not enough to prompt preemption under Section 7(d)." However, as the trial court found, not only do the agreements share headings on the same topic, but the substantive provisions under each heading also address what the parties are to do in the event a dispute arises between them.

Defendant further contends the parties agreed the MSA would preempt overlapping "contradictory" terms in the Construction Contract and only to the extent the MSA prescribed those terms. Defendant urges us to read the MSA and the Construction Contract "harmoniously," such that the terms of the agreements do not overlap, giving effect to the provisions of both agreements. Defendant argues the agreements should be interpreted together, such that any dispute between the parties must first be submitted to senior management in accordance with MSA Section 26, then either party may seek to resolve the dispute through mediation—also in accordance with MSA Section 26; absent mutual agreement to mediate the dispute, it shall be subject to arbitration in accordance with Article 16 of the Construction Contract—and a party may only immediately pursue court action in order to toll the statutes of limitations or seek injunctive or equitable relief pursuant to MSA Section 26.

It is true, this Court should interpret contracts "in a manner that gives effect to all of its provisions, if the court is reasonably able to do so." *Johnston Cty. v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992) (citation omitted). However, we also must interpret a contract by its plain language when possible. *See Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405, 553 S.E.2d 84, 87 (2001) ("Where the terms of a contractual agreement are clear and unambiguous, the courts cannot rewrite the plain meaning of the contract."). *See also Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 686, 821 S.E.2d 360, 369 (2018) (the Court must "enforce the parties' intent as evidenced by the clear and explicit language of the [contract]").

Here, the language of the MSA states: to the extent a topic is addressed or a remedy is provided for in the MSA, *corresponding* terms or remedies set forth in the Construction Contract are null and void and of no effect as to the rights or obligations of either Plaintiff or Defendant. The trial court concluded the same:

> 8. It is not necessary for the Court to determine whether the MSA and [the Construction Contract] dispute resolution provisions conflict because the MSA explicitly states that where a "topic" or "remedy" is addressed in the MSA, then a corresponding topic or remedy in the [Construction Contract] is null and void.

Indeed, MSA Section 7(d) contemplates there may be overlap of topics or remedies in subsequent project-specific agreements such as the Construction Contract—and provides that in such instances, the terms contained in the MSA should control. Moreover, we may not "creatively interpret the parties' actual . . . agreement in the manner urged . . . and must instead enforce the parties' intent as evidenced by the clear and explicit language of the" MSA—that the MSA renders any corresponding terms in the Construction Contract null and void. *Morrell*, 371 N.C. at 686, 821 S.E.2d at 369.

Further, the cases cited by Defendant for its argument a contract should be construed in a manner that gives full effect to all provisions are distinguishable from the facts before us. *See R.N. Rouse & Co., Inc.*, 331 N.C. at 90, 414 S.E.2d at 32 (contract stated "in the event of any *conflicting* statements or requirements" between two agreements, the subsequent agreement would control (emphasis added) (quotation marks omitted)); *Internet East, Inc.*, 146 N.C. App. at 405-06, 553 S.E.2d at 87 (agreement compelled arbitration "[u]nless the parties shall agree otherwise"); *In re Hall*, 210 N.C. App. 409, 415, 708 S.E.2d 174, 178 (2011) (construing two agreements in a harmonious manner where

neither agreement provided for control over the other); *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 642, 217 S.E.2d 682, 695 (1975) (contract contained "no indication" one clause was to "override" the other), *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975). Indeed, none of these cases concern an agreement which purported to have a voiding effect on corresponding terms and remedies in other agreements.

The dissent places heavy emphasis on the language in MSA Section 26(b) stating "Notwithstanding any other provision of [the MSA], each Party is entitled to immediate access to the courts to: (i) toll any statute of limitation or (ii) seek appropriate injunctive relief or other equitable remedy if, in such party's sole discretion, such action is deemed necessary to avoid irreparable damage or preserve the status quo."

Contrary to the dissent's assertion, our interpretation of the MSA and Construction Contract gives consistent effect to this provision. Section 26(a) requires the parties to first refer "[a]ny controversy or claim" to senior management by written request. Section 26(b) allows the parties—twenty days after referring the dispute to senior management—to either mediate the dispute or pursue court action "pursuant to the requirements and limitations set forth in [the MSA]." Thus, read in the full context of the agreement, Section 26(b) allows the parties to immediately access the courts to toll any statute of limitation or seek injunctive or equitable relief without first submitting the dispute to management or pursuing mediation as prescribed in Section 26(a) and (b) if such action is "*deemed necessary to avoid irreparable damage or preserve the status quo*." (emphasis added). In other words, the parties may immediately seek court action to preserve their rights while undertaking the dispute resolution process mandated by the MSA. Otherwise, the parties must follow the requirements and limitations set forth in the MSA and the remainder of Section 26—which Plaintiff has done here.

Here, MSA Section 7(d) expressly provides that to the extent the MSA addresses a topic, it renders corresponding terms or remedies set forth in the Construction Contract null and void. Thus, the Record supports the trial court's Findings that the MSA and the Construction Contract both contain sections titled "Dispute Resolution" and that MSA Section 26 provides specific terms for dispute resolution—expressly allowing for resolution in court—and Article 16 of the Construction Contract provides its own dispute resolution process—arbitration. These Findings, in turn, support the trial court's Conclusion that because MSA Section 26 and Article 16 of the Construction Contract "cover the exact same 'topic' ", Article 16 of the Construction Contract is null and void. Consequently, consistent with *JRM, Inc.*, this appeal is interlocutory

and does not affect a substantial right, subjecting it to dismissal. *See* 287 N.C. App. at 598, 883 S.E.2d at 221.

Conclusion

Accordingly, for the foregoing reasons, Defendant's appeal from the trial court's Order Denying its Motion to Compel Arbitration is dismissed.

DISMISSED.

Judge FLOOD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion wrongfully dismisses Defendant's immediately-available appeal of the trial court's denial of his motion to compel arbitration. The two clauses and remedies in the Master Service Agreement ("MSA") and the later and more specific Construction Contract are consistent and harmonious. The content and exclusions of the specific provisions read together reflect the intent and agreement of the parties. The paragraph headers are merely surplus and non-binding.

The MSA does not specifically exclude arbitration as an additional option and remedy to senior managements' meeting, mediation, and does not prevent the parties from resorting to the courts in the limited instances stated. The MSA provides:

> either party may pursue court action pursuant to the requirements and limitations set forth in this Agreement. *Notwithstanding any other provision of this Agreement, each Party is entitled to immediate access to the courts to: (i) toll any statute of limitation or (ii) seek appropriate injunctive relief or other equitable remedy if, in such party's sole discretion, such action is deemed necessary to avoid irreparable damage or preserve the status quo.* (emphasis supplied).

Resorting to the courts is expressly limited by and to the enumerated purposes stated in this "Notwithstanding" and overriding provision.

It makes perfect sense for the parties to expressly agree to a later and more specific individualized Construction Contract, in addition to

the MSA, for capital projects over $250,000, as opposed to smaller or nickel and dime daily maintenance between the parties. An arbitration option is needed as a supplement to the informal discussion between management and non-binding mediation for a prompt, final and binding decision. Much more is at stake for both parties on large projects. The delays inherent during litigation, while in the midst of large-scale projects, are intolerable for both parties.

This is a multi-million or multi-hundred-million dollar project. The project-specific Construction Contract is later in time, was specifically agreed to, and is in addition to, amends, and extends the MSA. The addition of arbitration as another procedure and remedy to resolve disputes does not usurp or conflict with any "topic" or provisions of the MSA. A more specific and later-in-time agreement takes priority and controls over an earlier and more general agreement. *See Wood-Hopkins Contracting Co. v. N.C. State Ports Auth.*, 284 N.C. 732, 738, 202 S.E.2d 473, 476 (1974) ("[W]hen general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics."). The presence of arbitration as a remedy to quickly resolve disputes in the project-specific Construction Contract, is binding and is entirely consistent with the parties' expressed intent in the later agreement.

The Federal Arbitration Act "was enacted in 1920 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 179 L. Ed. 2d 742, 750 (2011) (citing *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581, 170 L. Ed. 2d 254 (2008)).

The Federal Arbitration Act provides:

> A written provision in any maritime transaction or a contract evidencing a *transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the *revocation* of any contract.

9 U.S.C. § 2 (2024) (emphasis supplied).

The Supreme Court of the United States "described this provision as reflecting both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.' " *Id.* (internal citations omitted). Justice Scalia, writing for the majority of the Court held "courts must place arbitration agreements on an equal footing with

other contracts, and enforce them according to their terms." *Id.* (internal citations omitted).

The trial court erred in denying Defendant's motion to compel arbitration and the majority's opinion errs in dismissing Defendant's timely appeal. I respectfully dissent.

I. Background

An express agreement between the parties to arbitrate disputes, and the denial of that mechanism to resolve those disputes, triggers immediate review. To cease progress mid-point and languish in litigation purgatory will kill a large construction project quicker than anything else. Disputes over specific approvals, permits, time, materials, finance, completion, quality and delivery schedules demand prompt and final resolution. That is the reason Congress and our General Assembly and multiple binding precedents provide enforcement and allow for interlocutory review of the denial of an expressly-agreed-to alternative dispute resolution.

The later and more specific Construction Contract meets all the elements of a valid express contract and should be enforced according to its terms. Neither Plaintiff, the trial court, nor the majority's opinion dispute the validity of the later Construction Contract. In fact, it is that very contract Plaintiff seeks to enforce in an unauthorized forum after Plaintiff had bargained for and agreed to arbitration to timely resolve disputes under that very agreement!

Plaintiff brought a purported action in Mecklenburg County Superior Court on 26 May 2023 against Defendant alleging a claim for Breach of Contract and seeking foreclosure of a mechanic's lien. Neither of Plaintiff's claims in the trial court seeks to "*toll any statute of limitation or (ii) seek appropriate injunctive relief*" under the MSA.

Defendant timely filed a Demand for Arbitration with the American Arbitration Association on 24 July 2023. Defendant also filed Motions to Compel Arbitration and to Stay Judicial Proceedings on 26 July 2023, relying upon the arbitration clause contained in Article 16 of the Construction Contract. Plaintiff filed a Cross-Motion to Stay Arbitration on 1 September 2023. The Motions were heard before the trial court on 12 September 2023. The trial court denied Defendant's Motion to Compel Arbitration and granted Plaintiff's motion to Stay Arbitration on 28 November 2023. On 12 December 2023, Defendant timely filed Notice of Appeal.

II. Standard of Review

Federal and North Carolina statutes and precedents strongly encourage arbitration as an agreed-upon and alternative means for parties to resolve their disputes. Courts have held to enforce this principle, it is "well established that an order denying a motion to compel arbitration is immediately appealable." *Cornelius v. Lipscomb*, 224 N.C. App. 14, 16, 734 S.E.2d 870, 871 (2012) (citing *Edwards v. Taylor*, 182 N.C. App. 722, 724, 643 S.E.2d 51, 53 (2007)); *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289, 681 S.E.2d 512, 513 (2009) (citation omitted) ("[A]n appeal from the trial court's denial of a motion to compel arbitration is an interlocutory order."). The trial court's conclusions of law are reviewed *de novo* on appeal. *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 354-55, 826 S.E.2d 567, 571 (2019).

III. Analysis

A. N.C. Gen. Stat. § 1-569.7(a)(2)

N.C. Gen. Stat. § 1-569.7(a)(2) (2023) provides:

> (a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> . . . .
>
> (2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

The trial court must perform a two-step analysis "to ascertain both: (1) whether the parties had a valid agreement to arbitrate; and also, (2) whether the specific dispute falls within the substantive scope of that agreement." *U.S. Trust Co., N.A.*, 199 N.C. App. at 290, 681 S.E.2d at 514.

Defendant argues MSA Section 26 "did not prescribe [nor proscribe] terms for arbitration," did not expressly prohibit it as a procedure or remedy, and "addressed dispute resolution only to the extent it involved senior management, mediation by mutual agreement, and access to the courts for the limited purpose of tolling the statute of limitations and to avoid irreparable damage or preserve the status quo[.]" Defendant correctly asserts the MSA does not expressly contain anything about arbitration, does not "address" arbitration, and does not exclude or render Article 16 of the Construction Contract null and void.

B. Standards of Interpretation

The Construction Contract is a separate, distinct, specific, and more recent contract between the parties, which contains all essential elements of a valid express agreement. *Wood-Hopkins Contracting Co.*, 284 N.C. at 738, 202 S.E.2d at 476. Article 16 requires the parties to arbitrate resolution of their disputes on these larger-scale construction projects.

Defendant correctly argues the MSA and the Construction Contract must be read "harmoniously," where a procedure or remedy is not mentioned nor prohibited by the MSA, and the court is required to give effect to the provisions of both agreements. Agreements between the parties must be interpreted together, any dispute between the parties must first be submitted to senior management in accordance with MSA Section 26, then either party may seek to resolve the dispute through non-binding mediation, also in accordance with MSA Section 26. Absent mutual agreement to mediate, the dispute shall be subjected to arbitration in accordance with Article 16 of the Construction Contract.

The trial court and the majority's opinion failed to recognize or give effect to the parties' express agreement that, "*Notwithstanding any other provision of this Agreement*," a party may only immediately pursue court action in order "to toll the statutes of limitations or to seek injunctive or equitable relief" pursuant to MSA Section 26.

Trial and appellate courts must "enforce the parties' intent as evidenced by the clear and explicit language of the agreement(s)." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 686, 821 S.E.2d 360, 369 (2018). "Where the terms of a contractual agreement are clear and unambiguous, the courts cannot rewrite the plain meaning of the contract." *Internet East, Inc. v. Duro Commc'ns, Inc.*, 146 N.C. App. 401, 405, 553 S.E.2d 84, 87 (2001) (internal citation omitted). The agreements must be reviewed and enforced "in a manner that gives effect to all of its provisions, if the court is reasonably able to do so." *Johnston Cty. v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992) (internal citation omitted).

C. JRM, Inc. v. HJH Companies, Inc.

There is no finding nor conclusion the terms of either contract are ambiguous. The majority's opinion further compounds this error by relying upon *JRM, Inc. v. HJH Companies, Inc.*, 287 N.C. App. 592, 598, 883 S.E.2d 217, 221 (2023). This Court dismissed the appeal because no valid arbitration agreement existed, and no substantial right was affected. This reliance is contrary to the express and plain language of the admittedly-valid Construction Contract, not the MSA, which Plaintiff

specifically seeks to enforce, not in arbitration, as contractually required, but in the trial court. Resorting to the trial court for breach is specifically prohibited in the MSA, except as specifically allowed therein.

The trial court erroneously concluded as a matter of law, "It is not necessary for the Court to determine whether the MSA and [the Construction Contract] dispute resolution provisions conflict because the MSA explicitly states that where a 'topic' or 'remedy' is addressed in the MSA, then *a corresponding topic or remedy* in the [Construction Contract] is null and void."

The fallacy and prejudicial error therein is neither arbitration as a procedure, topic, nor remedy is mentioned at all in the MSA and is certainly not specifically excluded. Where the parties themselves later agreed to and adopted this procedure as an additional remedy to resolve disputes, it controls. *Wood-Hopkins Contracting Co.*, 284 N.C. at 738, 202 S.E.2d at 476.

MSA Section 7(d) also specifically provides. "To the extent that *a topic is not addressed or a remedy is not provided* for in this Agreement, then the *terms of the [project-specific contract] shall control for* that specific topic or remedy." (emphasis supplied). The trial court also made no findings or conclusions concerning Plaintiff wrongfully filing claims in court for breach of contract and to foreclose a lien in court, where those actions are also specifically excluded as a remedy in the MSA Section 7(d) and are *specifically* prohibited by the agreement to arbitrate in the Construction Contract. MSA Section 26 expressly limits the parties' access to the courts: "Notwithstanding any other provision of this Agreement, each Party is entitled to immediate access to the courts to: (i) toll any statute of limitation or (ii) seek appropriate injunctive relief or other equitable remedy if, in such party's sole discretion, such action is deemed necessary to avoid irreparable damage or preserve the status quo."

The trial court and the majority's opinion errs by giving primacy to a clause that "addresses a topic" as opposed to the MSA not mentioning a "topic" nor prohibiting a process or remedy. The trial court and the majority's analysis also ignores the plain language of the MSA to expressly limit either parties' initial access to the courts under the circumstances specifically stated: "*each Party is entitled to immediate access to the courts to: (i) toll any statute of limitation or (ii) seek appropriate injunctive relief or other equitable remedy if, in such party's sole discretion, such action is deemed necessary to avoid irreparable damage or preserve the status quo*." The topics and remedies in the contracts are simply not mutually exclusive.

Plaintiff's claims being asserted in court also directly violates this specified provision in the MSA, a "Notwithstanding" provision that expressly overrides all others contained therein. The two agreements contain "no indication" one clause was to "override" or exclude the other contract provision, where a process and remedy was not specifically named or excluded, and where express limitations on filing suit for relief for disputes is available only through specifically agreed-upon arbitration. *See Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 642, 217 S.E.2d 682, 695, *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975).

The trial court and the majority's opinion prejudicially err in denying Defendant's motion to compel arbitration and to dismiss Defendant's timely appeal. The decision to dismiss Defendant's timely appeal is also contrary to the Supreme Court of the United States' holding in "Jurisdiction over the appeal, however, 'must be determined by focusing upon the category of the order appealed from, rather than the strength of the grounds for reversing the order.' " *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 628, 173 L. Ed. 2d 832, 838 (2009) (citing *Behrens v. Pelletier*, 516 U.S. 299, 311, 133 L. Ed. 2d 773 (1996)). In other words, even if a litigant actually has no right to arbitrate and a trial court so determines, the party is still entitled to an immediate appeal and review on that issue.

IV. Admission of Untimely Second Affidavit

As I vote to address the merits of this timely interlocutory appeal and to reverse the trial court's denial of Defendant's motion to compel arbitration, I also address the trial court's error in admitting an untimely affidavit to supplement the record. The trial court also granted Plaintiff's Motion to Supplement the Record with an additional untimely affidavit (Second Affidavit), which it had served on Defendant the night prior to hearing.

North Carolina Rules of Civil Procedure 6(d) requires affidavits in support of a motion to be served with the motion and, unless as otherwise provided, affidavits in opposition to a motion *must* be served at least two days prior to the hearing on the motion. N.C. Gen. Stat. § 1A-1, Rule 6(d) (2023).

Rule 6(d) further provides:

> If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely

> served affidavit, or take such other action as the ends of justice require.

Id. There are no findings or conclusions to support or excuse Plaintiff's express violation of Rule 6(d). *Id*.

The trial court simply stated the Second Affidavit was submitted in purported response to an argument Defendant had raised in its memorandum opposing Plaintiff's Motion to Stay Arbitration. The order is devoid of any basis to deviate from the stated requirements of Rule 6(d), and it should have been excluded. *Id*.

V. Conclusion

The trial court committed reversible error in denying Defendant's motion to compel and allowing Plaintiff to supplement the Record with the untimely Second Affidavit. The trial court's order is properly reversed and remanded for entry of an order allowing Defendant's motion to compel arbitration and to strike Plaintiff's untimely affidavit. The majority's dismissal of Defendant's timely appeal is also erroneous and prejudicial. I respectfully dissent.

IN THE MATTER OF R.A.X.

No. COA24-743

Filed 2 April 2025

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—failure to obtain suitable housing—undocumented status not considered

An order terminating a father's parental rights in his son was affirmed where the findings of fact challenged on appeal were supported by competent evidence and where those and other findings supported the conclusion that the father failed to make reasonable progress in correcting the conditions that lead to the child's removal (N.C.G.S. § 7B-1111(a)(2)). Importantly, the trial court's decision was based not on the father's status as an undocumented immigrant, but rather on his failure to secure safe and appropriate housing for himself and his child. Although the father's undocumented status did affect his ability to obtain housing, the court also found that: his primary obstacle was his criminal record; social services gave him resources for finding housing options that would be

available to him even with his criminal record and undocumented status, but he failed to follow up on them; and, despite having over two years to find suitable housing and enough finances to afford it, he continuously lived under unsuitable conditions for raising a child (sleeping on a living room couch in a house with a group of unidentified adults).

Appeal by respondent-appellant father from order entered 20 May 2024 by Judge Thomas W. Davis V, in District Court, Forsyth County. Heard in the Court of Appeals 18 March 2025.

Assistant County Attorney Melissa Starr Livesay for petitioner-appellee Forsyth County Department of Social Services.

Matthew D. Wunsche for the guardian ad litem.

Richard Croutharmel for respondent-appellant father.

STROUD, Judge.

Respondent-father appeals from the trial court's Order terminating his parental rights as to his minor child. Respondent-father argues the trial court erred in concluding the child was neglected under North Carolina General Statute Section 7B-1111(a)(1) and that respondent-father willfully left the minor child in foster care for more than twelve months without sufficient progress to effect the minor child's return home under North Carolina General Statute Section 7B-1111(a)(2). As the trial court properly terminated respondent-father's parental rights under North Carolina General Statute Section 7B-1111(a)(2) for willful failure to make progress, we affirm the trial court's termination Order.

I. Background

Rex[1] was born in October 2020 in Forsyth County, North Carolina. On 15 December 2021, the Forsyth County Department of Social Services ("DSS") filed a juvenile petition alleging Rex was neglected since he "does not receive proper care from his parents and lives in an environment injurious to his welfare." Specifically, DSS alleged Rex's mother[2]

1. A pseudonym is used to protect the identity of the minor child.

2. Rex's mother is not a party to this appeal.

and Rex were "out at night without a coat or shoes on while [the mother] was knocking on apartments trying to find a place for her and [Rex] to stay for the night[,]" Rex's lips were turning blue, and the mother "uses drugs and prostitutes in the presence of [Rex], and it was unknown where they were staying." An order for nonsecure custody was entered 17 December 2021 placing Rex in the custody of DSS. Father was initially unknown but was identified after DNA paternity testing; the trial court found Father is "the natural and biological father" of Rex. Father is an undocumented immigrant from Guatemala.

The initial adjudication hearing was conducted on 11 February 2022 and on 1 April 2022 the trial court entered an order adjudicating Rex as neglected. At the hearing, Father "stated he could not provide care for [Rex] and did not have any kinship care placement to offer[.]" The trial court also noted a child and family team meeting on 14 December 2021 where Father stated "he is unable to provide adequate housing or physical care for [Rex] . . . due to lack of proper identification" and that "he rents a room from his boss, [and] because his boss does not want to be involved with DSS" Rex could not stay there with Father. Father also admitted to "a history of substance abuse treatment or domestic violence treatment." The trial court ordered Father to take parenting classes; "[o]btain and maintain stable housing that meets the needs" of Rex; "[p]articipate in a Substance Abuse assessment and follow all recommendations[;]" "[o]btain and maintain proper legal identification[;]" demonstrate an ability to meet Rex's needs; "[d]emonstrate that he can maintain a safe, stable home which is free from domestic violence and from substance use[;]" complete a domestic violence assessment and comply with recommendations; and sign a release allowing DSS and Rex's Guardian *ad Litem* ("GAL") to have access to Father's mental health and substance abuse treatment information.

The first permanency planning hearing was conducted on 6 May 2022 and the trial court found Father had started parenting classes and so far he had not missed a session; participated in substance abuse classes; has "begun to acknowledge concerns of [Rex's] basic and developmental needs[;]" and complied with the request to sign releases allowing DSS and Rex's GAL access to his mental health and substance abuse treatment information. However, Father did not obtain and maintain stable housing as he was "currently living at a residence he does not want to share with" DSS and stated he was "unable to secure housing as he does not have an ID" but was going to "receive a passport identification from Guatemala." The trial court also noted DSS gave Father "various resources located in Forsyth and Guilford County that could assist with

the immigration process." The trial court ordered the primary reunification plan to be reunification with a secondary plan of adoption.

The trial court held a second permanency planning hearing on 10 August 2022. The trial court again noted Father's continued progress with parenting and substance abuse classes; however, Father's housing situation had not changed. Father was "currently living at a residence he d[id] not want to share with" DSS. DSS had given Father information about a "Fathers Are Parents Too" class, which can be offered in Spanish, and has "funding tied that could assist him with maybe making a down payment on an apartment or house" but Father "has not called to enroll or made efforts to engage in the program in order to be able to receive the available assistance." Father received a passport from Guatemala in April 2022. A social worker "has provided [Father] with various resources located in Forsyth and Guilford County that could assist him with the immigration process" but he "failed to acknowledge [the] information provided by not responding."

A third permanency planning hearing was held in November 2022 and February 2023. A K'iche language interpreter was present with Father during the November 2022 and February 2023 hearings as the Spanish interpreter suggested at the end of the August 2022 hearing this would be beneficial to Father; K'iche is a "specific dialect most common to Guatemala[,]" Father's home country. While Father continued parenting classes, visited with Rex, and showed an interest in Rex's needs, he again was unable to "identif[y] safe and stable housing for" Rex during this hearing. The trial court noted that Father finally provided his current address during this hearing, but he did not "have a separate living area and [he] sle[pt] in the living room on the floor in front of the kitchen." Parenting Path was trying to help Father obtain housing, but

> Parenting Path staff reported that they have tried to work with [Father] to get the needed documentation together to request a green card for citizenship, however he has yet to provide the requested information. Without proof of citizenship and employment, Parenting Path is unable to assist [Father] with obtaining housing.

The permanent plan after this hearing was changed to a primary plan of adoption with a secondary plan of guardianship due to Father's continued inability to provide stable housing for Rex.

The fourth and final permanency planning hearing was held on 2 August 2023. The trial court again noted that Father provided his address at the prior hearing but would not allow a home visit by DSS

since Rex "would not be residing there and therefore [Father] does not want a home visit to occur." Father stated he was continuing to try to find housing but was unable to provide documentation of his efforts to DSS. The trial court stated Father was in the same position as to housing as he was in December 2021, when DSS first got involved with Rex. The trial court noted Father was aware of the requirement to obtain stable housing but his position is that there is nothing he can do, Father stated "[t]here is no solution."

On 3 November 2023, DSS filed a motion to terminate Father's parental rights. DSS alleged grounds for termination under North Carolina General Statute Section 7B-1111(a)(1) for neglect and 7B-1111(a)(2) for willfully leaving Rex in foster care for more than twelve months without showing to the court that he has made reasonable progress in correcting the conditions which led to Rex's removal. Father's inability to provide safe and stable housing for Rex was the main basis alleged for termination in the motion.

The termination hearing was held on 8 April 2024 and on 20 May 2024 the trial court entered an Order terminating Father's parental rights under North Carolina General Statute Sections 7B-1111(a)(1) and (a)(2). Father, the social worker, and the GAL all testified at the termination hearing. The trial court found that "[i]n the 845 days that have passed in [Rex]'s life since he was removed from his mother's care – as [Father] never provided full-time care to [Rex] prior to his removal – [Father] has not made any progress in securing safe and appropriate housing for himself and" Rex.

The trial court noted that the social worker visited Father's home but was unable to meet the other residents of the home and Father "has not provided the names or identifying information for the other residents of the home." At some points Father was sleeping on the floor, but by the time of the termination Order, Father "was sleeping on a couch in the shared living room of the apartment." The trial court outlined the various times it was explained to Father he must have safe housing before taking custody of Rex and that it could be appropriate for Father and Rex to live in a housing arrangement "without a formal rental or lease agreement" but that DSS would be required to "check out the home and the people who lived in it." The trial court found Father had a monthly surplus of $2,000.00 after monthly expenses for the past year and before that he had a monthly surplus of $1,200.00, which was an adequate amount "to obtain a basic, safe home" for Rex.

Father identified his lack of identification, undocumented status, and not speaking English as the main barriers to obtain housing, but

"acknowledged in his testimony [at the hearing] that the primary obstacle he encountered in obtaining housing was his criminal record." Father submitted an application for housing in the Fall of 2022 but was denied due to his criminal record, and Father "did not pursue other apartments to the point of submitting applications, assuming that he would be rejected for the same reasons." DSS provided Father "with information for ten (10) non-profit agencies and churches that offer housing assistance for undocumented individuals, including undocumented individuals with criminal histories." Finally, the trial court noted Father was initially provided a Spanish language interpreter and was then provided a K'iche language interpreter during the permanency planning hearings and that Father understood clearly the requirement to find safe housing. Father filed notice of appeal on 10 June 2024.

II. Willful Failure to Make Progress

Father argues

> [t]he trial court reversibly erred in concluding the existence of the TPR ground of willfully leaving Rex in foster care for more than 12 months with insufficient progress to effect his return home under N.C. Gen. Stat. § 7B-1111(a)(2) because the trial court used [ ]Father's undocumented immigrant status as the sole basis for concluding the existence of this TPR ground and the trial court operated under a misapprehension of law.

We disagree.

A. Standard of Review

> We review a district court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding. The issue of whether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a) is reviewed de novo by the appellate court. Under a *de novo* review, the court considers the matter

> anew and freely substitutes its own judgment for that of the trial court.

In re M.T., 285 N.C. App. 305, 336, 877 S.E.2d 732, 753-54 (2022) (citations, quotation marks, and brackets omitted).

B. Findings of Fact

First, we note the trial court's Order was thorough and well-organized, clearly delineating its findings related to Rex's mother and Father separately as well as clearly identifying its findings addressing adjudication and disposition. Father did not challenge 51 of the trial court's detailed findings of fact relevant to adjudication of his parental rights. The trial court made 57 findings of fact regarding Father for purposes of adjudication of termination of parental rights.[3] Father challenges six of these findings as unsupported by the evidence. We will address each of the challenged findings.

1. Finding 80

Father first challenges finding 80, which states he "contacted two (2) of those ten (10) agencies [that offer housing assistance for undocumented individuals]. When he did not immediately receive a call back from one of those two agencies, [Father] took no further action to follow up. He made no effort to contact the other eight (8) agencies." Father first testified he did not remember being given a list of ten agencies. He stated he only remembered "the number for the church that [he] called, and they didn't answer - - they didn't call [him] back. And then [social worker Choplin] gave [him] another number for another office, and they didn't answer." Then when asked "[d]id the social worker give you a different agency to contact after that church[,]" Father answered "[f]rom what I recall, no. Perhaps I have forgotten."

Social worker Choplin testified about giving Father a list of ten to fifteen programs to assist with his housing, but stated Father "did not follow up with any of them until later, when he followed up with the church" and then stated she was not "aware of [Father] making efforts to contact any of the other 10 to 15 programs that [she] identified for [Father.]" Social worker Choplin testified she spoke with the Church of Shattalon and Eureka Ministries on behalf of Father and helped Father learn how to use e-mail to apply for housing through these programs. As social worker Choplin gave Father a list of ten to fifteen agencies

3. Findings 1-40 address general procedural matters and adjudication as to the mother only.

to contact for housing assistance, Father testified he did not remember receiving any information other than the two agencies social worker Choplin identified specifically, and social worker Choplin was not aware Father made efforts to use any of the other agencies given to him by social worker Choplin, this finding is supported by the evidence. The trial court must assess the credibility of the witnesses and draw inferences therefrom. *See In re R.H.*, 295 N.C. App. 494, 500-01, 906 S.E.2d 829, 834 (2024) ("In the context of termination of parental rights proceedings, the proper inquiry is often fact-dependent and the trial court, as a fact-finding court, is in the best position to determine the credibility of the witnesses before it and make findings of fact. Thus, the trial court determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, the trial court alone determines which inferences to draw and which to reject." (citations and quotation marks omitted)).

2. Finding 81

Finding 81 states Father "did not take reasonable steps to pursue housing options that were made known to him and which could have assisted him, despite his criminal record, which he identified as a barrier to securing safe housing." Father argues "he did take reasonable steps to pursue housing options." This argument is closely related to Father's challenge to finding 80, which we consider supported by the evidence, showing Father contacted only two out of ten housing assistance resources given to him by social worker Choplin. We recognize Father testified on direct examination he paid an application fee at Vista Realty but was denied due to his criminal record and that he contacted a few other places, although the record is unclear as to the number of applications he paid for and submitted. However, on cross-examination, Father was unable to name any of the locations or offices he applied to. Father then stated once an office tells him "they have to check [his] records, then [he doesn't] apply because [he has] already been rejected[.]" Father then admitted, even after being denied for having a criminal record, he never asked DSS for help finding housing that would allow him even with a criminal record. We also note Father had over two years to secure housing instead of a limited time in which it would not be possible to complete this process. Much of finding 81 required the trial court to assess the credibility of Father and social worker Choplin, and finding 81 is supported by the evidence. *See id.*

3. Finding 87

As to finding 87, Father argues he did not testify at the termination hearing he understood Spanish "perfectly" as found by the trial court. Finding 87 specifically states:

> Social Worker Choplin has communicated with [Father] outside of court in Spanish. While this is not [Father's] first language, he has stated on numerous occasions that he understands Spanish. When asked during his testimony today about communications that occurred in Spanish, [Father] responded that he understood, even stating he understood "perfectly." Further, the record reflects that the need to obtain a safe and appropriate living arrangement for [Rex] and to secure childcare was explained to [Father] at hearings with the Ki'che (sic) interpreter.

DSS and the GAL recognize the trial court used a different word, stating Father actually testified to understanding Spanish "completely" instead of "perfectly." Specifically, in response to a question about his criminal record, Father testified "[t]hat's what they told me, not in English, in Spanish. *So I was able to understand completely what they were telling me*." (Emphasis added.) While Father did not use the word "perfectly" as the trial court found, he did indicate he understood Spanish "completely." The other parts of finding 87, and other uncontested findings of fact, also indicate Father understood Spanish. Webster's dictionary defines "complete" as "3. highly proficient" and "perfect" as "2: expert, proficient[.]" Merriam-Webster's Collegiate Dictionary 254, 919 (11th ed. 2003). Thus, there is no meaningful difference in the words "completely" and "perfectly" as used by Father in his testimony and the trial court in finding 87.

And to the extent Father suggests on appeal that not having a K'iche interpreter outside of court proceedings contributed to his failure to find safe and stable housing, this suggestion is not supported by the unchallenged findings of fact. The trial court's Order thoroughly addressed the question of Father's native language and his understanding of Spanish in findings 82 through 88, but he challenges only a small portion of finding 87. For example, finding 84 states "[p]rior to August 2022, [Father] participated in and completed programs to include Prime for Life, the Nurturing Parenting Program, and Domestic Violence Treatment provided in Spanish or with the aid of a Spanish interpreter. [ ]DSS and the [c]ourt accepted [Father's] completion of those programs." Finding 87 is supported by the evidence despite the trial court quoting the word "perfectly" instead of "completely."

4. Finding 89

Father challenges finding 89 by arguing that having a babysitter was not part of his case plan, was "irrelevant given he had no housing for Rex and the trial court was not going to place Rex in his custody until

he had housing[,]" and that Father examined one daycare but could not afford it. But this challenge does not really address the substance of finding 89. Finding 89 states:

> At the hearing today, when asked about how [Rex] will be cared for while he is at work, [Father] stated he will seek a daycare or a babysitter. [Father] doesn't have an identified daycare or an identified babysitter for [Rex] today. The expectation that a daycare spot or an appropriate babysitter will simply materialize upon [Rex's] return is not realistic.

Finding 89 does not state that finding a babysitter or day care was part of Father's case plan but having a babysitter or day care available was clearly relevant. Father's case plan required him to "demonstrate the ability to meet the basic, developmental, and medical needs of [Rex.] Rex was three and a half years old at the time of the hearing." Father was working full-time, and it is obvious that one of the things a parent must do to meet the "basic needs" of a child who is age three is to have a reliable babysitter or day care to take care of the child while the parent is working. This challenge is without merit.

5. Finding 90

Father challenges finding 90 as "pure speculation" and is "therefore erroneous." Finding 90 states:

> Were the court to return custody of [Rex] today, one of two things would happen:
>
> [Rex] would go to a situation [Father] himself acknowledged isn't suitable for [Rex], in an environment with an unknown number of unknown adults and no plan for how [Rex] will be cared for when [Father] goes to work tomorrow.
>
> Alternatively, [Rex] would be left in the care of [the mother]. This was the plan reported to [the mother] in her conversation with Social Worker Choplin in January 2024. As it is the only clear plan for [Rex's] care to have been identified by either parent, and as there has been at least some amount of continued communication between [Father] and [the mother] during the case, the [c]ourt gives some weight to the evidence that this would be the outcome.

Father "denies that he would rely on [the m]other to help him with Rex's care if he regained custody of Rex." Father also argues that he "admitted

that his current residence was inadequate for Rex. Thus, there was no evidence [ ]Father would attempt to house Rex at his current residence."

Father challenges the first part of finding 90, arguing there "was no evidence [ ]Father would attempt to house Rex at his current residence," but based on the evidence, the trial court had no reason to believe he would house Rex anywhere else. Father recognized his current residence was in a home with several adults he would not identify and DSS could not do background checks on, and he did not have a plan for care for Rex when he was working. He had been living in similar circumstances during the entire time Rex was in DSS custody, and he had been unable to find other housing. It is entirely reasonable for the trial court to infer that Father would leave Rex in the care of one or more of the "unknown adults" when he was working, if he had no babysitter or daycare. *See In re R.H.*, 295 N.C. App. at 500-01, 906 S.E.2d at 834.

Further, as to the second part of finding 90 that Rex would instead be left in the care of the mother, as "this was the plan reported to . . . Social Worker Choplin in January 2024[,]" and "it is the only clear plan for [Rex's] care to have been identified by either parent," and since Father and the mother were still in contact, the court "gives some weight to the evidence that this would be the outcome." Father argues only that he denies this assertion but does not point to any testimony or evidence to the contrary. Instead, social worker Choplin testified Father gave her the mother's phone number, the mother was living on the same street as Father, and

> [w]hen talking to [the mother] at the jail, I asked her if her and [Father] were still romantically involved. She stated "yes." She said "He probably doesn't want me telling you this," and further went to say that she sees [Father] pretty often. And then on the 4th of January, when we discussed it as well, I asked her if [Rex] was back into either of their care if they would parent together. She stated "yes," and they also plan to get married.

Again, the trial court could reasonably infer that Father may leave Rex in the care of the mother when he was working.[4] *See id.* The challenges to finding 90 are overruled.

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4. Other portions of the Order addressed the trial court's concerns about the mother. Unchallenged findings state that the mother "was leaving [Rex] in unsafe situations while she engaged in prostitution and used drugs." She also had a "mental health crisis but failed to accept help" and had "jeopardiz[ed] her own safety and further jeopardize[ed] her

6. Finding 92

As to finding 92, Father does not actually challenge the substance of the finding, but states his inability to obtain housing suitable for Rex was based on his immigration status, and

> [t]his Court should hold that it is improper to terminate parental rights where the only issue [ ]Father did not overcome on his case plan was finding adequate housing and the only reason he could not overcome that issue was due to his undocumented immigration status in the United States.

Finding 92 states:

> However, despite those actions, [Father] has not changed the fundamental issues underlying [Rex's] removal from his care and custody. As of April 2024, [Father] has had two years and four months, well over the twelve months to permanence, to obtain a safe living arrangement for [Rex] and provide a clear plan of care for [Rex]. [Father's] position has remained essentially the same as at the time of [Rex's] removal.

Father does not argue the substance of finding 92 is unsupported by the evidence, and this finding is supported by the evidence. We will instead review Father's argument as to his inability to find housing and the effect of his immigration status in our discussion of the trial court's conclusion of willful failure to make progress below. Finding 92 is supported by the evidence.

C. Conclusion of Willful Failure to Make Progress

Father contends the trial court erred in concluding there were adequate grounds for termination of his parental rights under North Carolina General Statute Section 7B-1111(a)(2) since "the trial court used [ ]Father's undocumented immigrant status as the sole basis for concluding the existence of this TPR ground and the trial court operated under a misapprehension of law." Although Father's undocumented immigrant status was a fact which complicated Father's ability to find

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son's." When Rex was removed from the mother's care by DSS, Father was informed that Rex "was exposed to unsafe conditions in [the mother's] care" but "[Father] did not act to intervene and informed [ ]DSS he was unable to care for his child." The trial court also found that Father "knew or should have known of the conditions his son was experiencing in [the mother's] care" even before DSS informed him of this situation.

housing, according to the Order, it was not part of the basis for the trial court's conclusion. We disagree with Father's contention that his immigration status played a substantial role in the trial court's determination and conclude the trial court properly terminated Father's parental rights under North Carolina General Statute Section 7B-1111(a)(2) for willful failure to make progress.

North Carolina General Statute Section 7B-1111(a)(2) states:

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2) (2023).

> [A]n adjudication under N.C.G.S. § 7B-1111(a)(2) requires that a child be "left in foster care or placement outside the home pursuant to a court order" for more than a year at the time the petition to terminate parental rights is filed. This is in contrast to the nature and extent of the parent's *reasonable progress*, which is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights.

In re J.S., 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (emphasis in original) (citations, ellipses, and brackets omitted). We first note it is undisputed Rex was "left" in foster care "for more than a year at the time the petition to terminate parental rights [was] filed." *Id.* Father only contends the trial court erred in using Father's immigration status and operated under a misapprehension of law as to whether Father could take immediate custody of Rex and that the trial court improperly required him to complete all elements of his case plan.

Our Supreme Court has outlined how to evaluate whether a parent's lack of progress with their case plan was willful:

> [A] finding that a parent acted "willfully" for purposes of N.C.G.S. § 7B-1111(a)(2) does not require a showing of fault by the parent. 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 sufficient to warrant termination of parental rights under section 7B-1111(a)(2).

Id.

In addressing housing concerns, our Supreme Court specifically noted in a case where the mother moved from a motel to a house, but only a month before the termination hearing, "[t]his limited and delayed progress does not amount to reasonable progress in light of the fact that the children had been in YFS custody for over three years." *In re E.C.*, 375 N.C. 581, 587, 849 S.E.2d 806, 811 (2020) (citation omitted). Here, Father lived in a house with other unknown adults and slept on the couch in the living room; this situation was the same since at least November 2022 and the termination hearing was not until April 2024. Father agreed that this was an unsuitable arrangement for a child but could not secure adequate housing despite having over two years to do so. DSS provided information and assistance to Father in seeking housing and particularly trying to find housing that would be available to him despite his undocumented immigrant status and his criminal record. In addition, Father did not challenge finding 76, where the court found that "[Father] acknowledged in his testimony today that the primary obstacle he encountered in obtaining housing was his criminal record." We also note Father had sufficient income to be able to pay for housing, as the trial court found that he worked full-time and had a surplus after paying his basic living expenses – including his rent and utilities – of $2,000.00 per month at the time of the hearing, so his inability to find housing was not based on poverty.

The trial court also noted, and Father was aware, he was not required to have housing with a formal lease agreement but he would need to give DSS the names of adults who would be living in the home with Father and Rex so they could conduct background checks on the individuals. Father refused to do this throughout the pendency of his case. And despite the ten to fifteen resources Father was given by DSS, the testimony at the hearing showed he only contacted two of those resources and acknowledged after he was denied housing at a facility due to his criminal record, he essentially stopped applying because he assumed he would be denied again. Father had ample time to find housing, was given

resources by DSS but did not utilize the resources fully and took limited steps to obtain housing. Although Father made progress in other areas of his case plan, such as completing parenting classes, he failed to make progress in obtaining suitable housing. Just as in *In re E.C.*, where the respondent actually found housing shortly before the termination hearing, "[t]his limited and delayed progress does not amount to reasonable progress." *Id.*

As to his immigration status, Father also cites to *In re B.S.O.*, 234 N.C. App. 706, 760 S.E.2d 59 (2014), to illustrate the effect of deportation on a termination of parental rights case. In *In re B.S.O.*, this Court stated "a parent's deportation should serve as neither a sword nor a shield in a termination of parental rights decision." 234 N.C. App. at 711, 760 S.E.2d at 64 (citations and quotation marks omitted). And while this principle is not in dispute, the trial court did not rely on, or even discuss, Father's immigration status in determining there were adequate grounds to terminate his parental rights. Father recognizes his case differs from *In re B.S.O.* since he was not actually deported or facing deportation, as far as we can tell from the record, but instead argues his immigration status prevented him from obtaining housing and it would thus be improper to terminate his parental rights based solely on his failure to secure safe and stable housing.

But we disagree with Father's contention that "his undocumented status prevented him from acquiring adequate housing for Rex." The trial court found that his "primary obstacle" in obtaining housing was "his criminal record." The trial court also found that he had "convictions for Assault of a Female, Assault with a Deadly Weapon, and Assault on a Child Under 12." Although Father's immigration status was a factor in his difficulty in finding housing, it was not his "primary obstacle"; that was his criminal record. Father's assertion the trial court improperly used his immigration status in terminating his parental rights is without merit.

Father also contends the trial court operated under a misapprehension of law since it "essentially found that [ ]Father was unable to have Rex in his care and custody at the time of the TPR hearing since finding 90 outlined what would happen if Father regained custody." Father cites to *In re J.S.*, 374 N.C. at 812, 845 S.E.2d at 73, to contend the trial court cannot consider whether a parent can regain custody of a child at the time of the termination hearing. Our Supreme Court, quoting *In re L.C.R.*, 226 N.C. App. 249, 252, 739 S.E.2d 596, 598 (2013), provides:

> the issue of whether or not the parent is in a position to actually regain custody of the children at the time of the termination hearing is not a relevant consideration under

> N.C.G.S. § 7B-1111(a)(2), since there is no requirement for the respondent-parent to regain custody to avoid termination under that ground. Instead, the court must only determine whether the respondent-parent had made reasonable progress under the circumstances in correcting those conditions which led to the removal of the juvenile. Accordingly, the conditions which led to removal are not required to be corrected completely to avoid termination. Only reasonable progress in correcting the conditions must be shown.

In re J.S., 374 N.C. at 812, 845 S.E.2d at 73 (citation, quotation marks, and ellipses omitted). Although finding 90 is phrased as what would likely happen if "the court were to return custody of [Rex] today," this finding, in context, was directly addressing Father's failure to make reasonable progress to correct the exact circumstances that led to Rex's removal. Essentially, the trial court found that nothing had changed since Rex was removed; Father still did not have a safe place for Rex to live and had no prospects of finding a safe place; and he still had no identified person or facility to provide safe care for Rex while he was working. As outlined above, the trial court discussed Father's past and current living conditions, the more than two years Father had to correct these conditions, the efforts DSS made to assist Father in finding housing and Father's limited use of these resources, and Father's financial situation which showed he was able to afford housing. This argument is overruled.

Finally, Father argues the trial court "operated under a misapprehension of law by believing that [ ]Father was supposed to have accomplished *all* the requirements of his case plan[.]" (Emphasis added.) Father is correct that "a trial judge should refrain from finding that a parent has failed to make reasonable progress in correcting those conditions which led to the removal of the juvenile simply because of his or her failure to fully satisfy all elements of the case plan goals." *In re A.B.C.*, 374 N.C. 752, 760, 844 S.E.2d 902, 909 (2020) (citations, quotation marks, and ellipses omitted). "However, we have also stated that a trial court has ample authority to determine that a parent's extremely limited progress in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)." *Id.* And in *In re A.B.C.*, we upheld the trial court's determination that the respondent failed to make reasonable progress since the core issues resulting in the child's removal were substance abuse issues and the respondent only made limited progress in correcting that condition.

See id. Here, Father did make more progress in the other areas of his case plan such as parenting classes and substance abuse, but he made essentially no progress in the housing issue. A core issue resulting in Rex's removal from his parent's care was housing; neither Father nor the mother had adequate housing for Rex. Thus, the trial court did not require Father make reasonable progress in all elements of his case plan as he contends and Father's limited progress in addressing housing is a proper basis for the trial court to terminate his parental rights under North Carolina General Statute Section 7B-1111(a)(2).

The trial court relied on Father's inability to provide safe and stable housing to Rex as a basis for terminating his parental rights, not his immigration status. In addition, Father still was unable to provide a suitable housing arrangement for Rex and this did not change in over two years since Rex was removed from his mother's care. Therefore, Father failed to make reasonable progress with his case plan and the trial court did not err in terminating his parental rights under North Carolina General Statute Section 7B-1111(a)(2). We need not review the trial court's conclusion as to North Carolina General Statute Section 7B-1111(a)(1) for neglect. *See In re D.H.H.*, 208 N.C. App. 549, 552, 703 S.E.2d 803, 805-06 (2010) ("Although the trial court found that three grounds existed, a single ground is sufficient to support an order terminating parental rights. Therefore, if we determine that the findings of fact support one of the grounds, we need not review the other grounds." (citations, quotation marks, ellipses, and brackets omitted)).

III. Conclusion

As the challenged findings of fact are supported by the evidence and the findings support the conclusion that Father failed to make reasonable progress with his case plan under North Carolina General Statute Section 7B-1111(a)(2), we affirm the trial court's termination Order.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

ASHLEE INSCOE, PETITIONER
v.
TODD ISHEE, COMMISSIONER OF PRISONS, RESPONDENT

No. COA24-272

Filed 2 April 2025

Mandamus—transfer of inmate from a men's prison to a women's prison—statutory discretion vested in Department of Adult Correction

The trial court erred in issuing a writ of mandamus ordering respondent—the Commissioner of Prisons—to transfer petitioner—an inmate assigned male at birth, but who claimed to be a woman (or an "intersex woman") and received an amended birth certificate designating her sex as female—from the men's prison where she was incarcerated to a women's prison because the relevant statutes (N.C.G.S. §§ 148-36 and 148-44), taken together, provide the Department of Adult Correction with discretion to assign an inmate to any prison facility so long as male and female inmates are quartered separately (which further comports with federal legislation enacted to prevent prison rape and sexual abuse). The trial court's erroneous conclusion that the department lacked discretion to assign petitioner to a male prison facility arose from its incorrect belief that petitioner's birth certificate created an irrebuttable presumption that she must be classified as female, while N.C.G.S. § 130A-93 provides that a birth certificate is only prima facie evidence of a person's sex. The evidence regarding petitioner's sex was conflicting, with the court's unchallenged findings of fact indicating that petitioner was intersex.

Judge HAMPSON concurring in a separate opinion.

Appeal by respondent from writ entered 28 November 2023 by Judge A. Graham Shirley, II, in Superior Court, Wake County. Heard in the Court of Appeals 24 September 2024.

Emancipate NC, by Elizabeth Simpson, for petitioner-appellee.

Attorney General Jeff Jackson, by Special Deputy Attorneys General Orlando L. Rodriguez and J. Locke Milholland, IV, for respondent-appellant.

STROUD, Judge.

Todd Ishee, Commissioner of Prisons for North Carolina, appeals from a Writ of Mandamus ordering him to transfer Ashlee Inscoe, an inmate at Nash Correctional Institution, to a women's prison operated by the North Carolina Department of Adult Correction. Under North Carolina statutes, the North Department of Adult Correction is required to "provide quarters for female prisoners separate from those for male prisoners." N.C. Gen. Stat. § 148-44 (2023). The North Carolina Department of Adult Correction also has discretionary authority to consider an inmate's request to transfer to a different prison facility based on the inmate's claim that he or she should be assigned to a different prison facility based on sex or gender. The North Carolina Department of Adult Correction has a multi-disciplinary committee to review requests for transfer and to decide if an inmate should be transferred. After the North Carolina Department of Adult Correction's full consideration of Petitioner's request, in accord with state and federal law, the Division Transgender Accommodation Review Committee made the decision, in its discretion, not to transfer Petitioner to another facility. Petitioner challenged the denial of her request for transfer by filing a petition for a Writ of Mandamus with the Superior Court of Wake County, claiming that the North Carolina Department of Adult Correction did not have the discretion to keep Petitioner in a male facility; her petition alleged that "[Petitioner] is a woman, and thus, she is entitled to be incarcerated at a women's prison."

The trial court ultimately granted the Writ of Mandamus requiring the North Carolina Department of Adult Correction to transfer Petitioner to a women's prison based on the fact that in 2023, Petitioner had her birth certificate amended to state her sex as "female." Although a birth certificate is *prima facie* evidence of a person's sex, it does not create an irrebuttable presumption. The trial court erred in treating the amended birth certificate as creating an irrebuttable presumption that Petitioner is female and therefore must be assigned to a female prison, particularly where the trial court found as a fact that "Petitioner is an intersex individual" who has "at least in part, masculine anatomy" and had an orchiectomy in 2022, resulting in the amendment to the birth certificate. The trial court erred in granting the Writ of Mandamus, and therefore we reverse.

I. Terminology used in this Opinion

Appellate judges strive to write opinions with precision and clarity. No doubt we often fail in meeting this goal but that does not make the

goal less worthy. Beyond deciding a single case, a court must consider how an opinion may be used.

> Once an opinion is filed, lawyers and others will read it with an eye to how they can use it to serve their particular purpose, no matter how remote that may be from what the writer had in mind. Thus, it is well for judicial writers to think how their words might be used, and write to forestall their misuse.

Judicial Writing Manual, 1991, FED. JUD. CTR., p. 21 https://www.fjc.gov/subject/opinion-writing-legal-writing [https://perma.cc/JGN9-C87R] (last visited Jan. 3, 2025). In an effort to forestall the potential misuse of this opinion, we will first address some terminology used in this opinion.

This Court's usual practice in its opinions is to use names and terminology to refer to parties as used in the order or ruling on appeal, unless that terminology may be confusing in the particular case.[1] Based on the usual practice, in conformity with the trial court's order, here we have generally used "Ashlee Inscoe" as Petitioner's name and "she" and "her" as pronouns for Petitioner. We also note that some documents in the record use Petitioner's former name, William M. Inscoe, and male pronouns for Petitioner. Because the trial court's order uses female pronouns for Petitioner, we will use them also. But our use of pronouns or names in this opinion, either feminine or masculine, does not indicate this Court's disapproval or approval of either type of pronoun, nor do the pronouns or name used indicate any legal ruling or holding by this Court.

II. Factual and Procedural Background

Todd Ishee ("Respondent"), Commissioner of Prisons for North Carolina, appeals from a Writ of Mandamus ordering him to transfer

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1. This Court addressed an argument based upon the trial court's terminology used to refer to a party in *Green v. Carter*, which states

> the doctrine of collateral estoppel does not apply because the trial court's use of the term "Non-parent" in place of Ms. Green's name or the word "plaintiff" in the custody order was not an adjudication of any fact or issue in that case. Court orders in child custody and child support cases often use descriptive terms to refer to the parties instead of technical legal terms such as "plaintiff" or "defendant." Here, the custody order used the word "Non-parent" to refer to Partner merely for convenience and clarity, just as we have used the terms "Mother" and "Partner" in this opinion.

293 N.C. App. 51, 59, 900 S.E.2d 108, 114 (2024) (citation omitted).

Ashlee Inscoe ("Petitioner"), an inmate at Nash Correctional Institution, to a women's prison within the purview of the North Carolina Department of Adult Correction ("the Department"). On 17 November 2021, with the consent of Respondent, the trial court entered an Order Sealing Motion and Exhibits. The Order sealed the "Motion for Writ of Mandamus and/or Preliminary Injunction, and the accompanying exhibits, from public access indefinitely[.]" Because the Motion for Writ of Mandamus and other documents filed in the trial court were sealed by court order, under North Carolina Rule of Appellate Procedure 42, the record on appeal is also sealed. *See* N.C. R. App. P. 42(a) ("Items sealed in the trial tribunal remain under seal in the appellate courts. When these items are filed with the appellate courts, counsel must attach a copy of the order, statute, or other legal authority that sealed the item below.").

Because the parties consented to seal the trial court file to protect Petitioner's medical information, and the trial court approved sealing the court file which resulted in sealing the record on appeal as well, we recognize those reading this opinion may have difficulty understanding this case without access to the documents filed with the trial court or most of the relevant information considered by the Department, the trial court, and this Court. As Petitioner correctly noted in her motion to seal, her "sex and gender are at issue in this matter and the information provided in her Motion is pertinent for the Court to consider." In its brief to this Court – which was not sealed – the Department addressed "Petitioner's complex biology and medical file" and referenced facts included in the record on appeal regarding Petitioner's medical background and incidents during incarceration. Petitioner also discusses and quotes portions of her medical records in her brief, which is not sealed. We have a duty to address the case as the parties presented it to this Court and based on the record and trial court's findings of fact and conclusions of law. But we appreciate our concurring colleague's concerns about discussing the facts of this case, and we have limited the information revealed in this opinion to the small portions of the extensive record necessary to address the issues raised by the trial court's order and the briefs.

Any medical information in this opinion is not intended to re-litigate Petitioner's sex or gender, as our concurring colleague contends, but to provide the background to understand the discussion of the relevant findings and the challenged conclusions of law in the Order on appeal. For example, the trial court made unchallenged findings of fact based on the evidence presented, including medical information, but then made a conclusion of law stating in part that "the relevant statutes do

not invite courts to consider the amount (sic) of chromosomes a person has, their physical characteristics, or their hormone levels, nor do the statu[t]es look to gender identity." This conclusion of law is incorrect, as discussed below, but our discussion of why this conclusion of law is in error requires some factual background.

In a case of this sort, we understand our concurring colleague's concern that this Court is addressing an intensely personal situation for Petitioner, but we are also addressing a matter of law for the guidance of the Department in conducting its operations in accord with both State and federal law for the benefit of all prisoners and all the residents of North Carolina. In deciding how much information to include in an opinion, we must consider both Petitioner's private interests and the constitutional mandate for and the public interest in open courts. *See* N.C. Const. art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."). Instead of discussing limited information from Petitioner's case in this opinion, we could have opted to provide public transparency – which is the general rule in cases before this Court – by un-sealing some or all the record filed with this Court. Instead, we sought to balance the competing interests of Petitioner's medical privacy and this Court's obligation to provide openness under Article I, section 18 of the Constitution of North Carolina. *See*, *e.g.*, *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999) ("Thus, even though court records may generally be public records under N.C.G.S. § 132-1, a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has "no power" to diminish it in any manner. N.C. Const. art. IV, § 1[.] This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial." (citation omitted)).

For these same reasons, this Court and the Supreme Court of North Carolina routinely address appeals dealing with sensitive medical and sexual issues in this manner in other types of cases even where the court files are sealed by operation of law, such as in appeals filed under North Carolina General Statute Section 7B-1001, North Carolina General Statute Section 7B-2602, and North Carolina General Statute Section

7A-27 "that involve a sexual offense committed against a minor." N.C. R. App. P. 42 (b). We are not convinced Petitioner's case should be treated any differently than those cases.[2] We will therefore summarize facts as relevant to Petitioner's claims and evidence as well as the Department's ruling upon Petitioner's request to the extent necessary to understand the Department's process and ruling, the trial court's proceedings and ruling, and this Court's analysis, while protecting Petitioner's medical information to the extent possible given the issues presented.

A. Trial Court Proceedings

The record before us tends to reflect that Petitioner began this action by filing a Petition for Writ of Mandamus on 30 September 2021, requesting Respondent to transfer her to a women's facility. Petitioner's claim was based on her allegation that she was "currently incarcerated in a men's prison . . . because she was erroneously assigned male at birth, over forty (40) years ago." Since 2020, Petitioner had been requesting the Department transfer her to a women's prison, without success. In the 2021 petition, Petitioner alleged that she "is an intersex woman" and that " 'intersex' refers to a wide range of variation in physical sex characteristics, such as chromosomes, genitals, and/or gonads, that may cause an individual's body not to conform to stereotypical notions of male or female." Petitioner alleged she was "subjected to near-constant verbal and physical harassment" by the other inmates in the facility.

Petitioner first requested transfer in 2020. In April 2020, the facility where Petitioner was housed made a formal request to the Division Transgender Accommodation Review Committee ("DTARC") to transfer Petitioner to a women's facility. The DTARC is a "multidisciplinary committee" comprised, at minimum, of the Medical Director, Chief of Psychiatry, Behavioral Health Director, Director of Rehabilitative Services, and the Prison Rape Elimination Act ("PREA") Director. *Evaluation & Management of Transgender Offenders*, E .2702(k) (2021) Standards for Adult Correctional Institutions (5th ed.). In May 2020, the DTARC requested that Petitioner "be seen by an endocrinologist." Under the Administrative Remedy Act, Petitioner filed a grievance

2. As a general rule, court files are available to the public unless sealed by court order, and documents in court files containing protected medical information or other types of information protected by law are redacted. *See*, *e.g.*, *Doe v. Doe*, 263 N.C. App. 68, 92, 823 S.E.2d 583, 598 (2018) ("Adjudicating claims that carry the potential for embarrassing or injurious revelations about parties, witnesses, or a corporation's image is part of the day-to-day operations of the North Carolina courts as well." (citation and quotation marks omitted)).

regarding her housing assignment on 29 July 2020. An endocrinologist examined Petitioner in September 2020 and recommended transfer, and a second doctor reviewed medical records and the endocrinologist's report and also recommended transfer.

In October 2020, the Facility Transgender Accommodation Request Committee ("FTARC") referred the request back to the DTARC. The FTARC is a facility-specific committee providing similar oversight and review as the DTARC, and comprised of representatives from the facility's psychiatry, behavioral health, nursing, administration, unit manager, and PREA Compliance Manager, among others. *Id.* at .2702(j). Petitioner alleged that the DTARC and the Department of Public Safety denied the request to transfer Petitioner in November 2020 based upon Petitioner's "gender assigned at birth" and what she alleged were "vague 'safety concerns.' "

On 16 February 2021 and 1 April 2021, Petitioner filed two more grievances regarding her housing assignment; these were also denied. After "[c]ounsel became aware of [Petitioner's] situation" in July 2021, on 10 August 2021, Petitioner's counsel sent a letter to Respondent and his general counsel seeking Petitioner's transfer to a women's facility. After some "back-and-forth correspondence[,]" Petitioner determined that the Department "does not intend to transfer [Petitioner] to a women's facility" so she filed the Petition for Writ of Mandamus in September 2021. Petitioner alleged that Petitioner "is a woman. Therefore, there is no discretion for [Respondent] to apply as to her housing assignment."

On 8 November 2021, the Department filed a response to the Petition, admitting some allegations and denying others. As relevant to this appeal, the Department admitted "upon information and belief that, currently, Petitioner identifies as a woman" and that she was "assigned male at birth[;]" this assignment was "one factor" the Department considered when "deciding where to incarcerate Petitioner." The Department admitted it had denied Petitioner's request for transfer but alleged the request was denied for three reasons. First, the Department cited "specific, not vague, safety and security reasons." The Department alleged "Petitioner is a convicted child sex offender having been convicted of sexually assaulting a 13-year-old girl, and therefore, is a possible safety and security threat to the population in a women's facility." Second, the Department had "determined that, in the requests for transfer to a women's facility, Petitioner has purposely misstated Petitioner's medical history" and this also posed a "possible threat to the safety and security of" other inmates in a women's facility. Third, the Department noted that "as to Petitioner's own safety and security, Petitioner has admitted numerous times that there are no threats to Petitioner in [the men's facility]"

and thus "housing Petitioner at [the men's facility] is not a threat to Petitioner's safety and security."

On or about 3 August 2023, Petitioner filed a "Supplement to Motion for Writ of Mandamus[,]" noting that since she filed her original Petition in 2021, she had obtained an amended birth certificate showing her sex as female and undergone "a surgical procedure . . . that aligned her genitalia with her gender identity[.]" When she was initially assigned housing, Petitioner's birth certificate stated she was male, but on 11 May 2023 the birth certificate was amended to state she is a female. This change was made based on an affidavit from Petitioner's physician, as allowed by North Carolina General Statute Section 130A-118, after Petitioner had an orchiectomy, or removal of testicles. Since her most recent incarceration in North Carolina, she has been housed in men's prison facilities and is currently assigned to a single person cell within a housing unit that houses male offenders. Petitioner's cell opens up to a housing unit designated for men and shared by 107 male inmates.

On 10 August 2023, the trial court entered a Writ of Mandamus ordering Respondent to direct the members of the DTARC to "complete their investigation into" Petitioner's pending transfer request "and make a final determination[.]" Respondent notified the trial court that the DTARC had reviewed and denied Petitioner's transfer request on or about 6 September 2023. The DTARC issued its Report on 19 September 2023. The Report concluded Petitioner's medical, mental health, and program service needs are being met in the current facility, "however, there are safety concerns if she were transferred to her requested facility housing environment."

The trial court held a hearing on Petitioner's Motion on 21 November 2023. Following the hearing, the trial court issued a Writ of Mandamus on 28 November 2023 ordering Respondent to transfer Petitioner to a women's prison by 5 December 2023.

Respondent timely filed written Notice of Appeal on 1 December 2023. The same day, Respondent also filed a Motion for Stay of Order to Transfer Pending Appeal. The trial court granted a temporary stay on 5 December 2023. However, on 2 January 2024, the trial court entered an Order denying Respondent's Motion to Stay. Respondent then filed a Petition for Writ of Supersedeas and Motion for Temporary Stay in this Court on or about 22 December 2023. This Court entered an Order allowing Respondent's Motion for Temporary Stay on 22 December 2023. On 8 January 2024, this Court allowed Respondent's Petition for Writ of Supersedeas.

B. The DTARC Process

The trial court considered hundreds of pages of exhibits presented by both Petitioner and the Department. Since that information is sealed, we will briefly summarize the DTARC process and some of the evidence before the trial court. This factual background is necessary to understand the DTARC's process and decision.

When an inmate requests transfer to another facility, both state and federal law require the Department to consider the individual inmate's own unique circumstances, including his or her health and safety, as well as the safety of other inmates and the prison facility's management or security concerns. *See* 28 C.F.R. § 115.42(b), (c), (e) (discussing the "[u]se of screening information" in determining where to house inmates); *see also* N.C. Gen. Stat. § 148-36 (2023) ("Secretary of the Department of Adult Correction to control classification and operation of prison facilities."). In this case, after a full evaluation by medical experts and other specialists on the DTARC, including review of Petitioner's medical information, criminal record, and other information, it determined Petitioner should not be transferred. Specifically, the DTARC concluded that Petitioner's "gender identity history has been complicated by various and repeated unreliable, inconsistent, and at times demonstrably false reports." Medical testing, including a CT scan, and physical examination, revealed Petitioner has male anatomy. Despite Petitioner's repeated claims she had a genetic karyotype of XX, or female, she never provided any test results to confirm this claim, and she declined the Department's offers to provide genetic testing.[3] The DTARC also noted concerns to the safety of other inmates if Petitioner were housed in a female facility since Petitioner is a registered sex offender based upon a conviction for sexual assault on a teenage girl. The DTARC also considered Petitioner's own safety, medical issues, and the availability of services and programs needed for her own well-being.

The DTARC's review process spanned several years and was concluded on 5 September 2023. The DTARC considered voluminous records and reports in its evaluation of Petitioner's request for transfer. The

3. Our concurring colleague states that Petitioner "produced genetic evidence indicating she is female" but our record does not include anything more than Petitioner's claims that she had testing done in California. She also declined the Department's offer to have genetic testing done, and Petitioner alleged in her Supplement to Motion for Writ of Mandamus that a "chromosome test is now irrelevant" due to the amendment to her birth certificate. (Emphasis in original.)

DTARC's Report noted that Petitioner "has been medically examined and reports indicate functioning male anatomy including a penis and testicles." Although Petitioner "self-report[ed]" as intersex, the DTARC noted that this "[s]elf-report [is] not confirmed by Medical." The DTARC Report included the following summary of its findings:

> [Petitioner] is registered as a sex offender related to an offense involving a teenage girl who (per official crime version) [Petitioner] took for a drive, got drunk, and sexually assaulted (victim said she woke up to [Petitioner] on top of her). [Petitioner's] own version of the crime (per OPUS) described the victim as a girlfriend and said her parents were upset and had [Petitioner] "locked up."
>
> [Petitioner's] gender identity history has been complicated by various and repeated unreliable, inconsistent, and at times demonstrably false reports. Examples include reporting undergoing a hysterectomy, experiencing menstruation, describing her testicles as ovaries, and requesting a clitoral reduction to remove her penis. [Petitioner]'s case had been previously reviewed by the DTARC [in 2022] for requested surgeries and transfer to a female facility; these requests were not supported at that time. [Petitioner] recently had an orchiectomy due to medical complaints related to testicular pain. The surgery was approved medically, based on external consultations, but was not related to [Petitioner]'s request for gender-identity related surgeries. Although inaccurate, [Petitioner] has reported to mental health and other providers in the prison system that she is the first person to have gender-identity related surgery in a North Carolina prison.
>
> [Petitioner]'s facility housing status was reviewed by the DTARC with input from PREA, Programs, and Operations. In review of [Petitioner]'s current facility (Nash) placement, the DTARC notes that she has been at the facility for approximately 1.5 years without any major adjustment issues (with exception to the issues created by [Petitioner]'s hoarding hormone medications as described below). According to PREA records, she has no substantiated PREA cases, but has made PREA reports in the recent past which she subsequently recanted or indicated were not accurate. Her medical, mental health, and program service needs are being met at the current facility. In

> this regard the DTARC review did not find issue with her current facility assignment.
>
> In review of [Petitioner]'s requested facility placement (female prison), the DTARC notes concerns. [Petitioner] is registered as a sex offender based on the sexual assault of a female victim and moving her from a male facility to a female facility raises security concerns. [Petitioner] has suggested that moving her to a female facility would be to affirm her gender identity, however, her gender identity history has been complicated by various and repeated unreliable, inconsistent, and at times demonstrably false reports. . . . She has continued her pattern of unreliability has been demonstrated in her recent medication hoarding behaviors as well as in relatively recent PREA reports which she recanted or indicated were not accurate.
>
> The DTARC finds it ill-advised to consider moving [Petitioner] from her current facility where there are no demonstrated issues for her safety or the ability to meet her medical, mental health, and/or program services needs to a requested facility (female) that would create issues for the safety and security of the requested facility (female).

In its "Medical Overview" the DTARC noted concerns regarding Petitioner's misuse and hoarding of her prescribed hormone medications, behavior which posed a risk to Petitioner's own health:

> [Petitioner] has repeatedly provided conflicting, inconsistent, and demonstrably false fabricated reports of remote and recent medical history, has repeatedly provided erroneous symptomatology and manifestations of illness not only during her medical care, but has used those erroneous reports outside of her medical care as well. Most recently, [Petitioner] reported that DAC had failed to refill hormone replacement medications. Not only was this entirely untrue, but a routine inspection of [Petitioner]'s room uncovered 450 tablets of estradiol and 68 tablets of spironolactone. As prescribed, this is more than 225 days of medication which was not taken as prescribed. Most concerning is that labs (blood) obtained after this discovery revealed very dangerously high estradiol levels (853). For reference, the highest level of estradiol in a biologic female is 360. Of note, this was an acute development, as

> recent lab work demonstrated normal estradiol levels. The only explanation for this was that [Petitioner] must have consumed what would be considered a potentially toxic dose of the medication. [Petitioner]'s supratherapeutic level demonstrates not only severe non-compliance but impacts many other aspects of medical treatments, and most concerning, poses a significant risk to [Petitioner]'s health. These repeated and concerning manipulations, coupled with PREA accusations which were subsequently recanted, create serious question about the credibility of [Petitioner]'s self-report to medical providers and medical decisions made in such circumstances must be carefully weighed in order to not initiate treatments which could harm the patient.

Based on all these considerations, the DTARC stated that:

> The DTARC does not support the request for gender-identity related facility transfer. Her request for transfer to a female facility was reviewed by the DTARC with input from PREA, Programs, and Operations. A review of the security staff ability to house and supervise [Petitioner] to ensure [Petitioner]'s safety and the safety of the population in her current facility assignment appears acceptable, however, there are safety concerns if she were transferred to her requested facility housing environment. Medical, mental health, and program services are available to meet the needs of [Petitioner] at her current facility assignment.

III. Analysis

"The writ of mandamus is an order from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971) (citations omitted). It is "a limited and extraordinary remedy to provide a swift enforcement of a party's already established legal rights." *Holroyd v. Montgomery Cnty.*, 167 N.C. App. 539, 543, 606 S.E.2d 353, 356 (2004). "The party seeking such writ must have a clear legal right to demand it, and the tribunal, board, corporation, or person must be under a present, clear, legal duty to perform the act sought to be enforced." *Bd. of Managers of James Walker Mem'l Hosp. of Wilmington v. City of Wilmington*, 235 N.C. 597, 600, 70 S.E.2d 833, 836 (1952) (citations omitted). We review grants of mandamus *de novo*. *See Graham Cnty. Bd.*

of Elections v. Graham Cnty. Bd. of Comm'rs, 212 N.C. 313, 322, 712 S.E.2d 372, 379 (2011). We also consider issues of statutory construction *de novo*. *See N.C. Farm Bureau Mut. Ins. Co., Inc. v. Hebert*, 385 N.C. 705, 711, 898 S.E.2d 718, 724 (2024) ("Questions of statutory construction are . . . reviewed de novo." (citation omitted)). Finally, "[q]uestions of law are reviewed de novo[.]" *Cherry Cmty. Org. v. Sellars*, 381 N.C. 239, 247, 871 S.E.2d 706, 714 (2022) (citation omitted).

In its Writ of Mandamus, the trial court made findings of fact and conclusions of law. The Department does not challenge the trial court's findings of fact on appeal, so those are binding on this court. *See id.* ("A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal."). We will note some findings as relevant to the issues on appeal. The Department raises arguments about some of the trial court's conclusions of law. The trial court first concluded that the Department has "discretionary authority relating to the actions of [the] FTARC and [the] DTARC and their decisions made under PREA[,] 34 U.S.C.S. § 30301-09; 28 C.F.R. Part. 115[,]" and that the Department committed "no abuse of discretion . . . as it relates to [the] FTARC, [the] DTARC, or discretionary decisions made under PREA." Therefore, the trial court concluded the Department had conducted its review of Petitioner's request for transfer in compliance with federal and state law and it did not abuse its discretion. But the trial court then concluded the Department did *not* have discretion in regard to Petitioner's request for transfer and issued the Writ of Mandamus on this basis.

The Department challenges the trial court's issuance of the Writ of Mandamus based on North Carolina General Statute Sections 148-44 and 130A-93. The Department contends that the trial court erred in its interpretation of these statutes. After making conclusions of law about the Department's proper review of Petitioner's request under state and federal law, the trial court's next conclusion of law addressed North Carolina General Statute Section 148-44:

> 4. However, N.C. Gen. Stat. § 148-44 is a sex-based, mandatory requirement on the Secretary of the Department of Corrections to maintain separate living and working facilities (or "quarters") for men and women.

The Department does not challenge conclusion of law 4.

The Department's arguments on appeal address the remaining conclusions of law:

5. Further, Petitioner's birth certificate is *prima facie* evidence that Petitioner is of the female sex under N.C. Gen. Stat. § 130A-93.

6. Respondent has failed to present evidence that challenges the authenticity of the birth certificate. They also do not dispute that an orchiectomy was performed, such orchiectomy being the basis for the amended birth certificate.

7. In making the determination of Petitioner's sex, the [c]ourt notes that the relevant statutes do not invite courts to consider the amount (sic) of chromosomes a person has, their physical characteristics, or their hormone levels, nor do the statu[t]es look to gender identity. The statutes solely look to a person's sex. Through her birth certificate, Petitioner has presented *prima facie* evidence that her sex is female.

8. In securing her amended birth certificate, Petitioner met the North Carolina requirements of N.C. Gen. Stat. § 130A-118 with a notarized letter from a doctor confirming certain statutory requirements. That is all she has to do in order to modify her sex. There is no dispute between the parties as to whether Petitioner has met these requirements. To pursue further lines of inquiry and to rule against the *prima facie* evidence that Petitioner has presented, on the current record, would put this [c]ourt in the position of a legislature. This [c]ourt declines to take such a position. Accordingly, this [c]ourt concludes that Petitioner's sex is female under N.C. Gen. Stat. § 148-44.[4]

4. Our concurring colleague believes that this "conclusion is clearly beyond the scope of this appeal." We note that the Department argued in its brief on appeal that the trial court erred in *this* conclusion of law by treating Petitioner's birth certificate stating she is female as *prima facie* evidence of her sex and that the birth certificate alone dictates her assignment to a female facility under North Carolina General Statute Section 148-44. This question was raised by the Department's brief on appeal and we have therefore addressed it. The Department argued that "the trial court's interpretation of N.C.G.S. §§ 148-44 and 130A-93 divested the Department of its discretion to make housing determinations." (Capitalization altered.) The Department argued at length about the trial court's erroneous interpretation of the interaction of North Carolina General Statute Section 130A-93 and 148-44.

We review the trial court's conclusions of law *de novo*. *See In re Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (citation and quotation marks omitted). The trial court concluded, "§ 148-44 is a sex-based, mandatory requirement on the Secretary of the Department of Corrections to maintain separate living and working facilities (or "quarters") for men and women." However, the Department's decision of where to house a particular inmate is inherently discretionary based on federal and state law. Our statutes grant the Department discretionary authority to determine the appropriate facility in which to house each individual:

> Subject to such rules and regulations, the Secretary shall classify the facilities of the State prison system and develop a variety of programs so as to permit proper segregation and treatment of prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and correctional treatment of persons committed to the Division. The Secretary of the Adult Correction, or his authorized representative, shall designate the places of confinement where sentences to imprisonment in the State's prison system shall be served. *The Secretary or his representative may designate any available facility appropriate for the individual in view of custodial and correctional considerations*.

N.C. Gen. Stat. § 148-36 (emphasis added). Thus, our statutes expressly accord the Department with discretion to determine the appropriate facility based on "custodial and correctional considerations." *Id*. Petitioner contends, however, that based on the statutory mandate the Department provide separate "quarters" for male and female prisoners, the Department's discretion is limited to determining the particular facility but not the *type* of facility (i.e., male or female prison) to which an inmate may be assigned.

North Carolina General Statute Section 148-44 provides: "The Department shall provide quarters for female prisoners separate from those for male prisoners." N.C. Gen. Stat. § 148-44. Petitioner contends Section 148-36 is subordinate to Section 148-44, requiring the Department to house male and female inmates separately because Section 148-36 does not reference sex. Thus, Petitioner argues, the Department's decision on Petitioner's transfer request was not, in fact, discretionary. Therefore, in Petitioner's view, the Writ of Mandamus did not remove discretion from the Department at all because its decision

was not discretionary. This interpretation misconstrues the statutes and, indeed, strips the Department of the discretion granted to it.

The grant of discretion to the Department under Section 148-36 is broad, requiring only that the Department make a decision based on "custodial and correctional considerations." N.C. Gen. Stat. § 148-36. Taken together with the requirement to provide separate quarters for male and female inmates under Section 148-44, *see* N.C. Gen. Stat. § 148-44, the Department may assign an inmate to any prison facility so long as male and female inmates are quartered separately.

Also, federal regulations accompanying PREA affirm state agencies' discretionary authority in housing determinations. PREA is a federal law enacted to "establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States" and "develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape." 34 U.S.C. § 30302. Although PREA is a federal law, its terms reflect that it also applies to State prisons.[5] In the accompanying regulations in the subsection entitled "Screening for Risk of Sexual Victimization and Abusiveness[,]" federal regulations expressly address housing assignments for transgender and intersex inmates:

> (b) The agency[6] shall make individualized determinations about how to ensure the safety of each inmate.
>
> (c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, *the agency shall consider on a case-by-case basis* whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.
>
> . . . .

5. For example, in its subsection providing definitions, PREA defines "prison" as "any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government, and includes (A) any local jail or police lockup; and (B) any juvenile facility used for the custody or care of juvenile inmates." 34 U.S.C. § 30309(7). Federal regulations accompanying PREA employ a nearly identical definition, which likewise encompasses state facilities: "Prison means an institution under Federal or State jurisdiction whose primary use is for the confinement of individuals convicted of a serious crime[.]" 28 C.F.R. § 115.5.

6. Under PREA, "[a]gency means the unit of a State, local, corporate, or nonprofit authority, or of the Department of Justice, with direct responsibility for the operation of any facility that confines inmates, detainees, or residents[.]" 28 C.F.R. § 115.5.

> (e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given *serious consideration*.

28 C.F.R. § 115.42(b), (c), (e) (emphasis added). This language illustrates that federal law contemplates multi-factor, discretionary decisions. Indeed, as these regulations underscore, such individualized considerations are necessary to uphold each inmate's safety, as well as each facility's management and security. *See* 28 C.F.R. § 115.42(a), (c).

Here, in issuing its second Writ of Mandamus, the trial court expressly first concluded the Department had not abused its discretion in making a housing decision under PREA arising from the FTARC and the DTARC reviews. However, in this second Writ of Mandamus, the trial court also ordered "Petitioner is to be transferred to a women's prison within the purview of the North Carolina Department of Adult Correction." Given the discretionary nature of the Department's housing decisions, this command moves from compelling an official to make a discretionary decision to "requir[ing] a particular result" – an impermissible use of mandamus. *In re T.H.T.*, 362 N.C. 446, 454, 665 S.E.2d 54, 59 (2008) (citation omitted); *see also Hamlet Hosp. & Training Sch. for Nurses v. Joint Comm. on Standardization et al.*, 234 N.C. 673, 680, 68 S.E.2d 862, 868 (1952) ("In such cases mandamus lies only to compel public officials to take action, but ordinarily it will not require them, in matters involving the exercise of discretion, to act in any particular way."). "It is well settled law that Mandamus cannot be invoked to control the exercise of discretion of a board, officer, or court . . . unless it clearly appears that there has been an abuse of discretion." *Moody v. Transylvania Cnty.*, 271 N.C. 384, 390, 156 S.E.2d 716, 720 (1967) (citation and quotation marks omitted). In this case, however, the trial court expressly concluded "[t]here was no abuse of discretion by Respondent as it relates to [the] FTARC, [the] DTARC, or discretionary decisions made under PREA." The trial court's grant of mandamus infringed on the Department's discretionary authority.[7]

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7. Indeed, the two Writs of Mandamus entered in this case illustrate the issue. In its first Writ of Mandamus entered 10 August 2023, the trial court ordered Respondent to compel the DTARC to make a final determination on Petitioner's transfer request—a type of action clearly approved of by our caselaw. *See Bd. of Educ. of Yancey Cnty. v. Bd. of Comm'rs of Yancey Cnty.*, 189 N.C. 650, 652, 127 S.E. 692, 693 (1925) ("The interested citizen is entitled to compel the exercise of discretion by public officers, in such as the instant case; but he cannot direct its course."); *Midgette v. Pate*, 94 N.C. App. 498, 504, 380 S.E.2d 572, 576 (1989) ("Where a duty to make a decision is imposed upon a body or officer, even though discretion is involved in the determination, mandamus will lie to compel the body

The trial court's erroneous conclusion that the Department had no discretion to assign Petitioner to a male prison facility was based directly on its legal error in considering Petitioner's birth certificate as creating an irrebuttable presumption she must be classified as female. Our concurring colleague states that there was no reason for this Court to discuss the facts of this case because "Petitioner's sex is irrefutably unnecessary to the analysis." But we must address the arguments about the trial court's conclusions of law properly presented by the parties in their briefs. According to Petitioner, her "gender identity" is necessary to our analysis. She argues that her "gender identity, her lived experience, her medical records, and a number of other markers including, but not limited to, her official amended birth certificate, reflect the indisputable (*and undisputed*) fact that [Petitioner] is a woman." (Emphasis in original.) Petitioner argues that her sex is the only fact necessary to the analysis, and her amended birth certificate requires a legal conclusion that she is female and must be assigned to a female facility. She contends that

> N.C. Gen. Stat. § 130A-93(h) is clear in its mandate that a vital record such as [Petitioner's] amended birth certificate is *prima facie* evidence of [Petitioner's] sex. The Department's denial that [Petitioner] is a female prisoner ignores [Petitioner's] material reality, and destroys the meaning of Sections 130A-118(b)(4) and 130A-93(h) which, unlike the Department, do have the authority to determine an individual's sex. The statutes regarding vital records and sex apply to all North Carolina residents, regardless of prisoner or intersex status. If the Department is allowed the statutorily-unfounded "discretion" to deny [Petitioner's] sex, simply because it does not agree with the State Registrar, then the Department would be given the power to invalidate the sex of any prisoner in North Carolina.

In response, the Department argues the trial court's conclusion of law interpreting this statute – which adopted Petitioner's contention regarding the legal effect of her birth certificate – is in error. The Department contends that "[a]bsent reversal, § 130A-93—a statute about public health and vital statistics, not prisons—would suddenly dictate the placement determinations of the Department and completely eliminate

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or officer to make the decision, since there is no discretion involved in whether action is to be taken." (citation omitted)).

the Department's discretion to make certain housing determinations as provided by state and federal law."

The trial court's conclusions of law 6, 7 and 8 were based upon an erroneous interpretation of North Carolina General Statute Section 130A-93. The trial court stated correctly that a birth certificate is "prima facie evidence" of Petitioner's sex. *See* N.C. Gen. Stat. § 130A-93(h) ("A certified copy issued under the provisions of this section shall have the same evidentiary value as the original and shall be prima facie evidence of the facts stated in the document."). But *prima facie* evidence creates only a rebuttable presumption. Petitioner's birth certificate was amended in May 2023, before the DTARC concluded its review in September 2023, but the DTARC also considered voluminous other evidence in making its decision, as we briefly summarized above. But the existence of evidence opposing the *prima facie* presumption created by the birth certificate can overcome the rebuttable presumption. The trial court's conclusions to the contrary, as stated in conclusions of law 7 and 8, are in error.

Our Supreme Court has described a rebuttable presumption as "a mere inference of fact" which "loses its potency" upon the presentation of opposing evidence:

> It is now quite generally held by the courts that a rebuttable or prima facie presumption has no weight as evidence. It serves to establish a prima facie case; but, *if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself.*

In re Wall's Will, 223 N.C. 591, 595-96, 27 S.E.2d 728, 731 (1943) (emphasis added) (citation and quotation marks omitted). The Supreme Court has distinguished between the presumption created by "prima facie" evidence and an irrebuttable conclusion of law:

> A rebuttable presumption is not an irrebuttable conclusion of law. It is a mere inference of fact. A rebuttable presumption has no weight as evidence. It serves to establish a *prima facie* case, but *if challenged by rebutting evidence, the presumption cannot be weighed against the evidence.* Supporting evidence must be introduced, without giving any evidential weight to the presumption itself.

In re L.D.B., 168 N.C. 206, 211, 617 S.E.2d 288, 291 (2005) (emphasis in original) (citation omitted).

Here, Petitioner's argument and the trial court's Writ of Mandamus, in conclusions of law 6, 7, and 8, treat the amended birth certificate as creating an irrebuttable conclusion of law. The argument, and the trial court's ruling, can be expressed as a simple, but erroneous, logical syllogism:

Major premise: The Department must "provide quarters for female prisoners separate from those for male prisoners." N.C. Gen. Stat. § 148-44.

Minor premise: Petitioner's amended birth certificate is *prima facie* evidence that she is female.[8]

Conclusion: Therefore, the Department must house Petitioner in a female facility.

The legal error begins in the minor premise and leads to the erroneous conclusion. As noted above, we review the trial court's conclusions of law *de novo*.[9] *See In re Bass*, 366 N.C. at 467, 738 S.E.2d at 175; *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." (citation omitted)). Petitioner's amended birth certificate *is prima facie* evidence that she is female, "but, if challenged by rebutting evidence, the presumption cannot be weighed against the evidence." *In re Wall's Will*, 223 N.C. at 596, 27 S.E.2d at 731. The Department presented voluminous

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8. The trial court's error in treating the birth certificate as requiring a conclusion of law that "Petitioner's sex is female" is illustrated in the conclusion quoted by our concurring colleague. We also note that the Department argued,

> even assuming that § 130A-93 has *some* relevance in the prison context, that statute says only that an individual's birth certificate is "prima facie evidence of the facts stated in the document." N.C.G.S. § 130A-93(h). In deciding where to house Petitioner, state law tasks the Department with considering a far broader range of factors than simply whether Petitioner's birth certificate is accurate. Most notably, the Department needed to consider how it could best ensure Petitioner's safety and the safety of the other offenders in its custody. Particularly given Petitioner's complex biology and medical file, the Department could not responsibly let a birth certificate blindly dictate Petitioner's placement. Section 130A-93 does not require otherwise. (Emphasis in Original.)

9. Our concurring colleague asserts that we were not "asked" to "rebut the presumption" created by Petitioner's birth certificate. But we were asked to review the trial court's conclusions of law, and we review conclusions of law *de novo*. Here, the trial court's conclusion of law was in error, based on both the law as to the effect of *prima facie* evidence and the unchallenged findings of fact.

evidence that Petitioner is male or at least intersex. Petitioner presented no evidence that she is actually female; she claims to be intersex. The medical evidence showed she had full male anatomy, at least until the orchiectomy, when the testicles were surgically removed. Petitioner's evidence tended to show she was "intersex" which is not the same as female. Petitioner's birth certificate does not require a finding or a legal conclusion she is female or that she must be housed in a female prison facility. In fact, the trial court found, in one of the *unchallenged* findings of fact, that "Petitioner is an intersex individual[.]"[10] Although much of the evidence considered by the DTARC challenges the Petitioner's claim of being "intersex," this finding is unchallenged and we accept it as true for purposes of appellate review. *See Graham Cnty. Bd. of Elections*, 212 N.C. at 322, 712 S.E.2d at 379. Under the regulations of the Department, "intersex" is defined as "[a] person who has a sexual or reproductive anatomy or chromosomal pattern that does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development. An example would be an individual born with characteristics of both sexes." *Offender Sexual Abuse and Sexual Harassment Policy*, F .3400(m) (2022). Put more simply, an intersex person is physiologically neither clearly male *nor* clearly female. This Court has previously noted the definitions of "male" and "female"[11]:

> A "female" is defined as an "individual that bears young or produces eggs as distinguished from one that begets young." Webster's New Collegiate Dictionary 422 (8th ed. 1977); *see also* Oxford English Dictionary 823 (2nd ed. 1989) (defining female as "belonging to the sex which bears offspring"). A "male" is defined as "of, relating to, or

10. In her brief to this Court, Petitioner repeatedly insists that she is both female and intersex. She argues that "Petitioner[ ] is a female prisoner who is wrongfully incarcerated inside a men's prison in North Carolina, in violation of a mandatory centuries-old statute that instructs: 'The Department shall provide quarters for female prisoners separate from those for male prisoners.' N.C. Gen. Stat. § 148-44." In the next paragraph, she quotes finding of fact 7: "[Petitioner] is an intersex individual and under Prison Rape Elimination Act (PREA) standards, she is at a high risk of being an abuse victim."

11. The North Carolina General Assembly has not adopted a statutory definition of male, female, or "biological sex" applicable to this case. However, we note that the definitions as used in this opinion are generally consistent with the definitions as stated in Chapter 90, Article 1N, entitled "Gender Transition Procedures on Minors." *See* N.C. Gen. Stat. Ch. 90, art. 1N (2023). These definitions were effective as of 1 August 2023, before the trial court's issuance of the Writ.

> being the sex that begets young by performing the fertilizing function in generation and produces relatively small usually motile gametes (as sperms, spermatozoids, or spermatozoa) by which the eggs of a female are made fertile." Webster's New Collegiate Dictionary 695 (8th ed. 1977); *see also* Oxford English Dictionary 259 (2nd ed. 1989) ("Of or belonging to the sex which begets offspring, or performs the fecundating or fertilizing function of generation.").

Green v. Carter, 293 N.C. App. 51, 62, 900 S.E.2d 108, 116 (2024) (brackets omitted).

Based on the trial court's *unchallenged* findings of fact, Petitioner is neither male nor female; she is intersex. The trial court found that "Petitioner developed, at least in part, masculine anatomy and was raised as a boy. . . . Both parties agree that Petitioner underwent an orchiectomy on September 7, 2022." An orchiectomy is the "surgical removal of one or both testes." Merriam-Webster's New Collegiate Dictionary 873 (11th ed. 2005). An amended birth certificate, obtained in May 2023 – about three years *after* Petitioner first requested transfer to another facility – does not change the physical fact that Petitioner is intersex. The trial court treated the birth certificate as creating an irrebuttable presumption that Petitioner is female, despite its finding of fact that she is intersex, and therefore made an error of law in concluding that Petitioner is female. This conclusion of law was based on an erroneous interpretation of North Carolina General Statute Section 130A-93 since *prima facie* evidence does not preclude the trial court from considering evidence opposing the rebuttable presumption, such as evidence presented in this case about "chromosomes a person has, their physical characteristics, or their hormone levels." Evidence of this type can be considered, and should be considered if presented, in opposition to the *prima facie* evidence of the birth certificate.

The trial court's unchallenged finding that Petitioner is "intersex" does not eliminate the Department's discretion to determine an appropriate housing assignment. In considering Petitioner's request for transfer, the Department was required to exercise its discretion to deal with actual physical realities of both Petitioner and other inmates, and its discretion is not limited by Petitioner's personal "material reality," as she describes it, or her "gender identity." To protect all inmates in North Carolina's prison facilities, the Department must operate its prisons based on real custodial and correctional considerations, including the characteristics and needs of each prisoner as well as the available prison

facilities and programs and the protection of all prisoners. Thus, the trial court's error of law in the application of North Carolina General Statute Section 130A-93 in conjunction with North Carolina General Statute Section 148-44 caused the trial court to issue the Writ of Mandamus in error. This error infringed on the Department's discretionary authority to determine the appropriate housing assignment by ordering the Department to assign an inmate to a particular facility or type of facility. Mandamus was not the proper remedy in this case.[12] Consequently, the trial court's issuance of the second Writ of Mandamus was in error.

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12. Additionally, we note Petitioner had an alternative legal remedy available to her. Our statutes, in the section immediately following the mandate for the Division of Prisons to adopt an Administrative Remedy Procedure, provide:

> (a) Upon approval of the Administrative Remedy Procedure . . . , and the implementation of the procedure, this procedure shall constitute the administrative remedies available to a prisoner for the purpose of *preserving any cause of action under the purview of the Administrative Remedy Procedure*, which a prisoner may claim to have against the State of North Carolina, the Division of Prisons of the Department of Adult Correction, or its employees.
>
> (b) No State court shall entertain a prisoner's grievance or complaint which falls under the purview of the Administrative Remedy Procedure *unless and until* the prisoner shall have exhausted the remedies as provided in said procedure. If the prisoner has failed to pursue administrative remedies through this procedure, any petition or complaint he files shall be stayed for 90 days to allow the prisoner to file a grievance and for completion of the procedure. If at the end of 90 days the prisoner has failed to timely file his grievance, then the *petition or complaint* shall be dismissed. Provided, however, that the court can waive the exhaustion requirement if it finds such waiver to be in the interest of justice.

N.C. Gen. Stat. § 148-118.2 (2023) (emphasis added).

Thus, our statutes clearly contemplate that an inmate dissatisfied with the outcome of the grievance process may file a petition or complaint in a state court for judicial review. *Cf. Evans v. Ishee*, 2023 WL 3671821 (W.D.N.C.) (declining to exercise supplemental jurisdiction over an inmate's claim brought pursuant to N.C. Gen. Stat. § 148-118.2(b) where no federal claims were viable). Indeed, the North Carolina Industrial Commission has reviewed a case in which an inmate filed a claim pursuant to the State Tort Claims Act, *Alston v. N.C. Dep't of Pub. Safety*, 2017 WL 6949233, I.C. No. TA-24795 (N.C. Ind. Com.), and declined to hear another State Tort Claims Act claim because the inmate had not exhausted his administrative remedies, *Taylor v. N.C. Dep't of Corr.*, 2010 WL 519701, I.C. No. TA-19535 (N.C. Ind. Com.) (citing N.C. Gen. Stat. § 148-118.2). Thus, Petitioner could have filed a complaint in superior court for judicial review of her prior grievances. Therefore, mandamus is not a proper remedy. *See TAC Stafford, LLC v. Town of Mooresville*, 282 N.C. App. 686, 698, 872 S.E.2d 95, 104 (2022) ("The trial court may only issue a writ of mandamus in the absence of an alternative, legally adequate remedy." (citation and quotation marks omitted)).

IV. Conclusion

Accordingly, for the foregoing reasons, we reverse the trial court's 28 November 2023 Writ of Mandamus.

REVERSED.

Judge ZACHARY concurs.

Judge HAMPSON concurs in a separate opinion.

HAMPSON, Judge, concurring.

I agree that the Writ of Mandamus was not the proper remedy in this case. This is so because the issuance of the Writ erroneously infringed on the Department's discretionary authority to determine the appropriate housing assignment by ordering the Department to assign an inmate to a particular facility or type of facility. That determination resolves the narrow issue before us.

The majority, however, goes well beyond this narrow issue. Instead, the majority elects to expose Petitioner's identity, medical records, and other materials in order to relitigate Petitioner's sex and gender identity. Not only is this unnecessary, it is misguided. As such, I cannot join the majority's opinion.

As the majority recognizes, its words matter. Indeed, in feeling the need to disclaim its use of female pronouns and Petitioner's name, the majority speaks volumes. The use of female pronouns and name is not at issue. No party disputes the use of these pronouns. Respondent's briefing consistently uses she/her pronouns for Petitioner. The majority's disclaimer purporting not to rule on Petitioner's gender identity only serves to preview its ruling rejecting Petitioner's gender identity.

The majority then makes the unfortunate choice to reveal the contents of Petitioner's medical records, DTARC report, and other personal and private information in great detail. This material was filed under seal—precisely to protect this information from public disclosure. This personal and sensitive information is entirely irrelevant to the issue of whether mandamus is an appropriate remedy in this case. Its only

purpose in the majority opinion is to, again, attempt to undermine Petitioner's gender identity.[1]

Finally, after having expressly concluded the trial court's grant of mandamus infringed on the Department's discretionary authority, the majority takes direct aim at Petitioner's gender identity. In so doing, the majority ignores the trial court's unchallenged Findings and instead substitutes its own judgment on the matter. Although the trial court did find "Petitioner is an intersex individual," it also found: Petitioner's birth certificate lists her sex as female and was amended pursuant to N.C. Gen. Stat. § 130A-118(b)(4); Petitioner produced genetic evidence indicating she is female; and, both parties agree Petitioner's gender identity is female and she has undergone gender affirming care consistent with her gender identity since at least 2019. The trial court then made the following unchallenged Conclusion of Law:

> In securing her amended birth certificate, Petitioner met the North Carolina requirements of N.C. Gen. Stat. § 130A-118 with a notarized letter from a doctor confirming certain statutory requirements. That is all she has to do in order to modify her sex. There is no dispute between the parties as to whether Petitioner has met these requirements. To pursue further lines of inquiry and to rule against the *prima facie* evidence that Petitioner has presented, on the current record, would put this Court in the position of a legislature. This Court declines to take such a position. Accordingly, this Court concludes Petitioner's sex is female under N.C. Gen. Stat. § 148-44.

The majority does not address this Conclusion. And, importantly, this Conclusion is clearly beyond the scope of this appeal. N.C. R. App. P. 28 (2024); *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997) ("Appellate review is confined to those exceptions which pertain

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1. The majority states our Courts "routinely address appeals dealing with sensitive medical and sexual issues in this manner in other types of cases even where the files are sealed by operation of law[.]" That is so where those sealed items are material to the case at hand. Here, however, they are not. Based on the Department's arguments, an individual assigned female at birth could be in the same position as Petitioner (although a transfer request would not be considered by DTARC or FTARC). That being the case, it cannot be true that Petitioner's biological or other medical history is relevant to our analysis. Further, how DTARC arrived at its decision is clearly in no way material to whether the trial court had the authority to order Petitioner's transfer via Writ of Mandamus. Thus, I see no compelling reason to include so much of Petitioner's private, sealed information in the majority opinion.

to the argument presented."). Fundamentally, it is error to address issues not properly before us. *See Matter of R.A.F.*, 384 N.C. 505, 512, 886 S.E.2d 159, 164 (2023) ("[T]he Court of Appeals *may not address* an issue not raised or argued by [a party][.]" (emphasis added)).

Further, while the majority and I agree Petitioner's birth certificate constitutes prima facie evidence of her sex, the majority—unasked—improperly attempts to itself unilaterally rebut the presumption Petitioner's birth certificate creates. Petitioner's sex is irrefutably unnecessary to the analysis. The broad question presented by this case is whether a trial court may compel, by writ of mandamus, the Department to transfer Petitioner from one prison facility to another, following an administrative review by the Department and its decision not to transfer Petitioner. Drilling down, we must determine whether the assignment of an inmate to a particular facility is a discretionary decision. Those questions are unchanged by the sex or gender of the inmate involved. Had the majority's analysis stopped before its discussion attacking the rebuttable presumption created by the birth certificate, the result would be the same and the opinion would have fully addressed the dispositive issue on appeal. Thus, the majority's exposition on Petitioner's sex and gender identity is clearly dicta. *See Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." (citations omitted)).[2]

In sum, I believe the majority far exceeds the task before us. It is enough to say that after conducting an in-depth investigation and review, the Department made a discretionary determination on the facts before it not to transfer Petitioner—an intersex person—to a women's prison. The grant of discretion to the Department under Section 148-36 is broad, requiring only that the Department make a decision based on "custodial and correctional considerations." N.C. Gen. Stat. § 148-36 (2023). Taken together with the requirement to provide separate quarters for male and female inmates under Section 148-44, the Department may assign

2. The majority takes issue with this characterization, stating that it addressed this matter because "[t]his question was clearly raised by the Department's brief on appeal[.]" However, the Department also raised issues regarding the trial court's interpretation of Section 148-44; that Section's requirement of "separate quarters" for male and female inmates and the interpretation of the term "quarters"; and Petitioner's right to placement in a particular facility. Yet the majority declines to address those arguments in the same manner. I think this appropriate because those issues are separate from the dispositive issue in this case: whether the trial court could order Petitioner's transfer using a writ of mandamus.

an inmate to any prison facility so long as male and female inmates are quartered separately. On the Record before us, there is no indication the Department abused its discretion in making its individualized determination in this case. The trial court expressly found the Department had not abused its discretion under the PREA in its FTARC and DTARC review processes—which included individualized consideration of Petitioner's circumstances and safety, each facility's management and security, and the safety of other inmates. The trial court's issuance of the Writ of Mandamus to compel transfer was, thus, error. This is so because it improperly infringed on the Department's discretionary authority and, instead, compelled a particular result. While, as the majority correctly notes, Petitioner may have other remedies available to her, mandamus is not the proper vehicle in this case.

INTREPID DIRECT INSURANCE AGENCY,
AS SUBROGEE OF MORNING STAR, LLC D/B/A HARDEE'S RESTAURANTS, PLAINTIFF
v.
AMEREX CORP. AND PYE-BARKER FIRE & SAFETY, LLC, DEFENDANTS

No. COA24-583

Filed 2 April 2025

Parties—plaintiff—not a real party in interest—lack of standing—motion to amend complaint—denied

In an action filed by the broker of an insurance policy covering a restaurant, which was damaged in a fire allegedly caused by a failure in the fire-suppression system provided and serviced by defendants, where the broker moved to amend its complaint to correct the plaintiff's name from the broker to the insurance company that issued the policy, the trial court properly granted defendants' motions to dismiss for lack of subject matter jurisdiction without allowing the motion to amend. The insurance company—having paid the restaurant owner's claims for damages under the policy—was the true necessary-party plaintiff in this case and was required to sue in its own name to enforce its subrogation rights against defendants. Therefore, the broker was not a real party in interest and lacked standing to sue defendants; accordingly, the trial court lacked jurisdiction to consider the broker's motion to amend and thus properly dismissed the case without ruling on the motion.

Appeal by plaintiff from order entered 16 October 2023 by Judge William Taylor Browne in Stanly County Superior Court. Heard in the Court of Appeals 29 January 2025.

Hausler Law Firm, PLLC, by Kurt F. Hausler, and Nielsen, Zehe & Antas, P.C., by Brian T. Suth, pro hac vice, and John J. Murphy, pro hac vice, for plaintiff-appellant.

Hamilton Stephens Steele & Martin, PLLC, by Graham B. Morgan and Keith J. Merritt, for defendant-appellee Amerex Corp.

Pinto Coates Kyre & Bowers, PLLC, by Richard L. Pinto and Britney M. Millisor, for defendant-appellee Pye-Barker Fire & Safety, LLC.

ZACHARY, Judge.

This case arises out of an apparent mistake in pleading. Plaintiff Intrepid Direct Insurance Agency ("Intrepid Agency"), as subrogee of Morning Star, LLC ("Morning Star"), filed a complaint against Defendants Amerex Corp. ("Amerex") and Pye-Barker Fire & Safety, LLC ("Pye-Barker"). Intrepid Agency subsequently filed a motion to amend its complaint "to correct [a] misnomer by correcting the name of Plaintiff" to Intrepid Insurance Company ("Intrepid Insurance"). Defendants filed motions to dismiss for lack of subject-matter jurisdiction, arguing that Intrepid Agency was without standing to bring the initial complaint. The trial court granted Defendants' motions to dismiss, and Intrepid Agency appeals that decision. After careful review, we affirm.

I. Background

On 22 December 2019, a fire caused significant damage to a Hardee's restaurant in Albemarle, North Carolina. The restaurant was owned and operated by Morning Star. At all times relevant to this appeal, the restaurant was covered by an insurance policy provided by Intrepid Insurance; Intrepid Agency served as the policy's broker. According to the amended complaint, Morning Star's claims for damages sustained to the restaurant as a result of the fire were paid.

On 14 December 2022, Intrepid Agency, as subrogee of Morning Star, filed a complaint against Defendants. Intrepid Agency raised claims for negligence and breach of contract arising from the alleged failure of the restaurant's fire-suppression system. The fire-suppression system was provided by Amerex and serviced by Pye-Barker.

On 24 February 2023, Intrepid Agency filed a motion to amend its complaint "to correct [a] misnomer by correcting the name of Plaintiff" to Intrepid Insurance, rather than Intrepid Agency. Amerex filed its motion to dismiss, answer, and crossclaims against Pye-Barker on 27 February 2023. Pye-Barker filed its motion to dismiss and answer on 2 March 2023.

On 7 and 11 August 2023, respectively, Amerex and Pye-Barker filed additional motions to dismiss. Pye-Barker also filed a memorandum of law in support of its motion. Both motions and the memorandum addressed the alleged misnomer, with Defendants arguing that Intrepid Agency lacked standing to bring the claims advanced in the initial complaint because Intrepid Agency was not a "real party in interest." *See* N.C. Gen. Stat. § 1A-1, Rule 17(a) (2023).

On 2 October 2023, Intrepid Agency's motion to amend and Defendants' motions to dismiss came on for hearing in Stanly County Superior Court. On 16 October 2023, having determined that it lacked subject-matter jurisdiction to grant Intrepid Agency's motion to amend, the trial court entered an order granting Defendants' motions to dismiss. Intrepid Agency[1] filed notice of appeal on 3 November 2023.

II. Discussion

On appeal, Intrepid Agency argues that the trial court erred by granting Defendants' motions to dismiss without allowing Intrepid Agency to amend its complaint. We disagree.

A. Standard of Review

"Standing concerns the trial court's subject[-]matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss." *WLAE, LLC v. Edwards*, 257 N.C. App. 251, 258, 809 S.E.2d 176, 181 (2017) (citation omitted). This Court reviews de novo a trial court's ruling on a Rule 12(b)(1) motion to dismiss for lack of subject-matter

1. Preliminarily, we must address whether Intrepid Agency or Intrepid Insurance is the plaintiff-appellant in this appeal. Appellant's counsel "adamantly denies that Intrepid Agency . . . was before the [trial] court," and further asserts that they were "never retained by Intrepid Agency" but instead were "engaged by [Intrepid Insurance] to file a subrogation claim as subrogee for Hardees [sic]." However, not only did Intrepid Agency file the initial complaint, but it also filed the motion to amend. Further, in the order from which appeal is taken, the trial court identified Intrepid Agency as the plaintiff. Finally, Intrepid Agency filed notice of appeal, not Intrepid Insurance. Accordingly, consistent with the record before us, we recognize Intrepid Agency as the plaintiff-appellant in this matter, notwithstanding counsel's representation otherwise to this Court.

jurisdiction, and in doing so, "may consider matters outside the pleadings." *Id.* (citation omitted).

B. Analysis

Intrepid Agency "insists that this matter involves a clerical error"—namely, "a scrivener's error in which its counsel misnamed the insurance company . . . using the similar name of the insurance broker." As such, it argues that this case is merely a matter of misnomer, and the trial court should have permitted it to correct its pleading pursuant to either Rule 15(c) or 17(a) of the North Carolina Rules of Civil Procedure.

Rule 15 governs the amendment of complaints. Subsection (c) provides that any "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. Gen. Stat. § 1A-1, Rule 15(c). Rule 17(a) provides, in pertinent part, that "[e]very claim shall be prosecuted in the name of the real party in interest." *Id.* § 1A-1, Rule 17(a). Furthermore:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Id.

However, as Defendants note, neither of these Rules is applicable in this case because Intrepid Agency lacked standing to file the initial complaint. "When the insurance paid the insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tort-feasor." *Shambley v. Jobe-Blackley Plumbing & Heating Co.*, 264 N.C. 456, 457, 142 S.E.2d 18, 20 (1965) (citation omitted). According to the amended complaint, Intrepid Insurance paid Morning Star's claims under the insurance policy; as such, Intrepid Insurance was the necessary-party plaintiff and was required to "sue in its own name to enforce its right of subrogation against" Defendants. *Id.* (citation omitted). Because Intrepid Agency lacked standing to bring these claims, the complaint

was a nullity; consequently, the trial court lacked subject-matter jurisdiction to consider the motion to amend under either Rule 15(c) or 17(a), and was therefore required to grant Defendants' motions to dismiss.

Our Supreme Court has explained that "[s]tanding refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that [it] may properly seek adjudication of the matter." *Town of Midland v. Harrell*, 385 N.C. 365, 371, 892 S.E.2d 845, 850 (2023) (citation omitted). "If a plaintiff does not have standing to assert a claim for relief, the trial court lacks subject[-]matter jurisdiction over the claim." *Id.* "Standing is measured at the time the pleadings are filed. In other words, a plaintiff must have standing at the time of filing to have standing at all. Subsequent events cannot confer standing retroactively." *Id.* (cleaned up).

"A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Coderre v. Futrell*, 224 N.C. App. 454, 457, 736 S.E.2d 784, 787 (2012) (citation omitted). Therefore, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. Gen. Stat. § 1A-1, Rule 12(h)(3).

In the related context of voluntary dismissal under Rule 41(a), this Court has recognized that "where a plaintiff lacked standing to file the initial complaint, that complaint is a nullity leaving no valid complaint to which an amended complaint could relate back." *Gantt v. City of Hickory*, 290 N.C. App. 279, 284, 892 S.E.2d 223, 227 (2023) (cleaned up), *disc. review denied*, 386 N.C. 281, 900 S.E.2d 682 (2024). Although Intrepid Agency relies upon Rules 15(c) and 17(a) rather than Rule 41(a) and strenuously seeks to distinguish *Gantt*, the fundamental legal principle of that opinion—that a complaint filed by a party that lacks standing is a nullity—nevertheless applies with equal force to the procedural posture presented here.

As if to prove this point, the *Gantt* Court directly cited cases involving Rules 15(c) and 17(a) in support of its standing analysis. *See id.* (citing *Coderre*, 224 N.C. App. at 457, 736 S.E.2d at 787; *WLAE*, 257 N.C. App. at 260, 809 S.E.2d at 182–83). In *Coderre*, where the plaintiff "lacked standing to file the initial complaint," thus rendering it a nullity, this Court held that "[w]ithout standing to bring the initial complaint, there was no valid complaint to which the amended complaint could relate back." 224 N.C. App. at 457, 736 S.E.2d at 787. Accordingly, this Court was unable to consider the plaintiff's appellate argument that it should have been allowed, under Rule 15(c), "to add an additional party

plaintiff to an already filed action and have the new plaintiff's claims relate back to the original filing." *Id.* at 457, 736 S.E.2d at 786.

Similarly, in *WLAE*, the plaintiff argued on appeal that "the trial court should have allowed [the] plaintiff the opportunity to amend its complaint to add the real party in interest" pursuant to Rule 17(a). 257 N.C. App. at 260, 809 S.E.2d at 182. However, this Court recognized that "because the trial court did not have subject[-]matter jurisdiction over th[e] proceeding at the time of filing, the court did not have the authority to order such substitution of party, and any attempt to do so would have been a nullity." *Id.* at 260, 809 S.E.2d at 182–83.

Intrepid Agency attempts to distinguish *Gantt* by noting that, in that case, this Court differentiated between a voluntary dismissal under Rule 41 and relation-back under Rules 15 and 17. The *Gantt* Court distinguished its holding from a pair of "cases [that] required amendments to alter a party's legal capacity to sue," neither of which "involved a voluntary dismissal under Rule 41." 290 N.C. App. at 282, 892 S.E.2d at 226. However, the instant case is far more similar to *Gantt*, *Coderre*, and *WLAE* than to those cases distinguished by the *Gantt* Court, primarily because this case does not involve the "alter[ation of] a party's legal capacity to sue." *Id.* Intrepid Agency is not seeking to alter its legal capacity to sue; it *never had* the legal capacity to sue.

Ultimately, Intrepid Agency was inadvertently named as plaintiff instead of Intrepid Insurance at the time of the complaint's filing, a mistake that deprived the trial court of subject-matter jurisdiction over the proceedings. *See WLAE*, 257 N.C. App. at 260, 809 S.E.2d at 182–83. Lacking subject-matter jurisdiction, the trial court was not authorized to rule upon Intrepid Agency's motion to amend, and moreover, was bound to dismiss this matter. N.C. Gen. Stat. § 1A-1, Rule 12(h)(3).

III. Conclusion

For the foregoing reasons, the trial court properly determined that Intrepid Agency lacked standing to file the complaint in this matter. Therefore, we affirm the court's order granting Defendants' motions to dismiss.

AFFIRMED.

Chief Judge DILLON and Judge STROUD concur.

RICHMOND COUNTY BOARD OF EDUCATION, PLAINTIFF
v.
DALE FOLWELL, NORTH CAROLINA STATE TREASURER, IN HIS OFFICIAL CAPACITY ONLY, NELS ROSELAND, NORTH CAROLINA STATE CONTROLLER, IN HIS OFFICIAL CAPACITY ONLY, KRISTIN WALKER, NORTH CAROLINA STATE BUDGET DIRECTOR, IN HER OFFICIAL CAPACITY ONLY, EDDIE M. BUFFALOE, JR., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, IN HIS OFFICIAL CAPACITY ONLY, JOSH STEIN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY ONLY, DEFENDANTS

No. COA24-827

Filed 2 April 2025

Judgments—renewal—against State Treasurer—enforceability not a bar to claim

In plaintiff county board of education's action to renew a judgment against the State Treasurer (involving fines collected for improper equipment violations), the trial court properly denied the motion to dismiss filed by defendants (the Treasurer and other State officials in their official capacity), in which defendants asserted sovereign immunity, because, while plaintiff may never be able to collect the judgment absent an appropriation from the General Assembly to satisfy the judgment, plaintiff was nevertheless entitled to seek renewal and have a new judgment entered. Plaintiff obtained a valid judgment in a prior action and properly brought the renewal action within ten years of the original judgment pursuant to N.C.G.S. § 1-47(1).

Judge FLOOD dissenting.

Appeal by defendants from order entered 19 August 2024 by Judge James Floyd Ammons, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 February 2025.

Crump Law Office, by George E. Crump, III, for plaintiff-appellee.

Dowling PLLC, by Troy D. Shelton and Craig D. Schauer, for defendants-appellants.

DILLON, Chief Judge.

Plaintiff Richmond County Board of Education commenced this action in February 2024 to collect on a judgment it obtained in a prior action against various officials and agencies of the State of North Carolina in 2014, a judgment which was affirmed by our Court.

In this present action, Defendants North Carolina State Treasurer Dale Folwell and North Carolina State Controller Nels Roseland (collectively, Appellants"), appeal from the trial court's order denying their motion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) of our Rules of Civil Procedure.

On appeal, Appellants argue the trial court erred, essentially contending that Plaintiff's new action seeking a money judgment is barred by sovereign immunity. For the reasoning below, we disagree with Appellants and affirm the trial court's order. Specifically, though we agree with Appellants that Plaintiff may not be able *to collect* on any judgment entered against Appellants in this action (unless money is appropriated by our General Assembly to pay the judgment), we conclude that Plaintiff is entitled to have a new judgment entered based on the uncollected prior judgment.

I. Factual and Procedural Background

This matter concerns a statute enacted by our General Assembly in 2011 which required any defendant convicted of driving with improper equipment to pay a $50.00 fee and for the fee to be remitted to the State for maintenance of State prisons. Plaintiff, a county board of education, commenced this action contending that it – and not the State prisons – was entitled to any $50.00 fee collected under the 2011 statute in Richmond County to be used for the public schools in that county. Plaintiff based its contention on a provision in our state constitution which mandates that fines collected in a county court be used for the public schools in that county, stating as follows:

> . . . the clear proceeds of all penalties and [ ] fines collected in the several counties . . . shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7(a).

The prior action came to our Court on three occasions.

In the first appeal to our Court, we concluded that Plaintiff's claim was not barred by sovereign immunity. *See Richmond Cnty. Bd. of*

Educ. v. Cowell, 225 N.C. App. 583, 591 (2013). On remand, the trial court entered judgment against the government defendants.

In the second appeal, we affirmed a trial court's order, concluding that our state constitution, indeed, required any $50.00 fee collected under the 2011 statute be used for the public schools and *not* for the prisons, and ordered the initial defendants pay to Plaintiff "all sums collected in Richmond County" from defendants convicted of an improper equipment violation. *Richmond Cnty. Bd. of Educ. v. Cowell*, 243 N.C. App. 116, 123 (2015). On remand, the trial court determined that Richmond County had collected $272,300.00 in fines under the 2011 statute and ordered the defendants pay Plaintiff that amount.

In the third appeal, however, we reversed the trial court's order, concluding that it is not in the power of the judiciary to order satisfaction of the judgment against the State; that is, the judgment could be satisfied only if our General Assembly appropriated the money to satisfy the judgment. *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 427–28 (2017) (hereinafter "*Cowell III*").

a. The Current Action

On 12 February 2024, Plaintiff filed a complaint (the "Complaint") against the above-captioned defendants seeking that a new judgment be entered based on the $272,300.00 judgment entered in the prior action.

In May 2024, Defendants filed a motion to dismiss the Complaint pursuant to Rules 12(b)(1), (2), and (6) of our Rules of Civil Procedure, contending the State had not waived its sovereign immunity for the new action and Plaintiff lacked an executable judgment that it could enforce and renew through a new action.

By order entered 26 July 2024, the trial court denied Defendants' motion to dismiss. Defendants appealed from that 2024 order.

II. Jurisdiction

We note that this appeal is interlocutory. However, Defendants argue, in part, that they are immune from suit based on sovereign immunity. And our Supreme Court has held that an order denying a motion to dismiss based on sovereign immunity affects a substantial right and is, therefore, immediately appealable. *Cedarbrook Res. Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 44 (2022). Accordingly, Defendants' sovereign immunity argument is properly before us.

We also consider Defendants' other arguments though they do not necessarily affect a substantial right. *See RPR & Assocs. v. State*, 139

N.C. App. 525, 530–31 ("Although this question . . . is interlocutory in nature, we choose to address it, given that [the] defendants' sovereign immunity argument is properly before us. After all, to address but one interlocutory or related issue would create fragmentary appeals.").

III. Analysis

We agree with Defendants that any judgment that Plaintiff may obtain in this matter may not ever be collectible. Specifically, our Supreme Court in *Smith v. State*, 289 N.C. 303 (1976), also cautioned that:

> In the event [that the] plaintiff is successful in establishing his claim against the State, *he cannot, of course, obtain execution to enforce the judgment*. The validity of his claim, however, will have been judicially ascertained. The judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend on the manner in which the General Assembly discharged its constitutional duties.

Id. at 321 (citations omitted) (emphasis added).

Based on *Smith*, we stated in *Cowell III* as follows:

> [W]hen the courts enter a judgment against the State, and no funds already are available to satisfy that judgment, the judicial branch has no power to order State officials to draw money from the State treasury to satisfy it.
>
> Of course, this case is no mere contract dispute. The State violated the North Carolina Constitution when it moved money otherwise destined for Richmond County schools to a separate State fund to pay for county jail programs throughout the State. As a result, this Court held that it is appropriate—as the trial court ordered—that this money be paid back to the clerk's office in Richmond County.
>
> It was well within the judicial branch's power to order this money—taken from Richmond County in violation of the constitution—to be returned. This, in turn, means that if the money collected from these fines still rested within the Statewide Misdemeanant Confinement Fund, awaiting the outcome of this protracted litigation, the courts could order State officials to return the money to Richmond County and the other affected counties.

> But, as the parties concede, this cannot be done because the money is gone. [Plaintiff] did not obtain a preliminary injunction to prevent the State from spending money while it litigated the case[.] . . . As a result, the only way the State can satisfy the judgment entered by the trial court is to pay *new* money from the State treasury—money not obtained from the improper equipment fees, but from the taxpayers and other sources of general State revenue. Under *Smith*, the judicial branch lacks the power to order State officials to pay this new money from the treasury.

254 N.C App. at 427–28 (citations and internal quotation marks omitted).

Plaintiff contended on appeal in *Cowell III*, however, that even without specific appropriation from the General Assembly, the trial court's writ of mandamus can be interpreted as an order that State officials take whatever steps are necessary to pay the judgment from any discretionary sources that are available. We rejected this argument, providing:

> [A] writ of mandamus may be used only to command public officials to perform a purely ministerial duty imposed by law; it generally may not be invoked to review or control the acts of public officers respecting discretionary matters.
>
> . . . .
>
> In sum, the role of the courts in this constitutional dispute is over. As the Framers of our constitution intended, the judiciary performed its function to the limit of its constitutional powers by entering a judgment against the State and in favor of [Plaintiff]. The State must honor that judgment. But it is now up to the legislative and executive branches, in the discharge of their constitutional duties, to do so. The Separation of Powers Clause prevents the courts from stepping into the shoes of the other branches of government and assuming their constitutional duties. We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box.

Id. at 428–29 (citations and internal quotation marks omitted).

In sum, Plaintiff obtained a valid judgment in the prior action, though Plaintiff at present cannot collect, as our General Assembly has not appropriated the money to pay the judgment.

Our General Assembly has determined that a judgment creditor's right to collect on a judgment is subject to a ten-year statute of limitations *but that* a judgment credit may bring a new action to enforce the prior judgment one time, thus effectively renewing a prior judgment for ten more years:

> Within ten years an action –
>
> (1) Upon a judgement or decree of any court of . . . any state . . . . No such action may be brought more than once . . . to continue the lien of the original judgment.

N.C.G.S. § 1-47(1). Indeed, we have held that "[a]n independent action seeking to effectively renew a judgment must be brought within ten years of entry of the original judgment, and such renewal action can only be brought once." *Unifund CCR Partners v. Loggins*, 270 N.C. App. 805, 809 (2020) (citing N.C.G.S. § 1-47). We hold that a party with a valid judgment against the State or other governmental entity has the right to bring a renewal action on that judgment under G.S. 1-47.

Here, Plaintiff seeks to renew the judgment it obtained in the first action. And based on the record before us, it appears that Plaintiff commenced this present action within ten years of that first judgment. Accordingly, we hold that the trial court did not err by denying Defendants' motion to dismiss. If Plaintiff is successful in this action in "renewing" its prior judgment, Plaintiff still may never collect, depending on whether our General Assembly appropriates money to pay any said new judgment. Nonetheless, Plaintiff is entitled to renew its judgment and hope.

AFFIRMED.

Judge COLLINS concurs.

Judge FLOOD dissents by separate opinion.

FLOOD, Judge, dissenting.

On appeal from a trial court's granting or denial of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Appellate Procedure, this Court's review is limited to the face of the pleadings, which includes the plaintiff's prayer for relief contained therein. While the majority concludes that Plaintiff, in filing its complaint (the

"Complaint"), "seeks to renew the judgment it obtained in the first action[,]" the face of the Complaint reveals an absence of law and fact in support of Plaintiff's claim, and such a conclusion requires that this Court make inferences impermissible under our standard of review. I therefore respectfully dissent.

As presented in the factual and procedural background section of the majority opinion, in *Cowell III*, this Court heard the initial defendants' appeal from the trial court's 1 November 2016 order, in which the trial court: found that the fees collected under N.C.G.S. § 7A-304(a)(4b) in Richmond County amounted to a total sum of $272,300, granted Plaintiff's petition for writ of mandamus, and ordered the initial defendants to pay Plaintiff damages in the amount of this total sum. 254 N.C. App. 422, 425 (2017). Upon review of the initial defendants' appeal, we reversed the trial court's order, and in so doing, this Court unequivocally provided that, while it was within the trial court's power to order restitution of the collected statutory fees to Plaintiff, "the judicial branch has no power to order State officials to draw money from the State treasury to satisfy it"; "the role of the courts in this constitutional dispute is *over*"; and Plaintiff's "remedy lies not with the courts, but at the ballot box." *Id.* at 427–29 (emphasis added).

As such, in the current action, while Plaintiff's claim of a money judgment against Defendant-Appellants has been properly established, *see Richmond Cnty. Bd. of Educ. v. Cowell*, 243 N.C. App. 116, 123 (2015) (hereinafter, "*Cowell II*"), Plaintiff cannot obtain judicial execution of this judgment, as it is not within the trial court's purview to ordain such execution. *See Cowell III*, 254 N.C. App. at 427–29; *see also Smith v. State*, 289 N.C. 303, 321 (1976) (holding that, after judicially ascertaining a claim, "[t]he judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties"); *D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 722–23 (1966) ("In our judicial system the Superior Court is a court subordinate to the Supreme Court. Upon appeal our mandate is binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals." (citations and internal quotation marks omitted)).

The majority, however, appears to interpret the Complaint's prayer for relief—to "have and recover judgment of . . . the principal sum of $272,300.00"—as Plaintiff seeking solely to renew the judgment it

obtained in the first action, and which was affirmed in *Cowell II*, and consequently concludes that this Court must affirm the trial court's denial of Defendant-Appellants' Rule 12(b)(6) motion to dismiss. As explained below, in my view, the majority's interpretation amounts to a misreading of Plaintiff's prayer for relief, and relies on inferences that contravene our standard of review.

On appeal from the trial court's denial of a defendant's Rule 12(b)(6) motion to dismiss, "this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted." *Green v. Kearney*, 203 N.C. App. 260, 266 (2010) (citation omitted) (cleaned up). In making this determination, this Court must consider whether, on "the face of the [plaintiff's] complaint[,]" construed liberally, the complaint (1) is supported by law, (2) "reveals the absence of facts sufficient to make a good claim[,]" or (3) "discloses some fact that necessarily defeats the plaintiff's claim." *Burgin v. Owen*, 181 N.C. App. 511, 512 (2007) (citation and internal quotation marks omitted); *see also Green*, 203 N.C. App. at 266–67.

Here, as presented in the Complaint, to satisfy Plaintiff's prayer for relief, Plaintiff must "have *and* recover" the $272,300 money judgment to which Plaintiff alleges entitlement. (Emphasis added). A plain reading of this language demonstrates that, to satisfy Plaintiff's prayer for relief, the trial court must *both* establish Plaintiff's entitlement to a money judgment from Defendant-Appellants *and* execute said judgment. *See Burgin*, 181 N.C. App. at 512. While neither our Supreme Court nor this Court have expressly provided that a plaintiff's prayer for relief, consisting of two claims connected by the word "and," is to be read conjunctively, we are not without guidance in this interpretation of such a prayer for relief.

Regarding interpretation of statutory language, our Supreme Court has stated "that ordinarily, when the conjunctive 'and' connects words, phrases or clauses of a statutory sentence, they are to be considered jointly." *Harrell v. Bowen*, 362 N.C. 142, 145 (2008) (citation and internal quotation marks omitted). Comparatively, our Supreme Court has explained that "the word 'or,' as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately." *In re Powell*, 237 N.C. App. 441, 444 (2014) (citation and internal quotation marks omitted) (cleaned up). These expositions may inform our understanding of a plaintiff's connective use of "and," as well as "or," in a prayer for relief, as Rule 8 of the North Carolina Rules of Civil Procedure—a creation of statute, and which governs the propriety of a plaintiff's claims—provides:

> A party may set forth two or more statements of a claim . . . alternatively[.] . . . When two or more statements are *made in the alternative* and one or more of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.

N.C. R. Civ. P. 8(e)(2) (emphasis added).

These binding authorities, taken together, support the interpretation that, in a prayer for relief consisting of two claims, for one claim to be considered independently of the other, the claims must be made in the alternative—or separately—which is accomplished by use of the connecting word "or." *See In re Powell*, 237 N.C. App. at 444; N.C. R. Civ. P. 8(e)(2). Conversely, by use of the word "and" to connect two claims in a prayer for relief, a plaintiff indicates the claims are to be considered jointly, and for the trial court to provide relief, *both* claims must be satisfied. *See Harrell*, 362 N.C. at 145; N.C. R. Civ. P. 8(e)(2); *see also State v. Rieger*, 267 N.C. App. 647, 649 (2019) ("When examining the plain language of a statute, undefined words . . . must be given their common and ordinary meaning." (citation and internal quotation marks omitted)). Finally, while our appellate courts have published no opinion germane specifically as to this issue, courts of other jurisdictions have published decisions that, while non-binding, are instructive of, and support, this plain interpretation of a plaintiff's use of the conjunctive "and," versus use of the disjunctive "or," in a prayer for relief. *See Brookline Residential, LLC v. City of Charlotte*, 251 N.C. App. 537, 545, n.4 (2017) ("Although decisions from other jurisdictions are not binding on this Court on an issue arising under North Carolina law, we may consider such decisions as persuasive authority." (citation omitted)); *Carolina Power & Light Co. v. Emp. Sec. Comm'n of N.C.*, 363 N.C. 562, 569 (2009) (noting that, while not binding, a decision from another jurisdiction was nonetheless "instructive"); *see also U.S. v. Garcon*, 54 F.4th 1274, 1278 (11th Cir. 2022) ("The parties' dispute turns on the meaning of the word 'and[,]' . . . so we consider the ordinary meaning of that word. 'And' means 'along together with[,]' [s]o when 'and' is used to connect a list of requirements, the word ordinarily has a 'conjunctive' sense, meaning that all the requirements must be met." (citations omitted)); *Stewart v. Dina's Pizza and Pub, Inc.*, 8th Dist. Cuyahoga No. 106790, 2018-Ohio-3415, ¶ 9, 2018 WL 409398, at *2 (providing that, upon appellate review of a motion to dismiss a plaintiff's claims, "where there is no indication that [the] claims [were] pled in the alternative, the demand for relief is in the conjunctive" (citations and internal quotation marks omitted)).

Applying the above-delineated interpretation to Plaintiff's Complaint, for this Court to consider independently each of the two claims in Plaintiff's prayer for relief, such that either claim may be sufficient to survive a Rule 12(b)(6) motion to dismiss—as appears to be the majority's interpretation—Plaintiff must have prayed to "have *or* recover" the money judgment. *See In re Powell*, 237 N.C. App. at 444; N.C. R. Civ. P. 8(e)(2); *see also U.S. v. Garcon*, 54 F.4th at 1278; *Stewart*, 2018-Ohio-3415, ¶ 9. Plaintiff, however, has prayed to "have *and* recover" the money judgment, meaning the claims must be considered *together*, and for the trial court to satisfy Plaintiff's prayer for relief, Plaintiff must *both* "have" the money judgment, *and* "recover" the money judgment. *See Harrell*, 362 N.C. at 145; N.C. R. Civ. P. 8(e)(2); *see also U.S. v. Garcon*, 54 F.4th at 1278; *Stewart*, 2018-Ohio-3415, ¶ 9. While, as presented by this Court in *Cowell II*, the judiciary may properly establish Plaintiff's entitlement to a money judgment from Defendant-Appellants, as determined in *Cowell III*, the judiciary may *not* order execution of this judgment, thus Plaintiff may not "recover" the money judgment. *See Cowell III*, 254 N.C. App. at 427–29; *Cowell II*, 243 N.C. App. at 123. As such, it is not within the trial court's power to satisfy Plaintiff's conjunctive prayer for relief to "have and recover" the money judgment.

Moreover, even when treating Plaintiff's allegations as true and affording a liberal construction of the Complaint, Plaintiff's prayer for relief is not as to just *any* money judgment to which Plaintiff is allegedly entitled; Plaintiff *specifically* identified in its prayer for relief "the principal sum of $272,300.00." *See Burgin*, 181 N.C. App. at 512; *see also Green*, 203 N.C. App. at 266. As set forth above, this "principal sum" was established in the trial court's 1 November 2016 order—the very order reversed by this Court in *Cowell III*. 254 N.C. App. at 427–29. While the majority would conclude that Plaintiff merely "seeks to renew the judgment" affirmed in *Cowell II*, nowhere in the Complaint does Plaintiff state that it seeks renewal of this judgment, and to reach such a conclusion requires this Court to make inferences in contravention of our scope of review—namely, the face of the Complaint. *See Burgin*, 181 N.C. App. at 512. A review of the face of the Complaint reveals Plaintiff has failed to present a cause of action from which Plaintiff may make a claim for relief, as the money judgment explicitly identified in Plaintiff's prayer for relief was reversed by this Court, and therefore no longer exists. *See Cowell III*, 254 N.C. App. at 427–29.

As the trial court may not order satisfaction of Plaintiff's prayer for relief to "have and recover" a money judgment, and Plaintiff's underlying cause of action is specifically as to a money judgment no longer in effect,

the face of the Complaint reveals an absence of law and fact upon which Plaintiff may make a good claim for relief. *See Burgin*, 181 N.C. App. at 512; *see also Cowell III*, 254 N.C. App. at 427–29. Accordingly, upon a de novo review, I believe the trial court's denial of Defendant-Appellants' Rule 12(b)(6) motion to dismiss was in error, and such error requires this Court to reverse the trial court's order and remand with instructions that the trial court grant Defendant-Appellants' motion to dismiss Plaintiff's Complaint. *See Green*, 203 N.C. App. at 266; *Burgin*, 181 N.C. App. at 512. For the foregoing reasons, I respectfully dissent.

MADIGAN SHOMETTE O/B/O T.N., PLAINTIFF
v.
MICHAEL NEEDHAM, DEFENDANT

No. COA24-172

Filed 2 April 2025

Domestic Violence—protective order—conflicting evidence resolved—denial proper

In a domestic violence protective order (DVPO) action, brought by a wife (plaintiff) against her husband (defendant) on behalf of herself and the parties' minor child, alleging that the child was the product of defendant raping plaintiff and that defendant had sexually assaulted and raped plaintiff "50-100" times during their marriage, the trial court did not err in denying plaintiff's complaint and motion where the only finding of fact challenged by plaintiff (as a mere recitation of evidence) both recounted the conflicting evidence regarding the parties' sexual encounters and explained the court's weight and credibility determinations, explicitly stating that it could not find that defendant "committed an act of domestic violence." Further, the trial court did not err in concluding that plaintiff failed to prove grounds for issuance of a DVPO because the findings of fact did not support a conclusion that an act of domestic violence occurred—a requirement for issuance of a DVPO.

Appeal by plaintiff from order entered 18 August 2023 by Judge Jena P. Culler in District Court, Mecklenburg County. Heard in the Court of Appeals 5 November 2024.

Rech Law, P.C., by Kate A. Rech, for plaintiff-appellant.

No brief filed for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from a trial court order denying her Complaint and Motion for Domestic Violence Protective Order ("DVPO"). Because the trial court's finding of fact was supported by competent evidence, and the finding of fact supports the trial court's conclusion of law, we affirm the trial court's order.

I. Background

Plaintiff ("Wife") and Defendant ("Husband") were married on 14 November 2022. The parties have a minor child together, T.N., born August 2021, who Wife alleged in her Complaint and Motion for DVPO "was a product of [Husband] raping [her] during the parties' marriage." The parties separated on 3 April 2023.

On 28 April 2023, Wife filed a Complaint and Motion for DVPO ("28 April 2023 Complaint and Motion for DVPO") in District Court, Mecklenburg County, file number 23-CVD-601007.[1] That same day, a magistrate judge denied Wife's request for an *Ex Parte* DVPO. On 1 May 2023, the trial court also denied Mother's request for an *Ex Parte* DVPO. The trial court found in its May 2023 order denying issuance of the *Ex Parte* DVPO that

> [t]he parties are separated but [Husband] visited the home to see their son. He wanted to see [Wife] and got upset when he couldn't. He told her he'd be moving back in on Sunday. She saw on the [security] camera that he did return to the home on Sunday and tried to get in the house . . . but was unsuccessful. Insufficient evidence of acts of DV. This seems more a dispute of access to the home.

Having been unsuccessful in obtaining an *Ex Parte* DVPO, Wife did not proceed to a contested hearing for the trial court to determine whether to grant a DVPO. Instead, on 15 May 2023, Wife filed a Notice of Voluntary Dismissal of the 28 April 2023 Complaint and Motion for DVPO.

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1. Wife made allegations of rape and attempted rape in the 28 April 2023 Complaint and Motion for DVPO, alleging specific dates, starting on 18 November 2020 and up to 19 March 2023, albeit in less detail than in her second Complaint and Motion for DVPO, which she filed 6 July 2023.

On 2 June 2023, Husband filed a complaint against Wife in Mecklenburg County seeking child custody, child support, physical and mental health examination of Wife, a motion for parenting capacity evaluation of Wife, equitable distribution, and attorney's fees. He alleged that

> [Wife] has routinely accused [him] of committing acts of rape against her throughout the marriage. Further, [Wife] would often corner [Husband] demanding that he admit to "what he had done." Upon information and belief, [Wife] would often record portions of these conversations between [Wife] and [Husband], when [she] was cornering [him].

He also included allegations regarding the 28 April 2023 Complaint and Motion for DVPO Wife had filed.

On 12 June 2023, Wife filed a Verified Complaint with claims for "Assault, Battery, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, False Imprisonment, and Punitive Damages" (capitalization altered), against Husband in Superior Court, Mecklenburg County ("Superior Court Complaint"). On or about 27 June 2023, Wife brought criminal charges against Husband and he was arrested and released.

On 6 July 2023, Wife filed another Complaint and Motion for Domestic Violence Protective Order ("6 July 2023 Complaint and Motion for DVPO") against Husband. She sought a DVPO for herself and on behalf of the parties' minor child, T.N. The 6 July 2023 Complaint and Motion for DVPO was filed on a form complaint, AOC-CV-303, Rev. 3.22, but she attached to this form her Superior Court Complaint and documents related to the criminal charges described above. According to Wife's 6 July 2023 Complaint and Motion for DVPO,[2] she was a virgin when the parties married, and the first time she had sex was on 18 November 2020, "while [Wife] and [Husband] were on their honeymoon." She alleged that "[Husband] initiated sex with [Wife]. [Wife] informed [Husband] that she was on her period and did not want to have sex on her period." She alleged Husband insisted on trying, but it was very painful and she asked him to stop, but he did not stop. Wife's 6 July 2023 Complaint and Motion for DVPO then alleges several other very detailed instances of occasions when Husband either had sex with her or tried to have sex with her. Ultimately, she

2. The attachments describe numerous sexual acts in extreme graphic detail and we will describe Wife's allegations generally for purposes of this opinion.

alleges that she believed "that [Husband] sexually assaulted and raped her approximately 50-100 times during their marriage."

That same day, a trial court entered an *Ex Parte* DVPO based on findings that "[Husband] raped [Wife] numerous times throughout the marriage while she was holding and nursing the minor child. On 3/19[/2023], [Husband] attempted to rape [Wife] and she had to force him off of her physically." The trial court also found "[Husband] was arrested and after being released he text [sic] [Wife] 6 times in violation of his bond condition."

The trial court held a hearing on the 6 July 2023 Complaint and Motion for DVPO on 16 August 2023. Wife testified that "throughout [their] marriage" Husband "raped" her "between 50 and 100 times[.]" As in her Superior Court Complaint, Wife described in graphic detail many times when Husband had sex with her or tried to have sex with her and she did not want to and repeatedly told him "no[.]" Wife testified that she had initiated criminal proceedings for "secondary forcible rape" against Husband in Mecklenburg County, North Carolina, and that other "criminal investigations" were proceeding in both Mecklenburg County and in Pigeon Forge, Tennessee.

Husband also testified. He agreed that the first time the parties had sex was on their honeymoon, but he claimed they had sex many times during the two-week honeymoon and he was not aware of "anything abnormal during the honeymoon that upset her[.]" Husband testified that the first time Wife had used the word "rape" regarding him was on the "date of separation, [3 April 2023]." He did not "learn any of the specifics" about her claims about rape until he "saw the . . . first ex parte order."[3] Just before their separation, Wife had told him "she had felt used during sex." He also testified about moving out of the house, his attempts to visit with the minor child, and his arrest, which caused him to lose his job. He denied that he had ever raped Wife or "physically held her down."

In an order entered 16 August 2023, and in an amended order entered 18 August 2023, the trial court denied Wife's 6 July 2023 Complaint and Motion for DVPO as to her and the parties' minor child, and rendered the 6 July 2023 *Ex Parte* DVPO "null and void." The trial court concluded Wife "failed to prove grounds for issuance of a [DVPO]." Wife timely

3. It appears Husband was referring to the 28 July 2023 Complaint and Motion for DVPO, as there was no *ex parte* order issued based on the 28 July 2023 Complaint and Motion for DVPO.

appealed the trial court's order denying her 6 July 2023 Complaint and Motion for DVPO on 30 August 2023.

II. Analysis

Wife makes two arguments on appeal. First, Wife argues the trial court's Finding of Fact No. 8 was not supported by competent evidence and that this finding could not serve as sufficient grounds to support its conclusion Wife "failed to prove grounds for issuance of a [DVPO]." Next, Wife argues the trial court "erred by failing to find and conclude that an act of domestic violence occurred in accordance with [North Carolina General Statute Section] 50B-1(a) and, therefore, erred by failing to enter a [DVPO] in favor of [Wife]." We disagree and affirm the trial court's order.

A. Standard of Review

> When the trial court sits without a jury regarding a DVPO, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Hensey v. Hennessy, 201 N.C. App 56, 59, 685 S.E.2d 541, 544 (2009) (citation, quotation marks, and brackets omitted).

> Findings of fact supported by competent evidence are conclusive on appeal even if there is evidence to the contrary. This is because
>
> > where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial court. This Court can only read the record and, of course, the written word must stand on its own. But the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.

Moorhead v. Moorhead, 296 N.C. App. 90, 93, 909 S.E.2d 327, 330 (2024) (citations and quotation marks omitted). Whether an act of domestic violence has occurred is a conclusion of law, *see Kennedy v. Morgan*,

221 N.C. App. 219, 223, 726 S.E.2d 193, 196 (2012), and this Court reviews conclusions of law *de novo*, *see State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008).

B. Sufficiency of Findings

Wife argues the trial court's Finding of Fact No. 8 was not supported by competent evidence and that this finding "merely recited the evidence" and does not serve as an "ultimate finding[ ] of fact." Wife contends recitations of testimony cannot serve as the sole basis of the trial court's findings to support its conclusions. We affirm the trial court's order as this contested finding goes beyond mere recitations of testimony.

Here, the trial court's Finding of Fact No. 8 reads:

> [Wife] contends that [Husband] "raped" her 50 to 100 times during their 2 and a half year marriage. She described several occasions when she says she said no and he didn't stop. [Husband] denies ever continuing to have sex with [Wife] when she told him to stop or pushed him off except when she was saying so while laughing or in a playful manner. The statutes regarding sexual offenses that are applicable require evidence of by [sic] force and against the will of the victim. The evidence of "against her will" is her saying she said no and him contradicting that evidence saying he never proceeded past a non-playful laughing no similar to when they were play wrestling. There is almost no evidence from which the court could find any alleged action was by force. The court considering all of the evidence and weighing the credibility of each witness cannot find by the greater weight of the evidence that [Husband] committed an act of domestic violence.

"There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951) (citations omitted). "Pursuant to Rule 52(a) [of our North Carolina Rules of Civil Procedure], the trial court's findings of fact must be more than mere evidentiary facts; they must be the specific ultimate facts sufficient for an appellate court to determine that the judgment is adequately supported by competent evidence." *Williamson v. Williamson*, 140 N.C. App. 362, 363-64, 536 S.E.2d 337, 338 (2000) (citation, quotation marks, ellipsis, and original brackets omitted).

In *In re Green*, this court explained in a footnote "verbatim recitations of the testimony . . . *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) (emphasis in original). Where the trial court fails to make adequate and sufficient findings to support its conclusions, this Court must vacate the order and remand for further proceedings. *See id.* ("The purported 'findings' . . . do not even come close to resolving the disputed factual contentions of the parties, and, under ordinary circumstances would require this Court to remand the matter to the [d]istrict [c]ourt for the entry of appropriately considered and detailed factual findings."); *see also Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967) ("However, when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence . . . , then the order entered thereon must be vacated and the case remanded for detailed findings of fact." (citation omitted)).

However, as further explained by our Supreme Court in *In re A.E.*, "recitations of . . . testimony . . . do not constitute findings of fact . . . *absent an indication concerning whether the trial court deemed the relevant portion of the testimony credible.*" 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (emphasis added) (citations, quotation marks, brackets, and original emphasis omitted). "There is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes." *In re T.N.H.*, 372 N.C. 403, 408, 831 S.E.2d 54, 59 (2019) (citations and quotation marks omitted).

> Where the evidence is conflicting . . . , the [trial] judge must resolve the conflict. He sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The trial court must determine the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, the trial court determines which inferences to draw and which to reject. Only the trial court can draw these inferences or any other potential inferences based on the evidence. This Court does not resolve issues of credibility or conflicting evidence.

Carolina Mulching Co. LLC v. Raleigh-Wilmington Investors II, LLC, 272 N.C. App. 240, 246, 846 S.E.2d 540, 544-45 (2020) (citations, quotation marks, and original brackets omitted). "The findings should resolve

the material disputed issues, or if the trial court does not find that there was sufficient credible evidence to resolve an issue, should so state." *Carpenter v. Carpenter*, 225 N.C. App. 269, 279, 737 S.E.2d 783, 790 (2013) (citation omitted).

In *Williamson*, this Court reversed and remanded a trial court order where the findings were not "ultimate facts required by Rule 52(a), . . . but rather . . . mere recitations of the evidence . . . not reflect[ing] the processes of logical reasoning[.]" *Williamson*, 140 N.C. App. at 364, 536 S.E.2d at 339 (citations and quotation marks omitted). "This is indicated by the trial court's repeated statements that a witness 'testified' to certain facts or other words of similar import." *Id.* For instance, the trial court's findings in *Williamson* had language such as "from [the defendant's] *testimony*" and "[the p]laintiff *testified*[,]" to then only outline what these witnesses testified to. *See id.* (emphasis in original). Such "findings are mere recitations of the evidence and are not the ultimate facts required to support the trial court's conclusions of law[.]" *Id.* Further, in *In re Green*, this Court identified via a footnote that "[e]leven out of the twelve '[f]indings of [f]act' begin by stating that the witness 'testified under oath', and continue to merely restate the content of that testimony." 67 N.C. App. at 505 n.1, 313 S.E.2d at 195 n.1 (ellipses omitted).

At the trial court hearing, Wife testified to allegedly being "raped . . . 50 to 100 times[ ]" by Husband throughout the course of their marriage. However, when asked whether "[d]uring sex, had [Wife] ever pushed you off her and told you to stop?" Husband responded "[s]he had done that, in a playful way, though. Never – it never sounded serious. It was always while she was laughing." Further, during cross-examination, Wife was presented with text messages sent between her and Husband on 8 August 2022, and the following interaction occurred:

> Q. Okay. And what's the date on that text?
>
> A. That is August 8th, 2022.
>
> Q. Is it fair to say that you were talking about you ovulating and for him to come home and hurry up?
>
> A. Yes.
>
> Q. Okay. So this is August 8th, 2022 and I think you said you were -- you were -- you were married on November 14th of 2020. So this is close to, you know, a year and a half later. How many times would you say he has allegedly raped you in August -- by August 8th, 2022?

> A. In August -- I can't give a specific number, no.
>
> Q. Okay. Just -- you said 50 to 100 times, so would it be fair to say maybe half; 25 times, at minimum?
>
> A. At minimum.
>
> Q. At minimum 25 times. And that's -- and that's the one you want to have a kid, a child, with?
>
> A. I still loved [Husband].

Additionally, Wife was presented with a post she made on 22 July 2023, after filing her 6 July 2023 Complaint and Motion for DVPO, to a local group dedicated to moms in her area, indicating she "definitely want[ed] to get pregnant sometime soon."

Wife specifically testified about an instance of alleged rape on 10 March 2022 during a road trip with Husband, their child, and Wife's sister. Wife testified her sister was asleep when Husband took her into the bathroom and tried to "rape" her. When asked on cross-examination whether she ever called out for help during this event, she answered "[n]o. I was telling [Husband] I didn't want to have sex."

Here, Finding of Fact No. 8 first correctly characterizes the conflicting testimony presented by Wife and Husband. But after this, the trial court clearly addresses the weight and credibility of the evidence, stating that after "considering all of the evidence and weighing the credibility of each witness cannot find by the greater weight of the evidence that [Husband] committed an act of domestic violence." Though this finding uses language such as "[Wife] contends[,]" "[Wife] described[,]" and "[Husband] denies[,]" this finding goes beyond "mere recitation[ ] of . . . evidence" as described by this Court in *Williamson* and *In re Green*. *See Williamson*, 140 N.C. App. at 364, 536 S.E.2d at 339; *see also In re Green*, 67 N.C. App. at 505 n.1, 313 S.E.2d at 195 n.1. The trial court weighed testimony of the parties and determined the credibility of the evidence, ultimately determining it could not "find by the greater weight of the evidence that [Husband] committed an act of domestic violence." This finding also indicates "[t]here is almost no evidence from which the court could find any alleged action was by force." This part of the finding is also correct. Wife testified about not wanting to have sex for various reasons and about telling Husband "no" but then they ended up having sex after she told him "no." Wife testified that "[i]f I say no, I do consider that rape."

When the trial court rendered its ruling at the hearing, it noted the careful consideration of the testimony of each party and the

> sex offenses list of statutes that are in the domestic violence statute. I have looked at each of those. And each of those requires a finding of force -- by force. There is basically a he said/she said situation about whether or not he continued past her saying no. He says that . . . he never did . . . if it was a serious no. He referenced playful no's or pushing off, similar to when they are play wrestling. [Wife] defined rape as when she says no, it means no. I don't disagree that when with regard to sexual intercourse, that no means no. But I have to follow the law and the law in our statutes say "by force and against the will."

Finding of Fact No. 8 was supported by competent evidence, and it is an ultimate finding of fact which resolves the disputed issue.

C. Act of Domestic Violence

Next, Wife argues the trial court erred in not finding and concluding that an act of domestic violence occurred under North Carolina General Statute Section 50B-1(a), and further erred in not granting Wife's 6 July 2023 Complaint and Motion for DVPO in accord with such findings. Wife contends, even if the trial court's finding is an ultimate finding of fact, it is still in error as the trial court should have concluded that an act of domestic violence occurred. We disagree.

We first note that the trial court made one conclusion of law in the DVPO on appeal: "[Wife] has failed to prove grounds for issuance of a domestic violence protective order." Wife does not directly challenge this conclusion of law in her appellate brief. Instead, she argues that the trial court should have instead made a different conclusion of law. We will treat this argument as a challenge to the trial court's conclusion of law since she has made this argument, however inartfully.

Under Section 50B-1(a) of our General Statutes,

> [d]omestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> > (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
> >
> > (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of

> imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33. [*i.e.*, sex offenses]

N.C. Gen. Stat. § 50B-1(a) (2023).

Wife argues that she "specifically alleged all three subsections of [North Carolina General Statutes Section] 50B-1(a) in her [6 July 2023 Complaint and Motion for DVPO] for the trial court to have considered and presented evidence on each of the three[ ]" subsections, not just subsection (3). It is true that Wife checked all the boxes on the 6 July 2023 Complaint and Motion for DVPO, for each subsection of the statute. In the blank where the form directs to "[g]ive specific dates and describe in detail what happened," Wife stated, "[p]lease see attached, which is incorporated by reference as though set forth fully herein." Wife also included an attachment referencing paragraphs 4, 5, and 8 of the 6 July 2023 Complaint and Motion for DVPO. Paragraphs (a) through (d) are general allegations about the parties' residences, date of marriage, date of separation, their minor child, and Wife's pregnancy with their second child. Then Wife makes detailed allegations of sexual assault or rape and incorporates the Superior Court Complaint and criminal papers noted above.

Wife argues in detail about how the trial court could have made findings that would support a conclusion that an act of domestic violence occurred under any three subsections of Section 50B-1(a), not just subsection (3), and argues the trial court erred in not doing so. Further, Wife contends the trial court only considered the occurrence of an act of domestic violence in the scope of "by force" and "against the will of the victim" under the sexual offenses identified by subsection 50B-1(a)(3) of the statute. Thus, Wife argues the trial court erred in not considering the other subsections of 50B-1(a), *i.e.*, (a)(1) and (a)(2), in finding whether an act of domestic violence occurred.

Wife's argument focuses on her testimony about various instances of sex with Husband and her contention that he was raping her or sexually assaulting her. She contends the trial court should have found that Husband "attempted to cause bodily injury[ ] or intentionally caused bodily injury" to her based upon this testimony. It is true, as Wife argues, that a forced sexual act *may* cause "bodily injury," but Wife neither alleged such injury nor presented evidence of this type of injury. Her 6 July 2023 Complaint and Motion for DVPO and her testimony focused

almost entirely and in exceptionally graphic detail on acts she deemed sexual assaults or rape or attempts of sexual assault or rape.

But no matter what findings the trial court could have made based on the evidence presented, we have already determined that the trial court's finding of fact was supported by competent evidence. This Court is not free to substitute its judgment for the trial court or to make new findings of fact. The trial court carefully considered the evidence and made determinations as to the weight and credibility of the evidence. The trial court's findings of fact do not support a conclusion of law that an act of domestic violence occurred under any subsection of Section 50B-1(a). Therefore, the trial court did not err by concluding that "[Wife] has failed to prove grounds for issuance of a [DVPO]."

III. Conclusion

The trial court's finding of fact was based on competent evidence and is an ultimate finding of fact, not a "mere recitation" of testimony, as it answers the material issue of whether Husband had committed any act of domestic violence as alleged by Wife. The trial court's conclusion of law was supported by the finding of fact. The trial court did not err in denying Wife's 6 July 2023 Complaint and Motion for DVPO.

AFFIRMED.

Judges ZACHARY and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
RICKY KEITH CAPPS

No. COA24-653

Filed 2 April 2025

1. Appeal and Error—preservation of issues—hearsay excluded—no offer of proof made

In a trial for possession of stolen goods arising from the discovery of a stolen pop-up camper on defendant's property, defendant failed to preserve for appellate review the trial court's exclusion of a detective's answer on hearsay grounds—after defense counsel asked whether the person who stole the camper lied to defendant about it—because defendant did not make the required offer of proof as to the content of the excluded testimony. Further, the substance of any answer that might have been given was not apparent from the leading question.

2. Possession of Stolen Property—constructive possession—incriminating circumstances—stolen camper located on defendant's property

The State presented substantial evidence, in the form of incriminating circumstances, from which a jury could find that defendant constructively possessed a stolen pop-up camper, which was discovered on defendant's property a couple of weeks after it was stolen, to meet the possession element of felonious possession of stolen goods. When law enforcement questioned defendant about the camper, he stated that he had been aware of the camper on his property; that although he didn't know where it came from, he "didn't choose to ask"; and he acknowledged that by the time of the interview he knew the camper was stolen.

Appeal by defendant from judgment entered 13 September 2023 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 29 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Mary W. Scruggs, for the State.

Lockamy Law Firm, by C. Scott Holmes, for defendant-appellant.

ZACHARY, Judge.

Defendant Ricky Keith Capps appeals from the trial court's judgment entered upon a jury's verdict finding him guilty of felonious possession of stolen goods. After careful review, we conclude that Defendant received a fair trial, free from error.

I. Background

Gina Monte left her home in Nebo on 24 November 2021 to spend Thanksgiving out of town. When she returned on 29 November, the Jayco Jay Series pop-up camper that had been parked in her driveway was no longer there. Monte called the police to report that her camper had been stolen.

On 7 December 2021, law enforcement officers who were responding to a fire on Defendant's property discovered the stolen camper there. At trial, Detective Burlin Ballew of the McDowell County Sheriff's Office described the property as a "fielded area" of "maybe a hundred yards in length" in front of "what used to be [Defendant's] residence there that had burned previously." In that field, which one officer described as an "impromptu campground," "there were a few campers, a tent" and "a shack type thing sort of structure."

Robert "Speedy" Jaynes resided in the field on Defendant's property and was present when officers discovered the stolen camper. Speedy produced a bill of sale to officers indicating that he had purchased the camper from Paul Poteat on 25 November. Speedy also gave officers permission to photograph the camper's exterior and interior. The camper appeared to have been modified to serve as a stationary residence: additional vinyl siding, wooden pallets, and a tarp were attached, and several blocks were wedged under the tires to keep the camper level. The camper also had been spray-painted a different color scheme. Nevertheless, the camper was identified as Monte's by its model number and serial number.

Meanwhile, on the same day that the camper was discovered, Monte reported to Detective Ballew that she had received a letter from an anonymous source who claimed to have "a bit of information that [she] might be interested in." Detective Ballew called the phone number provided in the anonymous letter, and the ensuing conversation led him to believe that he needed to interview Defendant regarding the camper.

Detective Ballew interviewed Speedy on 15 December. The next day, Detective Ballew and a colleague interviewed Defendant and

another suspect, Daniel Thrall, at Defendant's property. Defendant acknowledged that he knew at that point that the camper had been stolen, and that it had been on his property when he returned home following his release from jail on 25 November. According to Defendant, it was his understanding that John Daniels "got the camper for [Defendant]" and brought it to Defendant's property "because of money [Daniels] owed" to Defendant. Defendant also told Detective Ballew that "he didn't know where [the camper] came from and he didn't choose to ask." After speaking with Thrall and Defendant, Detective Ballew left the property believing that the camper "had been sold to Speedy" on Defendant's behalf.

On 6 March 2023, a McDowell County grand jury indicted Defendant for one count of felonious possession of stolen goods. Defendant's case came on for trial in McDowell County Superior Court on 12 September 2023.

Defendant moved to dismiss the charge at the close of the State's evidence, arguing "that no reasonable juror could find that [he] ever knowingly possessed any stolen property." The trial court denied the motion. Defendant opted not to present evidence but renewed his motion to dismiss at the close of all evidence, which the trial court again denied.

On 13 September 2023, the jury returned its verdict finding Defendant guilty of felonious possession of stolen goods. The court sentenced Defendant to a term of 9 to 20 months' imprisonment in the custody of the North Carolina Department of Adult Correction. Defendant gave notice of appeal in open court.

II. Discussion

Defendant argues that the trial court erred by excluding as inadmissible hearsay certain testimony that he sought to elicit while cross-examining Detective Ballew. Defendant also contends that the trial court erred by denying his motion to dismiss because the State presented insufficient evidence that he possessed the camper discovered on his property. We disagree.

A. Hearsay

[1] We first address Defendant's hearsay argument. Defendant claims that "[t]he trial court erred by excluding [as hearsay] the answer to the question about whether Daniels, the person who stole the camper, lied to [Defendant] about it." However, Defendant failed to preserve this argument for appellate review because he made no offer of proof as to the substance of the excluded testimony.

"In order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) (citation omitted), *cert. denied*, 557 U.S. 934, 174 L. Ed. 2d 601 (2009). Further, our Supreme Court has "held that the essential content or substance of the witness'[s] testimony must be shown before we can ascertain whether prejudicial error occurred." *Id.* (citation omitted). "Absent an adequate offer of proof, we can only speculate as to what a witness's testimony might have been." *State v. Ramirez*, 293 N.C. App. 757, 761, 901 S.E.2d 256, 259 (2024) (citation omitted).

In the case at bar, defense counsel asked Detective Ballew: Defendant "told you that John [Daniels] had lied to him, did he not?" The State objected on hearsay grounds and the trial court sustained the objection. Rather than providing an offer of proof of Detective Ballew's answer to the question for the record, defense counsel finished the cross-examination by stating: "Those are my questions." "By failing to make an offer of proof, [D]efendant has failed to properly preserve this issue for appellate review . . . ." *State v. Hardy*, 353 N.C. 122, 134, 540 S.E.2d 334, 344 (2000), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56 (2001).

Defendant nevertheless posits that this argument is preserved because "the offer of proof was in the leading question – which contained the answer." Defendant supports this contention with a citation to a nonprecedential opinion of this Court. *See State v. Everett*, 178 N.C. App. 44, 55, 630 S.E.2d 703, 710 (2006) ("An offer of proof is not necessary to preserve an issue for appellate review if the substance of the excluded testimony is apparent from the context within which the question was asked."), *aff'd and ordered not precedential*, 361 N.C. 217, 639 S.E.2d 442 (2007). Moreover, *Everett* has not subsequently been cited for this proposition in any binding opinion of our appellate courts.

But even assuming, *arguendo*, that *Everett* is mandatory authority, it still would not support Defendant's argument. It is manifest that "the essential content or substance of [Detective Ballew's] testimony must be shown before we can ascertain whether prejudicial error occurred." *Raines*, 362 N.C. at 20, 653 S.E.2d at 138 (citation omitted). Here, Defendant fails to show the essential content or substance of Detective Ballew's excluded testimony; all that appears in the record is defense counsel's unanswered leading question. As the State notes, "it is quite possible that [Detective Ballew] would have said that Defendant did not tell him that Mr. Daniels had lied to him or that the unsubstantiated

'lie' had nothing to do with any relevant subject matter." Accordingly, even under the rule from *Everett*, if it were to apply, "the substance of the excluded testimony is [not] apparent from the context within which [defense counsel's] question was asked." 178 N.C. App. at 55, 630 S.E.2d at 710. "It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness'[s] testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985).

Without an offer of proof as to Detective Ballew's answer to defense counsel's unanswered leading question, there is no evidence in the record to support Defendant's claim that Daniels lied to Defendant about the camper. Further, the State emphasizes that the evidence in the record "shows that Defendant did *not* ask who owned the camper and did not want to know, not that he was lied to about the ownership of it." This further underscores the futility and impropriety of any attempt to review this issue on appeal.

"Absent an adequate offer of proof, we can only speculate as to what [Detective Ballew]'s testimony might have been." *Ramirez*, 293 N.C. App. at 761, 901 S.E.2d at 259 (citation omitted). "We cannot engage in speculation as to how Detective [Ballew] would have answered the question, and Defendant's argument is thus dismissed." *Id.*

B. Motion to Dismiss

[2] Defendant further argues on appeal that the trial court erred by denying his motion to dismiss for insufficient evidence the charge of felonious possession of stolen goods.

1. Standard of Review

When ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (cleaned up). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Id.* at 492, 809 S.E.2d at 549–50 (citation omitted).

"The trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight, and the test of the sufficiency of the evidence to withstand the motion is the same

whether the evidence is direct, circumstantial[,] or both." *Id.* at 492, 809 S.E.2d at 550 (cleaned up). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Id.* (citation omitted).

"Once the court decides that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts satisfy the jury beyond a reasonable doubt that the defendant is actually guilty." *Id.* (cleaned up). "But if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *Id.* (cleaned up). "Whether the State presented substantial evidence of each essential element of the offense is a question of law"; consequently, an appellate court "review[s] the denial of a motion to dismiss de novo." *Id.* (citation omitted).

2. Analysis

Defendant alleges that there was insufficient evidence that he possessed the camper because "Daniels stole the camper and sold it to Speedy with[out] [Defendant] ever having dominion or control," and therefore, the State failed to show that he had actual or constructive possession of the camper.

"The essential elements of felonious possession of stolen property are: (1) possession of personal property; (2) valued at greater than $1,000.00; (3) which has been stolen; (4) with the possessor knowing or having reasonable grounds to believe the property was stolen; and (5) with the possessor acting with dishonesty." *State v. Privette*, 218 N.C. App. 459, 471, 721 S.E.2d 299, 309 (cleaned up), *disc. review denied*, 365 N.C. 566, 724 S.E.2d 532 (2012). The only element at issue in this appeal is the first—whether Defendant had possession of the stolen camper.

"Possession may be either actual or constructive." *Id.* (cleaned up). Here, the State makes no argument concerning actual possession; rather, the State maintains that Defendant had constructive possession of the stolen camper.

"Constructive possession exists when the defendant, while not having actual possession of the goods[,] has the intent and capability to maintain control and dominion over them." *Id.* (cleaned up). "When contraband is found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *Chekanow*, 370 N.C. at 493, 809 S.E.2d

at 550 (cleaned up). But "[w]here the defendant's possession is nonexclusive, constructive possession may not be inferred in the absence of other incriminating circumstances." *Privette*, 218 N.C. App. at 471, 721 S.E.2d at 309 (cleaned up).

"In determining whether sufficient incriminating circumstances exist to support a finding of constructive possession," our courts consider the following factors identified by our Supreme Court:

> (1) the defendant's ownership and occupation of the property . . . ; (2) the defendant's proximity to the contraband; (3) indicia of the defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; and (5) other evidence found in the defendant's possession that links the defendant to the contraband.

Chekanow, 370 N.C. at 496, 809 S.E.2d at 552. "Evidence of conduct by the defendant indicating knowledge of contraband . . . is also sufficient to permit a jury to find constructive possession." *State v. Rice*, 252 N.C. App. 480, 484, 798 S.E.2d 432, 435 (2017) (cleaned up).

"Our determination of whether the State presented sufficient evidence of incriminating circumstances depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury." *Id.* (citation omitted). Additionally, "ownership of the premises on which the contraband is found is strong evidence of control, and thus, should be considered as a weighty factor in the analysis." *Chekanow*, 370 N.C. at 497, 809 S.E.2d at 552–53 (cleaned up).

Here, Defendant asserts that "the evidence tended to show that the camper changed hands but was never possessed by" him, and hence he claims that "[t]he court convicted [him] of possessing the camper simply because it was located on his property." To the contrary, the trial court properly denied his motion to dismiss because there was sufficient evidence that he constructively possessed the camper to submit the question of his guilt to the jury.

First, Detective Ballew testified that Defendant "knew [the camper] was stolen" by the time that Detective Ballew interviewed him. The State thus produced evidence "indicating [Defendant's] knowledge of contraband" on his property, which we have held is "sufficient to permit a jury to find constructive possession." *Rice*, 252 N.C. App. at 484, 798 S.E.2d at 435 (cleaned up).

The State also presented further evidence of incriminating circumstances. Detective Ballew testified that Defendant "didn't know where [the camper] came from and he didn't choose to ask." As our Supreme Court has recognized, "a defendant's suspicious behavior in conjunction with the discovery of the contraband" may be considered an incriminating circumstance. *Chekanow*, 370 N.C. at 498, 809 S.E.2d at 554. Additionally, Defendant saw the camper on his property beginning on 25 November; his continuing "proximity to the contraband" is properly considered an incriminating circumstance. *See id.* at 497, 809 S.E.2d at 553 (recognizing that a defendant's prior presence "in the place where the contraband was found approximately two days later" may constitute an incriminating circumstance). Finally, Defendant's "ownership of the premises on which the [camper wa]s found is strong evidence of control, and thus, should be considered as a weighty factor in the analysis." *Id.* at 497, 809 S.E.2d at 552–53 (cleaned up).

Upon careful review of the totality of the circumstances, it is readily apparent that "the State presented sufficient evidence of incriminating circumstances" for the trial court to submit the question of Defendant's guilt to the jury. *Rice*, 252 N.C. App. at 484, 798 S.E.2d at 435 (citation omitted). Accordingly, the court did not err by denying Defendant's motion to dismiss.

III. Conclusion

For the foregoing reasons, Defendant received a fair trial, free from error.

NO ERROR.

Chief Judge DILLON and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
SHAJUAN DWATRAY ERVIN

No. COA24-650

Filed 2 April 2025

1. Homicide—first-degree murder—motion to dismiss—sufficient evidence of premeditation and deliberation

In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err in denying defendant's motion to dismiss where the evidence of premeditation and deliberation, viewed in the light most favorable to the state—including that defendant had walked away from a physical confrontation with the victim (which took place on the first floor of the townhome where defendant, his girlfriend, his sister, the victim, and others resided), went to the third floor to retrieve his gun, descended to the second floor where he spoke with his sister for some period of time, then returned to the first floor and shot the victim three times—was sufficient to send the charge to the jury.

2. Evidence—testimony regarding defendant's prior violent behavior—properly admitted under Evidence Rules

In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err or abuse its discretion in admitting testimony from defendant's girlfriend regarding three incidents in which defendant was violent toward her, where two of the incidents involved defendant brandishing a gun and all three incidents occurred during the time period when defendant, his girlfriend, and the victim were residing together. The evidence was properly admitted under Evidence Rules 401, 402, 403, and 404 because it: was relevant to the context of the parties' relationships and conflicts; demonstrated defendant's motive, intent, opportunity, and preparation to use the gun involved in the shooting; and had probative value that was not substantially outweighed by its prejudice to defendant.

3. Criminal Law—prosecutor's arguments—confusing or erroneous statement of law—cured by jury instruction

In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), any error in the prosecutor's confusing-at-best, legally-incorrect-at-worst, statement during closing arguments—"Even if it is reasonable, the defendant never has a right to use excessive force"—was cured by the trial court's proper instruction to the jury regarding the law of self-defense.

4. Evidence—victim's alleged gang involvement—exclusion—no error or abuse of discretion shown

In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err or abuse its discretion in excluding evidence of the victim's alleged gang involvement where, even if it was relevant, the trial court determined that the probative value of the evidence to defendant's self-defense theory of the case was substantially outweighed by the danger of unfair prejudice.

Appeal by Defendant from judgment entered 22 November 2022 by Judge James E. Hardin Jr. in Durham County Superior Court. Heard in the Court of Appeals 12 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Robert C. Montgomery, for the State-Appellee.

William D. Spence for Defendant-Appellant.

COLLINS, Judge.

Defendant Shajuan Dwatray Ervin appeals from a judgment entered upon a jury's guilty verdict of first-degree murder. Defendant argues that the trial court erred by denying his motion to dismiss the charge of first-degree murder, admitting testimony of several of his prior violent acts, overruling his objection to the State's closing argument, and excluding evidence surrounding the victim's alleged gang involvement. For the following reasons, we find no error.

I. Background

Defendant was charged with first-degree murder for a shooting that occurred in the early morning hours of 19 March 2019. The State's evidence at trial tended to show the following:

Defendant lived in a three-story townhouse in Durham, North Carolina with the following individuals: Defendant's girlfriend, Akira Jackson; Defendant and Akira's six-month-old child; Akira's brother, Marcus Jackson; Marcus' girlfriend, Kayla Tripp; and Defendant's sister, Domilege Hunter.

Several months before the shooting, Akira learned that another woman was pregnant with Defendant's child. This news caused tension between Defendant and Akira and between Defendant and Marcus. Two weeks before the shooting, Defendant and Akira got into a physical altercation during which Defendant punched Akira repeatedly in the thigh. After this incident, Defendant began sleeping on the first floor of the townhouse on an air mattress.

On the morning of 18 March 2019, Akira called her mother, Nicole Elliott, to talk about her relationship with Defendant. Concerned for her daughter, Elliott suggested that Defendant move out of the townhouse. Defendant, listening to the conversation on speakerphone, began yelling and cursing at Elliott and Akira. Later that day, Marcus learned of Defendant's outburst.

When Defendant arrived home from work later that evening, Marcus confronted Defendant. Defendant and Marcus were on the first floor; Akira, her baby, Tripp, and Hunter were all upstairs in their respective bedrooms. At some point, the confrontation between Defendant and Marcus became physical. Tripp, in her room on the second floor, heard "yelling" and "backs hitting the wall" coming from the first floor. Akira also heard the commotion and ran downstairs. She found Defendant on top of Marcus, pinning him to the ground. Marcus explained that he had confronted Defendant about Defendant's disrespect of Elliott.

After Akira convinced Defendant to get off Marcus, Akira and Marcus walked upstairs to Marcus' room for a short time before walking outside. A few minutes later, Defendant went to Hunter's room, carrying his baby and the gun he owned. He gave Hunter the baby and told her that Marcus had "jumped on him." According to Hunter, Defendant had scratches and blood on his face.

While standing outside in front of the townhouse, Marcus texted Defendant, "Backyard, let me get my one." Defendant immediately responded, "You brave, come on in." A few minutes later, Marcus again

texted Defendant, "Out here," and Defendant responded, "Come on in, you brave." Marcus then walked around the townhouse and stood directly outside the back door.

Akira walked inside and went into Hunter's room. She got her baby from Hunter and, as she walked out of the room, saw Defendant walking behind her with a gun in his hands. Defendant was yelling for Marcus. Tripp heard the yelling and walked out of her room to find Defendant and Akira standing in the hallway. Akira and Tripp tried to stop Defendant from going downstairs with the gun, to no avail. Tripp attempted to block Defendant by standing in between him and the stairwell, but Defendant pushed her down the stairs. At this point, Akira called the police.

Once downstairs, Tripp saw Marcus standing near the sliding doors at the back of the townhouse. Defendant initially walked toward the front door, but he quickly turned around and walked through the kitchen toward the back, shooting at Marcus as he walked. After Marcus fell face-down onto the floor, Defendant turned around and walked out the front door.

Upon arriving at the scene, Officer Cassen Bolick of the Durham Police Department found Defendant standing in the townhouse parking lot with his hands up. He told Officer Bolick that he had a firearm in his right pocket and ammunition in his left pocket. Officer Bolick immediately placed Defendant into custody. Defendant told law enforcement that Marcus had "jumped him," and when Defendant was asked about the blood on his clothes, Defendant said "[a]t least you know he was close." Defendant maintained that he shot Marcus in self-defense and that Marcus had told him, "I'm drunk, so if you going to kill me, you better kill me before I kill you."

Marcus had three gunshot wounds and was declared deceased shortly after being transported to the hospital. Two of Marcus' gunshot wounds had stippling, indicating that Defendant was less than three feet away from Marcus when he inflicted those wounds.

Defendant testified on his own behalf. According to Defendant, Marcus attacked him because he had "disrespected" Marcus and Akira's mother. After their initial physical altercation, Defendant went upstairs to retrieve his gun because Marcus had threatened, "kill me before I kill you." As Defendant walked back downstairs, Tripp opened the front door and, in a matter of seconds, Marcus charged Defendant. Defendant testified, "He lunged out at me. And I don't know if he was trying to, you know, grab the gun, grab me, whatever, but I shot him." According to Defendant, he was still standing on the stairs when he shot Marcus.

The jury convicted Defendant of first-degree murder, and the trial court sentenced Defendant to life imprisonment without the possibility of parole. Defendant appeals.

II. Discussion

A. Defendant's Motion to Dismiss

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of first-degree murder because the State failed to present sufficient evidence that Defendant acted with premeditation and deliberation when he shot and killed Marcus.

Upon 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, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378 (2000) (citation 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 (1980) (citations omitted).

> 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. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

State v. Ingram, 283 N.C. App. 85, 88 (2022) (citation omitted).

"First-degree murder is the intentional and unlawful killing of a human being with malice and premeditation and deliberation." *State v. Leazer*, 353 N.C. 234, 237 (2000) (citation omitted). "Premeditation means that the act was thought over beforehand for some length of time, however short." *Id.* at 238 (quotation marks and citation omitted). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly

aroused by legal provocation or lawful or just cause." *State v. Thomas*, 350 N.C. 315, 347 (1999) (citation omitted).

Premeditation and deliberation are often proved by circumstantial evidence. *State v. Taylor*, 362 N.C. 514, 531 (2008). Evidence that the defendant entered the site of the murder with a deadly weapon, for example, supports an inference of premeditation and deliberation because such evidence "indicates the defendant anticipated a confrontation and was prepared to use deadly force to resolve it[.]" *Id.* (citations omitted); *see*, *e.g.*, *Leazer*, 353 N.C. at 239. Premeditation and deliberation can also be shown through evidence that the defendant "fir[ed] multiple shots, because some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger[.]" *Taylor*, 362 N.C. at 531 (quotation marks and citations omitted); *see State v. Austin*, 320 N.C. 276, 295 (1987) ("[T]he premise of the 'felled victim' theory of premeditation and deliberation is that when numerous wounds are inflicted, the defendant has the opportunity to premeditate and deliberate from one shot to the next.").

Here, the evidence presented, viewed in the light most favorable to the State, is sufficient as to the challenged elements of premeditation and deliberation. Although Marcus and Defendant engaged in a physical altercation the night of the shooting, Defendant walked away from this fight on his own accord. He walked up two flights of stairs, retrieved his gun, walked down to the second floor, talked with his sister for a period of time, and then walked back down to the first floor. This evidence shows that Defendant anticipated another confrontation with Marcus and "had given some forethought to how he would resolve that confrontation." *State v. Ginyard*, 334 N.C. 155, 159 (1993).

The evidence also shows that Defendant inflicted multiple gunshot wounds on Marcus. Regardless of Defendant's intent when he fired his first shot, there was adequate time between each shot for Defendant to think through his actions. *See Austin*, 320 N.C. at 295 (noting that even though a gun "is capable of being fired rapidly, some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger"). When viewed in the light most favorable to the State, this evidence indicates that Defendant had thought through his actions before retrieving the gun and intentionally using deadly force. Thus, there was sufficient evidence of premeditation and deliberation.

Defendant also argues that the State failed to present sufficient evidence that Defendant did not act in self-defense. This argument is meritless. Evidence was presented showing that when Defendant arrived on the first floor, Marcus did not charge him; rather, Defendant began

walking toward the front door, turned around, and shot Marcus as Defendant walked through the house toward the back door, where Marcus was standing. Although Defendant offered a somewhat conflicting account of what occurred and indicated that he acted in self-defense, "contradictions in the evidence remain for the jurors to resolve." *State v. Revels*, 153 N.C. App. 163, 168 (2002) (citation omitted).

Accordingly, as the State presented sufficient evidence of each essential element of first-degree murder, the trial court did not err by denying Defendant's motion to dismiss the charge.

B. Evidence of Defendant's Prior Violent Behavior

[2] Defendant next argues that the trial court erred by admitting testimony of his prior violent behavior because the admission of the evidence violated Rules of Evidence 401, 402, 403, and 404(b). Specifically, Defendant objects to Akira's testimony regarding three prior incidents where Defendant was violent toward her.

1. Rules 401 and 402

Rules 401 and 402 govern the relevancy of evidence. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2023). All relevant evidence is admissible so long as it comports with the United States Constitution, the North Carolina Constitution, Acts by the United States Congress, Acts by the North Carolina General Assembly, and any other rules of evidence. N.C. Gen. Stat. § 8C-1, Rule 402 (2023). "Evidence which is not relevant is not admissible." *Id.*

> [I]n a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

State v. Riddick, 316 N.C. 127, 137 (1986) (citation omitted).

This Court "review[s] relevancy determinations by the trial court de novo . . . ." *State v. Triplett*, 368 N.C. 172, 175 (2015). "Although the trial court's rulings on relevancy technically are not discretionary . . . , such

rulings are given great deference on appeal." *State v. Davis*, 237 N.C. App. 481, 485 (2014) (citation omitted).

Here, Defendant challenges Akira's testimony regarding three incidents: In the first incident, Defendant cornered Akira against a wall and repeatedly punched her in the thigh. Akira called out to Marcus, who came to help. Defendant told Marcus, "I'll beat your ass," before walking out of the townhouse. In the second incident, which occurred several months before the shooting, Akira found Defendant in their bed with another woman and Akira hit him in the head. Defendant threatened Akira by placing his gun in his lap before telling her not to hit him again. In the third incident, Defendant threatened Akira by placing a gun to her head after she had upset him.

All three incidents involved Defendant's violence toward Akira, the victim's sister, when Defendant and Akira were living in the same home with Marcus. This evidence provides context as to "circumstances surrounding the parties" and the relationship between Defendant, Akira, and Marcus leading up to the shooting. *Riddick*, 316 N.C. at 137 (citation omitted). Accordingly, the trial court did not err by admitting this evidence under Rules 401 and 402.

2. Rule 404(b)

Defendant also contends that this challenged evidence constitutes inadmissible character evidence and should have been excluded under Rule 404(b).

This Court reviews "de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130 (2012) (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33 (2008) (quotation marks and citation omitted).

"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." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2023). Such evidence may, however, "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.*

"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." *State*

v. Jones, 288 N.C. App. 175, 181 (2023) (quotation marks and citation omitted). Rule 404(b) is a rule of inclusion. *State v. Coffey*, 326 N.C. 268, 278-79 (1990). Even though some evidence of prior acts may tend to show a defendant's propensity to commit the charged crime, such evidence is admissible under Rule 404(b) so long as it is used for some other purpose. *State v. Bagley*, 321 N.C. 201, 206 (1987). For example, evidence of prior acts "may be admissible under Rule 404(b) if it establishes the chain of circumstances or context of the charged crime." *State v. White*, 340 N.C. 264, 284 (1995) (citation omitted). "Such evidence is admissible if the evidence of other [acts] serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury." *Id.* (citation omitted).

"Second, the past act must be similar enough to the charged crime to distinguish the acts from any generalized commission of the crime." *Jones*, 288 N.C. App. at 181 (quotation marks, brackets, and citation omitted). The similarities need not "rise to the level of the unique and bizarre;" rather, "prior acts are considered sufficiently similar under Rule 404(b) if there are some unusual facts present in both [acts] that would indicate that the same person committed them." *Id.* (quotation marks and citations omitted).

"Third, the past act must be temporally proximate to the presently charged act." *Id.* (citation omitted). "[R]emoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307 (1991) (citation omitted).

Here, the trial court found this evidence to be admissible under Rule 404(b) to show "motive, opportunity to use the weapon in the subject of this action[, i]ntent, which is a necessary element of the crime charged in this case, and preparation to use the weapon that was used in this incident." We agree.

The evidence in question shows that in the weeks and months leading up to the shooting, Defendant had been violent toward Akira. He had thrown car keys at her, punched her repeatedly in the leg, and threatened her on multiple occasions with his gun. During at least one of the instances, Akira called out to Marcus for help. This evidence, therefore, shows that Marcus, who lived under the same roof as Defendant and Akira, had become aware of the nature of Defendant and Akira's relationship and the problems involved. Not only does this evidence help establish "the chain of circumstances or context of the charged crime," but it indicates Defendant's motive and intent to kill Marcus. *White*, 340

N.C. at 284 (citation omitted); *see State v. White*, 349 N.C. 535, 552 (1998) (determining that the defendant's prior violent acts toward the victim's family member were admissible under Rule 404(b) because, even though it was not part of the crimes charged, it "pertained to the chain of events explaining the context, motive and set-up of the crime") (brackets and citation omitted); *see also State v. Blalock*, 77 N.C. App. 201, 204 (1985) (determining that the evidence of defendant's prior assaults on members of the victim's family was admissible under Rule 404(b) because it "was relevant and competent to show his intent or motive").

The evidence in question is also sufficiently similar and temporally proximate to the charged crime. All of the events testified to by Akira involved violent acts committed by Defendant, who committed the charged crime of first-degree murder. This evidence also demonstrates Defendant's prior use of his gun—the same gun he used to shoot and kill Marcus. Furthermore, these prior acts occurred not long before the shooting. Even so, any remoteness in time to the charged crime is less significant because the evidence of these prior acts was used in part to show Defendant's motive and intent to kill Marcus. *See Stager*, 329 N.C. at 307.

Accordingly, all three requirements for evidence to be admissible under Rule 404(b) were met, and the trial court did not err by admitting the evidence of Defendant's prior violent acts toward Akira under Rule 404(b).

3. Rule 403

Defendant further argues that the challenged evidence should have been excluded under Rule 403. This Court reviews Rule 403 rulings for abuse of discretion, which "results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285 (1988) (citation omitted).

Rule 403 provides that otherwise 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 (2023). "While 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 (2009) (citations omitted).

In reviewing evidence of prior acts admissible under Rule 404(b), this Court's Rule 403 inquiry has two elements. First, the Court must consider the probative value of the Rule 404(b) evidence. *Jones*, 288 N.C. App. at 185. This requires the reviewing court to "consider the similarities between the prior conduct and charged conduct." *Id.* (citation omitted); *see*, *e.g.*, *State v. Magnum*, 242 N.C. App. 202, 213-14 (2015) (determining that the trial court did not abuse its discretion due in part to the "significant points of commonality between the Rule 404(b) evidence and the offense charged") (citation omitted).

Second, the Court must consider the danger of the evidence causing unfair prejudice. *Jones*, 288 N.C. App. at 185-86. Unfair prejudice, in the context of Rule 403, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. Buchanan*, 288 N.C. App. 44, 48 (2023) (quotation marks and citation omitted). In the context of admitting Rule 404(b) evidence, this requires considering "whether the trial court 'carefully handled the process.' " *Jones*, 288 N.C. App. at 185 (brackets and citation omitted); *see*, *e.g.*, *Beckelheimer*, 366 N.C. at 133 (determining that the trial court did not abuse its discretion due in part to its "careful handling of the process"). For example, the reviewing court shall examine 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." *Id.* (quotation marks and citations omitted).

Here, as discussed above, the evidence of Defendant's prior violent acts toward Akira provides context surrounding the nature of Defendant's relationship with Akira and Marcus in the weeks leading up to the shooting. The evidence was also used by the State to show Defendant's motive, intent, and opportunity to use his gun to kill Marcus. As such, Defendant's prior violent acts toward Akira were probative.

Furthermore, the admission of this evidence was not unfairly prejudicial to Defendant. The trial court, aware of the potential danger of unfair prejudice to Defendant, exercised its due diligence by first hearing Akira's testimony regarding these incidents outside the presence of the jury. After considering the arguments made by both parties, the trial court conducted the proper balancing test required under Rule 403 to determine the evidence's admissibility. Accordingly, the trial court did not abuse its discretion by admitting the evidence of Defendant's prior violent acts toward Akira under Rule 403.

C. The State's Closing Argument

[3] Defendant next argues that a portion of the State's closing argument was an improper misstatement of the law. Specifically, Defendant contends that it was error for the State to argue, over objection, that the law of self-defense does not apply because Defendant shot an unarmed man.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131 (2002) (citations omitted). Under this standard of review, this Court "first determines if the remarks were improper." *Id.* Second, this Court determines "if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* (citations omitted).

Prosecutors generally are "allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom." *State v. Guevara*, 349 N.C. 243, 257 (1998) (citation omitted). An incorrect statement of law in closing argument is improper. *State v. Ratliff*, 341 N.C. 610, 616-17 (1995). A prosecutor's misstatement of the law, however, "may be cured by the trial court's subsequent correct instructions." *Taylor*, 362 N.C. at 546 (citation omitted).

Here, the State argued to the jury that it was unreasonable for Defendant to believe that by shooting Marcus multiple times, he was protecting himself from imminent bodily injury or death. The State further argued, "Even if it is reasonable, the defendant never has a right to use excessive force." This statement is confusing at best.

Despite this statement, however, the State argued at length that Defendant's use of deadly force against Marcus was unreasonable. Furthermore, the State told the jury that the trial court would instruct them on the law of self-defense and, following the State's closing argument, the trial court instructed that

> A defendant does not have the right to use excessive force. A defendant uses excessive force if the defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing.
>
> It is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to the defendant at the time.

This instruction was proper.

Accordingly, the State's confusing statement, even if improper, was cured by the trial court's subsequent correct instructions, *Taylor*, 362 N.C. at 546, and the trial court did not abuse its discretion by failing to sustain the objection, *Jones*, 355 N.C. at 131.

D. Evidence of Victim's Alleged Gang Involvement

[4] Defendant argues that the trial court erred by refusing to allow evidence of Marcus' alleged gang involvement to be admitted. Specifically, Defendant argues that this evidence was relevant to show Defendant's state of mind during his altercation with Marcus. Defendant's argument is meritless.

A trial court's relevancy determination, although reviewed de novo, is still "given great deference on appeal." *Davis*, 237 N.C. App. at 485 (citation omitted). Any balancing done by the trial court pursuant to Rule 403 is reviewed for abuse of discretion. *Triplett*, 368 N.C. at 175. "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 (1993) (citation omitted). Under this standard, "[r]eversal is appropriate only if the trial judge's ruling was outside the bounds of reason." *Buchanan*, 288 N.C. App. at 48 (quotation marks and citation omitted).

"Evidence is relevant if it has any logical tendency to prove a fact at issue in a case, . . . and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *Riddick*, 316 N.C. at 137 (citation omitted). The bar for evidence being relevant is low; "evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *Id.*

Relevant evidence, however, "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. As stated above, unfair prejudice means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Buchanan*, 288 N.C. App. at 48 (quotation marks and citation omitted).

Here, Defendant attempted to introduce evidence that Marcus was involved with a gang through the testimony of Defendant's psychiatrist and a video allegedly showing Marcus making hand signals consistent

with gang membership. The trial court determined that evidence of Marcus' alleged gang membership was irrelevant, and even if it was relevant, its probative value was substantially outweighed by the danger of unfair prejudice.

Even if relevant, we agree with the trial court that its probative value was substantially outweighed by the danger of unfair prejudice. Evidence that Defendant feared for his life because Marcus belonged to a gang does little to support his theory of self-defense, and such evidence would have had "an undue tendency to suggest decision on an improper basis." *Id.* The trial court's decision to exclude this evidence was not "so arbitrary that it could not have been the result of a reasoned decision." *Syriani*, 333 N.C. at 379 (citation omitted). Accordingly, the trial court did not abuse its discretion in excluding Defendant's evidence of Marcus' alleged gang involvement.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Chief Judge DILLON and Judge FLOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 APRIL 2025)

COWEE MOUNTAIN IMPROVEMENT ASS'N, INC. v. MURRAH No. 24-760	Macon (18CVS000428)	Affirmed
GOLDEN v. ARGILA No. 24-337	Durham (07CVD583)	Affirmed.
HAMILTON v. FEDEX GROUND PACKAGE SYS., INC. No. 24-727	Mecklenburg (23CVS011522-590)	Affirmed
IN RE J.M. No. 24-146	Johnston (18JT189)	Affirmed
IN RE K.F.M. No. 23-834	Brunswick (14JT65)	Affirmed
IN RE K.M. No. 24-593	Onslow (16JA000200) (16JA000201)	Affirmed
IN RE P.J. No. 24-155	Mecklenburg (22JA000465-590)	Affirmed in Part; Vacated and Remanded in Part
IN RE R.A.C. No. 24-768	Mecklenburg (20JT000363-590)	Affirmed
IN RE R.E. No. 24-782	Iredell (23JA000289) (23JA000290)	Affirmed
MURRAH v. COWEE MOUNTAIN IMPROVEMENT ASS'N, INC. No. 24-761	Macon (19CVS000265)	Affirmed
ROBERTS v. ROBERTS No. 24-354	Durham (22CVS3267)	Affirmed
STATE v. BULLOCK No. 24-94	Wake (20CRS208545-46)	No Plain Error
STATE v. GARLINS No. 24-374	Mecklenburg (21CRS002206-590) (21CRS002207-590)	Dismissed
STATE v. HAMILTON No. 22-847-2	Davidson (17CRS51616)	No Plain Error

STATE v. HARVELL No. 24-268	Cabarrus (18CRS55192)	No Error
STATE v. HEARNE No. 24-998	Stanly (19CRS050475)	No Error
STATE v. JOHNSON No. 24-682	Franklin (18CRS052378,) (20CRS050452,) (23CRS000234)	No Error
STATE v. McBRYDE No. 24-657	Hoke (17CRS051516,) (17CRS051660)	No Error
STATE v. ROBERSON No. 24-392	Mecklenburg (20CR237181-590) (20CR237182-590) (20CR237184-590)	Judgment Vacated; Remanded for New Trial
STATE v. ROSEMAN No. 24-629	Davidson (23CRS000279) (23CRS000280) (23CRS243405) (23CRS367463)	No Prejudicial Error
STATE v. SMITH No. 24-642	Wilkes (23CRS701192)	New Trial
STATE v. STOCKWELL No. 24-549	Randolph (22CRS052814)	Affirmed
STATE v. WATTS No. 24-641	Mecklenburg (17CR014938-590) (17CR014939-590) (17CR213783-590) (17CR213784-590) (17CR213785-590) (17CR213786-590) (19CR207918-590) (19CR207919-590) (19CR207920-590) (19CR207921-590)	No Error

GRIFFIN v. N.C. STATE BD. OF ELECTIONS

[298 N.C. App. 436 (2025)]

JEFFERSON GRIFFIN, PETITIONER
v.
NORTH CAROLINA STATE BOARD OF ELECTIONS, RESPONDENT
AND
ALLISON RIGGS, INTERVENOR-RESPONDENT

No. COA25-181

Filed 4 April 2025

1. Elections—post-election protest filing—statutory requirements—adequate notice—dismissals reversed

In post-election protest proceedings brought by plaintiff (a candidate for a seat on the North Carolina Supreme Court who lost the election by 734 votes) in regard to three groups of challenged voters—voters with incomplete voter registration, overseas voters who failed to include a copy of photo identification or an exception form with their ballots, and voters who never domiciled or resided in North Carolina but whose parents or guardians were eligible North Carolina voters—the dismissals of plaintiff's protests by the State Board of Elections on the basis of his failure to satisfy statutory notice requirements set forth in the Board's Election Protest Form (plaintiff had mailed postcards with a quick response (QR) code to potentially affected voters) were reversed where the relevant statutes (N.C.G.S. §§ 163-182.9 and 163-182.10) required county boards of elections—rather than a protester such as plaintiff—to provide notice of hearings, and then only once the need for an evidentiary hearing had been established following a preliminary hearing—for which no notice to affected voters was required.

2. Elections—post-election protest filing—statutory requirements—probable cause of election violations shown

In post-election protest proceedings brought by plaintiff (a candidate for a seat on the North Carolina Supreme Court who lost the election by 734 votes) in regard to three groups of challenged voters—voters with incomplete voter registration, overseas voters who failed to include a copy of photo identification or an exception form with their ballots, and voters who never domiciled or resided in North Carolina but whose parents or guardians were eligible North Carolina voters—after reversing the State Board of Elections' dismissals of plaintiff's protests on notice grounds, the Court of Appeals further determined that probable cause existed to believe that election violations had occurred and, accordingly, reached the merits of plaintiff's challenges to each of the three voter groups.

The matters were remanded as to the voters with incomplete registrations and the overseas voters, with instructions for the Board to notify affected voters and provide them 15 days to cure the deficiencies in their registrations. Voters in the final group, who never domiciled or resided in North Carolina, were ruled ineligible to vote in North Carolina, non-federal elections, and the Board was instructed to remove their votes from the Supreme Court election count.

Judge HAMPSON dissenting.

Appeal by petitioner from orders entered 7 February 2025 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 21 March 2025.

Dowling PLLC, by W. Michael Dowling, Troy D. Shelton, and Craig D. Schauer, and Chalmers, Adams, Backer & Kaufman, PLLC, by Philip R. Thomas, for petitioner-appellant Jefferson Griffin.

North Carolina Department of Justice, by Solicitor General Ryan Y. Park, Deputy Solicitor General Nicholas S. Brod, Deputy Solicitor General James W. Doggett, Special Deputy Attorney General Terence Steed, Solicitor General Fellow Trey A. Ellis, Solicitor General Fellow Kaeli E. Czosek, Assistant Deputy Attorney General Marc D. Brunton, for respondent-appellee North Carolina State Board of Elections.

Womble Bond Dickinson (US) LLP, by Raymond M. Bennett and Samuel B. Hartzell, for intervenor-respondent-appellee Allison Riggs.

Tharrington Smith, L.L.P., by Colin A. Shive and Stephen G. Rawson, for amici curiae Dane C. Beavers, Deborah J. Bedford, Debra B. Blanton, et al. (Former Directors of County Boards of Elections).

Milberg Coleman Bryson Phillips Grossman PLLC, by Lucy Inman and Eric Steber, and Campaign Legal Center, by Danielle Lang, Brent Ferguson, Valencia Richardson, Heather Szilagyi, and Rachel Appel, for amici curiae Secure Families Initiative and Count Every Hero, an unincorporated association.

Southern Coalition for Social Justice, by Jeffrey Loperfido, Hilary Harris Klein, Christopher Shenton, and Mitchell Brown, and Forward Justice, by Caitlin A. Swain, Kathleen Roblez, and Ashley Mitchell, and Irving Joyner, for amici curiae Raim Allston, Cindy Oates Anthony, Rachel Arnold, Danielle Brown, Amy Bryant, Denise Carman, Jean Cary, Louanne Caspar, Alexia Chavis, Carrie Conley, Jose Benito Del Pliego, Sofia Dib-Gomez, Mary Kay Heling, Wesley Hogan-Philipsen, Elizabeth Hunter Kesling, Kevin Hunter Kesling, Lesley-Anne Leonard, Gaynelle Little, Jenna Marrocco, Audrey Meigs, Bruklyn Miller, Dirk Philipsen, Larry Repanes, Anna Richards, Lila Richardson, Lyse Rochleder, Kemeka Sidbury, Sophia "Felix" Soto, Alexa Adamo Valverde, Diane Wynne, Phoebe Zerwick, North Carolina State Conference of the NAACP, North Carolina Black Alliance, Common Cause Education Fund, Democracy North Carolina, El Pueblo, North Carolina Asian Americans Together, and North Carolina Poor People's Campaign.

Ballew Puryear PLLC, by Zachary R. Kaplan, Trent N. Turk, Matthew D. Ballew, and Paul J. Puryear, and Brennan Center for Justice, by Eliza Sweren-Becker and Justin Lam, for amici curiae U.S. Vote Foundation, Association of Americans Resident Overseas, and Impacted Voters Linda K. Berkeley, Nikita Berry, Colin Beveridge, Robert John Brightwell, Karen Brightwell, and Nicholas Ahmed De Laczkovich-Siddiqi.

ACLU of North Carolina Legal Foundation, by Krisi Graunke, and American Civil Liberties Union Foundation, by Matthew Segal and Bridget Lavender, for amici curiae American Civil Liberties Union of North Carolina and American Civil Liberties Union.

Patterson Harkavy LLP, by Narendra K. Ghosh, and Elias Law Group LLP, by Lalitha D. Madduri, Christopher D. Dodge, Tina Meng Morrison, Julie A. Zuckerbrod, and James J. Pinchak, for proposed-intervenors North Carolina Alliance for Retired Americans, VoteVets Action Fund, Juanita Anderson, and Tanya Webster-Durham.

Jay Norman Delancy for amici curiae Voter Integrity Project.

PER CURIAM.

I. Background

Petitioner, Jefferson Griffin ("Griffin"), and intervenor-respondent, Allison Riggs ("Riggs"), were both candidates for Seat 6 on the Supreme Court of North Carolina in the 2024 general election. Riggs is the incumbent. Griffin is a judge on the North Carolina Court of Appeals.

Election day was held on 5 November 2024. At the end of the canvassing period, Riggs led by 734 votes, having received 2,770,412 votes (50.01%) to Griffin's 2,769,678 votes (49.99%).

On 19 November 2024, Griffin filed six categories of election protests with the county boards of elections in each of North Carolina's one hundred counties, three of which are relevant to this appeal.

The first of these three categories is the "Incomplete Voter Registrations," in which Griffin challenges ballots cast by voters who are not properly registered, because they purportedly have never provided either their driver's license numbers or the last four digits of their social security numbers with their registration.

The second category is the "Lack of Photo Identification for Overseas Voters," wherein Griffin challenges ballots of certain citizens living overseas and of certain members of the military, their spouses, and dependents, which were cast pursuant to General Statutes Chapter 163, Article 21A, for failing to include a copy of their photo identification or an "Identification Exception Form" with their respective ballot. *See* N.C. Gen. Stat. § 163-230.1(a)(4) (2023) (requiring absentee voters under Article 20 to provide a copy of their photographic identification as described in N.C. Gen. Stat. § 163-166.16(a) or an affidavit as described in N.C. Gen. Stat. § 163-166.16(d) with their absentee ballots).

The third category is the "Never Residents" category. Griffin challenges the eligibility of overseas citizens who voted but were never domiciled or resided in North Carolina and have never indicated they intend live in this state, but whose parents or legal guardians were purportedly registered or eligible North Carolina voters prior to leaving the United States.

Post-election protests seek "to balance the public's interest in achieving accurate election results with the need to finalize those results in a short period of time." *Bouvier v. Porter*, 386 N.C. 1, 4, 900 S.E.2d 838, 843 (2024). Election protests are typically adjudicated by individual county boards of elections. *See* N.C. Gen. Stat. § 163-182.10(a) (2023) (stating the procedure for handling protests at the county boards of elections). On 20 November 2024, the day after Griffin filed his protests, the

North Carolina State Board of Elections ("Board") held an emergency meeting and voted unanimously to remove jurisdiction from the county boards regarding these three protest categories, which presented uniform legal questions of statewide significance pursuant to N.C. Gen. Stat. § 163-182.12 (2023), "in the interest of the efficient administration of justice[.]" The Board adopted the protest procedures under N.C. Gen. Stat. § 163-182.10(a) (2023).

Griffin's campaign had sought and previously received from county boards their lists of those identified voters who those boards indicated fell within one of the three challenged categories. The campaign mailed postcards to each voter identified by county boards at their listed addresses to notify them of the challenges. On 11 December 2024, the Board held a hearing to preliminarily consider these three protest categories.

Under the Board's procedures, the Board is required to resolve two preliminary considerations. *Id.* The Board must first determine whether the protest "substantially complies" with the filing requirements in N.C. Gen. Stat. § 163-182.9 (2023). The Board must determine whether the substance of the protest meets the pleading threshold. N.C. Gen. Stat. § 163-182.10(a) (2023).

The General Assembly has directed the Board to consider whether the protest "establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred." *Id.* This inquiry involves both a legal question of whether the allegations would constitute a violation of the law and a factual question of whether probable cause supports whether an alleged violation actually occurred. If the protest satisfies both of these preliminary considerations, then the protest advances to an evidentiary hearing. *Id.*

On 13 December 2024, the Board entered its "Decision and Order," dismissing all three protests without an evidentiary hearing. The Board determined "the protests did not substantially comply with the service requirements and did not establish probable cause to believe that a violation of election law or irregularity or misconduct occurred in the protested elections." In other words, the Board concluded Griffin's protests had failed to satisfy the preliminary considerations, meaning: (1) Griffin did not satisfy the notice requirements; and, (2) Griffin had failed to establish probable cause that an election violation occurred. Griffin timely appealed the Board's order.

On 18 December 2024, Griffin filed a petition for a writ of prohibition with the Supreme Court of North Carolina, petitioning the Court

to prohibit the Board from counting the challenged votes. Griffin also sought an order from the Court staying the Board's certification of the election results for Supreme Court Seat 6.

Before our Supreme Court acted, the Board removed the petition to the United States District Court for the Eastern District of North Carolina. The Board asserted Griffin's claims arose under federal law, providing the federal court with original jurisdiction over the claims.

On 20 December 2024, Griffin filed three separate petitions for judicial review in Wake County Superior Court, one for each of the three protest categories dismissed two days earlier by the Board. *See* N.C. Gen. Stat. § 163-22(l) (2023) (providing that judicial review of Board orders must be filed in Wake County Superior Court). In these petitions, Griffin sought a temporary restraining order, preliminary injunction, and/or for a stay of the Board's certification of the election. That same day, the Board also filed to remove the three petitions from Wake County Superior Court to the United States District Court for the Eastern District of North Carolina.

On 6 January 2025, the United States District Court issued an order holding it has jurisdiction under 28 U.S.C. § 1443(2) (2024), but abstained from hearing the case under *Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424 (1943). That same day, the District Court remanded the case to the Supreme Court of North Carolina and *sua sponte* remanded the Board's removal to Wake County Superior Court.

Following remand, the Supreme Court of North Carolina issued an order on 22 January 2025, dismissing Griffin's petition for a writ of prohibition and directing the Superior Court to review Griffin's appeal from the Board. The Supreme Court also stayed certification of the election until all appeals are completed and ordered the Wake County Superior Court "to proceed expeditiously." *See Griffin v. N.C. State Bd. of Elections*, 387 N.C. 395, 396, 910 S.E.2d 348, 349 (2025). Riggs filed a consent motion to intervene in Wake County Superior Court on 3 February 2025.

The Board had appealed the District Court's remand order to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). Riggs also moved to intervene at the Fourth Circuit, which was granted, and she also appealed the remand of the petition for writ of prohibition.

The Fourth Circuit heard oral arguments on 27 January 2025 and issued an unpublished *per curiam* opinion on 4 February 2025. The Fourth Circuit ordered the District Court to modify its remand order,

and held the "more appropriate theory" for abstaining from federal jurisdiction arises under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971 (1941). The Fourth Circuit further directed the District Court to modify its order to retain jurisdiction of the federal issues should those issues remain after resolution of the state law and state court proceedings. The Board and Riggs filed notice of the Fourth Circuit ruling and asserted an England reservation. *See generally England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 11 L. Ed.2d 440 (1964).

On 7 February 2025, the Wake County Superior Court held a hearing on Griffin's appeals from the Board's 13 December 2024 dismissals of his three protests. Later that day, the Superior Court entered three separate one-page orders affirming the Board's dismissal decisions.

Griffin appealed the three Wake County Superior Court's orders to this Court on 10 February 2025. On 13 February 2025, this Court allowed a motion to expedite the appeal. On 25 February 2025, Riggs filed two motions in this Court: (1) a motion for Judge Thomas Murry to recuse; and, (2) a motion for initial *en banc* consideration. On 14 March 2025, this Court denied the motion for initial *en banc* consideration. The motion to recuse was dismissed, as Judge Murry is not a member of the panel assigned to hear the appeal. This Court allowed all motions to file amicus briefs from multiple third parties. Oral arguments were held on 21 March 2025.

II. Jurisdiction

The three Superior Court orders entered 7 February 2025, which affirmed the Board's 13 December 2024 dismissals of Griffin's three challenges, are final judgments. This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

Griffin seeks review of whether the Superior Court properly affirmed the Board's dismissal of all three protests after a preliminary consideration. The two conclusions made by the Board and affirmed by the Superior Court are: (1) whether sufficient and adequate notice was provided to the voters whose votes were being challenged; and, (2) whether probable cause exists of an election law violation.

IV. Standard of Review

"The standard and scope of review for the trial court of an order of the State Board is found in the provisions of Chapter 150B of the

General Statutes, the Administrative Procedure Act." *Appeal of Harper*, 118 N.C. App. 698, 700, 456 S.E.2d 878, 879 (1995) (citing *In re Brown*, 56 N.C. App. 629, 630, 289 S.E.2d 626, 626–27 (1982)).

The Board does not have the authority to ignore or declare an act of the General Assembly unconstitutional. *In re Redmond*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) ("[I]t is a well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board."). The Superior Court did not rule upon the constitutional question. Accordingly, we review these issues *de novo*.

The North Carolina Administrative Procedure Act ("NCAPA") outlines two separate standards of review to apply when reviewing an agency decision. Which standard of review to apply depends upon the appealing party's alleged errors and arguments before this Court. N.C. Gen. Stat. § 150B-51 (2023).

A *de novo* standard of review is applied if a party argues the agency's "findings, inferences, conclusions, or decisions are: (1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge; (3) Made upon unlawful procedure; [or] (4) Affected by other error of law[.]" N.C. Gen. Stat. § 150B-51(b)(1)-(4) and 51(c) (2023).

If the appealing party argues the agency's decision was "(5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or (6) Arbitrary, capricious, or an abuse of discretion[,]" this Court must apply the "whole record" test. N.C. Gen. Stat. § 150B-51(b)(5)-(6) and 51(c) (2023).

Griffin argues the Board exceeded and acted contrary to its statutory authority and violated constitutional provisions, which are categories of arguments outlined in N.C. Gen. Stat. § 150B-51(b)(1)-(2). We review the Board's decision *de novo*. N.C. Gen. Stat. §§ 150B-51(b)(1)-(4) and 51(c) (2023).

V. Analysis

Our analysis when reviewing a post-election protest challenge is guided by certain core premises:

> The overriding issue that has been thrust upon this Court in the present case, and the concern of this Court is not the ultimate outcome of the [election]. Rather, the sole issue and concern for this Court in this matter is whether the . . . election[] w[as] conducted in accord with the will

> of the people of North Carolina, as expressed by them in their Constitution and in their statutes as enacted by their representatives.

James v. Bartlett, 359 N.C. 260, 292, 607 S.E.2d 638, 639 (2005).

"The right to vote on equal terms in representative elections—a one-person, one-vote standard—is a fundamental right." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E. 2d 759, 762–63 (2009). A voter's eligibility to lawfully vote in an election is based upon their status as of Election Day, here 5 November 2024, even if the voter cast an identifiable absentee or provisional ballot on an earlier date. *See* N.C. Gen. Stat. § 163-82.1 (2023).

"To permit unlawful votes to be counted along with lawful ballots in contested elections effectively 'disenfranchises' those voters who cast legal ballots, at least where the counting of unlawful votes determines an election's outcome." *James*, 359 N.C. at 270, 607 S.E.2d at 644. In reviewing this case, the Court is not concerned with the race, sex, age, or party affiliation of any contested voter or the outcome. *Id.* at 292, 607 S.E.2d at 639.

The Supreme Court of the United States has also repeatedly addressed the fundamental right of voting and upheld the sanctity of lawfully-conducted elections. "It is beyond cavil that voting is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433, 119 L. Ed. 2d 245, 252 (1992) (quoting *Ill. St. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 59 L. Ed.2d 230, 241 (1979)).

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," while the Supreme Court also confirmed requiring all voters are eligible to vote is of great national importance. *Reynolds v. Sims*, 377 U.S. 533, 555, 12 L. Ed. 2d 506, 523 (1964). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4, 166 L. Ed. 2d 1, 4 (2006) (per curiam).

The Board was preliminarily tasked with determining whether Griffin had complied with the post-election protest filing requirements of N.C. Gen. Stat. §§ 163-182.9 and 163-182.10 (2023). The Board found and concluded: (1) Petitioner had failed to serve voters affected by his protest with adequate notice; and, (2) Petitioner had failed to establish probable cause of an election-law violation. We will address the Board's analysis of each determination in turn.

A. Adequate Notice

[1] The Board concluded Griffin had failed to serve affected voters that had been identified by various county boards as falling into one of the challenged categories with notice in compliance with instructions provided on the Election Protest Form. The Board concluded the notification Griffin's campaign mailed to affected voters at their board-listed address was an invalid method of providing notice and dismissed all three protests for lack of notice. Griffin's campaign mailed a postcard to each potentially affected voter with the message "your vote may be affected by one or more protests filed in relation to the 2024 General Election" and a quick response or "QR" code to view his protest filings.

The Board concluded Griffin had failed to provide proper notice, relying upon instructions on the Election Protest Form:

> You must serve copies of all filings on every person with a direct stake in the outcome of this protest ("Affected Parties"). . . . If a protest concerns the eligibility or ineligibility of particular voters, all such voters are Affected Parties and must be served. Address information for registered voters is available from the county board of elections or using the Voter Lookup at www.ncsbe.gov.
>
> Materials may be served by personal delivery, transmittal through U.S. Mail or commercial carrier service to the Affected Party's mailing address of record on file with the county board of elections or the State Board, or by any other means affirmatively authorized by the Affected Party. . . . It is [the protester's] responsibility to ensure service is made on all Affected Parties.

Although the Board's Election Protest Form asserts it is the protester's responsibility to provide notice to potentially affected parties, North Carolina's General Statutes mandate it is "[t]he *county board [who] shall give notice* of the protest hearing to the protester . . . and those persons likely to have a significant interest in the resolution of the protest." N.C. Gen. Stat. § 163-182.10(b) (2023) (emphasis supplied). The statute states, "[e]ach person given notice shall also be given a copy of the protest or a summary of its allegations." *Id.*

While the Board is permitted to provide forms for a protester to fill out to initiate a protest under N.C. Gen. Stat. § 163-182.9(c) (2023), those forms are not the exclusive means to initiate a valid protest. This statute does not allow the Board to create new or contrary rules for protesters

to initiate this process. The Election Protest Form instructions directly conflict with N.C. Gen. Stat. § 163-182.10(b) (2023), which states "[the board] *shall* give notice *of a hearing*." (emphasis supplied).

Our General Statutes also clearly provide notice does not need to be given to any affected party until *after* it has been established an evidentiary hearing is set to take place. *Id*. A preliminary hearing is limited to determine: "whether the protest *substantially complies with G.S. 163-182.9* and whether it establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred." N.C. Gen. Stat. § 163-182.10(a)(1) (2023) (emphasis supplied). An agency's form cannot conflict with the North Carolina General Statutes. *See James*, 359 N.C. at 270, 607 S.E.2d at 644. Because the Election Protest Form created instructions purportedly requiring the protester, as opposed to the county boards, to provide notice *before* it is statutorily required, the Election Protest Form's notice instructions directly conflict with the General Statutes, which require "substantial compliance" to file a valid protest, and are void. N.C. Gen. Stat. § 163-182.10(b) (2023).

Even if the Board could require Griffin to provide notice, Griffin's campaign satisfied the purported notice requirement. Griffin's campaign used a notice method to mail postcards to listed addresses with notice of his challenges and a quick response or "QR" reference code to access additional materials to each potentially affected voter, which the Board itself had previously used to notify voters. *See* N.C. Gen. Stat. § 163-82.8(c) (2023) (providing county boards may mail voters their voter registration cards or mail voters a replacement registration card "to verify change of address, change of name, or change of party affiliation"); N.C. Gen. Stat. § 163-82.14(d)(2) (2024) ("Following each congressional election, the county board of elections shall send to each registered voter who has not voted or confirmed the voter's address by another means a confirmation mailing.").

In addition, when sending the statutorily mandated Judicial Voter Guide statewide to each registered voter in this and previous elections, the Board used electronic hyperlinks and bulk mail to send printed versions of the Judicial Voter Guide addressed to "Residential Customer" with QR codes. The Guide was not individually addressed to any specific voter. *See* N.C. Gen. Stat. § 163-278.69(a) (2023) (providing the Board "shall publish a Judicial Voter Guide" explaining "the functions of the appellate courts and the laws concerning the election of appellate judges" as well as "the laws concerning voter registration" and that the Board "shall distribute the Guide to as many voting-age individuals in the State as practical, through a mailing to all residences or other means it

deems effective"). *See also Online Judicial Voter Guide Now Available for 2024 General Election*, North Carolina State Bd. of Elections (Aug. 9, 2024), https://www.ncsbe.gov/news/press-releases/2024/08/09/online-judicial-voter-guide-now-available-2024-general-election.

Pages twelve through eighteen of the Board's "2024 Judicial Voter Guide," pertinent to this election, entitled "Voting 101: 8 Tips for NC Voters," contain six QR codes to enable a voter to seek additional information.

To condemn a non-statutory and voluntary method of notice and means to seek additional information, which the Board has repeatedly used, is essentially throwing stones while sitting inside a glass house. Benjamin Franklin, *Poor Richard's Almanack* (1732).

We conclude the Board erred by dismissing all three protests based on a failure to provide adequate notice.

B. Probable Cause of an Election-Law Violation

[2] When a protest is filed, the Board is statutorily required to conduct a preliminary consideration of the protest to determine whether the protest "substantially complies with G.S. 163-182.9" and whether there is "probable cause to believe that a violation of election law or irregularity or misconduct has occurred." N.C. Gen. Stat. § 163-182.10(a)(1) (2023).

Allegations of violations are sufficient to raise probable cause and proof of "violation . . . or irregularity or misconduct" are required at the evidentiary hearing. *Id.* As the Board explained in its Decision and Order, probable cause is a "commonsense, practical standard." *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983). The probable cause standard is satisfied when allegations and the material submitted by the protester are sufficient for a reasonable and prudent person to believe that election law violations, irregularities, and misconduct occurred in the conduct of the election. Probable cause does not require such a belief to be necessarily correct or more likely to be true than false. *Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 514 (1983). A probability of an irregularity in the conduct of the election is sufficient. *See Adams v. City of Raleigh*, 245 N.C. App. 330, 336–37, 782 S.E.2d 108, 113–14 (2016).

"Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court." *Best v. Duke Univ.*, 337 N.C. 742, 750, 448 S.E.2d 506, 510 (1994) (citation omitted).

Although the Board's Decision and Order dismissed the protests solely on the basis of inadequate notice, the Board's forty-three-page

Order also addressed and analyzed the potential merits of the protests to address the probable cause requirement as a preliminary consideration and dismissed all claims. Decision & Order at 40, *In re Election Protests of Jefferson Griffin, Ashlee Adams, Frank Sossamon, and Stacie McGinn*, N.C. State Bd. of Elections (Dec. 13, 2024) ("Even if the voters challenged in these protests had received adequate notice, the grounds for these protests are legally invalid for the reasons outline[d] in this decision.").

Our Supreme Court has stated, "[t]o permit unlawful votes to be counted along with lawful ballots in contested elections effectively 'disenfranchises' those voters who cast legal ballots, at least where the counting of unlawful votes determines an election's outcome." *James*, 359 N.C. at 270, 607 S.E.2d at 644.

More recently, our Supreme Court stated, "votes are not accurately counted if ineligible voters' ballots are included in the election results." *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842. "A free ballot and a fair count must be held inviolable to preserve our democracy." *Swaringen v. Poplin*, 211 N.C. 700, 702, 191 S.E. 746, 747 (1937). Free elections under art. I, § 10 of the North Carolina Constitution include the right to an accurate counting of votes. *Harper v. Hall*, 384 N.C. 292, 363, 886 S.E.2d 393, 439 (2023). Griffin has a legal right to inquire into this outcome through the statutorily-enacted and post-election procedures available to him. *See generally* N.C. Gen. Stat. §§ 163-182.9 to 182.15; N.C. Const. art. I, § 18. Even though the Board dismissed the protests solely for the purported lack of notice, which is not statutorily required, we review the Board's analysis on the issues raised by the protests.

In January 2025, the Supreme Court issued a temporary stay barring the Board from certifying the election results. One of the factors considered in issuing a stay is the likelihood the petitioner will prevail on the merits. "Briefly stated, a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay." *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). *See also Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (recognizing that the likelihood of the movant's success on the merits is considered when granting injunctive relief).

As was cited during oral arguments, the Fourth Circuit recently adjudicated on similar issues: "North Carolina has been flooded with dozens of challenges to the State's electoral regulations." *Sharma*

v. Hirsch, 121 F.4th 1033, 1043 (4th Cir. 2024). The Fourth Circuit added these challenges "are reasonably grounded in the law, and their gravity should not be understated[,]" and these challenges and uncertainty "is not conducive to the most efficient administration of elections." *Id.*

These observations and statements by the Fourth Circuit, combined with the Supreme Court's decision to issue a stay of certification, are evidence of probable cause to warrant review on the merits. *Id.*

1. Incomplete Voter Registrations

We first address Griffin's challenge to votes cast by individuals who failed to properly register by not providing either their driver's license numbers or the last four digits of their social security numbers.

a. Legally Registered

The North Carolina Constitution mandates a person must be legally registered to vote in order to cast a lawful vote in an election and empowers the General Assembly to enact laws governing required registration. N.C. Const. art. VI, § 3(1) ("Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.").

In compliance with this Constitutional mandate, the General Assembly enacted N.C. Gen. Stat. § 163-54 declaring: "Only such persons as are legally registered shall be entitled to vote in any primary or election held under this Chapter." N.C. Gen. Stat. § 163-82.1(a) also admonishes: "No person shall be permitted to vote who has not been registered under the provisions of this Article or registered as previously provided by law." N.C. Gen. Stat. §§ 163-54 and 82.1(a) (2023).

Our Supreme Court long ago stated the importance of voter registration laws:

> The registration of voters is essential and very important. As was stated in [*McDowell v. Rutherford Ry. Constr. Co.*, 96 N.C. 514, 530, 2 S.E. 351, 358 (1887)], the purpose of it is to ascertain who is entitled to vote, and to facilitate the exercise of the elective franchise by citizens so entitled, and to prevent unlawful voting, fraud and confusion in all elections by the people. . . . *The statutory regulations in such respects are not simply directory; they are in their substance mandatory as well. They do not imply discretion in those authorities charged with the execution of them[.]*

Smith v. City of Wilmington, 98 N.C. 343, 348, 4 S.E. 489, 492 (1887) (emphasis supplied).

b. ***N.C. Gen. Stat. § 163-82***

To enable eligible voters to lawfully register, the Board is statutorily tasked to develop a voter registration application form. N.C. Gen. Stat. § 163-82.3 (2023). The voter registration application form shall contain certain information to be provided by the voter applicant to lawfully register, including the applicant's "[d]rivers license number or, if the applicant does not have a drivers license number, the last four digits of the applicant's social security number[.]" N.C. Gen. Stat. § 163-82.4(a)(11) (2023).

If the voter applicant has neither a current and valid driver's license, nor a social security number, the Board must assign the applicant a "unique identifier number" which "shall serve to identify that applicant for voter registration purposes." N.C. Gen. Stat. § 163-82.4(b) (2023).

The General Assembly enacted this requirement in 2004 to comply with the federal Help America Vote Act ("HAVA"), 52 U.S.C. § 21083 (2024), and to provide a corresponding state mandate. N.C. Sess. Law 2003-226, § 9 (amending N.C. Gen. Stat. § 163-82.4), § 22 (amendment effective 1 January 2004). This legislation was enacted, and the statute became law, with bipartisan support during the administration of an elected Democrat governor and while elected Democrats constituted the majorities in both chambers in the General Assembly.

The Board failed to amend the voter registration application form to obtain this information required by the 2004 law from new voter applicants until 2023. Nearly twenty years later, in 2023 after more litigation, the Board amended its voter registration application to require *new* voter applicants to provide either their valid driver's license number or the last four digits of their social security number, or, without either, the Board would assign a unique identifier number for that voter. Order at 4, *In re: HAVA Complaint of Carol Snow*, N.C. State Bd. of Elections (Dec. 6, 2023).

The information statutorily required since 2004 to enable a North Carolina voter to lawfully register applied to the 2024 primary and general elections and remains in effect.

The General Assembly also mandated it is the Board's duty to notify voter registration applicants of their failure to provide and include the required information and their opportunity to cure:

> If the voter fails to complete any required item on the voter registration form but provides enough information on the form to enable the county board of elections to identify and contact the voter, the *voter shall be notified of the omission and given the opportunity to complete the form* at least by 5:00 P.M. on the day before the county canvass as set in G.S. 163-182.5(b). If the voter corrects that omission within that time and is determined by the county board of elections to be eligible to vote, the county board shall permit the voter to vote. *If the information is not corrected by election day, the voter shall be allowed to vote a provisional official ballot. If the correct information is provided to the county board of elections by at least 5:00 P.M. on the day before the county canvass, the board shall count any portion of the provisional ballot that the voter is eligible to vote.*

N.C. Gen. Stat. § 163-82.4(f) (2023) (emphasis supplied).

The Board and the county boards of election are also statutorily required to regularly review, update, and maintain the list of lawfully registered voters. N.C. Gen. Stat. § 163-2.14 (2024). The Board and county boards failed in their duty to contact existing improperly registered voters whose electronic records omitted or did not show a driver's license number or social security number to cure the information deficiency.

As noted during oral arguments, pending litigation in federal court challenges the Board's alleged noncompliance with HAVA's requirement for a voter applicant to provide a drivers license, and if not, the last four digits of a social security number. *See Republican Nat'l Comm. v. N.C. State Bd. of Elections*, 120 F.4th 390, 395 (2024).

In August 2024, the Republican National Committee and the North Carolina Republican Party filed a complaint in the United States District Court for the Eastern District of North Carolina ("Eastern District"), seeking for the court to direct and order the Board to remedy its alleged violations of HAVA and the state statute by:

> identifying all ineligible registrants and removing them from the state's voter registration lists in a manner consistent with state and federal law, and to the extent such removal is not feasible prior to the date set forth herein, then direct [the Board] to require all individuals who failed to provide necessary HAVA identification information but were still registered to vote under the state's prior

> registration form, to cast a provisional ballot in upcoming elections pending [the Board]'s receipt and confirmation of the required HAVA information[.]

Complaint at 19–20, *Republican Nat'l Comm.*, 120 F.4th 390 (Nos. 24-2044-45).

As with the case before us, the Board removed that case to federal court. *Id.* at 394. The Eastern District granted the Board's motion to dismiss the HAVA statutory claim, agreeing HAVA did not provide for a private right of action. *Id.* The Eastern District also remanded the constitutional claim to state court. *Id.* However, the Fourth Circuit reversed and remanded on 29 October 2024, over a week prior to the 2024 General Election. *Republican Nat'l Comm.*, 120 F.4th at 395. On remand, the suit remains pending in the Eastern District.

The Board was on notice over a week prior to the 2024 general election that the HAVA case had been reversed in favor of the Plaintiffs and remanded to be heard in the Eastern District. *See id.*

Griffin contends under both federal law and state statutes, it is unlawful for the Board to count the votes of purported voters who did not lawfully register to vote by their failure to provide the statutorily-required information on their registration application. At oral arguments, Griffin's attorneys conceded his protests are not challenging eligible voters who registered prior to HAVA or the enactment of N.C. Gen. Stat. § 163-82.4 in 2004.

The Board argues Griffin has failed to show violations of election law based on alleged incomplete voter registration. The General Assembly, not the Board, is constitutionally empowered to "enact general laws governing the registration of voters." N.C. Const. art. VI, § 3(1). We conclude any voter who registered since the adoption of N.C. Gen. Stat. § 163-82.4(a)(11), but who failed to provide their drivers license number or their social security number's last four digits or, in the absence thereof, otherwise was not properly assigned a unique number by the Board, is not lawfully registered to vote in North Carolina elections. *Id.*

In *James*, the Supreme Court disallowed votes cast based upon the unlawful advice of the Board. *James*, 359 N.C. at 269–70, 607 S.E.2d at 644. *See also Smith*, 98 N.C. at 348, 4 S.E. at 492.

Even though this Court has authority under *James* to disallow the votes cast by voters with incomplete voter registration forms, the absence of this information is curable and we elect to reverse the Superior Court's order with instructions upon issuance of the

mandate to remand to the Board with instructions to notify and allow the affected voters fifteen (15) business days after notice to provide this required information to cure their ballots. N.C. Gen. Stat. § 163-82.4(f) (2023) (requiring the Board to notify voters if their registration forms lack required information and to allow voters the opportunity to correct omissions). This statutory cure remedy is more than three times the number of days allowed in the statute and is without the pressure for the boards to complete the canvass and certify. *Id*. Any ballots cast by voters whose registrations are cured and verified by the boards within this period shall be counted. *Id*.

2. Lack of Photo Identification for Military and Overseas Voters

We next address Griffin's challenge to absentee votes cast by military and overseas voters pursuant to Article 21A of Chapter 163, but who failed to include a copy of a photo identification or to otherwise submit an Identification Exception Form. The protest seeks to enforce the requirement contained in Article 20 of Chapter 163 compelling absentee voters to include a photocopy of their valid identification or an Identification Exception Form with their ballots. Article 21A does not expressly address a military or overseas voter's obligation to include a copy of their photo identification or an Identification Exception Form with their absentee ballot.

The North Carolina Constitution provides: "Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters." N.C. Const. art. VI, § 3(1). To comply with this Constitutional mandate, the General Assembly enacted North Carolina General Statutes Chapter 163 to govern elections and to state who is qualified to vote in North Carolina elections and the procedures to lawfully register. N.C. Gen. Stat. §§ 163-54 to 163-91 (2023).

A voter's ability to lawfully vote in an election is based upon their eligibility status as of Election Day, here 5 November 2024, even if the voter cast an eligible or lawful absentee or provisional ballot on an earlier date. *See* N.C. Gen. Stat. § 163-82.1 (2023). If a person is not an eligible and registered voter on Election Day, the statutes deem them to be not registered and ineligible to vote. N.C. Gen. Stat. § 163-82.1(c)(2) ("The registrant becomes disqualified through death, conviction of a felony, or removal out of the county[.]").

Subchapter VII of § 163 is entitled "Absentee Voting" and contains only two articles: (1) Article 20, entitled "Absentee Ballot"; and, (2) Article 21A, entitled "Uniform Military and Overseas Voters Act."

a. Articles 20 and 21A – Absentee Ballot

Article 20 was enacted during the last century and mandates the procedures for absentee voting. *See* N.C. Gen. Stat. §§ 163-226 to 163-239 (2023).

Article 21A, also known as the Uniform Military and Overseas Voters Act ("UMOVA"), was enacted in 2011 and provides additional or alternative procedures for two categories of absentee voters: (1) North Carolina registered absentee voters who reside outside the United States; and, (2) absentee voters who qualify as "uniform-service voters" if their voting residence is North Carolina and they otherwise satisfy North Carolina's voter eligibility requirements. N.C. Gen. Stat. § 163-258.2(1) (2023). This latter category of "uniform-service voters" includes uniform-service voters' spouses and dependents. N.C. Gen. Stat. § 163-258.2(7)(d) (2023).

Article 20 requires eligible and registered absentee voters to provide photographic identification with their absentee ballots. N.C. Gen. Stat. §§ 163-230.1(a)(4), (b)(4), (e1)(3), (f1) (2023). *See also* N.C. Gen. Stat. § 163-166.16 (2023) (providing in-person voters must also show photographic identification when casting their ballots).

In 2018, the General Assembly amended Article 20 to require absentee voters to either include a photocopy of a permitted identification or to complete and submit a "Reasonable Impediment Declaration Form" ("photo ID requirement") with their ballots.

Article 21A does not contain an express provision regarding a photo ID requirement or lack thereof for voters casting ballots under this Article. The Board issued an administrative rule purportedly exempting all Article 21A UMOVA voters from the photo ID requirement. 08 N.C. Admin. Code 17.0109(d).

Griffin argues the statutory absentee ballots procedures under Article 20 and Article 21A must be read together, and Article 21A absentee voters must comply with the requirements for absentee voting contained in Article 20, including the photo ID requirement or substitute. Article 21A voters are referenced throughout Article 20. *See*, *e.g.*, N.C. Gen. Stat. §§ 263-231(b)(1); 163-234 (2023). Article 21A also refers to the requirements of Article 20. *See*, *e.g.*, N.C. Gen. Stat. § 163-258.7(f) (2023) ("This Article does not preclude a covered voter from voting an absentee ballot under Article 20 of this Chapter.").

The statute specifically provides Article 21A "shall not apply to or modify" Article 20. The plain language of this statute provides, in relevant part, except as provided in Article 21A, that the Article shall not

modify the requirements set forth for absentee voters in Article 20, which includes the photo ID requirement. This language shows the General Assembly intended for Article 21A to be read in conjunction and in addition to Article 20. These two parts of Subchapter VII of Section 163 must be read together. *See In re R.L.C.*, 361 N.C. 287, 294, 643 S.E.2d 920, 924 (2007) ("When determining the meaning of a statute, the purpose of viewing the statute *in pari materia* with other statutes is to harmonize statutes of like subject matter and, if at all possible, give effect to each.").

The Board allowed individuals living in foreign countries, who vote in North Carolina elections, to be exempt from our State's voter ID laws, to which all North Carolina voters are bound. The Board argues the photo ID requirement is a means of "authenticating" a ballot, not for identifying the individual who is voting, and Article 21A contains an "authenticating" requirement which does not include a photo ID requirement and purportedly modifies the photo ID requirement contained in Article 20. *Compare* 8 N.C. Admin. Code § 17.0109(d) *with* N.C. Gen. Stat. §§ 163-166.16, 230.1(f1), and 239 (2023). The Board's interpretation runs counter to the General Assembly's express purpose in enacting the photo ID requirement, to minimize the risk of voter fraud, *see*, *e.g.*, *Holmes*, 384 N.C. at 434, 886 S.E.2d at 128, by imposing the photo ID requirement only on domestic absentee and election day voters while not also requiring identification verification for individuals casting votes from another country.

We conclude that Articles 20 and 21A require all voters voting absentee in a non-federal election in North Carolina to comply with the photo ID requirement. As with the "Incomplete Voter Registration" category discussed above, we reverse the Superior Court's order and, upon this Court's mandate, remand with instructions to the Board to immediately notify affected voters whose votes were challenged for failing to include a photocopy of their approved identification or a Reasonable Impediment Declaration Form. N.C. Gen. Stat. §§ 163-226 to 163-239 (2023).

Those voters are also provided fifteen (15) business days after notice from the Board to provide photographic identification to the Board, or a Reasonable Impediment Declaration Form to cure their ballot's curable deficiencies and, upon receipt of which and verification thereof, the Board shall count their votes.

3. Never Residents

In Griffin's final challenge, he protests votes cast by individuals who have never resided in North Carolina and who have not indicated they

intend to reside in North Carolina. In arguing these "Never Resident" voters are eligible to vote in North Carolina elections, the Board relies on a provision in Article 21A, which defines a "covered voter" to include "[a]n overseas voter who was born outside the United States, . . . , and, *except for a State residency requirement*, otherwise satisfies this State's voter eligibility requirements[.]" N.C. Gen. Stat. § 163-258.2(1)(e) (2023) (emphasis supplied).

The North Carolina Constitution provides only lawful residents of North Carolina, who are eligible and properly registered to vote, are entitled to vote in our state and non-federal elections:

> Residence period for State elections. – Any person who has resided in the State of North Carolina for one year and in the precinct . . . for 30 days next preceding an election, . . . , shall be entitled to vote at any election held in this State. Removal from one precinct . . . to another in this State shall not deprive a person of the right to vote in the precinct . . . from which that person has removed until 30 days after the removal.

N.C. Const. art. VI, § 2.

The General Assembly has enacted statutes to implement this Constitutional mandate by limiting voting to only North Carolina residents. N.C. Gen. Stat. § 163-55(a) (2023). The statute defines residency as the place in North Carolina where the voter lives or, if absent from the State, intends to return, N.C. Gen. Stat. § 163-57 (2023). This statutory definition is consistent with our Supreme Court precedent equating residency under our state constitution with domicile. *See Hannon v. Grizzard*, 89 N.C. 115, 120 (1883) (providing residency includes the place where an absent voter intends to return). Residency for an absent, non-dependent, and emancipated adult is not inherited. *Id.*

Over 100 years ago, our Supreme Court held North Carolina recognizes three types of domicile: "domicile of origin, domicile of choice, and domicile by operation of law." *Thayer v. Thayer*, 187 N.C. 573, 574, 122 S.E.2d 307, 308 (1924). An emancipated adult not born in North Carolina and who is not "legally dependent" on a North Carolina resident cannot maintain domicile of origin. "As a general rule the domicile of every person at his birth is the domicile of the person on whom he is legally dependent." *Thayer*, 187 N.C. at 574, 122 S.E. at 308. The totality of the circumstances indicates the domicile of the parents of these absentee, "Never Resident" voters was overseas. These "Never Resident" voters, who were born to parents overseas, were never brought to North

Carolina to reside during the entirety of their eighteen-year dependency as minors, and their domicile is overseas. *See*, *e.g.*, *Hall v. Wake Cnty. Bd. of Elections*, 280 N.C. 600, 609, 187 S.E.2d 52, 57 (1972) (noting a person's domicile for voting purposes is determined by reviewing "the surrounding circumstances and the conduct of the person"); *Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996) (recognizing that an adult United States citizen may be domiciled in a foreign country).

An absent person, who has never lived in North Carolina, cannot make North Carolina their domicile of choice. *Thayer*, 187 N.C. at 574, 122 S.E. at 308. An emancipated adult affirmatively establishes a domicile of choice by having no intent to return to North Carolina, with residence in a new place, and an intent to make that new place their permanent home. *See Hall*, 280 N.C. at 608–09, 187 S.E.2d at 57. Notably, here, the "Never Resident" voters cannot show an intent to "return" to North Carolina, as they have never resided in North Carolina.

"A domicile by operation of law is one which the law determines or attributes to a person without regard to his intention or the place where he is actually living." *Thayer*, 187 N.C. at 574, 122 S.E.2d at 308. We conclude the challenged "Never Resident" voters are ineligible to vote in non-federal North Carolina elections. N.C. Gen. Stat. §§ 163-57; 258.2(1)(e) (2023).

VI. Conclusion

The post-election protest process preserves the fundamental right to vote in free elections "on equal terms." *See* N.C. Const. art. I, § 10. "It is well settled in this State that" this fundamental right includes " 'the right to vote on equal terms,' " and "to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *James*, 359 N.C. at 270, 607 S.E.2d at 644 (quoting *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990)).

This right is violated when "votes are not accurately counted [because] [unlawful] [ ] ballots are included in the election results." *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842. The inclusion of even one unlawful ballot in a vote total dilutes the lawful votes and "effectively 'disenfranchises' " lawful voters. *James*, 359 N.C. at 270, 607 S.E.2d at 644.

Post-election protests protect against this risk of vote dilution by enabling candidates and voters to rigorously investigate the election process, identify and challenge unlawful ballots, and ensure those ballots are not counted. *See* N.C. Gen. Stat. § 163-182.10(d)(2)(e) (2023)

(providing that the remedy for a meritorious election protest may be correction of the vote total).

As was noted in oral arguments. the Fourth Circuit recently observed: "North Carolina has been flooded with dozens of challenges to the State's electoral regulations." *Sharma v. Hirsch*, 121 F.4th 1033, 1043 (4th Cir. 2024). The Fourth Circuit added these challenges "are reasonably grounded in the law, and their gravity should not be understated," and repeated litigation fosters uncertainty that "is not conducive to the most efficient administration of elections." *Id.*

As to the "Incomplete Voter Registration" voters—those who registered after the effective date of N.C. Gen. Stat. § 163-82.4 in 2004 who have not provided their county boards with their drivers license numbers or the last four digits of their social security numbers or who otherwise have not been provided with a unique identifier number by their county boards—have not qualified as eligible voters in the 2024 election. Based on precedent from the Supreme Court of North Carolina, this Court could order that those voters are without a remedy to cure their incomplete registrations. *See James*, 359 N.C. at 269-71, 607 S.E.2d at 644-45.

However, because the Board and the county boards did not comply with their statutory obligations to notify these voters who have "provide[d] enough information on the form to enable the county board to identify and contact the voter" of the information defect in their registrations, N.C. Gen. Stat. § 163-82.4(f), we conclude these voters should be allowed a period of fifteen (15) business days after notice to cure their defective registrations. Upon receipt of the order of remand from the Superior Court, the Board shall immediately require the county boards to provide notice to these challenged voters of their ability to cure their registrations, and upon verification, their votes may be counted. The Superior Court's order in 24CV040620-910 affirming the Board's dismissal of Griffin's protest as to these voters is reversed with instructions upon mandate to remand the matter to the Board. Upon remand, the Board is instructed to immediately direct the county boards in all one hundred counties to expeditiously identify the challenged "Incomplete Voter Registration" voters and notify said voters of their registration defects, to allow said voters fifteen (15) business days from the mailing of the notice to cure the defect, and upon verification to include in the count of this challenged election the votes of those voters who timely cure their registration defects and to omit from the final count the votes of those voters who fail to timely cure their registration defects. *Id.*

As to the military and overseas voters under Article 21A—North Carolina residents who cast votes in this non-federal, Supreme Court election under Article 21A but failed to comply with the voter ID requirement—their ballots have not been properly cast. Again, based on *James*, this Court could order that those voters are without a remedy to cure their failure to comply with the photo ID requirement. *See James*, 359 N.C. at 269-71, 607 S.E.2d at 644-45.

Our General Assembly has identified the failure to comply with the photo ID requirement as a "curable deficiency," and N.C. Gen. Stat. § 163-82.4(f) requires the county board to promptly notify the voter of the deficiency and the manner in which the voter may cure the deficiency. *See* N.C. Gen. Stat. § 163-230.1(e)(1) (Supp. 2024). The Superior Court's order in 24CV040622-910 affirming the Board's dismissal of Griffin's protest as to these voters is reversed with instructions to remand the matter to the Board.

Upon remand, the Board is instructed to immediately direct the county boards to expeditiously identify the military and overseas voters challenged under this protest and notify said voters of their failure to abide by the photo ID requirement or equivalent, to allow said voters fifteen (15) business days from the mailing of the notice to cure the defect, and upon verification, to include in the count of this challenged election the votes of those voters who timely cure their failure to abide by the photo ID requirement and to omit from the final count the votes of those voters who fail to timely cure their deficiencies.

Finally, as to the "Never Residents" voters, we conclude these purported voters are not eligible to vote in North Carolina, non-federal elections, and the votes cast by these purported voters are not to be included in the final count in the 2024 election for Seat 6. The Superior Court's order in 24CV040619-910, affirming the Board's dismissal of Griffin's protest as to these purported voters is reversed with instructions to remand the matter to the Board to direct the county boards to identify the votes from "Never Residents" and remove them from the final count of the 2024 election for Supreme Court Seat 6.

The Clerk of this Court is ordered to issue this Court's mandate on Monday, 7 April 2025 at 5 P.M. *It is so ordered.*

REVERSED AND REMANDED.

Panel consisting of:

Judges TYSON, HAMPSON, and GORE.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

To be clear: on the Record before us, Petitioner has yet to identify a single voter—among the tens of thousands Petitioner challenges in this appeal—who was, in fact, ineligible to vote in the 2024 General Election under the statutes, rules, and regulations in place in November 2024 governing that election. Every single voter challenged by Petitioner in this appeal, both here and abroad, cast their absentee, early, or overseas ballot by following every instruction they were given to do so. Their ballots were accepted. Their ballots were counted. The results were canvassed. None of these challenged voters was given any reason to believe their vote would not be counted on election day or included in the final tallies. The diligent actions these voters undertook to exercise their sacred fundamental right to vote was, indeed, the same as every other similarly situated voter exercising their voting right in the very same election. Changing the rules by which these lawful voters took part in our electoral process after the election to discard their otherwise valid votes in an attempt to alter the outcome of only one race among many on the ballot is directly counter to law, equity, and the Constitution.

This alone supports the Board's ultimate conclusion Petitioner failed to establish probable cause to believe there was any violation of law, irregularity, or misconduct in the administration of the 2024 General Election for Associate Justice of the North Carolina Supreme Court. *Appeal of Harper*, 118 N.C. App. 698, 702, 456 S.E.2d 878, 880 (1995) ("When an unsuccessful candidate seeks to invalidate an election, the burden of proof is on him to show that he would have been successful had the irregularities not occurred."). To accept Petitioner's indiscriminate efforts to call into doubt the votes of tens of thousands of otherwise eligible voters, without any showing any challenged voter was disqualified under existing law from voting is to elevate speculation and surmise over evidence and reason. *See id.* at 704, 456 S.E.2d at 881 (Greene, J., concurring) ("To concede our inability to [sort out truthful and untruthful testimony] would require new elections in every case upon a mere showing that there has been some irregularity that may possibly have affected the election. This, in my opinion, would not represent sound public policy. Furthermore, it is inconsistent with the law of this state which holds that evidence based on 'conjecture, surmise and speculation' is not sufficient to support a verdict.").

Nor is the remedy invented by the majority in accord with North Carolina law or appropriate to the situation. The majority orders the Board allow a 15-day "cure period" for the majority of challenged voters. The proposition that a significant portion of these 61,682 voters will receive notice and timely take curative measures is a fiction that does not disguise the act of mass disenfranchisement the majority's decision represents.

While the majority's opinion is unsigned, I note this decision is not *per curiam* and I dissent in full. The Board's conclusion was correct. The Superior Court correctly affirmed the Board's decision. Under any rational analysis, we should do the same and affirm the Orders of the Superior Court. This is so for a number of reasons: (I) faithful application of the standard of review on judicial review of the Board's administrative decision compels affirmance of the Superior Court's Orders; (II) Petitioner's postcards to challenged voters providing only a QR code denied voters' right to notice of the proceeding; (III) the *Purcell* principle and other equitable principles demand we do not change the rules of an election midstream or after votes are tallied to disenfranchise qualified North Carolina voters; (IV) under long-standing law, qualified voters whose voter registration data may be incomplete are not disqualified from voting; (V) military and overseas voters are not subject to constitutional or statutory voter identification requirements and are governed by a separate statute designed to promote uniformity across the states and federal elections; (VI) U.S. citizens living overseas who meet North Carolina residency requirements through their parents or guardians have a right to vote in North Carolina elections; (VII) fundamental principles of equal protection demand these absentee and early votes be counted in this election; and (VIII) remanding this matter to the Board is improvident where Petitioner has not met his burden of proof to demonstrate any factual issue that would result in altering the outcome of his election under existing rules.

I. The Superior Court Properly Reviewed the Final Decision of the Board De Novo and Correctly Affirmed the Board Applying that Standard.

Petitioner presents a single issue for this Court's review: "Did the superior court err in affirming the State Board?" What this barebones generic issue statement lacks in appellate advocacy nous, is made up for by squarely placing this case in its proper procedural posture. The Superior Court was functioning as an appellate court to judicially review a final decision of an executive branch administrative agency sitting in its quasi-judicial capacity. *See* N.C. Gen. Stat. § 163-182.14 (2023). The task of this Court in reviewing the trial court is to determine (1) whether

the trial court exercised the appropriate scope of review and, if so, (2) whether the trial court did so properly. *Harper*, 118 N.C. App. at 701, 456 S.E.2d at 880.

Here, the parties agree the Superior Court sitting in judicial review appropriately exercised de novo review to the Board's Final Decision. The remaining question is simply whether it did so properly. While the Superior Court's orders themselves do not offer detailed analysis, none was necessary because the Superior Court functionally adopted the Board's reasoning in affirming the Final Decision. *See Thompson v. Union Cnty.*, 283 N.C. App. 547, 553, 874 S.E.2d 623, 628 (2022) ("The trial court, when sitting as an appellate court to review an administrative agency's decision, must only set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." (quoting *Sutton v. N.C. Dep't of Lab.*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999)).

In its section discussing probable cause, the majority makes the unfounded assertion that another court's observations about the number of challenges to North Carolina election regulations coupled with our Supreme Court's issuance of a stay in this case are sufficient evidence of probable cause. This is not true. And, in fact, despite the citation to a Fourth Circuit case—*Sharma v. Hirsch*, 121 F.4th 1033, 1043 (4th Cir. 2024)—that opinion does not say or even suggest that its musings could support a finding of probable cause. Petitioner does not raise this argument nor even cite to this case in briefing to this Court. Further, the majority's discussion of probable cause tellingly obfuscates the fact that it is *Petitioner's burden* to satisfy the probable cause standard. *See Clay Cnty. Gen. Election*, 45 N.C. App. 556, 570, 264 S.E.2d 338, 345-46 (1980) ("Clearly, if an unsuccessful candidate seeks to invalidate an election, he must be able to show that he would have been successful had the irregularities not occurred." (citations omitted)). And in any event, it is not the role of this Court to invent arguments for any party. *Matter of R.A.F.*, 384 N.C. 505, 512, 886 S.E.2d 159, 164 (2023) ("Further, the Court of Appeals may not address an issue not raised or argued by [a party] for '[i]t is not the role of the appellate courts . . . to create an appeal for an appellant.' (quoting *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360 (2005))).

Ultimately, it is the Board's Final Decision for us to review de novo. The Final Decision itself provides ample basis for determining the Superior Court correctly applied the de novo standard of review in affirming the ruling of the Board.

II. Expecting Voters to Scan an Anonymous QR Code on a Bulk-Mail Postcard Cannot Reasonably Constitute Service in Compliance with their Due Process Rights.

The first time—if at all—any challenged voter would have learned their right to vote was being challenged would have been if they happened to scan a QR code on a postcard "Paid for by the North Carolina Republican Party"—not a candidate or candidate committee—addressed to them "or current resident" and which merely seemed to carry a generalized threat that "your vote may be affected by one or more protests filed in relation to the 2024 General Election" without specifying any candidate or protest. Even if the voter (a) received this postcard; (b) did not simply discard it as another piece of political junk mail; and (c) happened to scan the QR code, they were directed to a North Carolina Republican Party website listing challenges by four different candidates and including dozens and dozens of protests under different counties and categories of protest, which in turn led to multiple spreadsheets of thousands upon thousands of challenged voters listed in non-alphabetical order.

This is so even though when filing his protests on the required forms promulgated by the Board, Petitioner took an oath affirming specifically he understood he "must timely serve all Affected Parties." This is consistent with the Board's administrative regulation regarding protest forms which instruct protestors:

> You must serve copies of all filings on every person with a direct stake in the outcome of this protest ("Affected Parties"). Affected Parties include every candidate seeking nomination or election in the protested contest(s) . . . , not only the apparent winner and runner-up. *If a protest concerns the eligibility or ineligibility of particular voters, all such voters are Affected Parties and must be served.*

8 N.C. Admin. Code 2.0111 (emphasis added).

That Petitioner did not comply with the requirements of the Board's service requirement is indisputable. Certainly, challenged voters were not provided copies of the protests impacting them. Indeed, Petitioner does not claim he did. Instead, Petitioner contends that the Board did not have statutory authority to promulgate its service rule—and thus claims he had no obligation at all to inform the voters he challenges of his efforts to discount their votes. Petitioner further argues his service by bulk-mail postcard should be deemed compliant because the

Board uses postcards in totally different circumstances. Additionally, Petitioner claims that, in any event, his postcards should be held sufficient to meet minimum constitutional standards of service. Each one of Petitioner's efforts to excuse serving the voters he challenges fails.

A. *The Board is Authorized by Statute to Promulgate Rules for Notice to Parties.*

First, the Board is, in fact, statutorily authorized to promulgate rules related to election protests. As Petitioner concedes, N.C. Gen. Stat. § 163-182.9(c) expressly requires "The State Board of Elections shall prescribe forms for filing protests." Petitioner asserts, however, that only County Boards of Election are tasked with serving notice under N.C. Gen. Stat. § 163-182.10(b). The majority adopts this reasoning. By its very terms, however, Section 163-182.10(b) applies to notice of the *hearing* by the County Board, which also requires parties given notice of the hearing must also be given a copy of the protest or a summary of its allegations. It makes absolute sense that a Notice of Hearing would not be issued or required until an actual hearing is set by the County Board—which would occur after a County Board makes its preliminary determination as to a protest's viability. However, this is easily distinguishable from requiring a protestor to serve what is effectively a pleading in a quasi-judicial proceeding providing basic due process for affected parties at the outset of the proceeding. *See Bouvier v. Porter*, 386 N.C. 1, 8, 900 S.E.2d 838, 845 (2024); *see also Little River, LLC v. Lee Cnty.*, 257 N.C. App. 55, 68, 809 S.E.2d 42, 51 (2017) ("A Board 'conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial[.]' " (quoting *Humble Oil & Refin. Co. v. Bd. of Aldermen of the Town of Chapel Hill*, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974))).

Moreover, Petitioner ignores entirely N.C. Gen. Stat. § 163-182.10(e), which expressly provides: "The State Board of Elections shall promulgate rules providing for adequate notice to parties, scheduling of hearings, and the timing of deliberations and issuance of decision." This statute unambiguously provides additional and independent support for the Board's promulgation of rules regarding service on affected voters. In sum, the Board is statutorily permitted to promulgate rules prescribing the required forms for voter protests and, further, to provide for adequate notice to parties, scheduling of hearings, and the timing of deliberations. The majority's declaration of the Board's service rule as "void" is bereft of support.

B. *The Board's Use of Postcards and QR Codes in Other Mailings does not Excuse Petitioner's Failure to Adequately Notify Affected Voters of the Efforts to Discount their Votes.*

Second, the Board's use of postcards in completely different contexts does not absolve Petitioner of compliance with the unambiguous service requirements for quasi-judicial election protests on affected voters. Petitioner points to N.C. Gen. Stat. § 163-82.8 permitting the County Boards to mail voter registration cards to voters. Petitioner also cites N.C. Gen. Stat. § 163-82.14(d)(2) related to updating registration records and allowing for the confirming of a voter's address using confirmation mailings that include: "a postage prepaid and preaddressed return card, sent by *forwardable* mail . . . ." (emphasis added).[1] Finally, Petitioner references informational mailings from the Board which use QR codes. These examples only underscore the differences. Unlike voter registration cards and address verification forms, there is no statutory authority for service of election protests by postcard. Likewise, informational postcards informing voters about new voter identification rules are just that: informational. Here, Petitioner was initiating a quasi-judicial proceeding which threatens each voter's fundamental constitutional right to vote. There is simply no comparison.

The majority offers another equally flawed example: voter guides mailed to voters. The majority asserts because these informational voter guides include QR codes, this use of QR codes to serve election protests on voters must be sufficient—if not surplus to requirements. While it is true these guides include QR codes linking to the Board's website, these guides also include helpful informational text about various subjects—a point illustrated by the fact the majority cites seven pages of the guide. Further, each section also provides a website URL—such that a voter may access the information without the need to scan a QR code. The voter guide is clearly addressed from a government agency—not a political party. More to the point, a failure to use the QR code does not carry with it the potential penalty of disenfranchising the voter. Any comparison between the two documents is a false equivalence and entirely out of touch.[2] The point is voter information guides serve a

1. Even by contrast here, Petitioner's postcards were deliverable to "current resident."

2. It bears mentioning, a panel of our Court, prior to this election, barred UNC students from using a secured digital identification card stored on a student's mobile device—likening these digital cards to photocopies or photos. *See Republican Nat'l Comm. v. N.C. State Bd. of Elections*, Amended Order dated 30 September 2024 (COA P24-660) (enjoining Board from accepting UNC's Mobile One Card or any other "image of a photo ID, either

completely different purpose than service of quasi-judicial election protests. Conflation of the two only serves to denigrate the importance of the constitutional right to vote and right to have one's vote count at the ballot box.

C. *Petitioner's Postcards Fail to Provide Basic Due Process to Voters.*

Third, Petitioner's postcards simply do not pass constitutional muster—even under his own standard. Petitioner asks us to apply *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). *Mullane* provides some helpful principles that should guide our analysis. "The fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* at 314, 70 S. Ct. at 657 (citation omitted) (internal quotations omitted).

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

Id. at 314-15, 70 S. Ct. at 657 (citations omitted).

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself

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as a photocopy or a photo on a mobile device."). Now, this same Court demands voters—including voters who may have no access to a mobile device, have a healthy distrust of unknown and anonymous QR codes, or are simply not as technologically savvy as others—scan a seemingly random QR code on a bulk-mail postcard to save their right to vote. The contradiction is plain. These rulings are, however, consistent in one significant way: they both—by judicial fiat—create obstacles to qualified voters having their votes counted.

> reasonably certain to inform those affected, . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Id. at 315, 70 S. Ct. at 657-58 (citations omitted). The teaching from these principles is that while there is some flexibility in the manner and nature of service, which might still conform to constitutional due process requirements, notice must be more than a mere gesture and reasonably certain to inform those affected.

Here, Petitioner's postcards are nothing more than a mere gesture. Certainly, as underscored by Petitioner's arguments, the means employed were certainly not "as one desirous of actually informing" the voter of the specific protest. The postcards do not identify a protestor or campaign committee, do not provide for forwarding, and, ultimately, provide no indication a quasi-judicial election protest has, in fact, been instituted involving the recipient. Forcing voters to have the technological means, ability, or trust to not only scan a QR code—sent anonymously through the mail—but to then be directed to a partisan website in order to sift through dozens of challenges and thousands of names, which were not even listed in alphabetical order, cannot be said to be reasonably calculated or certain to inform those affected voters. *Cf. id.* at 320, 70 S. Ct. at 660 ("Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' " (citation omitted)).

Thus, the Board properly concluded Petitioner's protests were not properly served on the affected parties as required by law—challenged voters whose ballots Petitioner seeks to discount. Therefore, the Board did not err in dismissing Petitioner's protests on this basis. Consequently, the Superior Court properly affirmed the Board.

III. Changing the Rules of an Election During an Election and After Ballots are Counted Violates Basic Concepts of Equity including Laches, the *Purcell* Principle, and Common Sense.

Petitioner asks the Board and our Courts to retroactively change the rules which applied to the election in hopes those rule changes will alter the result and lead to Petitioner being judicially declared the winner of an election he would otherwise lose based on the vote tally. Under

settled principles of equity and fair play, Petitioner's contentions should be rejected as untimely as applied to the 2024 General Election. This provides a separate basis for affirming the Superior Court's Orders in this case, which in turn affirmed the Board's Final Decision rejecting Petitioner's protests covered by this appeal.

Efforts to change the rules under which an election is conducted—either during the election or after valid votes have been cast—should be viewed with great skepticism. This is why courts are reluctant to insert themselves into election matters when the election is at hand or in the balance. "Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016).

The Supreme Court of the United States recognized in *Purcell v. Gonzalez*: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. 1, 4-5, 127 S. Ct. 5, 7, 166 L. Ed. 2d 1 (2006). "That principle—known as the *Purcell* principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Mem.) (Kavanaugh, J., concurring in grant of applications for stays).

A similar principle applies to prevent parties from bringing late challenges to election laws in a manner that would disrupt the established rules of an election. "The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept. We previously have suggested that claims must be brought expeditiously, to afford the district court sufficient time in advance of an election to rule without disruption of the electoral cycle[.]" *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060-61 (7th Cir. 2016) (citations and quotation marks omitted). "Courts have imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible. They have reasoned that failure to require pre-election adjudication would 'permit, if not encourage, parties who could raise a claim 'to lay by and gamble upon receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action.' " *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (citations omitted) (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)).

The same is true even after the results have been tallied. For example, in applying the doctrine of laches—the equitable principle that a party may not sit on their rights and unreasonably delay asserting those rights to the detriment of others—to challenges brought against the 2020 election results in Wisconsin, the Wisconsin Supreme Court emphasized:

> Parties bringing election-related claims have a special duty to bring their claims in a timely manner. Unreasonable delay in the election context poses a particular danger—not just to municipalities, candidates, and voters, but to the entire administration of justice. The issues raised in this case, had they been pressed earlier, could have been resolved long before the election. Failure to do so affects everyone, causing needless litigation and undermining confidence in the election results. It also puts courts in a difficult spot. Interpreting complicated election statutes in days is not consistent with best judicial practices. These issues could have been brought weeks, months, or even years earlier. The resulting emergency we are asked to unravel is one of the Campaign's own making.

Trump v. Biden, 2020 WI 91, ¶ 30, 394 Wis. 2d 629, 645-46, 951 N.W.2d 568, 577 (footnote omitted). The Court further noted:

> In each category of ballots challenged, voters followed every procedure and policy communicated to them, and election officials . . . followed the advice of [the Wisconsin Elections Commission] where given. Striking these votes now—after the election, and in only two of Wisconsin's 72 counties when the disputed practices were followed by hundreds of thousands of absentee voters statewide—would be an extraordinary step for this court to take. We will not do so.

Id. at ¶ 31, 394 Wis. 2d at 646, 951 N.W.2d at 577 (footnote omitted). Ultimately, in concluding the Plaintiffs in that case were not entitled to relief, the Court acknowledged:

> Our laws allow the challenge flag to be thrown regarding various aspects of election administration. The challenges raised by the Campaign in this case, however, come long after the last play or even the last game; the Campaign is challenging the rulebook adopted before the season began. Election claims of this type must be brought expeditiously. The Campaign waited until after the election to

> raise selective challenges that could have been raised long before the election.

Id. at ¶ 32, 394 Wis. 2d at 647, 951 N.W.2d at 577. One may quite easily see how these equitable principles squarely apply to bar Petitioner's arguments in the present case.

Petitioner, however, asserts that we ourselves are barred from applying these principles of equity and fairness. Petitioner claims the Board did not base its decision on these principles because it did not cite *Purcell* in its Final Decision. Therefore, citing *Godfrey v. Zoning Board of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986), Petitioner argues we are not permitted to affirm the Board's decision on an alternative basis.

Even if, for the sake of argument, one adopts Petitioner's application of *Godfrey* to this case, it fails. With respect to each category of challenged ballots, the Board, in fact, did apply these principles in its decision. First, with respect to the voters with allegedly incomplete registrations, the Board expressly invoked the principle of laches as barring Petitioner's claim. Second, with respect to U.S. citizens residing overseas, the Board expressly noted the applicable statutes had been in place for thirteen years and applied in 43 different elections. The Board further observed that applying a newly announced rule of law retroactively to ballots cast in reliance on the existing law would impair constitutional rights. Third, with respect to overseas voters under Article 21A of Chapter 163 who did not provide photo identification with their ballots, the Board expressly noted the fact the rule Petitioner challenges went through the administrative rule-making process—including through the Rules Review Commission and public comment—and that nowhere during or after the adoption of the rules regarding overseas voters did Petitioner or his party challenge the validity of the rule prior to the 2024 election. It is, thus, evident that the Board's Final Decision was, in fact, grounded in relevant part on the equitable doctrine of laches and principles emanating from *Purcell*: that challenges to established election laws and regulations should—where possible—be brought prior to an election and not in its midst.[3]

While North Carolina has not invoked the *Purcell* principle by name, the same concepts are found in North Carolina law. For example, in *Pender County v. Bartlett*, our Supreme Court struck down a legislative

3. That the Board also couched these principles in constitutional terms should be no surprise. These equitable principles are applied for the purpose of preserving the fundamental constitutional right to vote.

district prior to the 2008 election. 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009). However, that Court expressly stayed its mandate requiring the drawing of new legislative districts until after the 2008 election to "minimize disruption to the ongoing election cycle[.]" *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S. Ct. 1362, 1394, 12 L. Ed. 2d 506 (1964)). The Court cited the United States Supreme Court's decision in *Reynolds v. Sims* for its proposition. That Court noted:

> However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds v. Sims, 377 U.S. at 585, 84 S. Ct. at 1393-94. Indeed, our Courts have long recognized we should be wary of judicial intervention into elections and election results. *See Burgin v. N.C. State Bd. of Elections*, 214 N.C. 140, 145, 198 S.E. 592, 595 (1938) ("Nor will the courts undertake to control the State Board in the exercise of its duty of general supervision so long as such supervision conforms to the rudiments of fair play and the statutes on the subject."); *Gardner v. City of Reidsville*, 269 N.C. 581, 585, 153 S.E.2d 139, 144 (1967) ("Every reasonable presumption will be indulged in favor of the validity of an election." (citation omitted)).

Contrary to Petitioner's arguments in this case, *James v. Bartlett*, where our Supreme Court declared after an election provisional ballots cast within a voter's county of residence but outside of the voter's precinct should not be counted, is consistent with application of *Purcell* and other related equitable principles to elections. 359 N.C. 260, 271, 607 S.E.2d 638, 645 (2005). First, the Supreme Court expressly addressed the issue of whether the protests of those provisional ballots were timely.

There, respondents contended the challenge to permitting out-of-precinct provisional ballots should have been brought prior to the election. *Id.* at 265, 607 S.E.2d at 641. The Court, however, determined the challenge was timely: "The response of the Board's general counsel failed to indicate that the State Board of Elections would count out-of-precinct provisional ballots. This response, coupled with the absence of any clear statutory or regulatory directive that such action would be taken, failed to provide plaintiffs with adequate notice that election officials would count the . . . ballots now at issue." *Id.* The Court then determined by allowing provisional ballots cast outside a voter's precinct to be counted, the Board had acted contrary to both the existing statute and its own established rules. *Id.* at 267-69, 607 S.E.2d at 643-44.

Even so, the Court expressed its wariness of intruding itself into electoral results: "Mindful of these concerns, and attendant to our unique role as North Carolina's court of last resort, we cannot allow our reluctance to order the discounting of ballots to cause us to shirk our responsibility to say what the law is." *Id.* at 270, 607 S.E.2d at 644 (citation and quotation marks omitted). Ultimately, the Court did not expressly order the provisional ballots immediately discounted but, instead, remanded the matter to the trial court for further proceedings consistent with its opinion. *Id.* at 271, 607 S.E.2d at 645.

Thus, *James* is perfectly consistent with the *Purcell* principle and other equitable principles, including *Pender County*. The challenge in *James* was unable to be made prior to the election and was premised not on a challenge to existing rules and regulations, but on challenges to actions in violation of those existing rules and regulations. Nevertheless, the Court was reluctant to order discounting of ballots. Instead, it remanded the matter to the trial court for further proceedings to determine what should be done.[4] *Id.*

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4. It bears mentioning that, in fact, these votes were *not* discounted in the 2004 election. The General Assembly enacted legislation clarifying that it had not intended to prohibit provisional ballots cast out-of-precinct but in the correct county applicable to the 2004 election. The General Assembly noted:

> It would be fundamentally unfair to discount the provisional official ballots cast by properly registered and duly qualified voters voting and acting in reliance on the statutes adopted by the General Assembly and administered by the State Board of Elections in accordance with its intent. Moreover, to subtract such ballots only from the count for the General Election of 2004 without also doing so for the First or Second Primaries of 2004 would create a bizarre result in which out-of-precinct provisional ballots are allowed to count for some elections but not

Here, unlike *James*, this case does not involve ballots cast contrary to the laws existing at the time of the election. Instead, Petitioner selectively challenges voter registration data-keeping for early and absentee voters and the statutes and regulations applicable to military and overseas voters. To be clear, application of equitable principles to discourage judicial intervention in ongoing elections is not designed to prevent election protests—which determine whether the election was conducted according to the laws and regulations in place. Rather, these principles disapprove of judicial action or remedies which alter the rules during or after a valid election. Petitioner's ultimate goal is to have otherwise valid votes discounted in hopes that might change the outcome of the election. This is exactly the type of remedy and result *Purcell* and other equitable principles serve to prevent. *See Hendon*, 710 F.2d at 182. Petitioner's challenges to otherwise qualified and eligible North Carolina voters should be dismissed.

Thus, the Board did not err in determining Petitioner's protests were legally invalid. Therefore, the Board did not err in dismissing Petitioner's protests on this basis. Consequently, the Superior Court properly affirmed the Board.

IV. Lawfully Registered Absentee and Early Voters Cannot be Disenfranchised for Allegedly Incomplete Registration Data.

Petitioner has identified 60,273 votes cast by registered voters who do not have a drivers license or the last four digits of their social security number recorded in their voter registration record—and contends these votes were illegally cast. Yet, every vote Petitioner challenges was cast by a registered voter listed on the official voter rolls. Each voter previously submitted an application, created by the Board, to register to vote. All at some point received a notice in the mail informing them their receipt of that notice meant their County Board would register them to

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> others. The General Assembly did not and does not now intend to create such a system.

2005 N.C. Sess. Laws 2, §1(11). The General Assembly also enacted a separate law providing that election protest decisions by the Board in General Assembly and Executive Branch Offices would be appealable to the General Assembly. N.C. Gen. Stat. § 163-182.14(c). This legislation abated the protest and judicial proceedings in the case. *See In re Election Protest of Fletcher*, 175 N.C. App. 755, 758, 625 S.E.2d 564, 566 (2006). The fact the General Assembly felt obliged to step in and remedy the potential result in *James* should only underscore the need for judicial restraint in election matters concerning the counting of ballots—and calls the continued viability of *James* into question.

vote. All submitted a ballot in the 2024 General Election. Nonetheless, according to Petitioner, these voters are "unlawfully registered" and thus it is "unlawful" to count their votes. Petitioner requests these purportedly unlawful votes be thrown out—but only as to his race.

Indeed, our Constitution provides that "[e]very person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law." N.C. Const. art. VI, § 3(1). *See also* N.C. Gen. Stat. § 163-54 ("Only such persons as are legally registered shall be entitled to vote in any primary or election held under this Chapter.").

It is the Board's responsibility to "develop an application form for voter registration." *Id.* § 163-82.3(a). "Any person may use the form to . . . [r]egister to vote." *Id.* § 163-82.3(a)(1). Section 163-82.4, enacted in 2004 and incorporating the registration requirements of the Help America Vote Act of 2002 (HAVA), 52 U.S.C. §§ 20901-21145, governs the contents of the application form. That section sets out eleven different items the registration form shall request from an applicant, including their "[d]rivers license number or, if the applicant does not have a drivers license number, the last four digits of the applicant's social security number[.]"[5] N.C. Gen. Stat. § 163-82.4(a)(11).

Section 163-82.4(b) permits applicants who have not been issued a current and valid drivers license or social security number to register without one. Instead, that individual is assigned a "unique identifier number" which serves to identify them for voter registration purposes. *Id.* § 163-82.4(b).

If an applicant does not include a drivers license or social security number and does not otherwise indicate they are exempt from providing that information under Section 163-82.4(b), the burden is on the County Boards to reach out to the voter to collect the missing information:

> If the voter fails to complete any required item on the voter registration form but provides enough information on the form to enable the county board to identify and contact the voter, the voter shall be notified of the omission and given the opportunity to complete the form at least by 12:00 P.M. on the third business day after the

5. Any contention by Petitioner and the majority that the Board simply never requested this information from applicants is incorrect. The voter registration application form has provided fields for an applicant to provide their drivers license or social security number since as early as 2003.

> election. If the voter corrects that omission within that time and is determined by the county board to be eligible to vote, the county board shall permit the voter to vote. If the information is not corrected by election day, the voter shall be allowed to vote [with] a provisional official ballot. If the correct information is provided to the county board by at least 12:00 P.M. on the third business day after the election, the county board shall count any portion of the provisional official ballot that the voter is eligible to vote.

Id. § 163-82.4(f).

If an individual supplies the information on their application but it cannot be validated by the County Board, the individual must submit additional photo identification and a current utility bill, bank statement, or other government document showing their name and address. *Id.* § 163-166.12(d) (explaining, "[r]egardless of whether an individual has registered by mail or by another method," a voter whose drivers license or social security number does not validate must provide supplemental identification the first time they vote). "If that identification is provided no later than 12:00 P.M. on the third business day after the election and the county board does not determine that the individual is otherwise ineligible to vote a ballot, the failure of identification numbers to match shall not prevent that individual from registering to vote and having that individual's vote counted." *Id.*

The Board has explained a drivers license or social security number that does not validate is not retained in the registrant's voter record. Consequently, an individual whose drivers license or social security number does not validate will not have that information recorded in their voter registration record, despite having provided the information when they submitted their application.[6] Thus, contrary to Petitioner's contentions, that an individual does not have a drivers license or social security number recorded in their voter registration record is not dispositive that they never supplied one.

And, according to the Board, there are many reasons why an applicant's drivers license or social security number might not validate: the applicant incorrectly copied the information onto their application, the

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6. The State Board also offers that a voter may be missing the information from their registration record because they registered prior to the effective date of HAVA but a new registration was created for them that is not linked to that older registration, or because they supplied the information in a previous application under a different registration record than the one Petitioner has challenged.

County Board incorrectly entered the information from the application into the computer system, or there are discrepancies across databases in the applicant's name—e.g., differences between married and maiden names or hyphenated last names.

Ultimately, it is the County Boards' responsibility to approve or deny applications and register qualified applicants. N.C. Gen. Stat. § 163-82.7. Even assuming, without deciding, the County Boards improperly registered individuals who failed to provide a drivers license or social security number, we have long held "the mistake, or even the willful misconduct, of election officials in performing the duty cast upon them" does not "permit[ ] the disenfranchisement of innocent voters[.]" *Owens v. Chaplin*, 228 N.C. 705, 711, 47 S.E.2d 12, 17 (1948) (citation and quotation marks omitted). To be sure, even if there has been some error by the Board in collecting voter registration information, the remedy is not disenfranchising tens of thousands of innocent voters in this singular election.

In *Gibson v. Board of Commissioners of Scotland County*, our Supreme Court held qualified voters who were "inadvertent[ly]" registered could not have their votes discounted. 163 N.C. 510, 513, 79 S.E. 976, 977 (1913). There, election officials had failed to administer an oath to each voter, as required by statute, before each was registered and cast their vote. *Id.* at 511, 79 S.E. at 976. The Court stated "[a] constitutional or statutory provision that no one shall be entitled to register without first taking an oath to support the Constitution of the state and that of the United States is directed to the registrars and to them alone; and if they through inadvertence register a qualified voter, who is entitled to register and vote[,] without administering the prescribed oath to him, he cannot be deprived of his right to vote through this negligence of the officers." *Id.* at 513, 79 S.E. at 977.

Several years later, in *Woodall v. Western Wake Highway Commission*, the Court, relying in part on *Gibson*, held: "Where a voter has registered, but the registration books show that he had not complied with all the minutiae of the registration law, his vote will not be rejected." 176 N.C. 377, 389, 97 S.E. 226, 232 (1918). The Court explained a ballot may be refused *prior* to being cast for not complying with the registration law, "but if the party is allowed to vote and his vote is received and deposited, it will not afterwards be held to be illegal, if he is otherwise qualified to vote." *Id.* at 389, 97 S.E. at 232 (citation omitted).

Since then, our Courts have continued to reaffirm the principle that irregularities arising out of the conduct of election officials will not

vitiate an election—particularly where ballots have already been cast. *See Owens*, 228 N.C. at 711, 47 S.E.2d at 17 (citation omitted); *Davis v. Bd. of Ed.*, 186 N.C. 227, 233, 119 S.E. 372, 375 (1923) ("A ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which the elector had no control[.]" (citation and quotation marks omitted)); *Plott v. Bd. of Comm'rs*, 187 N.C. 125, 131, 121 S.E. 190, 193 (1924) (citing *Davis* for the principle that "a mere irregularity in registration will not vitiate an election"); *In re Brown*, 56 N.C. App. 629, 631-32, 289 S.E.2d 626, 627 (1982) (affirming certification of election where the State Board found certain irregularities to have occurred on the part of election officials but there was no evidence of fraud, corruption, or a material effect on the results of the election).

Petitioner believes this line of caselaw does not apply here,[7] and instead incorrectly asserts the facts before us are indistinguishable from those of *James v. Bartlett*. There, the validity of provisional ballots cast out-of-precinct was at issue, and the Court observed our General Statutes were clear and unambiguous a voter must vote in the precinct where he resides. 359 N.C. at 267, 607 S.E.2d at 642. Here, by contrast, it was not clear and unambiguous voters were required to have a drivers license or social security number in their registration record in order to cast a ballot in this election. Indeed, many of the voters whose ballots are challenged have been voting without issue for *years* without this information in their record. Adding to this apparent confusion is the fact that HAVA, which does not govern this election, "requires" the applicant to provide a drivers license or social security number, whereas N.C. Gen. Stat. § 163-82.4, which *does* apply to this election, merely "requests" it.[8] *See* 52 U.S.C. § 21083(a)(5)(A)(i)(I), (II) (Unless an applicant does not have a current and valid drivers license or social security number, "an application for voter registration for an election for Federal office *may not* be accepted or processed by a State unless the application includes [that information]." (emphasis added)); N.C. Gen. Stat. § 163-82.4 ("The form required by G.S. 163-82.3(a) shall *request* the applicant's . . . [d]rivers license number or . . . the last four digits of the applicant's social security number[.]" (emphasis added)).

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7. The majority inexplicably avoids discussion of these cases altogether.

8. The only information expressly required under North Carolina law is whether an applicant is already currently registered to vote. N.C. Gen. Stat. § 163-82.4(a) ("The form shall require the applicant to state whether currently registered to vote anywhere, and at what address, so that any prior registration can be cancelled.").

Of additional concern—and further distinguishing the facts before us from *James*—is the lack of notice to over 60,000 voters: not one of these voters had notice their vote might be discounted solely in this specific election for lack of a drivers license or social security number in their voter registration record. Unlike the ballots contested here, the ballots cast in *James* were provisional—thus, those voters were on notice that their votes might be discounted. The Court in *James* was very clear that the substantive issue before it was limited to "whether a provisional ballot cast on election day at a precinct other than the voter's correct precinct of residence may be lawfully counted in final election tallies." *Id.* at 263, 607 S.E.2d at 640 (footnote omitted). Here, Petitioner challenges votes made on a standard, official ballot by otherwise qualified, registered voters. These voters had every right to believe they were lawfully registered to vote—because they are. And an alleged irregularity in the registration of an otherwise eligible, registered voter—who has already cast their ballot—cannot warrant the voter's disenfranchisement.[9] *See Owens*, 228 N.C. at 711, 47 S.E.2d at 17 (citation omitted); *Woodall*, 176 N.C. at 377, 97 S.E. at 232 ("But what may be a good reason for not allowing a party to register is not always a good reason for rejecting his vote after it has been cast.").

At oral argument, Petitioner requested each "illegally cast ballot[ ]" be thrown out—exclusively as to his race. It is Petitioner's burden, however, to establish probable cause to obtain such relief, and Petitioner has not shown that even one of the 60,273 challenged ballots was cast "illegally" or by an "unlawfully registered" voter. *See Clay Cnty. Gen. Election*, 45 N.C. App. at 570, 264 S.E.2d at 345-46. "A vote received and deposited by the judges of the election is *presumed to be a legal vote*, although the voter may not actually have complied entirely with the requirements of the registration law; and it then devolves upon the party contesting to show that it was an illegal vote, and *this cannot be shown by proving merely that the registration law had not been complied with*." *Woodall*, 176 N.C. at 377, 97 S.E. at 232 (emphasis added) (citation omitted). Petitioner simply has not shown any of the votes he challenges were illegal; an alleged error by the Board in collecting voter data is not enough. *See id.* at 389, 97 S.E. at 232; *Gibson*, 163 N.C. at 513, 79 S.E. at 977. Every challenged vote was cast by a voter listed on North

9. By proclaiming any voter who registered since the adoption of N.C. Gen. Stat. § 163-82.4(a)(11) but who failed to provide their drivers license or social security number "is not lawfully registered to vote in North Carolina elections[,]" the majority completely disregards this line of precedent and single-handedly eviscerates the voting rights of countless North Carolinians.

Carolina's voter rolls; each voter's application to vote has been processed and approved by their respective County Board; and each voter is, for all intents and purposes, a registered voter. Thus, the challenged votes were not cast by "purported voters," as the majority characterizes them, but by lawfully registered voters—whose votes have already been counted as to every other race in the 2024 General Election.

Despite the General Assembly's clear direction that registering and maintaining the list of eligible voters is the duty of the Board and County Boards, Petitioner blames the voters for the alleged discrepancies in their voter registration records. Petitioner, attempting to distinguish this case from *Woodall*, argues the fact that the County Boards may have registered these voters without ensuring the voters had provided a drivers license or social security number does not excuse the voters of their duty to have provided the information in the first place—a failure which, according to Petitioner, warrants their disenfranchisement.[10] Indeed, in *Woodall*, it was the election officials' duty to administer the oath to each voter before registering the voter and allowing them to cast their votes. *Woodall*, 176 N.C. App. at 390-91, 97 S.E. at 233. And here, it is no different—it is the duty of the County Boards to register voters. N.C. Gen. Stat. § 163-82.7. *See also id.* § 163-82.14(a) (requiring the Board and County Boards to maintain the list of eligible voters); *id.* § 163-82.6 (directing the County Boards to accept voter registration applications); *id.* § 163-82.4(a), (f) (providing procedures for County Boards to follow if an applicant omits information on their registration form).

Petitioner's assertion these voters "never provided" the missing information goes too far. As explained at length, there are many reasons why an individual who provided a drivers license or social security number nonetheless might not have that information recorded in their voter registration. Petitioner has not shown even one of the 60,273 challenged votes was cast by a voter who failed to provide a drivers license or social security number to their County Board.[11] Indeed, the burden of proof lies with Petitioner—not only to establish probable cause these voters were "unlawfully registered," but also to show the outcome of the election would have been different absent the irregularities. *Clay Cnty. Gen.*

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10. Petitioner assumes without explanation that if a voter is missing a drivers license or social security number in their registration record, they never supplied one.

11. In fact, although there is no burden on the Board to counter Petitioner's claims, the Board has nonetheless produced evidence tending to show at least 28,803 of the challenged voters did, in fact, supply a drivers license or social security number when they registered to vote.

Election, 45 N.C. App. at 570, 264 S.E.2d at 345-46 (citations omitted); *In re Brown*, 56 N.C. App. at 632, 289 S.E.2d at 627 ("It is settled law that an election will not be disturbed for irregularities where it is not shown that such irregularities are sufficient to alter the result.").

The duty to "properly" register voters lies with the Board and County Boards—and we have been clear that irregularities arising out of the Board's conduct do not warrant the disenfranchisement of otherwise qualified, legally registered voters who have already cast their ballots. *See Gibson*, 163 N.C. at 513, 79 S.E. at 977 (citation omitted); *Woodall*, 176 N.C. at 389, 97 S.E. at 232 (citation omitted); *Owens*, 228 N.C. at 711, 47 S.E.2d at 17 (citation omitted). Petitioner asks we discard the votes of potentially over 60,000 registered voters—despite doing everything asked of them to register and cast their votes—because whether through clerical error, administrative oversight, sincere mistake, or even willful misconduct, the Board and County Boards did not ensure each voter's record contained a drivers license or social security number.

Petitioner characterizes his challenge as one to the election itself, rather than to the voters' registrations—despite blaming the voters for being allegedly unlawfully registered and threatening the status of their registrations.[12] As to challenges to voters, the General Assembly has instructed: "Challenges shall not be made indiscriminately and may only be made if the challenger knows, suspects or reasonably believes such a person not to be qualified and entitled to vote." N.C. Gen. Stat. § 163-90.1(a). Additionally, "[n]o challenge shall be sustained unless the challenge is substantiated by affirmative proof. In the absence of such proof, the presumption shall be that the voter is properly registered or affiliated." *Id.* § 163-90.1(b). While this statute may not apply directly to the challenge at hand, it is telling that the General Assembly would implement such a strenuous burden of proof where a voter is placed at risk of being disenfranchised.

Nonetheless, Petitioner has not met even the more flexible probable cause standard. In a misleading redirection of our attention towards the Board, Petitioner contends the Board's "explanation for the thousands of missing numbers, [is] at this point, speculation." But, even if so, the Board's explanation is no more speculative than Petitioner's own

12. Petitioner has stated he is not seeking removal of the voters from the voter registration rolls as part of his requested relief. Nonetheless, his challenge ultimately calls the validity of these voters' registrations into question and inescapably sets the stage for their further disenfranchisement: removal from the voter rolls altogether.

assertion that, because the numbers are missing from the voting registration records, the voters never supplied that information and were unlawfully registered—and, as explained, the burden to establish probable cause of an election violation lies with Petitioner. *See Clay Cnty. Gen. Election*, 45 N.C. App. at 570, 264 S.E.2d at 345-46 (citations omitted).

More to the point, it is Petitioner's challenge that is entirely speculative. In fact, Petitioner does not allege any of the votes were cast by a voter *ineligible* to vote in this election. Rather, Petitioner challenges the lawfulness of the voters' registration. And this distinction is not a minor one. To be *eligible* to vote, a voter must meet the requirements of Sections 1 and 2 of Article 6 of our Constitution. *See* N.C. Const. art. VI, § 1 ("Only a citizen of the United States who is 18 years of age and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State[.]"); *id.*, § 2 (Any person who meets certain residency requirements, has not been convicted of a felony, and presents photo identification if voting in person "shall be entitled to vote at any election held in this State."). Any individual who is eligible to vote must then *register* to vote in order to exercise that right. *See id.*, § 3. *See also Bouvier*, 386 N.C. at 4 n.2, 900 S.E.2d at 843 n.2 ("Even if a prospective voter meets all eligibility requirements, he or she must also be 'legally registered' to vote." (citing N.C. Gen. Stat. §§ 163-54, -82.1(a))). And every voter who cast a vote in this election was eligible *and* registered to vote. Instead, Petitioner's challenge as to this category of votes is based entirely on allegedly missing pieces of information in the voters' registration records. No principle supports the disenfranchisement of tens of thousands of voters on the basis of an alleged clerical error—but this is exactly what Petitioner requests.

The trial court properly affirmed the Board's decision because Petitioner has not shown probable cause of an election violation. The majority's discussion of litigation pending in federal court challenging the Board's alleged noncompliance with HAVA's registration requirements is, frankly, wholly irrelevant here.[13] HAVA, as all parties concede, does not apply to state elections. *See James*, 359 N.C. at 268, 607 S.E.2d at 643 ("HAVA, *which does not apply to state and local elections*, was initiated in the wake of allegations of irregularity and fraud in the 2000 presidential election." (emphasis added)). Thus, whatever the results of that litigation, on the merits of which we express no opinion, it does not bear on the issue before us: whether the superior court correctly

13. In fact, the majority's analysis throughout the opinion likely creates more issues of federal law than it solves.

affirmed the Board's conclusion Petitioner has not established probable cause that allegedly missing information from voter registration records resulted in an election violation or created an irregularity which would change the outcome of the election. The answer is clear: Petitioner has not met this burden.

Further, each of the 60,273 votes Petitioner challenges were cast early or by absentee ballot. This concentrated selectivity only serves to highlight the attenuated nature of the challenge's merits. Had these voters waited until election day to cast their vote—rather than voting early or by absentee ballot—their vote would not be subject to Petitioner's challenge and, thus, not currently at risk of being discounted. The practical effect of Petitioner's challenge is to punish voters for voting early or absentee—voters who had no notice their ballot might go uncounted because of a purported discrepancy in their registration record. This cannot be the solution to Petitioner's problem.

Thus, Petitioner has not established that any one of the ballots he challenges was cast by an unlawfully registered voter. Therefore, Petitioner has not met his burden of establishing probable cause to believe a violation of election law has occurred. Consequently, the trial court did not err in affirming the Board on this ground.

V. Military Voters and Overseas Voters Should not be Disenfranchised by Petitioner where those Voters Complied with Statutes Designed to Promote Uniformity Amongst the States in Administering Elections.

Petitioner challenges the votes of 1,409 military and overseas voters in Guilford County, arguing a photo identification requirement put into place for domestic absentee voters applies to these voters as well. Petitioner's challenge fails because military and overseas voters are governed by an entirely separate statutory scheme from domestic absentee voters. The majority allows Petitioner's challenge, subverting the purpose of this statutory scheme, based on a misinterpretation of a single separate statutory provision. In so doing, the majority ignores the deliberate choice by the General Assembly to enact model legislation that guarantees military and overseas ballots are processed in the same way from state to state. This purpose is defeated by reading a separate statute's photo identification requirement into the process mandated for overseas and military ballots.

1. Absentee Ballots in North Carolina

The General Assembly has enacted two distinct processes for the submission of absentee ballots, each governed by a separate Article of

Chapter 163 of our General Statutes. Article 20 provides procedures by which "any qualified voter" may obtain and submit an absentee ballot. N.C. Gen. Stat. § 163-226. In 2011, the General Assembly codified as Article 21A the Uniform Military and Overseas Voters Act (UMOVA), model legislation which provides procedures for overseas and military voters to do the same. This model legislation was originally drafted by the Uniform Law Commission for two primary purposes: (1) to extend to state elections the assistance and protections found in federal law; and (2) "to bring greater uniformity to the military and overseas voting processes." UMOVA, Prefatory Note 2.

Military and overseas voters may choose to cast absentee ballots under either Article 21A or Article 20. N.C. Gen. Stat. § 163-258.7(f). Each provides a comprehensive set of procedures for distributing and processing absentee ballots. Among other provisions, Article 20 creates procedures for requesting and issuing absentee ballots (§§ 163.230.1-2), voting and transmitting ballots to the County Board (§ 163-231), and for the County Board to count those ballots (§ 163-234). Article 21A likewise creates procedures for applying for a military-overseas ballot (§ 163-258.7), transmission of those ballots to covered voters (§ 163-258.9), casting ballots (§ 163-258.10), receipt of ballots by local election offices (§ 163-258.12), and requirements for accepting and interpreting ballots (§ 163-258.17).

In 2019, the General Assembly amended Article 20 to require absentee ballots submitted under its provisions to be accompanied by a copy of the voter's photo identification: "Each container-return envelope returned to the county board with application and voted ballots under this section shall be accompanied by a photocopy of identification described in G.S. 163-166.16(a) or an affidavit as described in G.S. 163-166.16(d)(1), (d)(2), or (d)(3)." N.C. Gen. Stat. § 163-230.1(f1); 2019 N.C. Sess. Laws 239. Petitioner argues this requirement applies to ballots submitted under Article 21A as well, and challenges 1,409 ballots submitted by military and overseas voters in Guilford County that were not accompanied by identification.[14] However, Articles 20 and 21A are separate statutory schemes that create parallel processes for requesting, distributing, and accepting two different types of absentee ballots. Their separate enactment and the purpose of Article 21A—creating a

14. Petitioner filed protests challenging Article 21A voters in six counties. At the time of the protest, Guilford County had provided a list of such voters, which was included in the protest. Petitioner later filed lists of Article 21A voters in Durham, Forsyth, and Buncombe counties, but the Board declined to determine whether such supplementations were allowed because it held the protest was legally insufficient.

streamlined, uniform absentee voting process for military and overseas voters—show the General Assembly did not intend the Article 20 photo identification provision to apply to Article 21A ballots.

2. Incorporating Article 20's Identification Requirement would Defeat the Purpose of Article 21A.

The General Assembly chose not to apply a photo identification requirement to military and overseas voters because such a requirement would undermine the first of two primary purposes of UMOVA and Article 21A: creating a uniform set of procedures by which all states process these ballots. Although Petitioner argues there was no rational basis to distinguish between domestic absentee ballots and those covered by Article 21A, the passage of UMOVA shows the General Assembly considers military and overseas voters in need of special protections.

The preface to the model legislation describes its purpose and gives insight into the General Assembly's goals in passing it. Military personnel have historically faced significant obstacles to voting: while they are registered at similar rates to the general population, they are half as likely to cast a vote. UMOVA, Prefatory Note 1. "[O]nly 25% of overseas and military voters who requested an absentee ballot in 2006 completed and returned one, compared to 85% of all voters who requested an absentee ballot. Meanwhile, more than one in five ballots cast by military service members were rejected." *Id.*

Passage of this legislation indicates the General Assembly's interest in countering these problems. In order to do so, UMOVA seeks to "bring greater uniformity to the military and overseas voting processes" administered by the several states. *Id.* at 2. Maintaining that uniformity is key to accomplishing the stated goals of the legislation. "Without uniform state legislation, military and overseas voters will continue to confront a panoply of diverging voting requirements." *Id.* "This lack of uniformity complicates any federal effort, such as the [The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)], to assist these voters to surmount the other major obstacles that they face." *Id.*[15] "Variations across states both complicate the procedures developed under the UOCAVA to help overseas and military voters, and make it difficult for consular officials, the U.S. military, and non-governmental voting assistance groups

15. UOCAVA provides protections for military and overseas voters in federal elections. UMOVA and Article 21A apply these protections to state elections.

to give standard advice to these voters." UMOVA therefore creates a uniform set of procedures for states to adopt as a whole to reduce confusion for military and overseas voters: the purpose of the act "can *only* be achieved through uniform state legislation." *Id.* (emphasis added). The General Assembly chose to participate in achieving this common goal by enacting the model legislation as Article 21A.

Accordingly, individual states applying piecemeal changes to its process is directly at odds with the purpose of UMOVA. Requiring North Carolina residents to submit photo identification when residents of other UMOVA states are not so required creates the exact "lack of uniformity" the legislation is intended to eliminate. This philosophy is clearly noted in Article 21A itself: "In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." N.C. Gen. Stat. § 163-258.19.

In considering this need to promote uniformity, we cannot understand the identification requirement, added to Article 20 and limited by its own terms to that Article, as modifying Article 21A. If the goal of the legislation can *only* be achieved by uniformity with the other states, it defies reason to infer a change that destroys that uniformity.

3. Articles 20 and 21A are Separate Statutory Schemes.

In accordance with this goal, the General Assembly codified the procedures for military and overseas ballots separately from those for domestic absentee ballots. When the General Assembly modifies one statute and not another, we do not infer it intended the change to apply to both. "By enacting two separate statutes, the legislature clearly intended that two distinct standards be applied." *Insulation Sys., Inc. v. Fisher*, 197 N.C. App. 386, 391, 678 S.E.2d 357, 360 (2009). Unless the General Assembly makes clear its intent to change multiple statutes, we read a modification as only applying to the indicated provision:

> Ordinarily, the enactment of a law will not be held to have changed a statute that the legislature did not have under consideration at the time of enacting such law; and implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be. An intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation; and an amendment by implication, or a modification of, or exception to, existing law by a later act, can occur only

> where the terms of a later statute are so repugnant to an earlier statute that they cannot stand together.

In re Halifax Paper Co., 259 N.C. 589, 594, 131 S.E.2d 441, 445 (1963) (quoting 82 C.J.S. Statutes, § 252, at 419-20 (1953)).

Articles 20 and 21A provide two exclusive processes for the distribution and collection of absentee ballots. This is clear from the General Assembly's codification of these processes in separate Articles, the distinct procedures contained in each, and the comprehensive nature of each set of procedures. A photo identification requirement for the submission of domestic absentee ballots is not "repugnant" to a policy of not requiring the same for military and overseas ballots. The two processes serve different purposes and their procedures reflect this.

There are significant differences between the two processes. Article 21A serves a smaller group of voters who have historically faced obstacles in voting and attempts to address their specific needs. Absentee ballots under Article 21A may be submitted electronically, whereas Article 20 ballots must be delivered physically. N.C. Gen. Stat. § 163-231(b). Absentee ballots under Article 20 must be authenticated by two witnesses or a notary, while those under Article 21A are authenticated by a signed declaration made under penalty of perjury. *Id.* §§ 163-231(a)(6), -258.13. The two have different submission deadlines—Article 20 ballots must be received by 7:30 p.m. on the day of the election, while an electronically transmitted Article 21A ballot must be submitted by 12:01 a.m. on the date of the election and received prior to the end of business on the business day prior to the date of canvass. *Id.* §§ 163-231(b)(2), -258.10, -258.12.

Articles 20 and 21A thus each set out a separate, comprehensive process for distributing and collecting absentee ballots for their respective voter groups. Petitioner argues because Article 20 "has many general provisions about absentee voting," all of its provisions apply to Article 21A ballots unless expressly disclaimed. However, the provisions identified by Petitioner include those governing who may vote in a partisan primary, criminal liability for certain acts, public records requirements, and the retention of applications for absentee ballots by the County Boards. These are provisions relating to the administration of the election, but they do not directly impact the process of an individual voter requesting and submitting an absentee ballot, which is Article 21A's entire remit.

When Article 20 procedures apply to Article 21A ballots, the General Assembly notes that specifically. For example, all physical ballots must be received by 7:30 p.m. on election day, and the Article 20 provision

specifies this requirement applies to "[a]ll ballots submitted under the provisions of this Article *and Article 21A*." *Id.* § 163-231(b)(1) (emphasis added). By contrast, Article 20's photo identification requirement mandates: "Each container-return envelope returned to the county board with application and voted ballots *under this section* shall be accompanied by a photocopy of identification[.]" *Id.* § 163-230.1(f1) (emphasis added).[16] Article 21A mandates instead that a voter swear under penalty of perjury "specific representations pertaining to the voter's identity, eligibility to vote, status as a covered worker, and timely and proper completion of an overseas-military ballot." *Id.* § 163-258.4(e). Further authentication "is not required for execution of a document under this Article." *Id.* § 163-258.17(b).

The General Assembly placed the identification requirement in an entirely different Article governing separate procedures from Article 21A and specified this requirement applied only to ballots submitted "under this section." A provision of Article 21A instructs us when interpreting it to consider "the need to promote uniformity of the law with respect to its subject matter among states that enact it." *Id.* § 163-258.19. If this is insufficient to show the General Assembly did not intend the photo identification requirement be applied to military and overseas voters, it is difficult to understand how the General Assembly could be expected to demonstrate that intent.

4. Potential Conflict with Federal Law

The General Assembly may also have chosen to apply photo identification requirements to only domestic ballots to avoid a likely conflict with federal law. In 2017, Virginia's legislature considered implementing a photo identification requirement for absentee ballots. The Director of the Federal Voting Assistance Program issued a letter advising the proposed bill was likely in conflict with 52 U.S.C. § 21083(b)(3)(C), which exempts UOCAVA voters (military and overseas voters participating in federal elections) from state photo identification requirements, explaining:

> UOCAVA voters, particularly those stationed or residing overseas, face complexities in the voting process that in-person or State absentee voters do not face. The original intent of the FPCA was to allow UOCAVA voters to simultaneously register and request an absentee ballot. By

16. I note additionally that electronically submitted Article 21A ballots have no "container-return envelope" to accompany with a photocopy of identification.

> swearing to the oath on the form prescribed by FVAP, voters would meet minimum qualifications to vote in federal elections. Requiring additional identification or proof of eligibility, in addition to the information provided on the FPCA, adds to the burden UOCAVA voters face when attempting to vote in federal elections. The voter would be forced to locate documents and the equipment necessary to photocopy and submit those additional documents to their local election official, a condition difficult to achieve depending on their geographic location and available infrastructure.[17]

The photo identification law the Virginia legislature ultimately passed (which was vetoed by the Virginia Governor) included an exception for overseas, military, and disabled voters. Senate Bill 872 (2017 Va.). Two years later, in 2019, our General Assembly likewise considered and passed into law a requirement that certain absentee ballots be accompanied by photo identification. By choosing not to apply this requirement to Article 21A ballots, it both avoided this conflict with federal law and allowed Article 21A to continue to achieve its second primary purpose: "to extend to state elections the assistance and protections for military and overseas voters currently found in federal law." UMOVA, Prefatory Note 2.

5. Absentee Ballots are Excepted from Constitutional Identification Requirement.

In 2018, Article VI of the North Carolina Constitution was amended to require those who vote in person to present photo identification. This was a legislatively referred constitutional amendment approved by ballot measure, by which the people approved the measure contained in Senate Bill 824. 2018 N.C. Sess. Laws 144. This amendment applied a photo identification requirement only to in-person voting and did not affect absentee voters. This limitation indicates the General Assembly, shortly before it amended Article 20 in 2019, was not specifically concerned with a lack of photo identification from military and overseas voters.

6. 8 N.C. Admin Code § 17.0109(d)

After the General Assembly amended Article 20 to require photo identification, the Board promulgated a Rule stating Article 21A voters were "not required to submit a photocopy of acceptable photo identification."

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17. Letter to Commissioner Cortes, Va. Dep't of Election, 6 Feb. 2017; available at https://perma.cc/2BSZ-VUJ4.

8 N.C. Admin Code § 17.0109(d). This Rule was re-adopted following the lifting of an injunction against the photo identification law, first as a temporary rule on 1 August 2023 and then as a permanent rule on 1 April 2024.

Petitioner argues this Rule: (1) is at odds with the statutes governing absentee ballots and (2) reflects a policy decision the General Assembly may not delegate to an administrative agency. *See Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 697-98, 249 S.E.2d 402, 411 (1978). I note Petitioner did not object to this Rule prior to the election, either during the open rulemaking process or through the judiciary.

As discussed above, this Rule does not conflict with the governing statutes, which do not require Article 21A voters provide photo identification. The Board was within its authority to issue this Rule: the General Assembly has directed the Board to "develop standardized absentee-voting materials, including . . . authentication materials and voting instructions" for Article 21A voters and mandated it "to the extent reasonably possible, shall do so in coordination with other states." N.C. Gen. Stat. § 163-258.4(d).

Voters who participated in this election were entitled to rely on the guidance of the Board. Even if Article 20 imposes a photo identification requirement on Article 21A voters, those voters submitted their ballots in accordance with all the rules and procedures as they understood them at the time. Assuming the Board made a mistake in communicating those requirements, rejecting these ballots renders all military and overseas voters who cast their ballot in Guilford County disenfranchised, through no fault of their own. It would have been effectively impossible for these citizens, who were qualified to vote and properly registered, to cast a "valid" vote because the proper procedures were not available to them.

7. N.C. Gen. Stat. § 163-239

The majority's decision to require Guilford County's military and overseas voters to cure their ballots' alleged deficiencies within fifteen days of mailing of notice or be disenfranchised rests entirely upon its interpretation of the final subsection of Article 20, which provides "Except as otherwise provided therein, Article 21A of this Chapter shall not apply to or modify the provisions of this Article." N.C. Gen. Stat. § 163-239. I disagree that a provision limiting the effect of Article 21A on Article 20 procedures should instead be interpreted to mean Article 20 controls Article 21A procedures.

Even if this provision places certain additional Article 20 requirements on Article 21A ballots, the majority ignores the unambiguous text of the specific statute in question, which applies a photo identification requirement only to ballots submitted "under this section." *Id.* § 163-230.1(f1). It also ignores the clear purpose of Article 21A and violates its mandate that "[i]n applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." *Id.* § 163-258.19.

The majority's decision to allow Petitioner's challenge frustrates legislative intent. The General Assembly recognized military and overseas voters as poorly served by existing absentee voting procedures and enacted specific protections for these voters. Requiring photo identification from them puts North Carolina out of step with other states despite the statute's stated goal of uniformity. Requiring the challenged voters to send proof of identification or have their votes thrown away disenfranchises voters in violation of the General Assembly's deliberate enactment of protections for them.

VI. Children of Military and Overseas Families Cannot be Unilaterally Disenfranchised.

Petitioner challenges the votes of 267 citizens living overseas—including the children of military servicemembers and other overseas families—who are domiciled in North Carolina while they reside somewhere else (Inherited Residents).[18] Even if the number of voters with inherited residence is sufficient to impact the outcome of this election, Petitioner's challenge fails on the merits.[19]

Article VI of the North Carolina Constitution provides "Any person who has resided in the State of North Carolina for one year and in the precinct, ward, or other election district for 30 days next preceding an election, and possesses the other qualifications set out in

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18. Petitioner alleges the number of relevant voters in this category may be 405 or 516 or more, depending on evidence he does not have and that is not in the Record before us.

19. A protest should be dismissed where "there is not substantial evidence of any violation, irregularity, or misconduct sufficient to cast doubt on the results of the election." N.C. Gen. Stat. § 163-182.10(d)(2)(c). *See also Appeal of Ramseur*, 120 N.C. App. 521, 525, 463 S.E.2d 254, 256 (1995) ("North Carolina law on this issue is well settled. An election or referendum result will not be disturbed for irregularities absent a showing that the irregularities are sufficient to alter the result." (citations omitted)). The margin between the candidates here is 734 votes—well above even the highest tally Petitioner asserts.

this Article, shall be entitled to vote at any election held in this State." N.C. Const. art. VI, § 2(1). Petitioner mistakenly equates "resided" with "lived" despite consistent, clear precedent from the North Carolina Supreme Court. That Court has repeatedly held "without variation that residence within the purview of this constitutional provision [Article VI] is synonymous with domicile[.]" *Owens*, 228 N.C. at 708, 47 S.E.2d at 15; *see also Hall v. Wake Cnty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972) ("Residence as used in Article VI of the North Carolina Constitution of 1970 continues to mean domicile."); *Farnsworth v. Jones*, 114 N.C. App. 182, 186, 441 S.E.2d 597, 600 (1994) ("The term 'residence,' as used in our State's election laws, is synonymous with legal domicile." (citations omitted)).

> Precisely speaking, *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another. Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence.

Farnsworth, 114 N.C. App. at 186, 441 S.E.2d at 600 (quoting *Hall*, 280 N.C. at 605, 187 S.E.2d at 55 (emphasis in original)). Thus, "[i]t is quite clear that residence, when used in election law, means domicile." *Hall*, 280 N.C. at 606, 187 S.E.2d at 55.

North Carolina law recognizes three types of domicile: "domicile of origin, domicile of choice, and domicile by operation of law." *Thayer v. Thayer*, 187 N.C. 573, 574, 122 S.E.2d 307, 308 (1924). While a person who has never lived in North Carolina cannot make North Carolina his domicile of choice, North Carolina may nevertheless be their domicile of origin or by operation of law.

Bouvier does not change this. In *Bouvier v. Porter*, 386 N.C. 1, 900 S.E.2d 838 (2024), our Supreme Court considered whether attorneys have absolute immunity for allegedly defamatory statements made about voters they claimed were ineligible to vote in the 2016 North Carolina Gubernatorial Election. In a footnote accompanying a general paragraph about election protests, the Court wrote that certain groups of individuals are "categorically ineligible to vote," including "noncitizens". *Id.* at 4 n.2, 900 S.E.2d at 843 n.2. This statement is not the smoking gun Petitioner makes it out to be. As the above discussion makes clear, residence for purposes of elections in this State means domicile. Nowhere in *Bouvier* does the Court address domicile at all. Reading that

opinion to wholly change our longstanding precedent would be radical, to say the least.

Contrary to Petitioner's assertions, it is not the Board that has permitted Inherited Residents to vote in our elections; rather, it is the General Assembly who enacted the statute that plainly allows such individuals to vote in North Carolina. UMOVA provides multiple methods for "covered voters" to register to vote. *See* N.C. Gen. Stat. § 163-258.6(a)-(c). Under this statute, a "covered voter" includes

> [a]n overseas voter who was born outside the United States, is not described in sub-subdivision c. or d. of this subdivision, and, *except for a State residency requirement*, otherwise satisfies this State's voter eligibility requirements, if:
>
> 1. The last place where a parent or legal guardian of the voter was, or under this Article would have been, eligible to vote before leaving the United States is within this State; and
>
> 2. The voter has not previously registered to vote in any other state.

N.C. Gen. Stat. § 163-258.2(1)(e).

"As a general rule the domicile of every person at his birth is the domicile of the person on whom he is legally dependent[.]" *Thayer*, 187 N.C. at 574, 122 S.E. at 308. This concept is well established under both North Carolina and federal law. *See In re Ellis' Will*, 187 N.C. 840, 843, 123 S.E. 82, 84 (1924) (quoting *Thayer*, 187 N.C. at 574, 122 S.E. at 308); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L. Ed. 2d 29 (1989). "Once an individual acquires a domicile, it is presumed to continue until a new domicile is established." *Farnsworth*, 114 N.C. App. at 187, 441 S.E.2d at 600. Petitioner cites no authority—and I know of none—in support of his bare assertion that a child's domicile of origin expires when they turn eighteen. Not only is this claim unsupported, it is antithetical to our longstanding, consistent understanding of domicile.

Petitioner asserts domicile of origin is irrelevant to this analysis because "infants can't vote." Although reaching the age of majority has certain legal implications, in practical terms there is nothing magical about turning eighteen. A child living with his parents at seventeen years of age is not suddenly ousted on his birthday to go out and choose his own domicile instantaneously. Indeed, many eighteen-year-olds and

young adults continue to live with their parents for simple, mundane reasons such as the fact they have not yet completed high school or may be otherwise dependent upon their parents.[20] To assume a person's domicile of origin vanishes at eighteen and wherever they happen to live at that time is their domicile of choice is simply out of touch with reality.

Moreover, there is ample caselaw stating a change in domicile must be affirmatively shown in order to have effect. *See Holyfield*, 490 U.S. at 48, 109 S. Ct. at 1608 ("One acquires a 'domicile of origin' at birth, and that domicile continues until a new one (a 'domicile of choice') is acquired." (citations omitted)). Indeed, "To effect a change of domicile there must be (1) an actual abandonment of the first domicile, accompanied by the intention not to return to it and (2) the acquisition of a new domicile by actual residence at another place, coupled with the intention of making the last acquired residence a permanent home." *Hall*, 280 N.C. at 608-09, 187 S.E.2d at 57 (citation omitted).

Further, "[d]omicile is *necessarily a matter that must be determined on an individual basis; there is no appropriate way* to make a group determination." *Lloyd v. Babb*, 296 N.C. 416, 428-29, 251 S.E.2d 843, 852 (1979). And, importantly, "[w]here a change of domicile is alleged, the burden of proving it rests upon the person making the allegation." *Reynolds v. Lloyd Cotton Mills*, 177 N.C. 412, 421, 99 S.E.2d 240, 244 (1919) (quoting *Mitchell v. United States*, 88 U.S. 350, 353, 22 L. Ed. 584 (1874)). Petitioner has made no showing whatsoever that any Inherited Resident voter was not domiciled in North Carolina at the time of the election.

Those who did not obtain domicile by birth may still be domiciled in North Carolina by operation of law. "A domicile by operation of law is one which the law determines or attributes to a person without regard to his intention or the place where he is actually living." *Thayer*, 187 N.C. at 574, 122 S.E.2d at 308. Indeed, N.C. Gen. Stat. § 163-57 defines "residence" in various contexts for the purposes of voting and registration.

The majority makes the unfounded assertion these voters "have never indicated they intend to live in this state[.]" This willfully misses the point. These voters are simply not required to make any such

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20. And, in fact, our statutes reflect this. For example, in the context of child support, our statutes provide child support payments may continue after a child reaches the age of eighteen if, for one, "the child is in primary or secondary school when the child reaches age 18, [then] support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress toward graduation, or reaches age 20" subject to the court's discretion. N.C. Gen. Stat. § 50-13.4(c)(2).

indication. The majority effectively invents a new requirement for this group to fit its own agenda and gives them no opportunity to satisfy it. The voters in this group checked a box on a card indicating "I am a U.S. citizen living outside the country, and I have never lived in the United States." No one, including Petitioner or the majority, has any idea whatsoever how many of these voters would have selected an option indicating they also intend to live in North Carolina had it been presented.

Further, the majority's perspective entirely upends our longstanding precedent regarding domicile. Again, although an adult may not inherit domicile, a child clearly does. *Thayer*, 187 N.C. at 574, 122 S.E. at 308. And a child *retains* that domicile until they affirmatively establish a new one. *Holyfield*, 490 U.S. at 48, 109 S. Ct. at 1608. The burden to prove a change in domicile is on the person making the allegation. *Reynolds*, 177 N.C. at 421, 99 S.E.2d at 244. The "totality of the circumstances" the majority points to is essentially the fact that these voters live and have lived somewhere else—which entirely erases the distinction between domicile and residence. Our law is clear: merely living somewhere is not enough to establish domicile. *See Farnsworth*, 114 N.C. App. at 186, 441 S.E.2d at 600 (citation omitted). Parsing the word "return" as the majority does is nonsensical and a transparent attempt to avoid the conclusion our law clearly dictates.

More to the point, the General Assembly enacted legislation that, by its plain language, guarantees the right of children and dependents of North Carolinians living abroad to vote in our elections. Section 163-258.2(1)(e) expressly confirms a person "who was born outside the United States," is not covered by another provision, and "*except for a State residency requirement*, otherwise satisfies this State's voter eligibility requirements" is eligible to vote if their parent or legal guardian was eligible to vote in North Carolina before leaving the United States and the individual has not previously registered to vote in any other state. N.C. Gen. Stat. § 163-258.2(1)(e). Further, the General Assembly enacted legislation not only establishing domicile by operation of law, but also assigning a specific residence for these particular voters: "In registering to vote, an overseas voter who is eligible to vote in this State shall use and shall be assigned to the precinct of the address of the last place of residence of the voter in this State, or, *in the case of a voter described by G.S. 163-258.2(1)(e)*, the address of the last place of residence in this State of the parent or legal guardian of the voter." *Id.* § 163-258.5 (emphasis added).

Petitioner's constitutional challenges to this statute are similarly unpersuasive. Our Supreme Court has only recently affirmed "[i]n

resolving constitutional challenges to a statute, this Court 'begin[s] with a presumption that the laws duly enacted by the General Assembly are valid.' " *Fearrington v. City of Greenville*, 386 N.C. 38, 54, 900 S.E.2d 851, 867 (2024) (quoting *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015)). While our courts " 'have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional' ", it "must be plainly and clearly the case." *Id.* (quoting *City of Asheville v. State*, 369 N.C. 80, 87, 794 S.E.2d 759, 766 (2016)). Petitioner argues the canon of constitutional avoidance applies here to read Section 163-258.2(1)(e) to exempt overseas voters only from a durational residency requirement rather than a bona fide residency requirement. He cites *Lloyd v. Babb*, for the proposition that North Carolina has had and continues to have a bona fide residency requirement. But to read the statute as Petitioner suggests is simply too implausible and contrary to the text to be permissible. *See Jennings v. Rodriguez*, 583 U.S. 281, 286, 138 S. Ct. 830, 836 (2018) (determining the lower court had adopted "implausible constructions" of the provisions at issue, noting "a court relying on that canon [of constitutional avoidance] still must *interpret* the statute, not rewrite it" (emphasis in original)). Since the General Assembly enacted UMOVA, a "State residency requirement" has only been understood to mean any residency prerequisite to voting.

As Petitioner recognizes, the United States Supreme Court case addressing a residency requirement, *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972), by its own terms exclusively addressed durational residency requirements—not bona fide residency requirements. *Id.* at 343-44, 92 S. Ct. at 1003-04. That case is, therefore, not particularly relevant here, and any proposed "corollary" principles are mere inferences at best. And, in fact, *Dunn* held states' durational residency requirements to vote are invalid. *Id.* at 360, 92 S. Ct. at 1012. Analyzing and applying *Dunn*, our Supreme Court's opinion in *Lloyd* at a minimum called into question North Carolina's residency requirement. Although *Lloyd* noted the *Dunn* court drew a "careful distinction" between durational and bona fide residency requirements, the Court nevertheless recognized the State's right to impose bona fide residency requirements only if they are "[a]ppropriately defined and [u]niformly applied[.]" *Lloyd*, 296 N.C. at 439-40, 251 S.E.2d at 858-59. Thus, it is unclear what meaning, if any, is to be given to the clause stating "[a]ny person who has resided in the State of North Carolina for one year . . . shall be entitled to vote at any election held in this State." N.C. Const. art. VI, § 2(1). The General Assembly, therefore, was entitled to deem Inherited Residents as meeting a bona fide residency requirement by statute.

As part of UMOVA, this statute also addresses significant issues regarding uniformity to alleviate some of the barriers to voting for overseas citizens. Indeed, as of this writing, fifteen other states have adopted UMOVA,[21] including identical or nearly-identical provisions defining their own Inherited Residents as "covered voters". *E.g.*, S.C. Code Ann. § 7-15-610(5)(e) (2023); Va. Code Ann. § 24.2-452(1)(e) (2023); Ky. Rev. Stat. Ann. § 117A.010(1)(e) (2023).

Fundamentally, Inherited Residents are United States citizens entitled to vote somewhere. *See* U.S. Const. art. I, § 2; *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 1071, 30 L. Ed. 220 (1886) ("Though not regarded as a strictly natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights."). Based on the plain language of the statute at issue here, this group would not be eligible to vote anywhere *except* North Carolina. The first requirement under this subsection is that the last place the individual's parent or legal guardian was or would have been eligible to vote is North Carolina—i.e., the person's domicile of origin is North Carolina. Second, the individual must not have previously registered to vote elsewhere. N.C. Gen. Stat. § 163-258.2(1)(e). Applying both provisions, no person under this Section would be eligible to vote in any other state. Thus, deeming them ineligible to vote in North Carolina disenfranchises them entirely.[22] This cannot be the case.

The majority makes short shrift of this issue, concluding our statute defining "residency," N.C. Gen. Stat. § 163-57, automatically disqualifies

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21. *Military and Overseas Voters Act*, Uniform L. Comm'n, https://www.uniformlaws.org/committees/community-home?CommunityKey=6acb3a89-34a9-4df0-a4bc-42f1b35581d8 (last visited Mar. 31, 2025).

22. The majority's line-drawing between state and federal North Carolina elections makes no practical sense. It is the states that administer federal elections. U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]"). Further, the President is not chosen by popular vote but by *electors* who are selected based on the vote totals within each state. *See* U.S. Const. amend. XII (establishing the electoral college). Thus, in order to count even exclusively for federal elections, a vote must be counted in a particular state. Moreover, the majority fails to reckon with how its holding would be implemented. Will the Board now be responsible for sending these voters special ballots with only North Carolina federal races? Will it send the ballots in full with instructions these voters cannot vote in state-level races? What of an Inherited Resident who signs an affidavit stating they intend to live in North Carolina—could they vote in future state elections? Because of the majority's cavalier approach to this mass disenfranchisement, it has not seriously addressed any of these questions. The confusion that will ensue is both predictable and avoidable.

this group from voting. But the statute under which this group voted *expressly exempts them from a state residency requirement*—a fact the majority notes but does not contend with. N.C. Gen. Stat. § 163-258.2(1)(e). Given the United States Supreme Court's opinion in *Dunn* invalidating durational residency requirements, like that in our Constitution, the majority could—at a minimum—explain why it believes one of our statutes implicitly invalidates another to such grave effect.

In an effort to justify disenfranchising Inherited Residents, the majority doubles down and likewise seeks to disenfranchise their parents by asserting—with absolutely no evidence—their parents are also not domiciled in North Carolina. That is not the law. There is simply no precedent setting a time limit on domicile, which is precisely what the majority invents here. The majority's casual dismissal of the law creates alarming consequences: potentially disenfranchising individuals, including military and foreign service members who spend their careers abroad, along with their children.

Petitioner expresses indignation at the notion that an individual who has never resided in North Carolina may vote in our elections—yet that is precisely and expressly what the General Assembly enacted. It is unquestionably clear the statute at issue identifies persons not born in the United States and who cannot satisfy a residency requirement anywhere but North Carolina, and it provides a mechanism for them to register and vote. To adopt Petitioner's interpretation would require reading this provision out of context and in willful disregard of well-established precedent. I decline to do so.

Thus, Petitioner has not met his burden to show there is probable cause to believe any violation of law, irregularity, or misconduct occurred that would cast doubt upon the outcome of this election.

VII. Equal Protection

Each of Petitioner's challenges additionally implicates constitutional Equal Protection concerns. His challenge to voters with allegedly incomplete registration addresses only those who cast their votes early or by absentee ballot, and not voters whose records likewise did not contain validated identification numbers but cast their votes in person on election day. His challenge to military and overseas voters is limited to those ballots cast in Guilford County. And his challenge to Inherited Residents attempts to deny a category of citizens the right to vote based on where they live. Each of these voters is at risk of being disenfranchised while similarly-situated voters are not, simply because of the county in which they reside, when they cast their ballot, or their physical location.

"Once the legal right to vote has been established, equal protection requires that the right be administered equally." *Blankenship v. Bartlett*, 363 N.C. 518, 525, 681 S.E.2d 759, 765 (2009). The type of targeted disenfranchisement represented by these challenges not only engenders distrust in our electoral processes but also discourages participation in voting—a fundamental underpinning of our democratic system. *See Northampton Cnty. Drainage Dist. v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990) ("The right to vote on equal terms is a fundamental right."); *Holmes v. Moore*, 384 N.C. 426, 464, 886 S.E.2d 120, 147 (2023) (Morgan, J., dissenting) (explaining that North Carolina laws authorizing early voting, out-of-precinct voting, and same-day registration have increased access to voting and "dramatically increased voter turnout, especially of Black voters." (citation omitted)).

The practical effect of Petitioner's challenge is to punish voters based on irrational distinctions. His challenge to early and absentee ballots from voters with allegedly incomplete registration ignores the population of election-day voters whose records likewise did not include validated identification numbers, despite both these groups of voters being both eligible and registered to vote. His challenge to only Guilford County's overseas and military absentee ballots discriminates by residence: the majority's remedy applies to these voters but similarly-situated voters in North Carolina's 99 other counties who submitted absentee ballots under Article 21A will be unaffected.[23] And his challenge to Inherited Residents leaves eligible voters with no venue in which to cast their vote simply because of where they live.

Petitioner argues this unequal distribution of challenges results in part from the County Boards failing to provide data to allow him to pursue these challenges. For example, he asserts only six counties confirmed their County Board had accepted overseas ballots without requiring photo identification, and only Guilford County provided a list of such ballots before the challenge deadline, while Durham, Forsyth, and Buncombe provided this data after the deadline.

This difficulty in performing effective discovery under the tight timelines required in an election challenge is exactly why challenges to

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23. While these distinctions are irrational from a constitutional standpoint, we note that Guilford, Buncombe, Durham, and Forsyth, the counties in which Petitioner attempted to challenge military and overseas ballots, are each counties which he lost by significant margins. Votes cast by absentee ballots likewise favored his opponent more than those cast in person on election day. *See* N.C. State Bd. of Elections Election Results Dashboard, available at https://www.ncsbe.gov/results-data/election-results.

election rules after the fact are disfavored. There was ample time to challenge the Board's interpretation of photo identification requirements as applied to Article 21A voters prior to the election, which would not have risked disenfranchising a selection of similarly-situated voters while leaving the votes of others unaffected. Likewise, Petitioner could have challenged voter registrations or our treatment of Inherited Residents prior to election day. A post-election challenge to the rules can be difficult or impossible to resolve fairly while also providing a timely resolution to the election. "We decline to grant [a party] extraordinary relief when they are responsible for their own predicament." *Kennedy v. N.C. State Bd. of Elections*, 386 N.C. 620, 622, 905 S.E.2d 55, 57 (2024).

While Petitioner argues that as a private actor he cannot violate anyone's rights under Equal Protection, his challenges petition the Board, a state actor, to disenfranchise a selection of similarly-situated voters based only on their county of residence, physical location, or decision to cast their vote early or via absentee ballot. The Board should not be so compelled to violate the United States Constitution.

VIII. Changing the Rules of the Election and Remanding This Case Will Disenfranchise North Carolina Voters.

The majority makes much of the fact eligibility to vote is determined as of election day. Despite professing this basic tenet, the majority changes the rules of the 2024 election—and only for one race—months after election day. It does so even though there is no actual showing or forecast that any challenged voter was not registered or otherwise unqualified to vote. Worse still, with no supporting authority, the majority invents out of whole cloth an illusory 15-day "cure period" that is no remedy at all. This is truly legislating from the bench.

Petitioner's challenge and the majority's decision are the latest salvo in a continued attack on early and absentee voting, methods notably favored by disabled and minority voters. The invented cure period does not save the majority's decision from being what it is: the disenfranchisement of thousands of voters in categories selected by Petitioner in order that he may have a second chance at winning his election. Each affected voter, in order that their vote be counted, must now receive effective notice, choose to cure their ballot or registration, determine which actions are necessary, and take those actions, all within fifteen business days of the mailing of notice from their County Board. This will prevent many of these voters from exercising their right to vote, but the reality is particularly stark for overseas voters, including servicemembers, who

are at the mercy of international post in both receiving notice and timely curing their ballots.

The majority imposes this remedy without thought or care for its impact on the people its decision truly impacts: the voters. What of voters who have died since election day? Their votes should count. What of servicemembers abroad sacrificing their lives and safety in remote locations unable to jump through the judicial hoops the majority now puts in their way? Their votes should count. What of overseas voters who only learned of this process second-hand due to lack of any service? Their votes should count. What of voters in every county of this State who may have moved, have not learned of this proceeding, or are sick, immobile, elderly, transient, away on extended business travel, traveling on school breaks with their children, or are simply overwhelmed by the unrelenting attack on their voting rights? Their votes should count. They did everything they were required to do. Their votes were accepted as valid votes on election day and through the canvassing process. Make no mistake: should the majority's decision be implemented, the impact will be to disenfranchise North Carolina voters even though they were eligible to vote on election day.

Giving Petitioner a second bite at the apple serves no legitimate purpose. Indeed, the fact the majority remands this case for a "cure period" only proves the point: there is no showing these voters were ineligible to vote. The majority skips right over the quasi-judicial evidentiary hearing process. By doing so, the majority erroneously places the burden of proof in this election protest on the individual voters and not the protestor.

At best, the majority's decision and completely unworkable remedy will lead to even more litigation—both state and federal. Tying this matter up in interminable litigation with no end in sight only results in delay, confusion, and sowing further doubt that every valid vote will be counted. This is exactly why the *Purcell* principle—largely ignored by the majority—exists.

The majority approach runs directly counter to the purpose of election protests. The election protest process seeks "to balance the public's interest in achieving accurate election results with the need to finalize those results in a short period of time." *Bouvier*, 386 N.C. at 4, 900 S.E.2d at 843. "In all election protests, however, swiftness is the order of the day. County boards of elections must expeditiously resolve election protests to facilitate appeals and the timely certification of elections. Accordingly, election protests proceed rapidly, and the process does not

lend itself to exhaustive discovery and absolute precision." *Id.* at 16, 900 S.E.2d at 850 (citations omitted).[24]

Here, the public's interest in accurate election results in a timely manner is not served by remanding this matter. To the contrary, it leads to only further delay and inevitably inaccurate election results due to undercounting valid votes. There is no probable cause to believe, even if Petitioner properly served his protests, that in any of the protests before us there was any violation of law, irregularity, or misconduct in the administration of the 2024 General Election for Associate Justice of the North Carolina Supreme Court. Thus, the Board did not err in dismissing Petitioner's protests. Therefore, the Superior Court properly affirmed the Board's Final Decision in each of its Orders. Consequently, the Superior Court's Orders should be affirmed. Accordingly, for the foregoing reasons, I dissent from the majority opinion.

24. Indeed, the necessity of a swift election protest procedure was, in part, the rationale for our Supreme Court granting absolute privilege immunity to unlicensed out-of-state lawyers ghost-writing election protests which defamed North Carolina voters. *See id.* at 17, 900 S.E.2d at 851.

ICENHOUR v. ICENHOUR

[298 N.C. App. 502 (2025)]

JEANNIE ROBERTS ICENHOUR, PLAINTIFF
v.
JEFFREY DAVID ICENHOUR, DEFENDANT

No. COA24-601

Filed 16 April 2025

1. Divorce—alimony—modification—consideration of debt payments and other expenses—no substantial change of circumstances shown

In denying defendant's motion to modify his alimony payments to plaintiff, the trial court did not fail to consider defendant's debt payments and the impact of his live-in girlfriend on his expenses in light of the specific factors set forth in N.C.G.S. § 50-16.3A to determine whether defendant had demonstrated a substantial change of circumstances, as required for modification. Rather, defendant failed to produce any evidence to support the allegations in his motion—including those concerning his purported increased expenses—leaving the court unable to determine whether there had been a substantial change in defendant's expenses.

2. Divorce—alimony—modification—change in circumstances—findings of fact supported by evidence

In denying defendant's motion to modify his alimony payments to plaintiff, the trial court's findings of fact necessary to support its conclusions of law were supported by competent evidence, including findings: (1) that defendant ceased paying full alimony to plaintiff during the relevant time period, as demonstrated by both an exhibit and testimony from plaintiff's counsel's paralegal; (2) regarding the amount of defendant's income in 2020, as shown by defendant's December 2020 paycheck and in light of his testimony that he was furloughed thereafter; (3) that defendant was not worried about making job transitions in the relevant time period, as determined by the court in considering the credibility of defendant's testimony and lack of other evidence; and (4) about defendant's income, which was supported by testimony and exhibits (despite a nonprejudicial clerical error).

3. Divorce—alimony—modification—imputed income—credibility and weight of evidence left to the trial court's discretion

In denying defendant's motion to modify his alimony payments to plaintiff, the trial court did not err in imputing income to defendant after considering defendant's evidence and testimony about

his choice to change jobs to accept a lower-paying position because the court was the sole of judge of credibility and was free to weigh the testimony and evidence in its discretion.

4. Contempt—civil—noncompliance with alimony order—finding of ability to pay sufficient—remand for clerical correction

In holding defendant in civil contempt for his failure to meet his support obligations under an existing alimony order, the trial court's findings of fact—that defendant's income at the time of the contempt hearing exceeded his income at the time the alimony order was entered and that defendant had acted in deliberate disregard of his support obligations—fully supported the court's determination that he had the ability to pay the alimony award for which he was in arrears; however, the matter was remanded for correction of a clerical error in regard to the exact amount of the arrearage.

Appeal by Defendant from an order entered 16 April 2024 by Judge Richard S. Holloway in Caldwell County District Court. Heard in the Court of Appeals 28 January 2025.

Wesley E. Starnes, for Plaintiff-Appellee.

Wilson, Lackey, Rohr & Hall, P.C., by Destin C. Hall, for Defendant-Appellant.

WOOD, Judge.

Defendant appeals from an order entered 16 April 2024 finding there had not been a substantial change in circumstances to warrant modifying Defendant's alimony obligation and finding Defendant in contempt for failure to pay alimony as ordered. Defendant contends the trial court erred by failing to consider Defendant's debt payments and other relevant ultimate facts, by making findings of fact regarding Defendant's income and reason for changing employment, by imputing income to Defendant, and by finding Defendant in contempt.

I. Factual and Procedural Background

Plaintiff and Defendant were married on 20 June 1987, separated on 23 April 2011, and divorced on 4 June 2014. The parties entered into a consent judgment on 10 January 2012 which resolved all issues, including spousal support and equitable distribution of the parties' martial property. Defendant was ordered to pay $1,800.00 per month in alimony

to Plaintiff, beginning 1 January 2012, until terminated by one of the statutory events in N.C. Gen. Stat. § 50-16.9.

In 2014, Defendant filed a motion to modify alimony which was denied by the trial court. On 15 February 2018, Defendant filed another motion to modify alimony alleging that his income had been reduced while his expenses were increasing. Plaintiff sought and received a show cause order on 10 April 2019 based on Defendant's alleged failure to fully pay his monthly alimony obligations starting in January of 2019.

On 17 January 2020, an Order Amending Alimony was entered, modifying Defendant's monthly alimony obligation to Plaintiff to $1,700.00 effective 1 January 2020. Plaintiff voluntarily dismissed her motion for contempt.

On 25 August 2020 Plaintiff filed another motion for contempt and show cause order. A corresponding show cause order was entered the same day.

On 29 December 2020, Defendant filed a motion to modify alimony. The parties' motions came on for hearing on 29 March 2022. On 6 June 2022, the trial court entered orders modifying Defendant's alimony obligation to $600.00 per month, finding Defendant in civil contempt of the 17 January 2020 order, and requiring Defendant to pay $100.00 per month towards the arrearage and to pay $1,000.00 to Plaintiff for attorney's fees at the rate of $50.00 per month. Both parties appealed from the 6 June 2022 order.

In an unpublished opinion issued 1 August 2023, this Court held that the Alimony Order lacked "adequate findings to support its legal conclusions" and set aside the order and remanded the matter to the trial court for further proceedings. *Icenhour v. Icenhour*, 290 N.C. App. 126, 889 S.E.2d 535 (2023) (unpublished). This Court noted that "[a] conclusion of a substantial change in circumstances based solely on a change in income is inadequate and erroneous. Instead, the extant overall circumstances of the parties must be compared with those at the time of the award to determine whether a substantial change has occurred" *Id.* (cleaned up).

Upon return to the trial court, the court determined, in consultation with counsel for each party, that it would not take new evidence but would decide the matter on the record and evidence previously presented. On 16 April 2024, the trial court issued an Order on Remand. The trial court denied Defendant's motion to modify the alimony award finding Defendant failed to establish a substantial change in circumstances

to warrant such a modification. In addition, the trial court found Defendant in contempt and ordered him to pay an extra $100.00 per month until the arrearage of $36,600.00 is paid in full. On remand the trial court made twenty-nine findings of fact to support its six conclusions of law. Defendant appeals from this order.

II. Standard of Review

During appellate review of both alimony modification and contempt orders, "the standard . . . 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." *Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 273 (2013) (cleaned up); *see also Spears v. Spears*, 245 N.C. App. 260, 273, 784 S.E.2d 485, 494 (2016). Whether the findings of fact support the legal conclusion of a substantial change under the circumstances is reviewed *de novo*. *Peeler v. Joseph*, 263 N.C. App. 198, 201, 823 S.E.2d 155, 158 (2018). The alimony determination, if supported by adequate findings and conclusions, is reviewed for abuse of discretion. *Dodson v. Dodson*, 190 N.C. App. 412, 415, 660 S.E.2d 93, 96 (2008).

III. Analysis

On appeal, Defendant raises four issues: whether the trial court committed reversible error by failing to consider Defendant's debt payments and other relevant ultimate facts; whether the trial court erred in making findings of fact regarding Defendant's income and reason for changing employment; whether the trial court erred by imputing income to Defendant; and whether the trial court erred in finding Defendant in contempt.

A. Consideration of Debt Payments and Ultimate Facts

[1] In North Carolina, N.C. Gen. Stat. § 50-16.9 provides for the modification of alimony. "An order of a court of this State for alimony or post-separation support, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-16.9 (2024). When establishing an alimony award, the trial court must consider specific statutory factors. N.C. Gen. Stat. § 50-16.3A(b) (2024). These same factors are to be considered when evaluating a substantial change in that award. *Cunningham v. Cunningham*, 345 N.C. 430, 435, 480 S.E.2d 403, 406 (1997). Not every factor is required in all cases, but "the court must provide sufficient detail to satisfy a reviewing court that it has considered 'all relevant factors.' " *Rhew v. Rhew*, 138 N.C. App. 467, 472, 531 S.E.2d 471, 474 (2000). The resulting

order must find "the ultimate facts which were raised by the defendant's motion to modify. . ." *Kelly v. Kelly*, 228 N.C. App. 600, 608, 747 S.E.2d 268, 276 (2013). "As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Cunningham* at 436, 480 S.E.2d at 406. There must be some "distinct and definite change in the financial circumstances of the parties." *Id.*

> However, it is error to modify alimony based on only one factor, such as a change in a party's income. Rather, the present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award in order to determine if there has been a substantial change.

Dodson v Dodson, 190 N.C. App. 412, 416, 660 S.E.2d 93, 96 (2008) (cleaned up).

Defendant contends the trial court failed to consider his debt payments, other expenses and the impact of Defendant's girlfriend on his expenses as relevant "ultimate facts." The trial court made the following findings to address these issues:

> 25. Defendant's expenses at the time of the order were $3,569.50. Defendant contends that his expenses at the time of the hearing were $4,043.46, at most a modest contention of change. In addition, Defendant acknowledged his girlfriend resided in his home. Defendant did not offer sufficient credible evidence from which the [c]ourt could determine the impact of Defendant's girlfriend upon his expenses. As such, the [c]ourt is unable to determine whether there has been a change in Defendant's expenses from the evidence and the record.

The trial court addressed Defendant's expenses and determined that Defendant's failure to present adequate evidence to support his claim made the ultimate determination of a change in expenses impossible. Defendant testified that his girlfriend lives with him and is employed but does not contribute consistently to payment of the bills. He did not produce evidence regarding her income, her contribution to the household expenses, or an increase in expenses related to her residing with him. He stated she "may" pay some of the light bill if he is short on money. There was no other testimony or evidence presented to determine what increase in expenses was incurred because of her presence in the home such as increases for water, electricity, food or other expenses, leaving

the trial court unable to determine any impact caused by her residing in the residence. Therefore, the trial court was unable to determine whether there was a substantial change in Defendant's expenses. "The movant bears the burden of showing a change of circumstances in order to modify . . . alimony." *Groseclose v. Groseclose*, 291 N.C. App. 409, 413, 896 S.E.2d 155, 160 (2023) (cleaned up). If Defendant has not provided the necessary information, then he has failed to meet his burden.

B. Errors in Findings of Fact

[2] Defendant next argues that the trial court's findings of fact 14, 15, 16, 20, 21, 22, 23 and 24 were not supported by competent evidence and cannot be relied upon to support the conclusions of law.

" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " *Sisk v. Transylvania Cmty. Hosp.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (cleaned up).

> [W]hen an appellate court determines that a finding of fact is not supported by sufficient evidence, the court must disregard that finding and examine whether the remaining findings support the trial court's conclusions of law. If the remaining findings support the trial court's conclusions, the appellate court must affirm, notwithstanding the existence of some invalid findings.

In re A.J., 386 N.C. 409, 410, 904 S.E.2d 707, 710 (2024).

1. Finding 14

Finding of fact 14 states, "In 2020, Defendant ceased paying his full amount of alimony to the Plaintiff. He made $5,200.00 in payments during the relevant time-period ($1,000.00 + $1,800.00 + $900.00 + $500.00 + $1,000.00 = $5,200.00)." Plaintiff's Exhibit 1 and testimony from Plaintiff's counsel's paralegal illustrate that in 2020 Defendant made $1,700.00 payments in each of January, February, and March. However, when he "ceased paying in full" in April, payments during that "relevant time period" included a $1,000.00 payment in April 2020; an $1,800.00 payment in May 2020; a $900.00 payment in June 2020; a $500.00 payment in January 2021; and a $1,000.00 payment in February 2021 totaling $5,200.00 in payments since he stopped paying in full. In addition, the calculation of total arrearage after credit for partial payments is addressed in findings of fact 27 and 28 and comports with the totals on Plaintiff's Exhibit 1. This finding of fact is clearly supported.

2. Finding 15

Finding of fact 15 states, "In 2020, the year of the January 17th, 2020, order, Defendant earned $67,106.00 for the year which equals $5,592.17. He was working at Richard Petty Motor Sports. He was furloughed for a time and upon his return his income was reduced."

The $67,106.00 noted by the trial court is the year-to-date income found on the 4 December 2020 paycheck from Richard Petty Motor Sports submitted as Plaintiff's Exhibit 4. Defendant's testimony indicated this would have been his last paycheck in 2020 due to his furlough and eventual layoff. The trial court determined a monthly amount of $5,592.17 by dividing the year-to-date income reported on the 4 December 2020 paystub by twelve months.

Further, the trial court stated that the year-to-date total of $67,106.00 was in fact his 2020 income which had been impacted by his furlough during COVID. Defendant's testimony concerning his termination from Richard Petty Motor Sports due to the pandemic as well as his receipt of an unknown amount in unemployment payments from the end of 2020 through the beginning of 2021 support this determination.

3. Findings of Fact 16 and 24

Defendant contends that together findings of fact 16 and 24 inaccurately imply that he chose to leave Richard Petty Motor Sports and had no concerns about unemployment. The findings at issue read:

> 16. Defendant changed employment, in February of 2021, when he went to work at Special Event Transportation, where he worked for three weeks.
>
> . . .
>
> 24. The Court has considered the ease with which Defendant was able to change employment. He was employed at Richard Petty Motor Sports at the time of the last order in January 2020. He left this employment and went to Special Event Transportation, which he left to take the job at Big Machine. He then left Big Machine to work at Big Wheels in November 2021[.] [The Court also considered whether] his concerns about finding other employment were anything other than speculation.

Defendant testified that he was first furloughed and then laid off from Richard Petty Motor Sports during the COVID pandemic in November 2020 and was out of work until February 2021 when he found employment

at Special Event Transportation ("SET"). However, he did not provide any documentation to evidence his unemployment payments. He then testified that he stayed at SET for only three weeks because he acquired a higher paying job at Big Machine. Finally, Defendant reported that in November 2021 he transitioned from Big Machine to Big Wheels because based on his twenty years of experience in the racing industry he was concerned that Big Machine would not have a team in the coming year, and he would again be out of a job.

The trial court's finding of fact 16 directly reflects Defendant's testimony regarding his limited time at SET. Defendant testified, he was at SET for "three weeks or so till the job at Big Machine came open." Therefore, Defendant's own testimony is competent evidence supporting the trial court's finding.

Similarly, the employment timeline illustrated in finding of fact 24 is also supported by Defendant's testimony. However, Defendant contends that the findings concerning the "ease" of his employment transitions and "speculation" about job security are not supported by competent evidence. During his testimony, Defendant made a vague statement that he had "some concern" about job security but offered no evidence or corroborating testimony as to why he chose to leave his higher paying job at Big Machine. This Court has consistently held that the trial court is "the sole judge of the credibility and weight of the evidence, and it [is] free to accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same." *State v. Johnson*, 378 N.C. 236, 242, 861 S.E.2d 474, 482 (2021) (cleaned up). It was entirely within the trial court's discretion to disbelieve Defendant's reasoning for leaving and question the frequency of his employment transitions. We conclude that findings of fact 16 and 24 were supported by competent evidence.

4. Findings of Fact 20, 21, 22 and 23

Defendant challenges the trial court's findings of fact 20, 21, 22 and 23 all of which address Defendant's income.

> 20. At Big Wheels, Defendant earned $5,706.20 per month.
>
> 21. Defendant's income in 2021, the year before the filing of his motion was $58,774.51 while at Big Machine Racing, LLC; $4,078.50 while at Special Event Transportation, Inc.; $1,835.83 while at Big Wheels Trucking, LLC; and an unknown amount in unemployment benefits. Thus,

> Defendant's income for 2021 was $64,688.84, plus an unknown amount of unemployment. The Court is without sufficient information to find a change in Defendant's income in 2021, without the evidence concerning his unemployment benefits. Even without the unemployment benefits, Defendant's income in 2021 had not changed substantially from his income at the time of the entry of the last order.
>
> 22. What is clear to the Court is that Defendant's income has remained steady since the entry of the January 17th, 2020 order, with income of 2020: $5,592.17 per month: $5390.74 per month plus an unknown amount of unemployment; and 2022: $5706.20 per month. The evidence is that even with his brief unemployment, Defendant's income had changed modestly and the Court finds so.
>
> 23. Defendant's decision to leave Big Machine where he earned $6,101.33 per month to take employment with Big Wheels where he earned $5,706.20 per month, without any factual or well-reasoned basis demonstrates that Defendant acted in deliberate disregard for his support obligations. Defendant's income of $6,101.33 per month exceeded his earnings at the time of the prior order that he seeks to modify, when his income was $5,592.17 per month.

In finding 20 and 23, the trial court found as fact that Defendant's income at Big Wheels Trucking was $5,706.20 per month. Both Defendant and Plaintiff entered Defendant's paystubs into evidence and Defendant testified to them on both direct and cross-examination. The same paystub also reports $735.00 in miscellaneous reimbursement. Absent any evidence concerning the purpose of the reimbursement, the trial court was within its discretion to include it in its calculation of Defendant's income.[1]

Plaintiff concedes that finding of fact 21 contains a typographical or clerical error. The trial court stated, "Defendant's income in 2021, the year *before* the filing of this motion." However, 2021 was the year after this motion was filed, 29 December 2020. The trial court correctly identified the filing date in finding of fact 12 stating "Defendant filed a motion

1. The year-to-date income of $13,749.96 + $735.00 in miscellaneous equals $14,484.96. $14,484.96 divided by 11 weeks equals $1,316.81 per week. $1,316.81 multiplied by 52 weeks equals $68,474.35 per year or $5,706.20 per month.

to modify the order for alimony on December 29th, 2020." Defendant makes no showing as to how he is harmed by this clerical error.

> Appellate courts do not set aside verdicts and judgments for technical or harmless error. It must appear that the error . . . was material and prejudicial, amounting to a denial of some substantial right. The appellant thus bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different.

Wiley v. L3 Commc'ns Vertex Aerospace, 251 N.C. App. 354, 366, 795 S.E.2d 580, 589 (2016) (quoting *Faucette v. 6303 Carmel Road, LLC*, 242 N.C. App. 267, 274, 775 S.E.2d 316, 323 (2015)). We conclude this clerical error does not constitute prejudicial error.

Defendant also contends there was error in the trial court's finding that the court included nontaxable income in its determination of the Defendant's income from SET. Defendant's W-2 from 2021 clearly states that his gross income was $4,078.50 and this Court has consistently held that gross income can be appropriate for determining a party's ability to meet alimony payments. *Britt v. Britt*, 29 N.C. App. 463, 471, 271 S.E.2d 921, 927 (1980). It is within the trial court's sound discretion to have utilized Defendant's reported gross income for its calculation.

Finding 22 states that Defendant's income had been relatively steady during the time between the 2020 and 2022 orders. As discussed supra, this finding of fact is well supported. Defendant earned $5,592.17 per month plus unknown unemployment benefits in 2020, $5,309.74 per month in 2021 plus unknown unemployment benefits, and $5,706.20 per month in 2022. "Minor fluctuations in income are a common occurrence and the likelihood that they would occur must have been considered by the court when it entered a decree for alimony." *Britt* at 472, 271 S.E.2d at 927, *see also Kelly* at 604, 747 S.E.2d at 274.

All contested findings of fact are supported by competent evidence. The findings of fact in turn support the trial court's conclusion of law that Defendant failed to establish a substantial change in circumstances to warrant a modification of the alimony.

C. Imputing Income

[3] Defendant contends that the trial court erred in imputing income to him when Plaintiff failed to prove bad faith on the part of the Defendant.

> The trial court may refuse to modify support and/or alimony on the basis of an individual's earning capacity instead of his actual income when the evidence presented to the trial court shows that a husband has disregarded his marital and parental obligations by: (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) *acting in deliberate disregard for his support obligations*, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business.

Wolf v. Wolf, 151 N.C. App. 523, 526-27, 566 S.E.2d 516, 518-19 (2002) (cleaned up) (emphasis added); *see also Sternola v. Aljian*, 293 N.C. App. 166, 172, 900 S.E.2d 139, 144 (2024).

In finding of fact 23, the trial court found "Defendant's decision to leave Big Machine where he earned $6,101.33 per month to take employment with Big Wheels where he earned $5,706.20 per month, without any factual or well-reasoned basis demonstrates that Defendant *acted in deliberate disregard for his support obligations*. . . ." The trial court also found, "Defendant testified that his decision to change employment was based upon concerns for his employment the next year. Defendant gave no fact or reasoning justifying his alleged concerns." Finally, the trial court made note of the "ease with which" Defendant was able to change employment and that his concerns about finding other employment were not "anything other than speculation."

Defendant's testimony was the only evidence offered to explain why he chose to change jobs.

> Q. Why did you – why'd you leave that job?
>
> . . .
>
> THE WITNESS: My understanding of the reasoning is, we were – they didn't know if they were going to proceed this year[] with the race team or not.
>
> Q. Okay. And how long have you worked in this general business of – of hauling racecars?
>
> A. Nineteen, twenty years.

> Q. And in that business, is it common for these haulers, from year to year, for it to be uncertain. . .
>
> A. Yes.
>
> Q. . . . as to whether they're going to go the next year?
>
> A. Yes. Yes, it is.
>
> Q. And -- and did you have some concern with this job that you were going to be without a job. . .
>
> A. Yes.
>
> Q. . . . come race season?
>
> A. Yes.

The trial court is the sole judge of credibility and is free to weigh the testimony in its discretion. *State v. Johnson*, 378 N.C. 236, 242, 861 S.E.2d 474, 482 (2021) (cleaned up). The trial court considered the available information regarding Defendant's choice to change jobs and determined Defendant made speculative choices of employment in disregard of his obligation to pay alimony. Therefore, the trial court was free to impute income based on his proven earning capacity of $6,101.33 per month.

D. Contempt

[4] Finally, Defendant contends that because he is unable to comply with the alimony order he should not be held in contempt. Additionally, he notes calculation errors in the dollar amount of arrears.

"Civil contempt is employed to coerce contumacious defendants into compliance with the orders of the court." *Bossian v. Bossian*, 284 N.C. App. 208, 214, 875 S.E.2d 570, 576 (2022). Pursuant to N.C. Gen. Stat. § 5A-21(a),

> "[f]ailure to comply with a court order is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable

> measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2024).

"It is well established that the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt." *Groseclose* at 427-28, 896 S.E.2d at 168. The trial court made a sufficient finding that "Defendant's income of $6,101.33 per month exceeded his earning at the time of the prior order that he seeks to modify, when his income was $5,592.17 per month." That, in addition to the findings that Defendant "acted in deliberate disregard for his support obligations" support the trial court's conclusion that Defendant is in civil contempt.

Plaintiff concedes that a clerical miscalculation of the amount Defendant is in arrears exists. Clerical mistakes are "mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission . . ." N.C. Gen. Stat. § 1A-1, R. Civ. P. 60. "A clerical error is defined as an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *Face v. Face*, 296 N.C. App. 306, 322, 909 S.E.2d 521, 532 (2024) (cleaned up). Here, the trial court stated Defendant owed an arrearage of $36,600.00. However, from January 2020 through 22 March 2022 Defendant owed $1,700.00 per month, which totals $45,900.00. As stated in finding of fact 27, Defendant had paid $10,300.00 during that time which left a total of $35,600.00 unpaid. Accordingly, we remand to the trial court for correction of the arrearage to the amount of $35,600.00.

IV. Conclusion

For the foregoing reasons we affirm the trial court's determination that Defendant failed to prove a substantial change of circumstances to warrant modification of the alimony order. However, we remand for correction of the clerical error in the calculation of arrearage which shall be corrected to reflect an arrearage of $35,600.00 as of 6 June 2022. It is so ordered.

AFFIRMED AND REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judge COLLINS and Judge GRIFFIN concur.

IN RE A.D.W.

[298 N.C. App. 515 (2025)]

IN THE MATTER OF A.D.W.

No. COA24-868

Filed 16 April 2025

Child Abuse, Dependency, and Neglect—abuse and neglect—child with life-threatening medical condition—parent's ongoing failure to provide proper care—causing injury and risk of serious physical harm

An order adjudicating a father's ten-year-old son as an abused and neglected juvenile was affirmed where the trial court's uncontested factual findings showed that the father was aware of his child's serious medical condition but consistently failed to provide the necessary medical care, which caused injury to the boy and placed him at risk of serious physical harm and even death. Specifically, the court found: the father knew his son had type 1 diabetes, received extensive training on how to medicate his son, and was repeatedly informed of the risks associated with his son's diabetes not being monitored by an adult; the father refused to take responsibility over his son's medical care, instead leaving the child in charge of managing his own diet, blood sugar, and medication schedule; and, as a result, the child was hospitalized several times for diabetic ketoacidosis, which in turn resulted in end organ damage and multiple near-death injuries.

Appeal by Respondent-Father from orders entered on 24 June 2024 by Judge David E. Sipprell in Forsyth County District Court. Heard in the Court of Appeals 19 March 2025.

Patricia M. Propheter for Respondent-Father Appellant.

Forsyth County Department of Social Services, by Deputy County Attorney Theresa A. Boucher, for Petitioner-Appellee.

Poyner Spruill LLP, by Rohun S. Shah, for Guardian ad Litem, Petitioner-Appellee.

WOOD, Judge.

Respondent-Father ("Father") appeals from the trial court's adjudication and disposition orders. The trial court adjudicated the juvenile

abused and neglected and entered a disposition identifying reunification as the permanent plan. On appeal, Father argues the trial court erred by adjudicating the juvenile abused when evidence failed to prove abuse as defined by N.C. Gen. Stat. § 7B-101(1)(b) and by adjudicating the juvenile neglected where Father did his best to control the juvenile's diabetes. For the reasons set forth below, we affirm the trial court's order.

I. Factual and Procedural Background

Andrew[1] was born on 23 May 2013. He lived with Mother, Father, and his siblings after birth until he and his siblings were removed from the home. From 5 July 2013 until March of 2015, Andrew and his siblings were in the custody of Forsyth County Department of Social Services ("DSS") due to concerns with Mother's mental health and her ability to care for the children as well as Father's inability to keep the children safe from Mother. In 2014, at about thirteen months old, Andrew was diagnosed with Type 1 Diabetes. After Andrew returned to his parents' care in March 2015, DSS received ten Child Protective Services reports necessitating family assessments resulting in case findings of services needed three times for in-home services to work with the family to address the concerns.

On 19 March 2023, DSS received a report alleging improper care of Andrew's medical needs after Andrew was admitted to the Intensive Care Unit ("ICU") with a blood sugar level of 966. The report alleged that the parents were not providing appropriate medical care and were expecting nine-year-old Andrew to manage his own blood sugar and medication.

On 20 March 2023, a DSS social worker met with Andrew, his parents, and hospital staff. It was noted that Andrew had been hospitalized three times in the previous six months due to diabetic ketoacidosis. In addition, hospital staff determined he also has lipohypertrophy which impacts his body's ability to move insulin. Parents confirmed that Andrew was responsible for managing his diabetes and blamed him for his poor eating habits. Mother also reported that she has Bi-Polar Disorder and Schizophrenia for which she was not seeking treatment. After the 20 March meeting, Mother relocated to Mississippi, leaving Andrew in Father's care. Mother has not been actively involved in the family since that time and is not a party to this appeal.

During the Child Protective Services Family Assessment Father acknowledged that the power in the home had been cut off and that he

1. A pseudonym is used to protect the identity of the juvenile pursuant to N.C. R. App. P. 42(b).

was unemployed. The family's sole income was Andrew's Social Security income. Father refused support offered by the social worker including substance abuse treatment and help with transportation. Father continued to miss Andrew's medical appointments and Andrew was again hospitalized for diabetic ketoacidosis.

On 11 July 2023, the case was transferred to in-home services under a new social worker, Phillip Wilson ("Wilson"). At that time DSS recommended that Father complete drug screenings, restore and maintain electricity and utilities, attend parenting classes, and follow medical directives from Andrew's providers for the care and management of Andrew's diabetes. However, Father continued to miss medical appointments for Andrew including those on 14 July, 25 July, and 14 August 2023.

Also, on 14 August, Father tested positive for cocaine before entering into a Family Services Agreement in which he agreed to comply with the recommendations previously made by his DSS social worker.

On 5 October 2023, a Child and Family Team Meeting was held. Social worker Wilson and Father discussed a Temporary Safety Provider (TSP) for Andrew. Father agreed that Andrew would stay with a neighbor.

On 2 October, 11 October, and 23 October 2023 Andrew was admitted to the hospital due to diabetic ketoacidosis and elevated blood sugar. During the 23 October admission hospital staff reported that Father told Andrew, "you should have told me last night you needed insulin."

On 27 October 2023, Social Worker Hinson met with Andrew and the neighbor while Andrew remained hospitalized. Andrew reported he was still responsible for his medication, but it would be good to have an adult's help. The neighbor acknowledged that she was caring for Andrew but did not seem to understand her responsibility for his medical needs. Hinson explained the necessity of managing the juvenile's diet, medications and medical appointments and the neighbor stated she understood and would comply. Father requested a Dexcom 7 device, a continuous glucose monitoring system, be provided by hospital and DSS staff to assist in managing Andrew's diabetes. On 1 November 2023, Andrew was discharged from the hospital into the neighbor's care.

On 30 November 2023, Andrew completed a Child Medical Exam (CME) with Dr. Meggan Goodpasture. The doctor found that Andrew has had many admissions secondary to medical neglect. She also stated that "excessive training and education for all family members involved including father has been documented repeatedly in the medical record" and "[Andrew] continues to be at tremendous risk for serious bodily

harm and death due to repeated medical neglect as documented over the years and reported to CPS in his medical record. His medical needs due to his [diabetes] are tremendous and require consistent and thorough care." Father was present for the CME but appeared to be under the influence of substances. He could not answer simple questions like how old he was or how many children he had. Dr. Goodpasture determined that Andrew's life was at risk because his diabetes was not being managed well.

Also on 30 November 2023, DSS received a second report alleging improper discipline, improper medical and remedial care, injurious environment and domestic violence. This report stemmed from an incident that occurred on 26 November 2023. Reportedly, Father was angry at Andrew because his blood sugar was high, so he hit him on the arm and leg with his hand, grabbed him by the shirt, threw him on the couch and slapped him on the head. Father was cursing and yelling during the incident. Andrew also reported that he did not feel safe with the neighbor because "she is fighting with a grown up and they use their bodies and words."

On 1 December 2023, Hinson met with Andrew and Father. Andrew was withdrawn during the meeting. Father reported that the incident in question did not occur as described, however he did admit to hitting and yelling at Andrew. He stated that he did not know how to get through to Andrew but if Andrew did not do what he needed to he was going to have to leave his dad and had nowhere else to go. The following week Hinson met with the neighbor who stated Andrew had reported to her the incident of being hit on his head by his father. Also, she admitted Andrew had been going to Father's house unsupervised.

On 27 December 2023, a Child and Family Team meeting was held with Father via teleconference regarding his non-compliance with the in-home services plan. Father became frustrated during the meeting and refused to engage. He stated that it was not his fault that Andrew sneaks food and eats food when he goes out in the neighborhood. When it was discussed that Andrew needs supervision, Father stated to the social worker, people need to sleep, and he cannot watch him all the time. Father acknowledged that he had hit Andrew but said it was "not like he punched him." Father was upset and stated he wanted Andrew back home but could not articulate any changes he would make to ensure Andrew's safety. He refused to discuss other placement options and was unaware of Andrew's next medical appointment. Father eventually hung up and did not participate further at that time. However, Father contacted Social Work Supervisor Coble ("Coble") within the following

forty-eight hours and decided to reengage in substance abuse treatment, random drug screens and comply with medical appointments.

On 29 December 2023, Coble completed a referral for a substance abuse assessment, mental health assessment, and parenting classes for Father. Also on 29 December, Coble met with the neighbor and Andrew. Andrew reported that it had been three days since he checked his blood sugar. The last check was 520. Coble asked Andrew to check his blood sugar, and his current level was 415. The neighbor denied being aware of Andrew's blood sugar level or that anyone had discussed with her the necessity of helping Andrew maintain a lower blood sugar level. In contrast, she acknowledged that both she and her niece were diabetic, and she was familiar with the process of diabetic care. She also stated that Andrew had lost his Dexcom 7. Coble contacted Father about Andrews' blood sugar level. When Father arrived, he asked Andrew what he had been eating and instructed him to use insulin. Andrew gave himself an insulin shot, and Father instructed him to wait thirty minutes and recheck. When Andrew rechecked, his level was 492. Coble asked Father to call EMS, but Father refused, instead instructing Andrew to use more insulin, this time in his leg instead of his arm. Coble again advised Father to call EMS and again he was hesitant. Eventually, Father called EMS, and Andrew was taken to the hospital where they were able to get his blood sugar stabilized.

On 2 January 2024, Father was supposed to take Andrew for a diabetes management appointment; however, he called to reschedule because he reportedly overslept. Additionally, the neighbor determined that she no longer wanted to be a temporary placement because of "her hands being tied," so she returned Andrew to Father.

On 11 January 2024, Coble conducted a school visit and learned there were current concerns with elevated blood sugar levels now that Andrew was back at home. Additionally, the previous day Andrew missed the bus, googled the school phone number, and requested that someone come to get him. Coble then visited Father to discuss the new concerns. Father again blamed Andrew for his blood sugar levels. Additionally, Father stated that he would have to reschedule the substance abuse and mental health assessment that Coble had referred him to because he had a court date for a driving offense that conflicted with the scheduled date and time. Coble requested that Father take a drug screen, but Father admitted that he would test positive for cocaine as he had used the previous day.

Later in the day of 11 January 2024, the school contacted Coble and informed her that they were concerned about Andrew because he had

shut down at school and written a note asking God to kill him. They were in the process of assessing his immediate medical needs and had contacted Father.

On 12 January 2024, DSS filed a petition alleging Andrew to be an abused and neglected juvenile. The trial court entered an Order for Nonsecure Custody 18 January 2024, and Andrew was placed with his maternal aunt ("Aunt").

On 19 January 2024, a Nonsecure Custody Hearing was held. Father attended the hearing but Mother's whereabouts were unknown. The trial court continued nonsecure custody with DSS and placement with Aunt as well as supervised visitation with Father once a week for an hour.

On 24 January 2024, another Nonsecure Custody Hearing was held. Father was present and Mother's location was still unknown. The trial court continued nonsecure custody with DSS and placement with Aunt and scheduled the adjudication hearing for 26 February 2024.

On 26 February, the adjudication hearing was continued by request of DSS as they needed additional time to issue subpoenas. The adjudication hearing was rescheduled for 10 May 2024.

On 10 May 2024, the trial court conducted an adjudication hearing. The trial court heard testimony from Dr. Goodpasture, DSS social workers, Father and the Guardian ad Litem and admitted various records, including the DDS and Guardian ad Litem reports. The trial court made numerous findings regarding Father's refusal to take responsibility for Andrew's medical needs despite DSS' repeated attempts to educate and train him as well as Andrew's continuously high blood sugar readings and hospitalizations from failure to manage his care. By order rendered on 10 May 2024 and filed 24 June 2024, the trial court adjudicated Andrew as abused and neglected. Father entered timely notice of appeal on 18 July 2024.

II. Analysis

Father asserts two arguments on appeal regarding the 24 June 2024 adjudication order. Father argues: (1) the trial court erred by adjudicating Andrew as an abused child when evidence failed to prove abuse as defined by N.C. Gen. Stat. § 7B-101(1)(b) and (2) the trial court erred by adjudicating Andrew as neglected when Father did his best to control Andrew's diabetes.

This Court reviews an adjudication of neglect and abuse to determine whether the findings of fact are supported by "clear and convincing

evidence," and whether the trial court's findings support its conclusions of law. "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *In re L.C.*, 293 N.C. App. 380, 389, 900 S.E.2d 697, 706 (2024) (cleaned up). Any unchallenged findings of fact are binding on appeal. *Id.* Because Father has not challenged any findings of fact, all fifty-nine findings are binding on appeal.

We review a trial court's conclusions of law *de novo*. *Id.* "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (cleaned up). "The determination that a child is 'neglected' [or 'abused'] is a conclusion of law we review de novo." *In re L.C.*, 293 N.C. at 389, 900 S.E.2d at 706.

A. Adjudication of Abuse

Father contends that the ongoing lack of appropriate care for a life-threatening medical condition does not meet the requirements of N.C. Gen. Stat. § 7B-101(1)(b). We disagree.

N.C. Gen. Stat. § 7B-101(1)(b) reads:

> (1) Abused juveniles.--Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker:
>
> b. Creates or *allows to be created a substantial risk of serious physical injury* to the juvenile by other than accidental means . . .

(emphasis added).

DSS and the Guardian ad Litem argue that Father: (1) allowed to be created a substantial risk of (2) serious physical injury when he repeatedly refused to monitor and medicate Andrew's type 1 diabetes causing repeated hospitalizations for diabetic ketoacidosis, which resulted in end organ damage.

This Court has repeatedly held that when the parent is aware of the existence of the risk and "fail[s] to take the necessary steps to protect [the] minor" the element of "allow[s] to be created a substantial risk" under N.C. Gen. Stat. § 7B-101(1)(b) is met. *In re W.C.T.*, 280 N.C. App. 17, 28, 867 S.E.2d 14, 22 (2021); *In re M.G.*, 187 N.C. App. 536, 549, 653 S.E.2d 581, 589 (2007), *rev'd in part on other grounds*, 363 N.C. 570, 681 S.E.2d 290 (2009).

The juvenile code does not contain a definition for the term "serious physical injury" with respect to chapter 7B. However, this Court has utilized the definition provided by N.C. Gen. Stat. § 14-318.4, the felony child abuse statute. *In re L.T.R.*, 181 N.C. App. 376, 381, 639 S.E.2d 122, 125–26 (2007). "Under N.C. Gen. Stat. § 14- 318.4, a 'serious physical injury' is defined as an injury that causes 'great pain and suffering.' " *State v. Romero*, 164 N.C. App. 169, 172, 595 S.E.2d 208, 210 (2004) (cleaned up). Additionally, Black's Law Dictionary defines an "injury" as "[a]ny harm or damage," and defines "physical" or "bodily" injury as "[p]hysical damage to a person's body." *Black's Law Dictionary* (12th ed. 2024).

In an unpublished yet persuasive opinion, this Court has previously held that a heart attack caused by severe malnourishment met the criteria for a serious physical injury and when the father "saw the problem, and realized it was a problem, and they failed to get the child . . . to health care professionals" it supported the adjudication of abuse. *In re D.L.*, 213 N.C. App. 217, 714 S.E.2d 209 (2011) (unpublished).

Similarly, in *In re K.B.*, this Court upheld a trial court's determination of abuse when a parent failed to medicate and supervise their child, and that failure resulted in the child inflicting serious self-harm. *In re K.B.*, 253 N.C. App. 423, 434-35, 801 S.E.2d 160, 168 (2017). This Court held, "[the child] was abused in that respondents created a substantial risk of physical injury to [the child] by other than accidental means, and that respondents inflicted or allowed to be inflicted on [the child] serious physical injury by other than accidental means." *Id.* at 435, 801 S.E. 2d at 168.

In the case *sub judice*, the trial court heard extensive testimony from Dr. Meggan Goodpasture and admitted medical reports based on that testimony. Dr. Goodpasture testified that Andrew suffers from Type 1 diabetes mellitus and has been admitted to the intensive care unit many times due to Father's failure to monitor Andrew's diet, blood sugar, and medication administration. Due to these repeated hospitalizations, Dr. Goodpasture stated that Andrew has been "close to death on multiple occasions" and has had "end organ damage and complication[s]" such as acute kidney injuries. The doctor testified that Andrew is at high risk for death and further organ damage including damage to his kidneys, brain, eyes and nerves.

In addition, the trial court made multiple findings concerning the numerous times that medical and DSS staff met with Father and educated him concerning the need for serious and continuous adult

monitoring of Andrew's blood sugar levels and insulin usage as well as the serious risks to Andrew's life and health if that monitoring and medication administration fails. However, Father repeatedly refused to take responsibility and repeatedly blamed Andrew, a ten-year old child, for his inability to care for himself.

These unchallenged findings of fact illustrate the abundance of evidence, including testimony and reports from medical providers and DSS staff, which provide clear and convincing evidence that Father was aware of the risk associated with Andrew's type 1 diabetes being unmonitored and failed to take any of the necessary steps to protect Andrew. Father's inaction resulted in near death and acute kidney damage that caused Andrew "great pain and suffering" requiring the juvenile to be in the intensive care unit for multiple days on multiple occasions. We affirm the trial court's conclusion that Andrew met the statutory criteria of an abused juvenile.

B. Adjudication of Neglect

Father argues the trial court erred by adjudicating Andrew as neglected when Father did his best to control Andrew's diabetes; however, Father does not challenge any of the trial court's findings. Based on a thorough review of the uncontested findings of fact by the trial court, this argument is without merit.

N.C. Gen. Stat. § 7B-101(15) reads in pertinent part:

> 15) Neglected juvenile.–Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.
>
> . . .
>
> c. Has not provided or arranged for the provision of necessary medical or remedial care.
>
> . . .
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.

"[I]n concluding that a juvenile lives in an environment injurious to the juvenile's welfare, N.C. [Gen. Stat.] § 7B-101(15), the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693,

698 (2019). Further, the Supreme Court stated, "[i]n order to adjudicate a juvenile neglected, our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide 'proper care, supervision, or discipline.' " *Id.* Specifically, neglect has been found in cases where "the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003).

In the case *sub judice*, the trial court made numerous findings by clear and convincing evidence that Father continuously failed to monitor Andrew's blood sugar and insulin use which resulted in serious near-death injuries. Specifically, the trial court found:

> 14. On or about March 19, 2023, Forsyth County Department of Social Services (FCDSS) received a Child Protective Services report alleging improper care, and improper medical/remedial care. [Andrew] was not receiving proper medical care for his Type 1 Diabetes; his parents were not giving him insulin appropriately or regularly. [Andrew] was being admitted to the ICU due to his blood sugar being 966. Reportedly, his parents expected [Andrew] to manage his blood sugar and medication, which is not appropriate for a 9 year old.
>
> 15. FCDSS social worker Janet Riley-Wright met with [Andrew], his mother [ ], his father [ ], and hospital staff on March 20, 2023, and confirmed that [Andrew] was not receiving the appropriate medical care for his diabetes. As of that date, [Andrew] had been hospitalized three times in the previous six months due to Diabetes Ketoacidosis (DKA). Additionally, medical staff stated he had Lipohypertrophy, which is the condition that involves insulin settling in frequently injected areas and not traveling through the body appropriately. [Mother] and [Father] confirmed that [Andrew] was in charge of managing his diabetes and blamed him for his poor eating habits. Additionally, his parents were not consistent with [Andrew's] medical appointments. They also blamed the current hospitalization on [Andrew] going to a birthday party at a friend's house, but [Father] could not remember the name of the woman who hosted the party. . . .

17. . . . During in Home Services, [Father] missed several medical appointments; July 14, July 25 and on August 14, 2023. . . .

19. On or about October 2, 11, and 23, [Andrew] was admitted to Brenner Children's Hospital due to Diabetes Ketoacidosis and his blood sugar levels being elevated.

20. . . . on October 23, 2023, . . . [Father] was heard saying to [Andrew] "you should have told me last night you needed insulin."

23. On or about November 30, 2023, [Andrew] completed a Child Medical Exam (CME) with Dr. Meggan Goodpasture. Dr. Goodpasture's evaluation found that [Andrew] has had many admissions secondary to medical neglect, and multiple life-threatening events due to the medical neglect. She also stated that "excessive training and education for all family members involved including father has been documented repeatedly in the medical record." Dr. Goodpasture concluded that "[Andrew] continues to be at tremendous risk for serious bodily harm and death due to repeated medical neglect as documented over the years and reported to CPS in his medical record. His medical needs due to his DM are tremendous and require consistent and thorough care."

24. On or about November 30, 2023, FCDSS received a second report alleging improper discipline, improper medical/remedial care, injurious environment, and domestic violence. On Sunday, November 26, 2023, [Father] was mad at [Andrew] because his blood sugar was high, so [Father] hit him on the arm and leg with his hand. [Father] also grabbed the child by the shirt and threw him on the coach and slapped him on the head. [Father] was cursing and yelling at him and stated, "you must want me to go to jail."

27. On or about December 27, 2023, a Child and Family Team meeting was held with [Father] regarding his non-compliance with the In-Home Services plan to ensure [Andrew's] safety. [Father] became frustrated during the meeting and refused to engage. [Father] again stated that it's not his fault [Andrew] sneaks food and eats what he wants when he goes out in the neighborhood.

> When it was discussed that he needs supervision, [Father] responded that people need to sleep and he cannot watch him all the time. When the concerns from the CME were discussed, [Father] acknowledged he hit [Andrew] in the head but said it was not like he punched him. [Father] became verbally upset during the meeting and said he wanted his son back home. [Father] could not state anything he would do differently to ensure his son was safe in his home. . . . When asked about [Andrew's] next appointments, [Father] said he did not know when they were and did not know how to log into MyChart to figure it out. . . .
>
> 28. On or about December 29, 2023 social work supervisor Coble met with [neighbor] regarding [Andrew] and asked [Andrew] when the last time he checked his blood sugar; [Andrew] reported it was three days ago and was at his brother, [ ] house. Social work supervisor Coble observed the last blood sugar level was 520. Social work supervisor Coble asked [Andrew] to check while she was present, and the blood sugar level was 415. . . . Social work supervisor Coble contacted [Father] about [Andrew's] blood sugar level. Upon arrival, [Father] asked [Andrew] what he had been eating and instructed him to use his insulin. . . . Social work supervisor Coble observed as [Andrew] gave the insulin shot in his right arm. [Father] instructed [Andrew] to wait 30 minutes and recheck his blood sugar levels. When it was checked again, it was 492. Social work supervisor Coble asked [Father] to contact EMS; at first [Father] refused to call EMS and advised [Andrew] to use his insulin again in his leg, instead of his arm. Social work supervisor Coble advised [Father] to contact EMS due to life threatening blood sugar levels. [Father] was hesitant but contacted EMS. Social work supervisor Coble waited for EMS. Upon arrival, [Andrew] was take to Brenner Children's Hospital for further evaluation. . . . [Father] was supposed to take [Andrew] to a diabetes management appointment on January 2, 2024, but called and rescheduled the appointment until January 23, 2024. [Father] reported that he overslept and was unable to attend this appointment.

These findings support the trial court's conclusion that Andrew meets the criteria under N.C. Gen. Stat. § 7B-101(15) as a neglected

juvenile. Father was repeatedly informed of the risks associated with Andrew's diabetes not being monitored by an adult, was taught how to monitor and medicate him, witnessed the repeated hospitalizations required when Andrew suffered from diabetic ketoacidosis as a result of dangerously high blood sugar levels and still refused to accept responsibility for the monitoring and management of his son's serious medical condition. This clearly constituted a pattern of conduct that both caused injury and potentially would cause further injury to the juvenile.

III. Conclusion

The trial court made fifty-nine uncontested findings of fact which adequately support by clear and convincing evidence its conclusions that the juvenile is abused and neglected. When a parent is aware of their child's serious medical issue and fails to provide or acquire the necessary medical care, which causes injury to the child and places the child at risk of serious physical harm or death, this failure can constitute both abuse and neglect of the child. Accordingly, we affirm the trial court's adjudication order.

AFFIRMED.

Judges ARROWOOD and FLOOD concur.

IN THE MATTER OF K.E.P., A JUVENILE

No. COA24-792

Filed 16 April 2025

1. Child Abuse, Dependency, and Neglect—abuse and neglect—adjudicatory findings of fact—evidentiary support

In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical exams), the district court's findings of fact challenged by respondent-mother were supported by clear, cogent, and convincing evidence, including: (1) child welfare reports that were properly admitted pursuant to the business records exception to the general bar on hearsay; (2) testimony from doctors whose opinions were properly based on out-of-court

statements made for the purpose of medical treatment and a written child medical examination (which itself had been admitted); and (3) testimony from a child protective services worker, about which the court made credibility determinations.

2. Child Abuse, Dependency, and Neglect—abuse and neglect—adjudicatory findings of fact—ambiguity resolved

In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical exams), the district court's adjudicatory findings of fact did not lack clarity about respondent-mother's role in causing the child to undergo three vaginal exams where, although the evidence was unclear about whether respondent-mother or the maternal grandmother took the child to the hospital, the court specifically found that respondent-mother gave permission for each of the exams to be undertaken.

3. Child Abuse, Dependency, and Neglect—abuse and neglect—adjudicatory findings of fact—no finding of bad faith required

In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical examinations), the district court did not err in failing to determine whether respondent-mother acted in bad faith in making the sexual abuse reports because the Juvenile Code does not require bad faith by a parent for a juvenile adjudication; rather, in determining whether a child is abused or neglected, the circumstances and conditions surrounding the child—not the fault or culpability of a parent—are the determinative factors.

Appeal by respondent-mother from orders entered 10 April 2024 and 3 May 2024 by Judge Shelly S. Holt in Sampson County District Court. Heard in the Court of Appeals 18 March 2025.

Mary McCullers Reece and The Law Office of W. Joel Starling, Jr. PLLC, by W. Joel Starling, Jr., for petitioner-appellee Sampson County Department of Social Services.

NC Guardian Ad Litem Program, by Michelle FormyDuval Lynch, for appellee guardian ad litem.

BJK Legal, by Benjamin J. Kull, for respondent-appellant mother.

ZACHARY, Judge.

Respondent-Mother appeals from the trial court's orders adjudicating her minor child "Karina"[1] to be an abused and neglected juvenile and placing Karina in the sole legal and physical custody of Respondent-Father. After careful review, we affirm.

I. Background

Karina was born to Respondents in April 2018, when they were living in Cumberland County. Within months of Karina's birth, Respondents' relationship drastically deteriorated, with each parent making allegations of domestic violence against the other. Respondent-Mother filed an action seeking custody of Karina in 2018. In 2019, a child custody order was entered in Cumberland County District Court awarding Respondent-Mother custody of Karina and granting Respondent-Father visitation.

From 2018 to 2021, the Cumberland County Department of Social Services ("CCDSS") received five child welfare reports concerning Respondent-Father's alleged maltreatment of Karina. The first report was not investigated, and CCDSS determined that the allegations of the next four reports were unsubstantiated. Nevertheless, after receiving the fifth report, CCDSS sought to have a child medical examination conducted on Karina. Dr. Danielle Thomas-Taylor initially objected to performing the examination, as Karina had already been evaluated for sexual allegations twice before and Dr. Thomas-Taylor believed that further physical examination could be traumatic for Karina.

By 2021, Karina and Respondent-Mother were living in Sampson County with Karina's maternal grandmother and step-grandfather. On 23 March 2021, the Sampson County Department of Social Services ("SCDSS") received its first child welfare report that Respondent-Father had sexually abused Karina. Dr. Thomas-Taylor agreed to conduct a child medical examination in the hopes that this would "potentially . . . stop having [Karina] evaluated so many times and give the family an answer and recommendations for moving forward for the safety and well-being of their child." SCDSS determined that the allegations were unsubstantiated; however, in her written report ("the CME"), Dr. Thomas-Taylor expressed "concerns for the frequency with which [Karina] has presented to the emergency department with request for thorough evaluation for concerns of sexual abuse."

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1. For ease of reading and to protect the identity of the minor child, we use the pseudonym to which the parties stipulated. *See* N.C. R. App. P. 42(b).

In July 2021, SCDSS received two more child welfare reports alleging Respondent-Father's maltreatment of Karina. Further involvement by SCDSS in Karina's case led a child protective services worker to develop "concerns for control and manipulation" of Respondent-Mother. SCDSS determined that Dr. Maria O'Tuel should perform a child and family forensic evaluation ("the CFE") "to help determine the presence or absence of abuse, to determine the extent of abuse or neglect if found," and to provide a basis for informed treatment recommendations.

As part of the CFE, Dr. O'Tuel conducted interviews and reviewed Karina's medical records and reports drafted by child protective services workers from both counties, including the CME. Dr. O'Tuel concluded, *inter alia*, "that it was highly improbable that [Karina] had been sexually abused as alleged" and instead "concluded that it was highly likely that [Karina] had sustained some emotional abuse" by Respondent-Mother and her family. Consistent with Dr. O'Tuel's recommendations, SCDSS attempted to implement a safety plan allowing Karina to reside with Respondent-Father, but Respondent-Mother refused to agree to its terms.

On 8 September 2021, SCDSS filed a juvenile petition alleging that Karina was an abused and neglected juvenile. SCDSS obtained nonsecure custody of Karina that same day and placed her with Respondent-Father.

This matter came on for hearing on 26 February 2024 in Sampson County District Court. Child protective services workers from CCDSS and SCDSS testified, as did Dr. Thomas-Taylor and Dr. O'Tuel. The CME and the five child welfare reports alleging Respondent-Father's maltreatment of Karina that were received by CCDSS were admitted into evidence; however, the CFE and various hospital and medical records upon which the CME was partially based were not.

On 10 April 2024, the trial court entered an order in which it adjudicated Karina to be an abused and neglected juvenile. On 3 May 2024, the court entered its disposition order, determining that it was in Karina's best interests for Respondent-Father to be granted sole legal and physical custody of Karina and for Respondent-Mother to be granted visitation. That same day, the court entered a Chapter 7B-911 custody order to that effect. *See* N.C. Gen. Stat. § 7B-911 (2023).

Respondent-Mother timely filed notice of appeal.

II. Discussion

On appeal, Respondent-Mother challenges the evidentiary support for several of the trial court's adjudicatory findings of fact and further contends that the adjudicatory findings lack necessary clarity. Finally,

she argues that the adjudication order "must be reversed because even as written, the adjudicatory findings lack one necessary factual determination: that the reports of Karina's suspected sexual abuse were somehow made in bad faith." We disagree.

A. Standard of Review

In an appeal from an initial adjudication in a juvenile proceeding, "the sole question for the reviewing court is whether the trial court's conclusions of law are supported by adequate findings and whether those findings, in turn, are supported by clear, cogent, and convincing evidence." *In re A.J.*, 386 N.C. 409, 411–12, 904 S.E.2d 707, 711 (2024) (cleaned up). "When assessing whether a particular finding is supported by clear, cogent, and convincing evidence, the reviewing court must consider any properly preserved challenges to the admission of the supporting evidence." *Id.* at 412, 904 S.E.2d at 711.

It is well established that "the North Carolina Rules of Evidence apply at the adjudication stage of these juvenile proceedings. Thus, statements that constitute inadmissible hearsay are not clear, cogent, and convincing evidence on which the trial court may rely." *Id.* (citation omitted). "Assuming an evidentiary objection is properly preserved, a party may argue on appeal that any findings supported solely by inadmissible evidence are infirm and cannot support the trial court's conclusions of law." *Id.*

Moreover, "[i]n a non-jury [juvenile] 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. If competent evidence supports the findings, they are binding on appeal." *In re L.Z.A.*, 249 N.C. App. 628, 632, 792 S.E.2d 160, 165 (2016) (cleaned up).

B. Analysis

On appeal, Respondent-Mother raises a series of arguments concerning the sufficiency of the trial court's findings of fact in the adjudication order, which she contends must be reversed. She further asserts that if her arguments succeed, then "the disposition order—as well as the private custody order resulting from it—must also be reversed." However, she offers no independent arguments concerning those orders; her appeal rests entirely on the sufficiency of the adjudication order.

The trial court adjudicated Karina to be an abused juvenile pursuant to N.C. Gen. Stat. § 7B-101(1)(e) and a neglected juvenile pursuant to § 7B-101(15)(a) and (e). A juvenile may be adjudicated as abused if the

juvenile's parent, guardian, custodian, or caretaker "[c]reates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others." N.C. Gen. Stat. § 7B-101(1)(e). A juvenile may be adjudicated as neglected if the juvenile's 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." *Id.* § 7B-101(15)(a), (e).

1. Evidentiary Support for Adjudicatory Findings

[1] We first address Respondent-Mother's argument that many of the trial court's adjudicatory findings of fact were "based on evidence that was not offered to prove the truth of the matter(s) contained therein" and therefore "cannot be considered" in our appellate review of whether the court's findings support the conclusions of law. In particular, Respondent-Mother focuses on findings of fact that she alleges were based on evidence received at the hearing (1) "for explaining the background of SCDSS's investigation," and (2) "for explaining the factual bases of the two experts' opinions."

As an initial matter, the guardian ad litem contends that many of Respondent-Mother's arguments concerning the findings of fact "are broadside challenges stating the finding relied on evidence that was either not admitted into evidence or does not contain the information in the finding with no reference to objections, acknowledgment of testimonial evidence supporting the finding, and little to no citation to legal authority." It is well established that a single general challenge to "the sufficiency of the evidence to support numerous findings of fact is broadside and ineffective." *In re K.D.*, 178 N.C. App. 322, 327, 631 S.E.2d 150, 154 (2006) (cleaned up). We agree that Respondent-Mother wages broadside attacks against many of the findings of fact that she challenges, including findings #11–20, 22–24, 38–39, and 52. However, even assuming, *arguendo*, that the general thrust of Respondent-Mother's arguments provides sufficient support for review of these challenges, they still lack merit.

a. Child Welfare Reports

The first two groups of findings that Respondent-Mother challenges are those based on the five child welfare reports concerning Karina that CCDSS received, all of which were admitted into evidence pursuant to the business records exception to the hearsay rule. Because

Respondent-Mother's argument regarding these reports is based on a misunderstanding of this exception to the hearsay rule, we begin with a brief overview of that rule.

"Hearsay" is defined by our Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). "Hearsay is not admissible except as provided by statute or by" the Rules of Evidence. *Id.* § 8C-1, Rule 802. One such exception is the business records exception, "which provides that business records of regularly conducted activity are not excluded by the hearsay rule, even though the declarant is unavailable as a witness." *In re S.D.J.*, 192 N.C. App. 478, 482, 665 S.E.2d 818, 821 (2008); N.C. Gen. Stat. § 8C-1, Rule 803(6).

Rule 803(6) provides that the following types of evidence, if properly authenticated, are not excluded by the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation . . . .

N.C. Gen. Stat. § 8C-1, Rule 803(6).

The records of a juvenile case, kept by a department of social services, upon which a child protective services worker relies in her testimony, may qualify as a business record under this exception. *In re C.R.B.*, 245 N.C. App. 65, 69–70, 781 S.E.2d 846, 850–51, *disc. review denied*, 368 N.C. 916, 787 S.E.2d 23 (2016). As this Court has recognized, "even though a witness's knowledge was limited to the contents of . . . [a parent]'s file with which [s]he had familiarized h[er]self, [s]he could properly testify about the records and their significance so long as the records themselves were admissible under the business records exception to the hearsay rule." *Id.* at 69, 781 S.E.2d at 850 (cleaned up).

Qualifying business records are admissible under Rule 803(6) "when a proper foundation is laid by testimony of a witness who is familiar with the records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *Id.* at 70,

781 S.E.2d at 850 (cleaned up). "While the foundation must be laid by a person familiar with the records and the system under which they are made, there is no requirement that the records be authenticated by the person who made them." *Id.* at 70, 781 S.E.2d at 850–51 (cleaned up).

At the hearing below, SCDSS consistently maintained that it was offering the child welfare reports into evidence pursuant to the business records exception to the hearsay rule, and our careful review of the transcript clearly shows that the trial court admitted all five reports under this exception. Indeed, Respondent-Mother's counsel acknowledged as much when she objected to the records' admission—arguing that the records were, in fact, being offered as substantive evidence—and when she subsequently renewed her objection to the court's ruling on the grounds of "authentication, hearsay, and no business record exception."

On appeal, Respondent-Mother does not argue that these child welfare reports were improperly admitted pursuant to the business records exception. Respondent-Mother does not challenge the reports' admission into evidence, nor does she raise any of her arguments that were more vigorously asserted below regarding the reports' authentication and any alleged hearsay therein. Instead, she argues that the findings of fact based on the child welfare reports should be treated as "non-substantive evidentiary findings." *In re A.J.L.H.*, 384 N.C. 45, 52, 884 S.E.2d 687, 692, *reh'g denied*, 384 N.C. 670 (2023). This argument fails for several reasons.

In support of her argument, Respondent-Mother relies upon *A.J.L.H.* and *In re Mashburn*, 162 N.C. App. 386, 591 S.E.2d 584, *appeal dismissed*, 359 N.C. 68, 603 S.E.2d 884 (2004). However, the portions of these cases relevant to Respondent-Mother's argument concern *admissible nonhearsay*, rather than *hearsay properly admitted* pursuant to the business records exception, as was the case here. *See A.J.L.H.*, 384 N.C. at 52, 884 S.E.2d at 692; *Mashburn*, 162 N.C. App. at 392–93, 591 S.E.2d at 589.

Respondent-Mother's citation to *A.J.L.H.* is particularly inapposite because, in a portion of this Court's opinion that was not appealed to our Supreme Court, we upheld the trial court's finding of fact summarizing the details of previous child welfare reports that were admitted into evidence as properly authenticated business records. *In re A.J.L.H.*, 275 N.C. App. 11, 19–20, 853 S.E.2d 459, 466 (2020), *rev'd and remanded on other grounds*, 384 N.C. 45, 884 S.E.2d 687 (2023). Indeed, it is well established that properly authenticated records kept by a department of social services in a juvenile matter may be "admissible under the business

records exception to the hearsay rule." *In re Smith*, 56 N.C. App. 142, 148, 287 S.E.2d 440, 444, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982).

In that Respondent-Mother neither claims that the reports were not properly authenticated, nor raises any concern of double-hearsay within the reports, she has thus abandoned any such arguments on appeal. *See* N.C. R. App. P. 28(b)(6). The argument that she does raise lacks merit, and therefore her challenge to the court's adjudicatory findings #11–15, 29, 38–39, and 61 is overruled.

b. Bases for Expert Opinions

Respondent-Mother next challenges a series of adjudicatory findings based upon the testimony of Dr. Thomas-Taylor and Dr. O'Tuel, asserting that "the evidence that forms the factual basis for an expert's opinion is not admissible for the truth of the matter(s) asserted therein." She claims that therefore any of the trial court's findings of fact based on this type of evidence—such as "the experts' testimony regarding the content of the hospital/medical records and the content of interviews they conducted in the course of forming their opinions, or the [CME]"—"are not findings regarding the truth of the matters asserted therein" and "serve no practical purpose" in our appellate review of the adjudication order.

However, the CME was admitted into evidence. At the hearing, SCDSS not only offered the CME into evidence on the ground that it contained "the information that formed the basis of [Dr. Thomas-Taylor's] conclusions" as an expert witness, but it also noted that the out-of-court statements within the CME were "made for the purposes of a medical evaluation or medical treatment" and were therefore admissible hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 803(4) (providing that out-of-court "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history" are not excluded by the hearsay rule). The trial court admitted the CME—which Respondent-Mother admits "also discussed" the factual bases for the experts' opinions—with the explanation that "any statements [in the CME] made by other individuals were done as the basis of preparing her, conducting her examination and . . . the foundation of her conclusions." Consequently, the CME was admitted not only as the basis for expert testimony but also as statements made for purposes of medical treatment. *See id.* Again, Respondent-Mother's counsel confirmed this when she subsequently noted her objections for "lack of foundation, hearsay, and various other violations of [Respondent-Mother]'s constitutional state and federal rights."

On appeal, however, Respondent-Mother raises no argument concerning the CME's admission into evidence, nor does she challenge any

potential hearsay statements contained therein. As a result, any such arguments are abandoned. *See* N.C. R. App. P. 28(b)(6). The trial court properly considered the CME when making its findings of fact. In that the CME, with its descriptions of Karina's medical history, supports the challenged portions of findings #16–20, 22–24, 31–32, 35, 37, 48, 50, 52, 55, and 57–59, these challenges are likewise overruled.

c. Other Challenged Findings

In addition to the two primary groups of findings that Respondent-Mother challenges, she also challenges several others on a variety of grounds that are similarly unsuccessful. For example, Respondent-Mother challenges finding of fact #6, but that finding is unnecessary to support the trial court's conclusions of law and thus may be disregarded. *See*, *e.g.*, *In re J.K.*, 253 N.C. App. 57, 60, 799 S.E.2d 439, 441–42 (2017) ("[E]rroneous findings that are unnecessary to support the trial court's conclusions of law may be disregarded as harmless." (citation omitted)).

We further note that challenged findings of fact #38–39, 49, and 61 are supported by the testimony of a SCDSS child protective services worker. To the extent that Respondent-Mother challenges findings #49 and 60 as mere recitations of testimony, we note that these findings appropriately carry "indication[s] that the trial court evaluated the credibility of the relevant witness[es] or resolved any contradictions in [their] testimony." *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021). Moreover, to the extent that Respondent-Mother asks us to reconsider the trial court's credibility determinations regarding the various testifying witnesses from the adjudication hearing below, it is not the role of this Court to question such credibility determinations on appeal. *See In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019) ("[A]n important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because the trial court is uniquely situated to make this credibility determination that appellate courts may not reweigh the underlying evidence presented at trial.").

Finally, as Respondent-Mother aptly notes, challenged findings #63–64 are actually conclusions of law, which we treat as such on appeal. *See*, *e.g.*, *In re K.J.M.*, 288 N.C. App. 332, 341–42, 886 S.E.2d 589, 596 (2023).

As indicated herein, our careful review of the record reveals that the unchallenged findings, combined with the challenged findings of fact that are supported by clear, cogent, and convincing evidence, amply support

the trial court's conclusions of law. Therefore, Respondent-Mother's evidentiary arguments are overruled.

2. Clarity of Findings

[2] Respondent-Mother next argues that "the adjudicatory findings lack the clarity needed to determine whether [she] 'allowed' the non-caretaker Maternal Grandparents to take Karina to the hospital for three vaginal exams." This argument is wholly without merit.

Respondent-Mother contends that "the adjudicatory findings fail to specifically identify *who* took Karina to the hospital for those emergency room visits and exams." Instead, she notes that finding of fact #16 "says that it was either [Respondent]Mother, Maternal Grandmother, 'and/or' Maternal Grandfather who took her." Critically, finding of fact #18 explains that Respondent-Mother "either took [Karina] to these emergency room visits herself *or gave permission* for [Karina] to receive medical treatment during the emergency room visits." (Emphasis added).

This finding of fact satisfies the "allows to be created" elements of the definitions of abused and neglected juveniles. N.C. Gen. Stat. § 7B-101(1)(e), (15)(e). As this finding of fact—which resolves the alleged ambiguity that Respondent-Mother sees—is binding on appeal, as discussed above, Respondent-Mother's argument is meritless. As the guardian ad litem notes: "There is no ambiguity; it is clear that Respondent[-]Mother either took Karina to the ER when invasive physical exams were completed, or allowed the maternal grandparents to take her." Respondent-Mother's clarity argument is also overruled.

3. Failure to Find Bad Faith

[3] Finally, we address Respondent-Mother's argument that the trial court erred "because even as written, the adjudicatory findings lack one necessary factual determination: that the reports of Karina's suspected sexual abuse were somehow made in bad faith."

First, this is essentially a policy argument, wherein Respondent-Mother presages "a terrifying dilemma for any parent." According to Respondent-Mother: "If you withhold your suspicions [of sexual abuse] out of fear of being wrong, then you risk criminal liability; but if you report your suspicions and end up being wrong, then even if you acted in good faith, your mistaken reporting can be used against you and your family." But such rhetoric is ineffective, as we remain "an error-correcting body, not a policy-making or law-making one." *In re I.B.*, 262 N.C. App. 402, 408, 822 S.E.2d 472, 476 (2018) (citation omitted), *abrogated on other grounds by In re L.E.M.*, 372 N.C. 396, 831 S.E.2d 341 (2019).

Second, and more fundamentally, there is simply no requirement in our Juvenile Code that a parent's reports of suspected sexual abuse must be made in bad faith in order to adjudicate a juvenile as abused or neglected. In support of her contention, Respondent-Mother cites the immunity provision of N.C. Gen. Stat. § 7B-309, which states that a person who makes "a good-faith report of child abuse or neglect . . . is immune from any civil or criminal liability that might otherwise be incurred or imposed for that action provided that that person was acting in good faith." N.C. Gen. Stat. § 7B-309. She further cites our Supreme Court's statement that § 7B-309 "is intended to encourage citizens to report suspected instances of child abuse without fear of potential liability if [the] report [is] made in good faith." *Dobson v. Harris*, 352 N.C. 77, 82, 530 S.E.2d 829, 835 (2000). These citations are unavailing.

As SCDSS aptly observes, "the adjudication of a child as neglected or abused is not a matter of monetary damages or 'civil liability' for her parents. As such, the cooperation requirement of N.C. Gen. Stat. § 7B-309 cannot provide 'cover' against adjudications of abuse or neglect."

Moreover, with specific regard to neglect, it is well established that "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).[2]

Indeed, this Court recently reviewed a similar case involving a mother's treatment of her children amidst an investigation of reported allegations of sexual abuse against the children's father. *In re B.C.*, No. 23-830, 2025 WL 850051, slip op. at *5 (N.C. App. Mar. 19, 2025). "[A]lthough the DSS investigation into the allegations of the father's alleged sexual abuse remained ongoing, DSS was sufficiently concerned about [the r]espondent-[m]other's actions to file juvenile petitions" alleging that the children were abused, neglected, and dependent. *Id.*

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2. Respondent-Mother claims that this oft-cited precedent is no longer good law, asserting that recent legislative amendments to N.C. Gen. Stat. § 7B-101(15) have "brought the definition of 'neglected juvenile' in line with that for 'abused juvenile,' which is likewise written in terms of the parent's (or other caregiver's) actions, rather than the child's conditions or circumstances." (Citation omitted). We disagree.

Notwithstanding the supposedly precedent-altering legislative amendments that Respondent-Mother cites, this Court has continued to cite this well-known proposition from *Montgomery* as good law. *See, e.g.*, *In re M.C.*, 286 N.C. App. 632, 641, 881 S.E.2d 871, 878 (2022). Our Supreme Court has not overruled *Montgomery*, "and this Court is bound by precedent from our Supreme Court." *In re N.R.R.N.*, 297 N.C. App. 673, 680, 911 S.E.2d 510, 516 (2025).

On appeal, the respondent-mother argued, *inter alia*, "that she was not able to present 'a full defense' " because "she was not able to present evidence that the father had sexually abused [the children] such that her actions in light of that belief were justified, appropriate, and could not have constituted abuse or neglect of the children." *Id.* at *20. This Court was unpersuaded and instead approvingly cited the trial court's findings that the respondent-mother did "not appear to understand the nuances of what DSS's investigation entailed"; "that DSS's role was to monitor and try to create a plan"; and further, that "*whether the father ha[d] sexually abused these children or not* and *whether the sexual abuse happened or not*, [the children] ha[d] been traumatized by the way that [the r]espondent-[m]other ha[d] handled the situation with them." *Id.* at *23 (cleaned up).

Here, Respondent-Mother's claim that the trial court erred by failing to make an adjudicatory finding of bad faith is likewise misguided and reflects a similar misunderstanding of the focus of the proceedings at the adjudication phase. As illustrated by *B.C.*, when a parent's reports of sexual abuse precipitate further investigation in an ongoing juvenile case, the proper focus of the trial court in an adjudication hearing is on *the effect of those reports—and their investigation—on the child*, not the sincerity of the parent's reporting. *See id.* at *19.

This argument is also overruled.

III. Conclusion

For the foregoing reasons, the trial court's adjudicatory order is affirmed. Because Respondent-Mother raises no independent arguments concerning the disposition order or the private custody order, those orders are also affirmed.

AFFIRMED.

Judges STROUD and COLLINS concur.

IN RE L.Q.

No. COA24-571

Filed 16 April 2025

1. Termination of Parental Rights—Indian Child Welfare Act—inquiry into child's heritage—"at the commencement of the proceeding"—hearing held after twelve continuances

An order terminating a father's parental rights in his son—and finding that the child was not an "Indian child" for purposes of the Indian Child Welfare Act (ICWA)—was affirmed because, although the case was continued twelve times after the termination petition was filed, the trial court had complied with ICWA's requirement to inquire into the child's possible Indian heritage "at the commencement of the proceeding," where it conducted the inquiry during a pre-trial hearing, which—because it was the first hearing held after the filing of the petition and after all twelve continuances—provided the first opportunity for the court to conduct the inquiry.

2. Termination of Parental Rights—initial hearing on petition—continued for more than 90 days—father's failure to petition for writ of mandamus

In a termination of parental rights (TPR) case, where the initial hearing on the petition to terminate a father's rights did not occur until seventeen months after the petition was filed, since the trial court had continued the case twelve times (including for reasons related to the COVID-19 pandemic), the father failed to file a petition for a writ of mandamus while the TPR petition was pending and therefore missed his opportunity to seek a remedy for what he argued was a violation of N.C.G.S. § 7B-1109(d) (providing that courts may continue an initial hearing on a TPR petition "for up to 90 days" after the petition's filing).

Appeal by Respondent-Father from order entered 25 October 2023 by Judge J. Frank Wood in Harnett County District Court. Heard in the Court of Appeals 18 March 2025.

Duncan B. McCormick for Petitioner-Appellee Harnett County Department of Social Services.

K&L Gates, LLP, by Sophie Goodman, for Guardian ad Litem.

Emily Sutton Dezio for Respondent-Appellant Father.

COLLINS, Judge.

Father appeals the termination of his parental rights to his minor child, Lou.[1] Father argues that the trial court (1) failed to conduct an Indian Child Welfare Act ("ICWA") inquiry at the commencement of the action terminating his parental rights and (2) violated Father's due process rights when it failed to comply with N.C. Gen. Stat. § 7B-1109(d) and continued this case for more than ninety days before holding an initial termination of parental rights hearing. We find no merit in these arguments and affirm the trial court's order.

I. Background

Mother and Father are the biological parents of Lou, a minor child born in July 2017. Mother and Father were never married but had an on-and-off relationship that produced two children. Mother also had two other children with two other fathers; those children were adjudicated neglected and dependent in 2016.[2] Johnston County Department of Social Services ("DSS") became involved with Mother and Father in 2016 because of a history of domestic violence, substance abuse issues, and concerns for untreated mental health issues for both Mother and Father. In light of this history, DSS again became involved with the family shortly after Lou's birth due to concerns for his wellbeing. Father was in jail at the time of Lou's birth, and DSS formulated a case plan for him to begin upon his release. DSS noted that, prior to going to jail, Father: did not have stable housing; did not cooperate with DSS; refused to address the allegations of substance abuse; refused to take drug tests; acknowledged his history of domestic violence; violated safety assessments put in place by DSS; failed to attend psychological evaluations and counseling appointments; and "engaged in criminal activity resulting in new criminal charges."

On 29 January 2018, DSS filed a petition alleging that Lou was neglected and took nonsecure custody of Lou that same day. On 27 April 2018, the trial court entered its adjudication order, finding in relevant part that it had "inquired of the participants with respect to possible Indian heritage," that "[t]he participants are not reporting any Indian

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

2. Mother is not a party to this appeal, and Lou's siblings are not subjects of this appeal.

heritage," and that Father "is not a member of an Indian tribe." The trial court found that: Father was in jail at the time of the filing of the petition and remained in jail as of the time of the adjudication hearing; Lou did not receive proper care, supervision, or discipline; Lou lived in an environment injurious to his welfare prior to the filing of the petition; and Lou was exposed to a substantial risk of physical, mental, or emotional impairment prior to the filing of the petition. The trial court concluded that Lou was a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(15), and it moved to the disposition phase of the hearing.

During the disposition phase, the trial court found that Father was still incarcerated, and it was not in Lou's best interest to "award a minimum period or frequency of visitation to [Father] while he is in jail." The trial court ordered that Father enter into and comply with a services agreement with DSS, which included notifying DSS of his release from jail; obtaining a substance abuse assessment; complying with substance abuse treatment; completing random drug screens; enrolling in parenting classes; completing domestic violence prevention classes; and participating in "any relevant programs and services available to him while in jail or prison." The trial court found that it was in Lou's best interest to remain in DSS custody and scheduled a permanency planning hearing for July 2018.

In a permanency planning review order entered on 8 March 2019, the trial court found that Father was released from jail in September 2018, had not made any progress on his case plan, and was "now jailed in Johnston County." The trial court concluded that it was in Lou's best interest to remain in DSS custody, and it was not in Lou's best interest to visit with Father. The trial court again directed Father to comply with his case plan with DSS and scheduled a permanency planning review hearing for 5 April 2019.

In a permanency planning review order entered on 28 June 2019, the trial court again found that Father had not made any progress on his case plan and that he was "now jailed in a county jail" and "has pending criminal charges." The trial court found that "[c]ontinued reunification efforts clearly would be unsuccessful with . . . [Father]. Reunification efforts should be ceased." The trial court concluded that it was in Lou's best interest to remain in DSS custody and that Lou's primary permanent plan should be adoption, and it scheduled a permanency planning review hearing for 4 October 2019.

In a permanency planning review order entered on 8 May 2020, the trial court found that Father "maintained contact with DSS" and

"contacted DSS following his release from incarceration," but that Father "has not made or documented significant progress since the [last permanency planning review] hearing." The trial court found that Father was not actively participating in his case plan or cooperating with the plan, DSS or the guardian ad litem. The trial court again found that reunification efforts between Lou and Father would be unsuccessful. The trial court concluded that it was in Lou's best interest to remain in DSS custody and that Lou's primary permanent plan should be adoption, and it scheduled a permanency planning review hearing for 14 August 2020.

On 5 August 2020, DSS filed a petition to terminate Father's parental rights to Lou ("TPR Petition"). DSS alleged that Father's rights should be terminated on the grounds of neglect; willfully failing to make reasonable progress in correcting the conditions which led to Lou's removal; willfully failing to pay a reasonable portion of the cost of care; abandonment; and a prior involuntary termination of Father's parental rights to another child. In the TPR Petition, DSS alleged that Lou "is not an Indian child for the purposes of the Indian Child Welfare Act." Father did not file a response to the TPR Petition.

Between the filing of the TPR Petition and the first hearing on the TPR Petition on 11 March 2022, the trial court entered twelve continuance orders due to various reasons including Father becoming ill, attorneys and court staff contracting COVID-19, and the Court's heavy docket due to COVID-19. No one objected to any of the continuances.

On 11 March 2022, the TPR Petition came on for hearing. During the pre-trial hearing, DSS stated, "[T]he department is not aware of any American Indian heritage or any native American Indian heritage. This case is old enough to where I don't recall what findings were made then, but I believe inquiries were made. . . . We would ask that all participants indicate that they're aware of any American Indian heritage." The trial court asked whether anyone was "aware of any tribal affiliation or any American Indian heritage," and Father's attorney responded, "[Father] informs me his grandmother is Blackfoot Indian." DSS then called Elaine Coley, a worker with DSS, to the stand for direct examination. Coley testified that she was not aware of any possible American Indian heritage with respect to Lou or his parents and that she had not been given any indication that Lou or his parents had "any kind of tribal affiliation." On cross-examination, Father's attorney asked Coley if she ever asked about "whether there was any Indian heritage from [Father]." Coley responded:

> We always, in the very beginning. That's one of the things that we have to look into if there is any possibility of

> Indian heritage. I can't say if I asked myself or if the CPS worker would have asked, but that's something that we thought very early on about Indian heritage.

The trial court continued the hearing to 25 March 2022, at which point it moved to the adjudication phase of the hearing. DSS called Father as a witness and he testified that he had possible "Blackfoot" heritage and that his grandmother's "mama's mama's mama" was "Blackfoot." Father testified that she never showed him any documentation or identification card showing that she was a member of the tribe and that none of his other relatives indicated that they were members of the tribe. On cross-examination by his attorney, Father testified that he had been told he was a member of the "Blackfoot" tribe and had believed that since he was sixteen years old. He also testified that DSS never asked him about Indian heritage. The trial court continued the adjudicatory hearing until 8 April 2022.

At the 8 April 2022 session, Father called his paternal aunt as a witness; Father's attorney asked her about a possible relationship to the "Blackfoot" tribe, and she testified that the only thing she knew was that Father's paternal grandmother was "100 percent Cherokee Indian." Father's aunt was not sure whether Father's paternal grandmother was a member of the Cherokee tribe and testified that she did not have a membership or any documentation to show that she was part of the Cherokee tribe. Father's aunt did not recall any mention of the "Blackfoot" tribe and did not recall any mention of any other tribes.

Father was called to the stand again as a witness, and DSS asked him on cross-examination whether he had heard of any Cherokee heritage. Father testified, "I'm just going to be honest. The reason why I said Blackfoot because I remember when I was 16, my grandmama and everybody, you know, they come to my grandmama house and communicate, socialize. And my grandmama said something about, you know, Blackfoot tribe, so that stuck with me. I didn't know about Cherokee." The trial court continued the hearing until 22 April 2022.

On 22 April 2022, the trial court moved to the disposition phase of the hearing and explained that it was ready to give findings for all issues "except for the native American finding." DSS explained that it was "still waiting" for "letters from the tribes" of Blackfeet and Cherokee. The trial court stated, "I'm going to go ahead and give you findings, but this is all subject to receiving documentation back from the letters that we sent to the tribe. The Court would hold the evidence open for any final determination regarding the tribal affiliation or none thereof."

Over the following seven months, DSS waited to hear back from the three federally recognized Cherokee bands and the federally recognized Blackfeet tribe. On 28 July 2022, the Cherokee Nation indicated that Lou was "not an Indian Child" in relation to Cherokee Nation. On 28 July 2022, the Eastern Band of Cherokee Indians indicated that Lou was "not an Indian Child" as to the Eastern Band of Cherokee Indians. On 20 September 2022, the Blackfeet tribe indicated that Lou was "not an Indian Child" as to the Blackfeet. On 21 November 2022, the United Keetoowah Band of Cherokee Indians indicated that Lou was "not an Indian Child" in relation to the United Keetoowah Band of Cherokee Indians. On 18 April 2023, the trial court held a hearing for "tribal affiliation discussions," and DSS entered the tribal information and responses into evidence without objection.

On 25 October 2023, the trial court entered its order terminating Father's parental rights. The Court found that: it had inquired of the participants as to possible Indian heritage; Father and his aunt were told about possible family connections to Indian tribes; Father described a possible connection to the "Blackfoot" tribe and his aunt described a possible connection to the Cherokee tribe; Father and his aunt did not have any information other than what they had been told by paternal relatives; and Father and his aunt were not members of any tribes. The trial court then found that Lou was not an "Indian Child" in relation to the Blackfeet tribe or any three of the Cherokee bands and concluded that Lou was not an "Indian Child" for purposes of ICWA.

The trial court concluded that grounds existed to terminate Father's parental rights on the grounds of neglect; willfully leaving Lou in foster care for more than twelve months without showing reasonable progress in correcting the conditions which led to Lou's removal; and prior involuntary termination of Father's parental rights to another child. The trial court further concluded that it was in Lou's best interest to terminate Father's parental rights. Father filed his notice of appeal on 25 January 2024.[3]

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3. Father filed a petition for writ of certiorari with this Court on 3 September 2024, explaining that the order terminating Father's parental rights was entered on 25 October 2023, that there is no certificate of service indicating when DSS served Father with the order, and that Father received "actual notice" of the order on 6 December 2023. Father signed his Notice of Appeal with his attorney on 22 December 2023 but, due to miscommunication in his attorney's office and the Christmas holidays, Father's notice of appeal was not filed until 25 January 2024. Father states that his notice of appeal was untimely, as it was filed more than 30 days after the order was entered and after he received actual notice of the order, and he asks this Court to grant his petition for writ of certiorari and reach the merits of the appeal. We grant Father's petition for writ of certiorari.

II. Discussion

Father argues that (1) the "[t]rial [c]ourt's failure to conduct an ICWA inquiry at the commencement of the action violated [Father's] due process rights," and (2) the trial court violated his due process rights when it failed to comply with N.C. Gen. Stat. § 7B-1109(d) and continued this case for more than ninety days before holding an initial termination of parental rights hearing.

1. ICWA

[1] The issue of whether a trial court complied with ICWA requirements is reviewed de novo. *See In re A.P.*, 260 N.C. App. 540, 542-46 (2018). Under de novo review, this Court "considers the matter anew and freely substitutes its own judgement for that of the trial court." *In re M.R.F.*, 378 N.C. 638, 641 (2021) (quotation marks, brackets, and citations omitted).

Congress enacted ICWA "to establish the 'minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes' in order to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' " *In re A.P.*, 260 N.C. App. at 542-43 (quoting 25 U.S.C. § 1902).

Subsection 23.107(a) of Title 25 of the Code of Federal Regulations provides that "[s]tate courts must ask each participant in an . . . involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record." 25 C.F.R. § 23.107(a) (2024).

An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4) (2023). The relevant inquiry is whether the child has a political affiliation with a federally recognized Indian tribe. *In re C.C.G.*, 380 N.C. 23, 29 (2022). "Indian heritage, which is racial, cultural, or hereditary does not indicate Indian tribe membership, which is political." *Id.* at 30; *see* 25 U.S.C. § 1903(4).

A trial court has reason to know an Indian child is involved in a proceeding if: "Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child[.]" 25 C.F.R. § 23.107(c)(2) (2024). When a trial

court has reason to know that a child could be an Indian child, but does not have conclusive evidence, the trial court should confirm and "work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member . . . ." 25 C.F.R. § 23.107(b)(1) (2024).

When a trial court knows or has reason to know that an Indian child is involved in an involuntary custody proceeding, federal law provides:

> [T]he party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe . . . .

25 U.S.C. § 1912(a) (2023).

This Court has "required social service agencies to send notice to the claimed tribes rather than risk the trial court's orders being voided in the future, when claims of Indian heritage arise, even where it may be unlikely the juvenile is an Indian child." *In re A.P.*, 260 N.C. App. at 545 (citations omitted).

Here, the parties do not dispute that the trial court inquired about Lou's possible Indian heritage, nor that, when the trial court had reason to know that Lou may be an Indian child, DSS properly notified the relevant tribes and each tribe confirmed that Lou is not an eligible member.

Father does dispute, however, whether this inquiry was made at the commencement of the termination of parental rights proceedings, and thus whether it was proper under ICWA. The trial court inquired about Lou's potential membership in an Indian tribe at the pre-trial hearing on 11 March 2022. This hearing took place following twelve continuances beginning on 5 September 2020. All twelve continuances were caused by either COVID-19 exposures and regulations, Father's inability to be present, Mother's inability to be present, or a heavy docket. Father argues that, due to the twelve continuances over seventeen months, the inquiry into Lou's possible Indian heritage did not occur at the commencement of proceedings, as is required by 25 C.F.R. § 23.107(a). We disagree.

The record indicates that the 11 March 2022 pre-trial hearing was the first opportunity for the trial court to make an inquiry into Lou's

possible Indian heritage. At the start of the pre-trial hearing, the court asked the parties if "[a]nybody [was] aware of any tribal affiliation or any American Indian heritage?" DSS was not aware of any possible Indian heritage. Father's counsel responded, stating that Father's grandmother is "Blackfoot Indian." At subsequent hearings, the court heard testimony on potential Indian heritage from Father, Mother, Father's paternal aunt, and a social worker. Father stated that his paternal grandmother was "Blackfoot" Indian, while his paternal aunt indicated that she was told the paternal grandmother was Cherokee Indian. No documentation of tribal affiliation was presented at trial. After being given reason to know Lou may be an Indian child, DSS properly notified and received responses from the Blackfeet Tribe, the Cherokee Nation, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians indicating that Lou is not an Indian child.

The record reflects that the trial court properly made the inquiry required by 25 C.F.R. § 23.107(a) at the commencement of the termination of parental rights proceedings and subsequently notified and received responses from the relevant tribes. Therefore, the trial court complied with ICWA.

2. N.C. Gen. Stat. § 7B-1109

[2] Father argues that the trial court violated his due process rights when it failed to comply with N.C. Gen. Stat. § 7B-1109(d) and continued this case for more than ninety days before holding an initial hearing on the petition to terminate his parental rights. Father acknowledges that filing a writ of mandamus is the appropriate remedy for the trial court's failure to hold a timely hearing on a petition to terminate parental rights. However, Father argues that, "considering the time-frames established by the juvenile code for the expeditious resolution of these matters," the trial court "should have moved this case to its conclusion within a reasonable amount of time." We are not persuaded.

This Court reviews whether a trial court complied with N.C. Gen. Stat. § 7B-1109 de novo on appeal. *In re C.V.D.C.*, 374 N.C. 525, 530 (2020).

A writ of mandamus is the proper remedy when the trial court fails to hold a hearing or enter an order as required by statute. *See In re C.R.L.*, 377 N.C. 24, 28 (2021). "A writ of mandamus ensures that the trial courts adhere to statutory time frames without the ensuing delay of a lengthy appeal." *In re T.H.T.*, 362 N.C. 446, 455 (2008). "Moreover, the availability of the remedy of mandamus ensures that the parties remain actively engaged in the district court process and do not 'sit back' and rely upon an appeal to cure all wrongs." *Id.* at 455-56 (citations omitted).

In *In re C.R.L.*, the parent argued that a thirty-three month span between the filing of a termination of parental rights petition and the termination hearing was so egregious a violation of N.C. Gen. Stat. § 7B-1109 that it should be considered "presumptively prejudicial." 377 N.C. at 28. Our Supreme Court held that the appellant's failure to petition for writ of mandamus precluded him from obtaining relief from the violation of N.C. Gen. Stat. § 7B-1109. *Id.* at 29.

Here, as in *C.R.L.*, Father failed to file a petition for writ of mandamus at any point between the filing of the TPR Petition and the conclusion of proceedings to terminate his parental rights. Also like in *C.R.L.*, Father offered no explanation for his failure to file a petition for writ of mandamus. Because Father "did not file a petition for writ of mandamus while the termination petitions were pending, . . . he missed his opportunity to remedy the violation of [N.C. Gen. Stat.] § 7B-1109." *Id.*

III. Conclusion

The record indicates that the trial court properly inquired about Lou's potential Indian heritage at the commencement of termination of parental rights proceedings. After being given reason to know that Lou may be an Indian child within the meaning of ICWA, DSS properly notified and received responses from the relevant Indian tribes. Thus, the trial court complied with ICWA.

Father missed his opportunity to remedy the trial court's violation of N.C. Gen. Stat. § 7B-1109 by failing to file a petition for writ of mandamus during the termination of parental rights proceedings. Accordingly, we affirm the trial court's termination order.

AFFIRMED.

Judges STROUD and ZACHARY concur.

OATES v. BERGER

[298 N.C. App. 550 (2025)]

TIM OATES, PLAINTIFF
v.
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE HOUSE OF REPRESENTATIVES; CAMERON INGRAM, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION; THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION; AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA24-559

Filed 16 April 2025

Constitutional Law—North Carolina—Sunday hunting statute—facial challenge—rational basis

In considering a facial challenge to the constitutionality of an amended version of N.C.G.S. § 103-2 (restricting hunting on Sundays to permitted times, locations, methods, and prey) enacted in the same legislative session during which an amendment to the North Carolina constitution (that was ultimately ratified) protecting the right to hunt and fish was introduced, the Court of Appeals affirmed the decision of the three-judge panel that allowed summary judgment in favor of defendants (government entities connected to the passage or enforcement of the statute) after applying rational basis review and noting that the restrictions ensured that, on Sunday mornings: non-hunters could safely enjoy game lands; residents—including churchgoers—could enjoy respite; and migratory bird populations could be preserved. Additionally, by applying the statutory restrictions, North Carolina received compensatory hunting days from the U.S. Fish and Wildlife Service.

Appeal by plaintiff from order and judgment entered 12 February 2024 by a panel consisting of Judges Daniel A. Kuehnert, Rebecca W. Holt, and Richard K. Harrell in Superior Court, Wake County. Heard in the Court of Appeals 29 January 2025.

Center for Constitutional Rights & Free Trade, by Scott Maitland, for plaintiff.

Attorney General Jeff Jackson, by Deputy Solicitor General Nicholas S. Brod, Solicitor General Ryan Y. Park, Special Deputy Attorney General Olga Vysotskaya de Brito, Solicitor General Fellow Kaeli Czosek, and Assistant Attorney General Benjamin T. Spangler, for defendants.

ARROWOOD, Judge.

Tim Oates ("plaintiff") appeals from an order granting summary judgment in favor of Philip Berger, et al. ("defendants"), on plaintiff's facial challenge to the constitutionality of the Sunday hunting laws of N.C.G.S. § 103-2. For the following reasons, we affirm the lower court's decision.

I. Background

On 25 July 2017, Governor Roy Cooper signed House Bill 559 into law, amending the Sunday hunting laws of North Carolina which up to that point had prohibited all firearm hunting on Sundays, punishable as a Class 3 misdemeanor. 2017 H.B. 559, S.L. 2017-182. The amended law included the following prohibitions in pertinent part:

> (a) Any landowner or member of the landowner's family, or any person with written permission from the landowner, may, subject to rules established by the Wildlife Resources Commission, hunt wild animals and upland game birds with the use of firearms on Sunday on the landowner's property, except that all of the following limitations apply:
>
> (1) Hunting on Sunday between 9:30 A.M. and 12:30 P.M. is prohibited, except on controlled hunting preserves licensed pursuant to G.S. 113-273(g).
>
> . . .
>
> (3) The use of a firearm to take deer that are run or chased by dogs on Sunday is prohibited.
>
> (4) Hunting on Sunday within 500 yards of a place of religious worship, as defined by G.S. 14-54.1(b), or any accessory structure thereof, is prohibited.
>
> . . .
>
> (a1) Any person may . . . hunt wild animals and upland game birds with the use of firearms on Sunday on public lands of the State managed for hunting, except that the following limitations apply:
>
> (1) Hunting on Sunday between 9:30 A.M. and 12:30 P.M. is prohibited.
>
> (2) The use of a firearm to take deer that are run or chased by dogs on Sunday is prohibited.
>
> (3) Hunting on Sunday within 500 yards of a place of religious worship, as defined by G.S. 14-54.1(b), or any accessory structure thereof, is prohibited.

> . . .
>
> (a2) The hunting of migratory birds on Sunday is prohibited unless authorized by proclamation or rules of the Wildlife Resources Commission, subject to the following limitations:
>
> (1) Hunting on Sunday between 9:30 A.M. and 12:30 P.M. is prohibited, except on controlled hunting preserves licensed pursuant to G.S. 113-273(g).
>
> (2) Hunting on Sunday within 500 yards of a place of religious worship, as defined by G.S. 14-54.1(b), or any accessory structure thereof, is prohibited.
>
> . . .

Id. These Sunday hunting laws are codified as N.C.G.S. § 103-2. During the same legislative session, an amendment to the North Carolina Constitution protecting the right to hunt and fish was filed in the Senate, which was ultimately ratified on 25 June 2018. 2018 S.B. 677. This amendment reads as follows:

> The right of the people to hunt, fish, and harvest wildlife is a valued part of the State's heritage and shall be forever preserved for the public good. The people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly to (i) promote wildlife conservation and management and (ii) preserve the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. Nothing herein shall be construed to modify any provision of law relating to trespass, property rights, or eminent domain.

N.C. Const. art. I § 38.

On 25 September 2020, plaintiff filed a complaint against Attorney General Josh Stein in Wake County stating three causes of action: (1) that N.C.G.S. § 103-2(a2), which prohibits Sunday waterfowl hunting, impermissibly interferes with the fundamental rights of hunting and pursuit of happiness guaranteed by the North Carolina Constitution; (2) that N.C.G.S. § 103-2(a1), which limits hunting hours on Sunday, is likewise unconstitutional; and (3) that all restrictions on Sunday hunting are not allowed under the federal Establishment Clause. Attorney General Stein filed a motion to dismiss on 23 October 2020, arguing that

he was not a proper party to the action and that plaintiff lacked standing to sue him. On 2 December 2020, plaintiff filed an amended complaint against present defendants. In the amended complaint, plaintiff argued that restrictions on the right to hunt migratory birds on Sunday, all restrictions on hunting on public grounds on Sundays, and time bound hunting restrictions "interfere[] with a multitude of rights granted by the state constitution . . . ."

Defendants subsequently filed a motion to dismiss the amended complaint pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) as to Cameron Ingram, the North Carolina Wildlife Resources Commission, and the State of North Carolina, arguing that plaintiff had failed to plead sufficient facts to state claims upon which relief could be granted. Plaintiff filed a motion for summary judgment on 13 January 2021. An additional motion to dismiss as to defendants Philip E. Berger and Timothy K. Moore was filed on 17 June 2021, stating in part that plaintiff had not pled sufficient facts to support his as-applied challenge.

The amended complaint and motions to dismiss were heard in Wake County Superior Court on 14 September 2021. In a 19 January 2022 order, Judge Keith Gregory recognized that plaintiff had dismissed his as-applied challenges with prejudice and transferred the facial challenges to a three-judge panel.

On 12 February 2024, a panel consisting of Judges Daniel Kuehnert, Rebecca Holt, and Richard Harrell, entered an order granting summary judgment in favor of defendants. In addressing Count 1, plaintiff's challenge to the restriction on migratory bird hunting on Sundays, the panel applied rational basis review, finding that plaintiff could not meet his burden on the facial challenge "because the statute is reasonably and rationally related to the legitimate government interest contemplated in the text of the amendment under which Plaintiff brings his challenge." The court noted that strict scrutiny was "chiefly inappropriate," given that the Article contained "express language that limits the right to hunt by vesting in the State a right and a duty to manage wildlife." The panel further noted that there were additional State obligations to protect the lands and waters to the benefit of both hunters and non-hunters, and discussed "several conceivable reasons to restrict hunting" on Sundays: protecting migratory birds; enabling non-hunters to enjoy scenic game lands without disturbance; and allowing an extended hunting season through compensatory hunting days.

In addressing Count 2, plaintiff's contention that any and all restrictions on hunting on public lands are unconstitutional, the panel noted

its analysis of Count 1 and cited Article XIV of the North Carolina Constitution: "the State is required 'to conserve and protect its lands and waters for the benefit of *all* its citizenry . . . .' " The court further noted that the Equal Protection Clause does not apply to different types of land.

Regarding Count 3, plaintiff's challenge to the ban on hunting on public or private land between 9:30 a.m. and 12:30 p.m. on Sundays, the panel found that the General Assembly had authority to exercise the police power of the State to protect the people's welfare, and that an ordinance which "may require the cessation of secular pursuits on Sunday during the hours in which churchgoing people usually attend religious services, will not be held unconstitutional, if otherwise reasonable and valid[,]" quoting *State v. McGee*, 237 N.C. 633, 644 (1953). The panel determined that this law was "a valid exercise of the State's police power," given the benefit to non-hunters, who will have a guaranteed window of time during which they will not be disturbed by hunting, and the extended hunting season in North Carolina.

Upon finding that there was "no genuine issue of material fact" and that plaintiff had failed to satisfy the burden of proof as to facial unconstitutionality, the panel granted summary judgment in favor of defendants. Plaintiff filed notice of appeal on 10 March 2024.

II. Discussion

Plaintiff raises three issues on appeal. First, plaintiff argues that the panel applied the incorrect standard of review; second, that the panel's interpretation of Article I, Section 38 as a grant of power to the general assembly was incorrect; and third, that the correct application of any level of scrutiny to the hunting law would show it to be unconstitutional. We address each of plaintiff's arguments in turn.

A. Standard and Scope of Review

We review an appeal from an order granting summary judgment *de novo*. *Stevens v. Heller*, 268 N.C. App. 654, 658 (2019). "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 (2008) (interior quotations and citation removed).

A party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56 (2024). "The purpose of summary judgment is

to eliminate formal trial when the only questions involved are questions of law." *Ellis v. Williams*, 319 N.C. 413, 415 (1987) (citations omitted).

Reviewing plaintiff's appeal requires an additional level of analysis, that of the constitutionality of the law itself, which we also review *de novo*. *See State v. Grady*, 372 N.C. 509, 521 (2019). Here, plaintiff engages in a facial challenge to the statute, rather than a challenge to the statute as applied to himself in particular. To succeed in this challenge, plaintiff bears a heavy burden, as he must not rely on speculation, but rather "establish that no set of circumstances exists under which the act would be valid." *Holmes v. Moore*, 384 N.C. 426, 436 (2023) (interior quotations and citation omitted). We presume that laws passed by the General Assembly are constitutional, and will not make a finding of unconstitutionality unless convinced beyond a reasonable doubt. *Grady*, 372 N.C. at 521–22. A "constitutional violation must be plain and clear," and in deciding such, "we look to the text of the constitution, the historical context in which the people of North Carolina adopted the constitutional provision at issue, and our precedents." *N.C. State Bd. of Educ. v. State*, 371 N.C. 149, 157 (2018) (citations omitted).

B. Appropriate Level of Scrutiny

Laws passed by the General Assembly implicate different types of rights, and the type of right implicated will determine how closely we examine the purpose and effect of the law. Where a right "is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the law must demonstrate that it serves a compelling state interest." *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 535–36 (2002) (citation omitted). However, where the right is not fundamental, "the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest." *Id.* at 536.

We have previously held that "[f]undamental rights include those either explicitly or implicitly guaranteed by the state or federal constitution . . . ." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 694 (2002). Very few rights are recognized as fundamental under the federal Constitution; these include the right to marry, have children, and enjoy marital privacy. *Standley v. Town of Woodfin*, 362 N.C. 328, 332 (2008) (citations omitted). Fundamental rights under the North Carolina Constitution appear in a variety of cases; our courts have, at various times, recognized fundamental rights to just compensation, *Dept. of Transp. v. Rowe*, 353 N.C. 671, 676 (2001), opportunity for a basic education, *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 435–36 (2022), and a one-person one-vote standard, *Blankenship v. Bartlett*, 363 N.C. 518, 522 (2009).

Plaintiff argues that the right to hunt is a fundamental right, and thus deserving of strict scrutiny. However, while the right to hunt has been made explicit in our Constitution, this does not mean that it is a fundamental right for several reasons, chief among them being the reservation of power to the General Assembly contained within the constitutional amendment.

In *Blankenship v. Bartlett*, our Supreme Court addressed the question of whether a right written into the constitution is a fundamental right. There, the court held that even though the State was "under no mandate to give its citizens the right to vote for superior court judges, once it has done so in its constitution, that provision must be construed in conjunction with the Equal Protection Clause to prevent internal conflict." *Blankenship*, 363 N.C. at 525. This right, the Court held, "is literally enshrined in the North Carolina Constitution and, as such, is distinguishable from other citizenship privileges that receive rational basis review." *Id.* at 526. However, despite this "literal enshrinement," the Court did not find that strict scrutiny was appropriate, since judicial elections have "a separate component that is ordinarily the province of the legislature . . . ." *Id.* at 523–24. Thus, despite "literal enshrinement," the right to vote in judicial elections also occupied the province of the legislature, which prevented the court from applying rational basis review.

Even further distinguishing the right in the case *sub judice* from a fundamental right, and also distinguishing it from the right in *Blankenship*, is the grant of power to the General Assembly written into the amendment. Our Supreme Court has previously ruled on the appropriate standard of review when a right is subject to the power of the General Assembly. The Court found that the right of contract is "qualified" and that the "guaranty of liberty does not withdraw the right of legislative supervision . . . ." *Morris v. Holshouser*, 220 N.C. 293, 296 (1941). Where the legislature has power over a right, this court will not overturn a law curtailing that right unless it was unreasonable or arbitrary. *See id.* (quoting *Alaska Packers Ass'n v. Indus. Comm.*, 55 S. Ct. 518, 522 (1935)). Thus, although the right to hunt was written into our Constitution, the amendment has all the hallmarks that indicate laws passed under the amendment deserve only rational basis review.

Plaintiff takes issue with interpretation of the phrase "subject only to laws enacted by the General Assembly" contained within the constitutional amendment. He argues that this phrase was misinterpreted by the superior court panel, and that it acts as a *limit on*, rather than a grant of, power to the General Assembly, the latter being our contention here. Plaintiff's argument centers on his interpretation of our reasoning

in *Coastal Conservation Ass'n v. State*, 285 N.C. App. 267 (2022), upon which the superior court panel relied in making its determination.

The central dispute of *Coastal Conservation Ass'n* was the allegation that the State had breached, *inter alia*, Article I, Section 38 of the North Carolina Constitution by "permitting for-profit harvesting of finfish or shellfish in quantities or through methods that cause overexploitation or undue wastage to North Carolina's coastal fisheries resources." *Id.* at 269. We held that this amendment was created to protect the right to fish against encroachment, and that the State had an affirmative duty pursuant to the amendment "to preserve the right of the people to fish and harvest fish." *Id.* at 282. This included the duty to preserve fisheries. *Id.* at 283.

Plaintiff argues that rational basis review is inappropriate in light of this holding, since it would "allow almost any encroachment of these rights no matter how tenuously related they are to actual wildlife management." He contends that the Sunday hunting laws "have nothing to do with managing wildlife and everything to do with managing people." We disagree with plaintiff's position for a number of reasons: the historical record surrounding the Sunday hunting laws and the enactment of this amendment indicate that these were decided in tandem, and the state Constitution already demands that state land be used for the benefit of all.

The scope of our historical review can be expansive: we interpret the law "in accordance with the intent of its framers and the citizens who adopted it. Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation." *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613 (1980). Our review here reveals that the amendment and updates to the Sunday hunting laws were made almost in tandem. North Carolina House Bill 559 was passed as part of the 2017–18 legislative session, first filed 4 April 2017, and ratified on 30 June 2017. 2017 H.B. 559. At the same time that these changes to the Sunday hunting laws were under consideration in the House, the Senate introduced the hunting and fishing amendment on 6 June 2017, which was ratified a year later. 2017 S.B. 677. Both of the bills passed with significant margins. It is clear from the historical record, then, that our legislature saw no conflict between the amendment and what was left of the Sunday hunting laws, as they chose to pass the amendment and keep the laws in a limited form, rather than entirely discard Sunday hunting laws.

Finally, we note that "a constitution cannot be in violation of itself," and thus we read each provision of our Constitution in *pari materia*. *Stephenson v. Bartlett*, 355 N.C. 354, 378 (2002) (citations omitted). Article XIV, Section 5 of our State Constitution reads, in pertinent part: "It shall be the policy of this State to conserve and protect its lands and waters for the benefit of *all its citizenry* . . . ." N.C. Const. art. XIV, § 5 (emphasis added).

Given, then, that the power of the General Assembly to pass laws concerning hunting was written into the amendment, that the laws were changed and the amendment introduced in the same session of the General Assembly and ratified with wide margins, the fact that our Constitution requires the protection of land for all the citizens of North Carolina, we hold that the Sunday hunting laws must be reviewed under the rational basis test.

C. Rational Basis Review of Sunday Hunting Laws

Reviewing, then, the Sunday hunting laws for a rational basis, we find that they are valid under the North Carolina Constitution. "The 'rational basis' standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government." *White v. Pate*, 308 N.C. 759, 766–67 (1983). Laws reviewed under rational basis are presumed valid. *Id.* at 767.

There are numerous rational bases on which these hunting laws rest. By restricting hunting on Sundays, North Carolina receives compensatory hunting days under U.S. Fish and Wildlife regulations, extending the hunting season while receiving the same number of hunting days. Letter from U.S. Fish and Wildlife Serv. to N.C. Wildlife Res. Comm'n (Nov. 3, 2023) (on file in record). By limiting the hours on which hunting can occur, the law provides opportunities for non-hunters to enjoy North Carolina game lands and provides residents and churchgoers with an assured respite on Sunday mornings. The law also ensures that migratory bird populations will be preserved by preventing their hunting on Sundays.

Plaintiff challenges this last basis, protecting bird populations, by pointing to a study on the impact of Sunday hunting on migratory birds conducted by the North Carolina Wildlife Resources Commission and presented to the North Carolina General Assembly on 1 March 2018. N.C. Wildlife Resources Comm'n, *Final Report to the North Carolina General Assembly on the Biological, Resource Management, Sociological and Economic Impacts of Allowing Sunday Hunting of Migratory Birds in North Carolina* (2018). Plaintiff notes that the study concluded

that "Sunday hunting of waterfowl has NO NEGATIVE (*sic*) impact on conservation, management or preservation, it also has POSITIVE (*sic*) social economic impacts."[1] However, plaintiff misstates the strength with which the Commission provided its advice. The Commission offered the advice that "[w]hile there is no evidence that Sunday hunting would have any negative biological impact on migratory bird populations, empirical data to accurately predict impacts do not currently exist nor are they likely to exist in the future." *Final Report* at 4. The General Assembly, therefore, was entitled to make a reasoned decision based on the lack of conclusive evidence and thereby decided to preserve the law prohibiting the hunting of migratory birds on Sunday.

III. Conclusion

For the foregoing reasons, we affirm the decision of the Superior Court panel.

AFFIRMED.

Judges GORE and MURRY concur.

1. The Commission's letter notes that migratory birds include waterfowl. *Final Report* at 2.

SMITH v. LANE

[298 N.C. App. 560 (2025)]

ROBERT DUSTIN SMITH, Plaintiff
v.
TERESA LANE, individually and in her official capacity as a City of Raleigh Firefighter, and CITY OF RALEIGH, Defendants

No. COA24-790

Filed 16 April 2025

Immunity—governmental—city firefighter—collision while driving firetruck back to fire station—governmental function—waiver not shown

In a negligence case brought against a city firefighter and the city itself (together, defendants), where the firefighter was driving a firetruck back to the fire station when she collided with a motorcyclist (plaintiff) who sustained serious injuries as a result, including one leg amputation, the trial court erred in partially denying defendants' motion to dismiss—filed pursuant to Rule 12(b)(2)—based on governmental immunity. To begin with, governmental immunity—which applies to actions taken by municipalities in the course of a governmental function—applied to the firefighter's conduct because the operation of a firetruck is a governmental function, even when the firetruck is not responding to an emergency. Furthermore, plaintiff failed to show that defendants waived governmental immunity where: (1) the city's excess liability insurance policies contained language excluding coverage for claims in which immunity applied; (2) the city did not participate in a local government risk pool; and (3) although the city did pass a resolution establishing requirements that, if met, would result in a limited waiver of immunity, plaintiff failed to meet those requirements.

Appeal by Defendants from an order entered 3 May 2024 by Judge Hoyt G. Tessener in Wake County Superior Court. Heard in the Court of Appeals 25 February 2025.

Krompecher Law Firm, LLC by Pedro Krompecher, III and Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. by J. Parker Miller, pro hac vice, for Plaintiff-Appellee.

City Attorney Karen McDonald, by Andrew J. Seymour Senior Associate City Attorney, for Defendants-Appellants.

WOOD, Judge.

Teresa Lane and the City of Raleigh ("Defendants") appeal from an order denying a Motion to Dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6). As Plaintiff has failed to "allege and prove" Defendants waived their immunity as required in N.C. Gen. Stat. § 160A-485(a), the trial court erred by denying Defendants' motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). For the reasons set forth below, we reverse the trial court's order.

I. Factual and Procedural Background

On 22 October 2022, Teresa Lane ("Lane") a City of Raleigh firefighter, was on duty and driving a firetruck and returning to Fire Station 9. Robert Smith ("Plaintiff") was riding on a motorcycle following Lane's firetruck along Six Forks Road in Raleigh in the right lane. Plaintiff contends that Lane moved from the right lane to the center lane while Plaintiff continued in the right lane. Then suddenly and without warning Lane performed a lane change from the middle lane back to the right lane directly in front of Plaintiff without signal causing a collision.

Defendants assert Lane was driving in the far-right lane and Plaintiff was directly behind the firetruck but as Lane approached the entrance to the fire station, Defendant crossed into the middle lane to make the right turn into the entrance of the fire station. As Defendant was turning, Plaintiff drove straight into the side of the firetruck. Both parties agree that the firetruck was not responding to an emergency and did not have its lights or sirens activated. Plaintiff sustained serious injuries, including the amputation of one leg above the knee.

On 4 October 2023, Plaintiff filed a complaint alleging Lane had negligently caused the collision and that the City of Raleigh was responsible for the negligence under the doctrines of negligent supervision and *respondeat superior*.

On 1 December 2023, Defendants filed motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6) citing grounds that the trial court lacked personal and subject matter jurisdiction over Defendants based on the doctrine of governmental immunity and that the complaint failed to state a cause of action upon which relief could be granted.

On 25 April 2024, Defendants' motion came on for hearing in Wake County Superior Court. The trial court granted the motion in part and denied it in part. The trial court granted the 12(b)(6) motion to dismiss punitive damages and denied the 12(b)(6) motion to dismiss

official capacity claims against Lane. In addition, the trial court denied Defendants' 12(b)(1) and 12(b)(2) motions to dismiss based on governmental immunity.

On 15 May 2024, Defendants filed notice of appeal.

II. Analysis

On appeal, Defendants contend the trial court erred by denying Defendants' Rule 12(b)(2) motion to dismiss. Defendants argue the undisputed evidence establishes that, as a matter of law, governmental immunity bars Plaintiff's claims. We agree.

A. Standard of Review

"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." *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 363, 731 S.E.2d 245, 248 (2012) (cleaned up). The denial of a Rule 12(b)(2) motion to dismiss is such an interlocutory order. Generally, interlocutory orders are not immediately appealable unless they affect a substantial right. However, such an appeal "addressing a governmental entity's immunity claim is immediately appealable because immunity represents a substantial right. This Court reviews a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of governmental or legislative immunity using a de novo standard of review." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 209, 876 S.E.2d 453, 460 (2022) (cleaned up).

B. Governmental Immunity

North Carolina courts have long held that "governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 212, 876 S.E.2d 453, 462 (2022) (cleaned up) (quoting *Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Rec. Dept.*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012)). Governmental immunity does not apply when the municipality engages in a proprietary function. In determining whether an entity is entitled to governmental immunity, the issue turns on whether the alleged tortious conduct of the county or municipality was a result of an activity that was governmental in nature or proprietary in nature. *Id.*

We have long held "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.' " *Providence*

Volunteer Fire Dep't, Inc. v. Town of Weddington, 382 N.C. 199, 212, 876 S.E.2d 453, 462 (2022) (quoting *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952)). In contrast, a proprietary function is one that is "commercial or chiefly for the private advantage of the compact community." *Britt* at 450, 73 S.E.2d at 293.

Sub judice, both Plaintiff and Defendants, acknowledge "at all times relevant, Defendant Lane operated the Firetruck in the course and scope of her employment with Defendant City." In *Taylor v. Ashburn*, this Court held that a firefighter shares in the city's governmental immunity for claims arising out of a firefighter's negligent operation of a fire truck concluding that the operation of a firetruck is a governmental function. *Taylor v. Ashburn*, 112 N.C. App. 604, 608, 436 S.E.2d 276, 279 (1993). Although both parties agree with the holding in *Taylor*, Plaintiff attempts to distinguish *Taylor* from the current case on the notion Defendant's firetruck was not responding to an emergency call with lights and sirens, but rather it was returning to the fire station. We disagree. A firetruck's departure from its station by necessity requires its return. Therefore, a firetruck on return to a Fire Station fulfills a governmental function because a city or municipalities' operation of a fire department is clearly a governmental function. We conclude governmental immunity applies *sub judice*.

C. Waiver of Immunity

We next consider whether Defendants waived their governmental immunity. Pursuant to N.C. Gen. Stat. § 160A-485(a), governmental immunity may be waived: (1) by purchasing insurance that actually indemnifies the city from tort liability; (2) by participating in a local government risk pool that actually indemnifies the city; or (3) by adopting a resolution that deems the creation of a funded reserve to be the same as a purchase of insurance. N.C. Gen. Stat. § 160A-485(a) (2024). "Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983). A plaintiff bringing claims against a governmental entity and its employees acting in the scope of their official capacities "must allege and prove that the officials have waived their immunity or otherwise consented to suit." *Wright v. Gaston Cnty.*, 205 N.C. App. 600, 607, 698 S.E.2d 83, 89 (2010).

1. Waiver By Purchase of Insurance

Plaintiff contends that Defendants waived their liability by purchasing two insurance plans whose exclusionary clause does not explicitly address governmental immunity.

The purchase of excess insurance does not waive a governmental entity's immunity when the insurance policy contains language that preserves the entity's immunity and excludes coverage for claims to which immunity applies. *See*, *e.g.*, *Hinson v. City of Greensboro*, 232 N.C. App. 204, 213, 753 S.E.2d 822, 828 (2014); *Wright v. Gaston Cnty.*, 205 N.C. App. 600, 607-08, 698 S.E.2d 83, 89 (2010); *Estate of Earley ex rel. Earley v. Haywood Cnty. Dep't of Social Servs.*, 204 N.C. App. 338, 343, 694 S.E.2d 405, 409-10 (2010).

It is uncontested that the City of Raleigh purchased two excess insurance policies that provide a combined total of $10 million in insurance coverage for certain claims subject to certain limitations and endorsements. Defendants submitted affidavits by Ryan Wilson, the Risk and Insurance Manager for the City of Raleigh, and Karen McDonald, the City Attorney, as well as evidence that the endorsements preserved their immunity and excluded coverage to claims in which immunity applied. The endorsements at issue state:

> Governmental Tort Liability Limitation Endorsement: By accepting coverage under this policy, the *insured* does not waive any of its statutory immunities for monetary limits of liability (commonly known as tort liability damages caps), and Berkley Public Entity shall not be liable for any *claims* in excess of the statutory monetary limits unless the statutory tort limitation is found by a court not to apply. If *claims* are asserted in any judicial jurisdiction where statutory liability damage caps do not apply, then the limits of coverage shown in the Declarations and further described in Section C. Limits of Insurance apply.

Plaintiff argues that the language in this endorsement is ambiguous and therefore should not be held to exclude governmental immunity claims. We disagree. "If the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written[.]" *Wright v. Gaston Cnty.*, 205 N.C. App. 600, 607, 698 S.E.2d 83, 89 (2010) (cleaned up). The "Governmental Liability Limitation" in *Wright* was substantially similar to the endorsement in this case and based upon that provision this Court held that the defendants had not waived sovereign immunity through the purchase of the policy. Similarly, the plain language of the endorsement for "Governmental Tort Liability" in the City of Raleigh's insurance policies likewise excludes coverage for claims to which governmental immunity applies. As governmental immunity applies to each of Plaintiff's claims, the excess insurance policies provide no coverage and therefore, no waiver of immunity has occurred.

2. Waiver By Participation in a Local Government Risk Pool

Based on Defendant's affidavit from Ryan Wilson, the City's Risk and Insurance Manager, the City does not participate in a local government risk pool. Rather, the City of Raleigh manages its liability through a $1,000,000.00 self-insured retention ("SIR"). Further, Plaintiff has not brought forth any argument that the City of Raleigh waived governmental immunity by participating in a risk pool.

3. Waiver by Resolution

In 1999, by authority granted under N.C. Gen. Stat. § 160A-485, the Raleigh City Council adopted a resolution setting forth guidelines for waiver of its immunity and the immunity of its officers for claims within its $1,000,000.00 SIR. The resolution established mandatory requirements that must be met before the City would agree to a limited waiver. These requirements include that a party must accept the limited damages contained in the resolution and execute a release of all claims against all persons, firms, and corporations on account of the incident giving rise to the claim. *Arrington v. Martinez*, 215 N.C. App. 252, 259-60, 716 S.E.2d 410, 414-15 (2011). Plaintiff has not met the waiver requirements of the City of Raleigh's Resolution. Additionally, Plaintiff explicitly seeks damages exceeding the limits set forth under the resolution. Therefore, Defendants' immunity is not waived by the resolution.

"Because it is a jurisdictional matter, a plaintiff's complaint must affirmatively demonstrate the basis for the waiver of immunity when suing a governmental entity which has immunity." *Arrington v. Martinez*, 215 N.C. App. 252, 263, 716 S.E.2d 410, 417 (2011). Plaintiff fails to do so here. As Plaintiff has failed to establish basis for the waiver of immunity, we hold the trial court erred in its denial of Defendants' Rule 12(b)(2) motion to dismiss.

III. Conclusion

Driving a firetruck on return to the station is clearly a governmental function entitled to immunity. As Plaintiff has failed to "allege and prove" Defendants had waived their immunity as required in N.C. Gen. Stat. § 160A-485(a) the trial court erred in its denial of Defendants' motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). We therefore reverse and remand for dismissal.

REVERSED AND REMANDED.

Judge TYSON and Judge MURRY concur.

STATE OF NORTH CAROLINA
v.
BRANDON WALKER BRYANT

No. COA24-436

Filed 16 April 2025

Evidence—possession of drug paraphernalia—motion to dismiss—evidence sufficient

In a prosecution on several drug charges—brought after defendant, upon being stopped for suspected shoplifting, was discovered to possess heroin and a glass pipe—the trial court properly denied defendant's motion to dismiss the charge of possession of drug paraphernalia where, in the light most favorable to the State, the evidence that defendant intended to use the glass pipe to ingest a controlled substance "other than marijuana" (as required by N.C.G.S. § 90-113.22)—or, more specifically, that defendant had heroin in the same pocket as the pipe (which was visibly charred, indicating prior use), but did not possess marijuana or any other substance for which the pipe could be used—was sufficient to send the issue to the jury.

Appeal by Defendant from Judgment entered 30 November 2023 by Judge George R. Hicks in Union County Superior Court. Heard in the Court of Appeals 16 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Milind K. Dongre, for the State.

Cooley Law Office, by Craig M. Cooley, for Defendant.

HAMPSON, Judge.

Factual and Procedural Background

Brandon Walker Bryant (Defendant) appeals from a Judgment entered upon jury verdicts finding him guilty of Felony Trafficking in Heroin by Possession, Felony Trafficking in Heroin by Transportation, and Misdemeanor Possession of Drug Paraphernalia.[1] The Record

1. On appeal, however, Defendant challenges only the conviction for Misdemeanor Possession of Drug Paraphernalia.

before us—including evidence presented at trial—tends to reflect the following:

On 6 September 2021, Detective Brantley Birchmore and Officer Jacob McWhorter of the Monroe Police Department (MPD) responded to a report of suspected shoplifting at a Belk department store in Monroe, North Carolina. The store's Loss Prevention Officer (LPO) identified Defendant, Samantha West, and Jimmy Russell as potential shoplifters.

Detective Birchmore and Officer McWhorter approached Defendant, West, and Russell and explained "Belk suspected or thought that they might be shoplifting." Detective Birchmore requested the group walk him and Officer McWhorter to their car. Russell, the car's registered owner, consented to a search of the vehicle; no store merchandise was found. West agreed to a search of her handbag, during which Detective Birchmore discovered a "medicine bottle" holding "another type of smaller container," within which were "plastic baggies" containing "a brown powder[y] tar like substance." Upon this finding, West was detained.

As West was being placed in handcuffs, Detective Birchmore saw Defendant "make a motion from the front of his body with his hand . . . going around behind his back." Detective Birchmore observed Defendant holding a "bright orange or red . . . container of some sort." After Defendant refused to identify what he was holding, Detective Birchmore attempted to detain him. Defendant "took off" running through the parking lot and Detective Birchmore, along with Officer McWhorter, chased after him. During the chase, Officer McWhorter observed Defendant remove "a clear tube with [a] reddish orangish cap" from his right front pocket. Officer McWhorter saw Defendant throw the container toward Russell's vehicle immediately before Defendant was apprehended.

Other officers, including Detective Patrick Torpey and Officer Bryson Burton had arrived on the scene to provide backup assistance. Officer Burton searched Defendant and found a clear glass pipe, a red straw, and two "clear plastic baggies"—one containing "a black tar substance" and the other containing "a white crystal like substance"—all in Defendant's right front pants pocket. While Officer Burton searched Defendant, Detective Birchmore recovered the container Defendant had thrown. The container held four small baggies of "a brown tar like substance." These baggies, along with the pipe and other items, were sent to the North Carolina State Crime Laboratory for testing. Forensic analysis revealed the baggies found in the container Defendant had

thrown contained approximately 29.53 total grams of heroin. No forensic analysis was conducted on the pipe or other items.

On 29 November 2021, Defendant was indicted for Trafficking in Heroin by Possession, Trafficking in Heroin by Transportation, Possession of Drug Paraphernalia, and Possession of Methamphetamine. The matter came on for trial on 27 November 2023. On 28 November 2023, the State dismissed the charge of Possession of Methamphetamine because the Lab had not finished its testing. At the close of the State's evidence, defense counsel moved to dismiss the charge of Possession of Drug Paraphernalia. The trial court denied this motion. Defense counsel renewed its Motion to Dismiss after declining to present evidence. Again, the trial court denied the Motion.

On 30 November 2023, the jury returned verdicts finding Defendant guilty of all three charges. The trial court consolidated the convictions and entered a Judgment sentencing Defendant to 225 to 282 months imprisonment. Defendant orally gave Notice of Appeal in open court.

Issue

The sole issue on appeal is whether the trial court erred in denying Defendant's Motions to Dismiss the charge of Possession of Drug Paraphernalia.

Analysis

"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). "Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable

inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). However, "[w]hether the State has offered such substantial evidence is a question of law for the trial court." *State v. McKinney*, 288 N.C. 113, 119, 215 S.E.2d 578, 583 (1975) (citations omitted).

Defendant argues the trial court erred in denying his Motions to Dismiss the charge of Possession of Drug Paraphernalia. Under N.C. Gen. Stat. § 90-113.22, titled Possession of Drug Paraphernalia, it is a Class 1 misdemeanor to "knowingly use, or to possess with intent to use, drug paraphernalia to . . . inject, ingest, inhale, or otherwise introduce into the body a controlled substance *other than marijuana* which it would be unlawful to possess." N.C. Gen. Stat. § 90-113.22(a), (b) (2023) (emphasis added).[2] On appeal, Defendant challenges only the element of intent. Specifically, Defendant argues the State did not present sufficient evidence he intended to use the pipe in connection with a controlled substance other than marijuana.[3] Defendant contends the pipe could have been used to smoke marijuana or for some other use, rather than any other controlled substance.

While much of the caselaw addressing the specific intent to use drug paraphernalia to introduce a controlled substance into the body is unpublished and, thus, not controlling legal authority,[4] we find *State v. Gamble* persuasive in our assessment of the facts at bar. In *Gamble*, officers searched a home where an informant had purchased cocaine. *State v. Gamble*, 218 N.C. App. 456, 721 S.E.2d 763, 2012 WL 380251, at *1 (2012) (unpublished). During the search, the defendant was observed exiting a bedroom; the officers searched the bedroom and located a bag

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2. Possession of Marijuana Drug Paraphernalia is a separate, lesser included offense of N.C. Gen. Stat. § 90-113.22. *See* N.C. Gen. Stat. § 90-113.22A (2023) (defining Possession of Marijuana Drug Paraphernalia as a Class 3 misdemeanor).

3. At trial, defense counsel argued the pipe was not drug paraphernalia as defined by N.C. Gen. Stat. § 90-113.21. Defendant did not make this argument in his briefing and appears to have abandoned this argument on appeal. Nonetheless, we conclude there was substantial evidence the pipe constitutes drug paraphernalia. *See State v. Garrett*, 246 N.C. App. 651, 783 S.E.2d 780, 785 (2016) (glass pipe was drug paraphernalia); *State v. Huffman*, 222 N.C. App. 636, 731 S.E.2d 276, 2012 WL 3573940, at *6 (2012) (unpublished) (same); *State v. Christopher*, 184 N.C. App. 758, 646 S.E.2d 864, 2007 WL 2034113, at *2 (2007) (unpublished) (same).

4. Our Rules of Appellate Procedure provide: "An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored[.]" N.C. R. App. P. 30(e)(3) (2024).

of cocaine inside a chair, as well as "crack pipes concealed in a shoe box and under a couch." *Id.* at *4. The defendant was indicted for and convicted of, *inter alia*, possession of drug paraphernalia. *Id.* at *1. On appeal, the defendant argued there was insufficient evidence of his intent to use the crack pipes in connection with a controlled substance. *Id.* at *4. The State's evidence of intent included: the crack pipes were found in the same room as cocaine, a controlled substance; an officer testified that "through his training and experience he knew that the glass pipe found in the shoe box was a crack pipe because it was charred, broken at the ends, and was stuffed with a brillo pad"; and another officer testified the pipe found under the couch was "also charred." *Id.* The Court held this evidence was sufficient to establish the defendant intended to use the crack pipes in connection with a controlled substance. *Id.*

Similarly, in *State v. Harlee*, also an unpublished case, this Court held there was sufficient evidence of the defendant's intent to introduce a controlled substance other than marijuana. *State v. Harlee*, 180 N.C. App. 692, 639 S.E.2d 143, 2006 WL 3718084 (2006) (unpublished). This evidence included a ceramic pipe found on the defendant; officer testimony that "through his experience as a police officer, a ceramic pipe is used to ingest crack cocaine" and the defendant's pipe "had burn marks where a lighter had been used to heat the crack cocaine"; and additional officer testimony that the pipe "was a crack pipe." *Id.* at *3 (internal quotation marks omitted).

Defendant points to *State v. Hedgecoe*, 106 N.C. App. 157, 415 S.E.2d 777 (1992) and *State v. Eldred*, 259 N.C. App. 345, 815 S.E.2d 742 (2018) in support of his argument. In *Hedgecoe*, this Court held the evidence of the defendant's intent to introduce a controlled substance was insufficient. 106 N.C. App. at 164, 415 S.E.2d at 781. The only evidence presented at trial was a hypodermic syringe and needle that had been found on the defendant, along with an officer's testimony that the items "were used to introduce drugs of 'some kind' into the body." *Id.* The Court found the evidence "merely established that defendant possessed a hypodermic syringe and needle but did not show any other incriminating circumstances." *Id.* Thus, "mere possession . . . fail[ed] to establish the crucial element of possession of drug paraphernalia with the accompanying intent necessary to establish a violation of our Controlled Substances Act." *Id.*

In *Eldred*, we held there was insufficient evidence to support the defendant's conviction for driving while impaired. 259 N.C. App. at 350-51, 815 S.E.2d at 746. The defendant was found "[t]wo or three miles" away from his wrecked vehicle. *Id.* at 346, 815 S.E.2d at 743. He

had visible head injuries and told officers he was "smoked up on meth." *Id*. However, no evidence was produced at trial of "whether Defendant's [impairment] was caused by an impairing substance or by [his injuries]," "when or where Defendant had consumed meth or any other impairing substance[,]" and when the vehicle had crashed. *Id.* at 350, 815 S.E.2d at 745. The Court reasoned this evidence did "no more than raise a suspicion of guilt[.]" *Id*. at 350, 815 S.E.2d at 746 (citation omitted). Thus, there was insufficient evidence to support the conclusion the defendant was impaired while driving.

Here, unlike *Hedgecoe*, the evidence at trial reflected more than "mere possession" of drug paraphernalia. 106 N.C. App. at 164, 415 S.E.2d at 781. Likewise, the facts before us are distinguishable from *Eldred*, where there were significant "gaps in [the] evidence." 259 N.C. at 345, 815 S.E.2d at 742. Indeed, the evidence at trial tended to show Defendant was found contemporaneously in possession of drug paraphernalia—the pipe—and a controlled substance other than marijuana—heroin. Moreover, there is no evidence Defendant was in possession of marijuana or other substances for which the pipe may have been used.

Here, as in *Gamble* and *Harlee*, the State presented evidence of incriminating circumstances from which a jury could reasonably infer Defendant intended to use the glass pipe in connection with a controlled substance other than marijuana: heroin. The evidence tended to show Defendant possessed the pipe and the baggies of heroin in the same right front pocket. The pipe, admitted into evidence and presented to the jury, was visibly charred—consistent with signs of prior use. Furthermore, like the officers in *Gamble* and *Harlee*, Detective Torpey testified, based on his training and experience, the pipe was "consistent with narcotic use." This evidence is sufficient to support the inference Defendant intended to use the pipe in connection with a controlled substance other than marijuana. *See Harlee*, 2006 WL 3718084 at *3. *See also In re A.O.A.*, 248 N.C. App. 453, 790 S.E.2d 753, 2016 WL 3889922, at *3 (2016) (unpublished) (observing there was no evidence of a controlled substance "found anywhere near" the defendant in holding there was insufficient evidence of intent to use drug paraphernalia in connection with a controlled substance).

Thus, viewed in the light most favorable to the State, there was substantial evidence Defendant intended to use the pipe in connection with a controlled substance other than marijuana. Therefore, the trial court properly denied Defendant's Motions to Dismiss. Consequently, the trial court did not err in entering Judgment against Defendant on the jury verdicts.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgment.

NO ERROR.

Judges GORE and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
SOSHA NICOLE PETERS, Defendant

No. COA24-475

Filed 16 April 2025

Search and Seizure—warrantless search of vehicle—implied consent—wallet on top of car excluded

In a prosecution for possession of methamphetamine, which was based on drugs found inside defendant's wallet during a warrantless search of defendant's vehicle while in a national forest, the trial court erroneously denied defendant's motion to suppress the drugs. Although wildlife officers had defendant's implied consent to search the vehicle (because defendant did not object after her companion, who had been driving the car and thus had control over it, gave explicit consent for the search in her presence and hearing and because defendant tried to assist the officers as they began their search), that consent did not extend, absent clear and unequivocal evidence, to search the wallet, which the trial court found had been placed on top of the car by defendant at some point during the encounter and which was not attached or tethered to the car in any way. Since the only evidence supporting the offense was found inside the wallet, and the trial court did not make any findings regarding whether defendant consented to the wallet being searched, defendant's conviction was vacated and the matter was remanded for further proceedings.

Appeal by defendant from judgment entered 13 November 2023 by Judge Steve R. Warren in McDowell County Superior Court. Heard in the Court of Appeals 14 January 2025.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

DILLON, Chief Judge.

Defendant Sosha Nicole Peters was convicted of possession of methamphetamine discovered in her wallet by wildlife officers during a warrantless search. During the encounter, officers were in the process of searching Defendant's vehicle and retrieved and searched the inside of Defendant's wallet that she had placed on top of the vehicle, whereupon the officers found the methamphetamine inside the wallet. On appeal, Defendant argues that the trial court erred by denying her motion to suppress the evidence found in her wallet during the search. We vacate and remand for further consideration.

I. Background

This matter involves an encounter between officers and Defendant during which the officers searched Defendant's vehicle and her wallet which was on top of her vehicle. Defendant was not charged for possession of anything found by the officers inside her vehicle, but only for the methamphetamine found inside her wallet.

The uncontradicted evidence and findings made by the trial court at Defendant's suppression hearing tended to show as follows: On 1 July 2022, two officers with the State of North Carolina Wildlife Resource Commission came in contact with Defendant and Tyrone Thomas, who were residing in a camp in the vicinity of Pisgah National Forest in McDowell County. During the encounter, one of the officers requested to see proof of identity and proof of ownership of the vehicle parked next to the tent where Defendant and Mr. Thomas were residing. Much of the encounter was caught on an officer's body camera.

Defendant walked to the car, opened the passenger door, retrieved both her wallet and the vehicle title, retrieved her identification from her wallet, and handed her identification and vehicle title showing her as the vehicle owner to the officer. The officers acknowledged Defendant as the owner of the vehicle. There were several needles in the vehicle. Defendant provided the officer with a card that allowed her access to the needles that she received from a medical center. Mr. Thomas explained

to the officer that they had only had the vehicle for two days and he had been driving it, as Defendant did not have a current license.

After checking the identity of both Defendant and Mr. Thomas, the officer went back to speak with them. The officer asked them if there was "anything in the car [he] might need to know about." Defendant responded, "No sir."

The officer then asked if he could "check [the car] out," to which Mr. Thomas responded, "Yeah, go ahead." While the officer was preparing to search the vehicle, Defendant was cleaning the passenger side of the car and grabbing her pill bottles off the floor. The officer informed her to leave everything in the car. She apologized, stating she was just trying to clean it up for him because it was messy.

At some point, before the officer began his search of the car's interior, Defendant's wallet came to be on top of the vehicle. Neither the video of the encounter nor the testimony from the suppression hearing definitively establishes *how* Defendant's wallet came to be on top of Defendant's vehicle. The trial court, though, made a finding that it was Defendant who placed her wallet on top of the car at some point during the encounter. And Defendant in this present appeal does not challenge this finding. Therefore, for purposes of our review, the trial court's finding is binding. *See, e.g.*, *Brackett v. Thomas*, 371 N.C. 121, 127 (2018) (holding unchallenged findings are binding on appeal). (We express no opinion as to whether this finding remains binding on Defendant on remand or in any subsequent appeal.)

In any event, at some point, the officer retrieved Defendant's wallet from the top of the vehicle and searched inside of it, whereupon he discovered a bag of methamphetamine inside the wallet. It is unclear based on testimony and body camera footage when, by whom, and under what circumstances Defendant's wallet was placed on top of the car.

Defendant was only charged for the methamphetamine found in her wallet. Prior to her trial, she moved to suppress the evidence found in her wallet on the grounds that the evidence was found during an unconstitutional search.

The trial court entered an order denying Defendant's motion to suppress. The court determined that Defendant's companion, Mr. Thomas, had validly consented to the search of her vehicle, based on his "apparent control" of the vehicle, and that Defendant, otherwise, also implied consented to the search of her vehicle (presumably based on her actions and inactions). The trial court, however, made no findings or conclusions concerning whether consent was given to search the wallet itself.

Defendant pleaded guilty to possession of methamphetamine, reserving her right to appeal the trial court's denial of her motion to suppress. Defendant appealed.

II. Analysis

We review a trial court's order denying a defendant's motion to suppress by "determining whether the trial court's underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the trial court's ultimate conclusions of law." *State v. Parisi*, 372 N.C. 639, 649 (2019) (citations and internal quotations omitted). A trial court's findings of fact are "conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745 (1994). "We will review conclusions of law de novo regardless of the label applied by the trial court." *State v. Jackson*, 220 N.C. App. 1, 8 (2012).

The relevant findings of facts and conclusions of law are as follows:

> [Finding 5]: At each time Ms. Peters accessed the car she did so from the driver's side. The court concludes that Ms. Peter[s] had her belongings stored in the passenger area of the car and she did not access the driver's area as she had not been in control of its operations and contents in the driving area.
>
> [Finding 7]: In the presence of both Mr. Thomas and Ms. Peters, [the officer], in requesting consent to search the car, asked "care if we check it out?" Mr. Thomas said "Yeah, go ahead." The Court finds from this evidence that Ms. Peters did not object and at no time voiced opposition to the search, or the impending search, thereafter.
>
> [Finding 8]: As a result of the search [the officer] discovered methamphetamine inside a pink [wallet] which had been removed from the interior of the car by Ms. Peters who placed it on the roof of the car in view [of the officer] after he had received consent to search.
>
> [Conclusion 1]: Mr. Thomas was in apparent control of the vehicle's operation and contents at the time the consent by him was given and had valid authority to consent to said search.

> [Conclusion 2]: Ms. Peters did not object to Mr. Thomas'[s] authorization given to [the officer] to search the vehicle and impliedly consented to the same.

Consent of a search is analyzed by looking at the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). A person who is not the lawful owner of a vehicle may consent to the search of a vehicle. *See*, *e.g.*, N.C.G.S. § 15A-222(2) (providing that one in apparent control of a vehicle may consent to its search). Also, our Court has held that consent of an owner to search her vehicle may be inferred from her silence when consent is given by a third party who is in apparent control of the car. *See State v. Foster*, 33 N.C. App. 145, 148 (1977).

Here, we conclude there is evidence from which the trial court could find that Defendant impliedly consented to the search of her vehicle, aside from her failure to object when Mr. Thomas consented. Specifically, there was uncontradicted evidence that Defendant cleaned an area of the interior to facilitate the officer's search and that she responded, "okay," when the officer told her to "just leave everything in it." From this and other behavior, the officer reasonably believed that Defendant was consenting to the search that had been previously verbally given by Mr. Thomas, specifically, to search the vehicle.

Notwithstanding, the trial court failed to make any finding concerning whether Defendant consented to the search of her wallet outside the vehicle. That is, the trial court found that the officer "request[ed] consent to search the car," that consent was given "to search the vehicle," and that the methamphetamine was discovered "inside a pink [wallet] which had been removed from the interior of the car by [Defendant] who placed it on the roof of the car in view of [the officer] after he had received consent to search." The wallet was neither inside nor otherwise attached to the vehicle. *See*, *e.g.*, *United States v. Clayton*, 2024 U.S. Dist. LEXIS 87639 (W.D. Tenn. 2024) (holding that the automobile exception did not authorize officers to search a plastic bag on top of the vehicle, reasoning that "[c]ontainers that can serve as a natural extension of a vehicle possess the same potential mobility as does the car, but containers placed on a vehicle that are neither attached nor tethered do not").

Since the trial court made no determination concerning whether consent was validly given for the search of the wallet where the methamphetamine was found, the trial court's findings cannot support its order denying Defendant's motion to suppress. And such denial was necessarily prejudicial as the methamphetamine found in the wallet was the basis of the charge against Defendant.

We, however, must next consider whether the proper mandate is to vacate and remand for further findings or whether the proper mandate is to reverse the order denying Defendant's suppression motion. For the reasoning below, we believe the best course in this case is to vacate the trial court's order and subsequent judgment and remand the matter to the trial court for further findings.

In so considering the appropriate mandate, we are mindful that the burden rests *with the State* to show that consent to search a particular area was validly given. *See State v. Hardy*, 339 N.C. 207, 226 (1994). We are also mindful that the consent must be "clear and unequivocal" for the consent to be valid. *State v. Pearson*, 348 N.C. 272, 277 (1998).

Here, the trial court did find that the wallet "had been removed from the interior of the car by [Defendant] who placed it on the roof of the car in view of [the officer] after he had received consent to search [the car]." There was evidence that she was in possession of the wallet earlier when she was providing her identification and title information to the officer, that she went towards the car to clean it out to facilitate the officer's search of the car (after Mr. Thomas gave verbal consent to the search), and that she did not possess the wallet when she stepped away from the car as the officer began his search. However, there is no direct evidence in the record for this finding. Defendant, though, has not challenged the finding. Therefore, this finding is binding on appeal. *In re A.A.M.*, 379 N.C. 167, 176 (2021).

However, it is unclear why Defendant placed her wallet on the car. She may have left it there inadvertently while cleaning out her car and simply forgot that the wallet was there when the officer told her to stop cleaning. Or it may be that she placed the wallet on the car as a gesture of consent to the search since she carried other personal items away from the car prior to the search.

Further, Defendant's silence while the officer searched her wallet cannot constitute consent. Specifically, our Supreme Court has held that where a defendant has consented to the search of his vehicle, the officer's search of a defendant's *person* (and finding drugs on his person) based on a defendant's silence/acquiescence is unlawful:

> The superior court relied on the consent to search the vehicle . . . and the fact that [the defendant] did not object when he was [personally] searched to conclude the defendant consented to the search. This was error. The consent signed by the defendant applied only to the vehicle. We cannot broaden the consent to include the defendant's

> person. We also cannot hold that the acquiescence of the defendant when the officer told him he would frisk him was consent, considering all the circumstances. There must be clear and unequivocal consent before a defendant can waive his constitutional rights.

Pearson, 348 N.C. at 277. We have held, though, that nonverbal behavior by a defendant *may* constitute a sufficient expression of consent. *See State v. Harper*, 158 N.C. App. 595, 603 (2003).

The United States Supreme Court has held the test concerning the scope of consent to be "that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

On remand, the trial court may again deny Defendant's motion, but only if it makes findings based on the evidence that the officer objectively believed that Defendant was giving her clear and unequivocal consent to the officer's search of her wallet. Otherwise, it is the trial court's duty to grant Defendant's motion.

We express no opinion as to the appropriateness of the trial court's consideration of new evidence on remand, as neither party has briefed this issue.

VACATED AND REMANDED.

Judges WOOD and MURRY concur.

STATE OF NORTH CAROLINA
v.
KENNETH LOUIS WALKER

No. COA24-615

Filed 16 April 2025

Sentencing—life imprisonment without parole—judicial review after 25 years served—statutory requirements met

After defendant had served 25 years of his life without parole sentence for first-degree murder, thereby becoming eligible for review of his sentence pursuant to N.C.G.S. § 15A-1380.5, the trial court's recommendation not to alter or commute defendant's sentence was affirmed, where the court's review process followed all of the statutory requirements and where its recommendation was reasonably supported by the record. The trial court did not abuse its discretion by declining to hold a hearing on the matter or to enter written factual findings supporting its recommendation, as neither step was required under section 15A-1380.5. Further, the court made it clear that it had considered the trial record, defendant's record from the Department of Corrections, the risk he posed to society, and other relevant information when reviewing defendant's sentence.

Appeal by Defendant from a recommendation pursuant to N.C. Gen. Stat. § 15A-1380.5 entered 8 February 2024 by Senior Resident Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 28 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Benjamin Szany, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant.

WOOD, Judge.

Kenneth Walker ("Defendant") filed a Petition for a Writ of Certiorari on 8 March 2024, which this Court granted on 24 April 2024, seeking to appeal the trial court's recommendation regarding his sentence entered 8 February 2024 pursuant to N.C. Gen. Stat. § 15A-1380.5. For the reasons set forth below, we affirm the trial court's recommendation.

I. Factual and Procedural Background

Defendant was tried in October 1999 in Wake County Superior Court for the murder of Stephanie B. Keith on 14 November 1998 in a capital trial. On 20 October 1999, the jury found him guilty of first-degree murder. The State sought the death penalty. On 22 October 1999, the jury recommended a sentence of life imprisonment without parole after concluding the State had not proved the one aggravating factor submitted to the jury. The trial court entered judgment sentencing Defendant to life imprisonment without parole in accordance with the jury's recommendation. On 5 June 2001, Defendant filed an Anders brief on appeal. In an unpublished opinion issued 7 June 2002, this Court determined Defendant's trial was free from prejudicial error and his appeal was wholly frivolous.

On 11 September 2023, Defendant requested that the trial court review his sentence of life imprisonment without parole pursuant to N.C. Gen. Stat. § 15A-1380.5. Under N.C. Gen. Stat. § 15A-1380.5, Defendant became eligible for review of his life sentence on or about 14 November 2023. After careful review and consideration of the trial record, Defendant's record from the Department of Corrections, the degree of risk posed by Defendant to society, and other information contained in the record, Senior Resident Judge Paul C. Ridgeway made his recommendation that Defendant was not entitled to have his sentence altered or commuted on 8 February 2024. On 10 April 2024, Defendant filed a pro se Petition for Writ of Certiorari to this Court. On 24 April 2024, this Court allowed certiorari and remanded the matter to the trial court for a hearing to determine whether Defendant is indigent and entitled to court appointed counsel. On 29 April 2024, Judge Ridgeway entered an order finding Defendant was indigent and entitled to appointment of counsel and on 13 May 2024 appellate entries were entered finding Defendant indigent and appointing the Appellate Defender's Office to represent him.

II. Analysis

On appeal, Defendant raises three issues: the trial court abused its discretion by concluding Defendant's sentence should not be altered without making findings of fact; the trial court erred by failing to consider the trial record; and the trial court abused its discretion by not conducting a hearing during its review of Defendant's sentence.

In 1994, the North Carolina General Assembly enacted N.C. Gen. Stat. § 15A-1380.5 in response to the addition of life imprisonment without parole to North Carolina sentencing practices. From 1994 to 1998,

the statute provided that "[a] defendant sentenced to life imprisonment without parole is entitled to review of that sentence by a resident superior court judge for the county in which the defendant was convicted after the defendant has served 25 years of imprisonment." N.C. Gen. Stat. § 15A-1380.5(b) (1994) (repealed 1998).

Defendants sentenced to life imprisonment without parole for offenses committed between 1 October 1994 and 1 December 1998 remain entitled to review of their sentences after serving 25 years of imprisonment. *Id.*; *see also State v. Young*, 369 N.C. 118, 124, 794 S.E.2d 274, 278-79 (2016) (cleaned up). A trial court's recommendation under N.C. Gen. Stat. § 15A-1380.5 is "reviewed on appeal only for an abuse of discretion." N.C. Gen. Stat. § 15A-1380.5(f) (1994) (repealed 1998).

N.C. Gen. Stat. § 15A-1380.5 states in its entirety:

> (a) For the purposes of this Article the term "life imprisonment without parole" shall include a sentence imposed for "the remainder of the prisoner's natural life."
>
> (b) A defendant sentenced to life imprisonment without parole is entitled to review of that sentence by a resident superior court judge for the county in which the defendant was convicted after the defendant has served 25 years of imprisonment. The defendant's sentence shall be reviewed again every two years as provided by this section, unless the sentence is altered or commuted before that time.
>
> (c) In reviewing the sentence the judge shall consider the trial record and may review the defendant's record from the Department of Correction, the position of any members of the victim's immediate family, the health condition of the defendant, the degree of risk to society posed by the defendant, and any other information that the judge, in his or her discretion, deems appropriate.
>
> (d) After completing the review required by this section, the judge shall recommend to the Governor or to any executive agency or board designated by the Governor whether or not the sentence of the defendant should be altered or commuted. The decision of what to recommend is in the judge's discretion.
>
> (e) The Governor or an executive agency designated under this section shall consider the recommendation made by the judge.

> (f) The recommendation of a judge made in accordance with this section may be reviewed on appeal only for an abuse of discretion.

N.C. Gen. Stat. § 15A-1380.5 (1994) (repealed 1998).

"It is a bedrock rule of statutory interpretation that if the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Belmont Ass'n v. Farwig*, 381 N.C. 306, 313, 873 S.E.2d 486, 490 (2022) (cleaned up). N.C. Gen. Stat. § 15A-1380.5 clearly and plainly lays out the requirements for the trial court when reviewing a defendant's sentence. After serving 25 years of imprisonment: (1) the defendant must receive a review; (2) the review must be completed by a superior court judge; (3) the judge must review the trial record; (4) the judge must make a recommendation; (5) the recommendation must be considered; and (6) the recommendation can only be reviewed for an abuse of discretion. N.C. Gen. Stat. § 15A-1380.5 (1994) (repealed 1998).

Our Supreme Court has held that N.C. Gen. Stat. § 15A-1380.5 "guarantees no hearing, no notice, and no procedural rights." *State v. Young*, 369 N.C. 118, 124, 794 S.E.2d 274, 279 (2016). It "requires only that the judge consider the trial record and notes that the judge may review other information in his or her discretion." *Id.* (cleaned up).

Similarly, N.C. Gen. Stat. § 15A-1380.5 does not require the reviewing resident superior court judge to issue an order with findings of fact or conclusions of law. The statute requires only a recommendation to be made. "[I]n effectuating legislative intent, it is the duty of the courts to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *State v. Watterson*, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009). In North Carolina, a court order, generally, must be in writing and contain findings of fact and conclusions of law that are supported by evidence. The findings must be sufficiently detailed to demonstrate that the court properly considered the relevant issues and evidence. The conclusions of law must logically follow from the findings of fact, and the judgment must be based on these conclusions. This progression ensures that appellate courts can review the order for legal sufficiency. *See Sunshine v. Sunshine*, 294 N.C. App. 289, 292, 903 S.E.2d 352, 256 (2024); *see also State v. Edwards*, 286 N.C. App. 306, 308, 879 S.E.2d 391, 393 (2022). Had the legislature intended for findings of fact and conclusions of law to be required it could have chosen to require the reviewing judge to issue orders, rather than recommendations, as they have in numerous other statutes. *See* N.C. Gen. Stat. §1A-1, Rule 52; *see also* N.C. Gen. Stat. § 7B-906.2(d).

This Court reviews recommendations made pursuant to N.C. Gen. Stat. § 15A-1380.5 for abuse of discretion. N.C. Gen. Stat. § 15A-1380.5(f) (1995) (repealed 1998). "An abuse of discretion occurs when a trial court's ruling is so arbitrary that it cannot be the result of a reasoned decision. A trial court also abuses its discretion when it makes an error of law." *In re McClatchy Co.*, 386 N.C. 77, 92, 900 S.E.2d 765, 776 (2024) (cleaned up). Based on this discretionary standard of review paired with the limited effect inherent in a mere recommendation, our Supreme Court in *Young* recognized,

> [u]ltimately, the decision of what to recommend is in the judge's discretion, and the only effect of the judge's recommendation is that the Governor or an executive agency designated under this section must "consider" it. Because of these provisions, the possibility of alteration or communication . . . is deeply uncertain and is rooted in essentially unguided discretion.

State v. Young, 369 N.C. 118, 124-25, 794 S.E.2d 274, 279 (2016) (cleaned up). As such, when the trial court has followed the statutory requirements of N.C. Gen. Stat. § 15A-1380.5 and its recommendation is reasonably supported by the record review there is no abuse of discretion.

In the case *sub judice*, the trial court clearly stated it had considered "the record proper" and the submissions of the State and Defendant during its review. It further stated that the court "has considered the trial record, the Defendant's record from the Department of Corrections, the degree of risk to society posed by the defendant, and such other information contained in the record." The trial court concluded, "[f]ollowing this review, the [c]ourt, in its discretion, recommends that the sentence of the defendant should not be altered or commuted."

Through these actions, the trial court satisfied the requirements of N.C. Gen. Stat. § 15A-1380.5. Further, a thorough review of the record provides ample support for the trial court's decision to recommend that Defendant's sentence not be altered or commuted. Accordingly, we hold the trial court did not abuse its discretion when making its recommendation without holding a hearing or making explicit findings as it completed the necessary review of the record, and the record supports the trial court's recommendation.

III. Conclusion

Pursuant to N.C. Gen. Stat. § 15A-1380.5 when reviewing a defendant's sentence of life of imprisonment without parole, "the judge shall

consider the trial record and *may* review . . . any other information that the judge, in his or her discretion, deems appropriate." N.C. Gen. Stat. § 15A-1380.5(c) (1994) (repealed 1998). Upon completion of the review, the trial court must make a recommendation but is not required to hold a hearing or make explicit findings of fact. The trial court did not abuse its discretion in making its recommendation as the record supports the trial court's recommendation. Thus, the trial court's recommendation is affirmed.

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
MERANDA CHANTEL WATLINGTON

STATE OF NORTH CAROLINA
v.
FANA ANQUETTE FELTON

No. COA23-1106

Filed 16 April 2025

1. Homicide—first-degree felony murder—predicate felony—assault with deadly weapon inflicting serious injury

In defendant's trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not err by submitting to the jury the first-degree felony murder charge based on the underlying felony of assault with a deadly weapon inflicting serious injury. Although defendant did not preserve the issue for appellate review, the appellate court considered the issue in its discretion and determined that the assault could serve as a predicate felony for the felony murder charge as a matter of law. Sufficient evidence was presented that defendant had actual intent to commit the assault by first backing the vehicle directly over multiple people, completely running them over; coming to a full stop; pausing; and then shifting the car's gears and driving forward at full speed over the victims a second time.

2. Criminal Law—jury instructions—felony murder—level of intent required—plain error analysis

In defendant's trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not plainly err in its jury instruction on felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury, where the court properly told the jury that it could convict defendant if it found that defendant intentionally struck the victims with her vehicle. Contrary to defendant's argument, the trial court's instruction did not allow the jury to convict defendant upon mere culpable or criminal negligence.

3. Criminal Law—jury instructions—felony murder trial—voluntary manslaughter not supported by evidence

In defendant's trial for felony murder and related offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not err by failing to instruct the jury on the lesser included offense of voluntary manslaughter because the evidence did not support a reasonable inference that defendant's actions were a result of a passion or heat of blood produced by adequate provocation. Defendant had walked away from an initial altercation in the parking lot, gotten into the car, and paused, then backed over the victim before changing gears and running over the victim a second time. Even if the instruction had been warranted, any error would have been harmless given that the jury convicted defendant of felony murder.

4. Motor Vehicles—murder trial—multiple counts of hit and run—unit of prosecution—rule of lenity

In defendant's trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, although defendant was convicted of four counts of felonious hit and run resulting in serious bodily injury or death and one count of misdemeanor hit and run based on the number of victims, since the charging statute—N.C.G.S. § 20-166—was ambiguous regarding the allowable unit of prosecution, the appellate court applied the rule of lenity and held that the unit of prosecution under the statute was the number of crashes from which the defendant fled and not the number of victims. Since defendant had fled from two crashes, she could only be convicted of two violations of the statute; therefore,

the appellate court arrested judgment on three of the hit-and-run convictions and remanded to the trial court for resentencing.

5. Accomplices and Accessories—accessory after the fact—felony murder—assault with deadly weapon—hit and run

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the State presented substantial evidence to defeat defendant's motion to dismiss the charges. Defendant's behavior after witnessing her co-defendant run over multiple victims more than once with the car gave rise to a reasonable inference that she aided her co-defendant in escaping arrest, detection, or punishment, including by: getting in the car, leaving the scene, abandoning the car some distance from the scene, and taking the car key from the co-defendant so as to conceal the co-defendant's identity as the driver.

6. Indictment and Information—indictment—accessory after the fact—no fatal variance from evidence at trial

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, there was no fatal variance between the indictments and the evidence presented at trial. Evidence that defendant possessed the car keys after the incident—an allegation that was not included in the indictments—demonstrated the means by which defendant aided her co-defendant in escaping detection, arrest, and punishment.

7. Accomplices and Accessories—accessory after the fact—multiple counts—unit of prosecution—rule of lenity inapplicable

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person

and seriously injuring several others, before the two defendants drove away from the scene, the appellate court determined that, because the charging statute—N.C.G.S. § 14-7—unambiguously set forth the allowable unit of prosecution to be each felony that was committed by the principal and assisted by the accessory after the fact, the rule of lenity did not apply. Therefore, the trial court did not err by denying defendant's motion to dismiss for insufficient evidence that she committed more than one count of accessory after the fact.

8. Accomplices and Accessories—accessory after the fact—hit and run—more than merely leaving the scene

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court did not err by denying defendant's motion to dismiss the charges of accessory after the fact to her co-defendant's convictions for hit and run. Contrary to defendant's argument, the convictions were not merely for "leaving the scene," but for defendant's actions in assisting her co-defendant escape detection, arrest, and punishment by taking the car keys, abandoning the car after driving away from the scene, and concealing her co-defendant's identity as the driver.

9. Accomplices and Accessories—accessory after the fact—some of principal's judgments arrested—corresponding accessory convictions unsupported

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, where the appellate court had arrested judgment on three of the co-defendant's convictions of hit and run, leaving two undisturbed, the appellate court similarly arrested judgment on three of defendant's convictions of accessory after the fact and remanded for resentencing.

10. Criminal Law—jury instructions—accessory after the fact—evidence showing assistance

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court did not plainly err by allowing the jury to consider defendant's possession of the car keys as circumstantial evidence that defendant knowingly assisted her co-defendant in escaping detection, arrest, and punishment. Although the indictments did not allege that defendant possessed the car keys, this evidence provided the means by which defendant assisted her co-defendant after the events that gave rise to the charges.

11. Criminal Law—prosecutor's closing argument—post-crime evasion—reasonable inferences from evidence

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court was not required to intervene ex mero motu during the State's closing argument, in which the prosecutor stated that defendant and her co-defendant were "walking away together." The statement was a reasonable inference from the evidence—provided by officer testimony and body camera footage—that the two defendants were walking near each other when they were apprehended.

Appeal by Defendants from judgments entered 10 and 11 October 2022 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 29 October 2024 in session at Duke University School of Law in the City of Durham pursuant to N.C. Gen. Stat. § 7A-19(a).

Attorney General Jeff Jackson, by Special Deputy Attorney General Kathryne E. Hathcock, for the State-Appellee.

Hynson Law, PLLC, by Warren D. Hynson, for Defendant-Appellant Meranda Chantel Watlington.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for Defendant-Appellant Fana Anquette Felton.

COLLINS, Judge.

This case involves appeals by two defendants: Meranda Chantel Watlington and Fana Anquette Felton. Watlington appeals from judgments entered upon a jury's guilty verdicts of nine felonies, including one count of first-degree murder, and two misdemeanors. Felton appeals from judgments entered upon a jury's guilty verdicts on eleven counts of accessory after the fact, one for each of Watlington's convictions. Watlington and Felton each raise several issues on appeal. For the following reasons, we arrest judgment on three of Watlington's convictions for hit and run and three of Felton's convictions for accessory after the fact to hit and run, and we remand for resentencing. We find no error or dismiss defendants' arguments as to the remaining convictions, including Watlington's conviction for first-degree murder and Felton's conviction to accessory after the fact to first-degree murder.

I. Background

Watlington was indicted for one count of first-degree murder, five counts of attempted first-degree murder, four counts of assault with a deadly weapon with intent to kill inflicting serious injury, six counts of felonious hit and run resulting in serious bodily injury or death, one count of driving while license revoked, and one count of failure to reduce speed. Felton was indicted for sixteen counts of accessory after the fact to all of the felony charges against Watlington. Watlington and Felton were tried jointly, and the evidence at trial, which included testimony from both lay and expert witnesses, medical records, and video footage, tended to show the following:

In the early morning hours of 12 October 2019, at approximately 3:25 a.m., Felton drove a 2006 Ford Explorer to the Exxon gas station located on West Gate City Boulevard in Greensboro, North Carolina. In addition to Felton, three other individuals were in the Explorer: Watlington was in the front passenger seat, and cousins Latika and Zanelle Tucker were in the rear seats.

Felton turned into the Exxon parking lot and drove the Explorer between two gas pumps toward the store. Shanna Goode was sitting

inside her car that was parked at one of the gas pumps. As Felton passed the gas pumps, she hit the side of Goode's car with the front right side of the Explorer. Felton drove the Explorer a few feet past Goode's car and stopped in the middle of the parking lot. Felton and Watlington got out of the Explorer and approached Goode, who had stepped out of her car and was standing beside it. A conversation ensued between Watlington, Felton, and Goode. A few minutes later, Latika and Zanelle got out of the Explorer and joined the conversation. This conversation occurred to the side of Goode's car and directly behind the Explorer.

As the conversation about the accident continued, Felton became increasingly aggressive. Exxon's security footage shows Watlington repeatedly attempting to remove Felton from the situation back to the Explorer, to no avail. Others at the Exxon began to take notice, and a few individuals approached to check on the situation. Eventually, approximately ten people can be seen on the security footage standing to the side of Goode's car and behind the Explorer.

After approximately twenty minutes, the confrontation became physical. Goode testified that a fight first broke out between Felton and Jennifer Lennon, one of the individuals who had approached to check on the situation. Soon after, multiple fights broke out in the Exxon parking lot. Goode testified that the fighting lasted for more than twenty-five minutes, with Felton being the primary aggressor.

Throughout the fight, Zanelle tried to control Felton and get her back into the Explorer. While doing so, however, Zanelle was hit in the head. She started to feel light-headed and laid down on the ground directly behind the Explorer. Meanwhile, the fighting and chaos continued. Some individuals became concerned about Zanelle and approached to check on her. Latika stood over Zanelle, and Donnetta Evans sat on the ground next to Zanelle and attempted to check Zanelle's pulse. Evans' husband, Billy Travis, also stood behind the Explorer, checking on Zanelle.

Nearly thirty minutes after the initial conversation between Watlington, Felton, and Goode began, with the fighting and chaos ongoing, Watlington walked back to the Explorer and got into the driver's seat. She sat in the Explorer for a few seconds and then backed the Explorer over the group of individuals directly behind her, which included Zanelle, Latika, Evans, Goode, and Travis. It took Watlington approximately ten seconds to completely run over them. Goode testified that Watlington ran over her legs and "people's bodies."

Watlington brought the Explorer to a complete stop, with the people she had hit now on the ground a few feet in front of her. A few individuals

began moving and attempting to stand up; some, including Goode, were able to roll out of Watlington's immediate path. Kalyn Burch, who was not initially hit by Watlington, dragged Travis out of the way and then kneeled next to Evans, who was lying injured on the ground.

However, eight seconds after Watlington backed over the individuals, she put the Explorer in drive, stepped hard on the gas pedal, and drove forward toward the same group. According to Goode, who had rolled herself far enough to the side to avoid getting hit a second time, Watlington drove the Explorer forward at full speed. Watlington drove straight into and over the group of people in front of her, which included Zanelle, Latika, Evans, and Burch. She also swiped the side of Goode's car and crashed into another vehicle—occupied by Melinda Sims—on the other side of the parking lot. The incident, caught on Exxon's security footage, left several individuals lying motionless on the ground.

Felton, as seen in the security footage, watched the entire incident occur. After Watlington ran over the victims the second time, Felton stood directly over the victims and yelled at them. Watlington backed the Explorer up again and stopped adjacent to the individuals she had just hit. As law enforcement and emergency services vehicles began to arrive, Felton got into the front passenger seat of the Explorer, and Watlington drove out of the Exxon parking lot.

Law enforcement officer Douglas Maund saw chaos upon arriving at the scene; he saw people running everywhere, multiple damaged vehicles, and "five or six" individuals lying on the ground motionless.

Law enforcement officers located the Explorer parked in a driveway about a quarter of a mile away from the Exxon. Expert testimony at trial indicated that although the vehicle was damaged, its brakes, steering wheel, and accelerator pedal were functioning normally. Officer James Cozart, a member of the Greensboro Police Department's Crash Reconstruction Unit, analyzed data from the Explorer's data recorder. He testified that the accelerator pedal percentage, which measures how much the driver is depressing the gas pedal, was at 99.5 percent when Watlington put the Explorer into reverse and backed over the individuals. When Watlington put the Explorer in drive and began driving forward, Officer Cozart testified that the accelerator pedal percentage was ninety-five percent.

Not long after arriving at the scene and locating the abandoned Explorer, officers found Watlington and Felton walking along West Gate City Boulevard near the Exxon and apprehended them. The keys

to the Explorer were found in the purse Felton was carrying when apprehended.

Zanelle was declared deceased at the scene. Several other individuals were injured as a result of being hit or run over by Watlington, including Travis, Evans, Latika, Burch, and Sims.

- Travis sustained a concussion and blunt chest trauma, and suffered two miniature heart attacks in the days immediately following the crash.
- Evans woke up in the hospital approximately twenty days after the crash and spent a total of twenty-six days in the hospital. She sustained a fractured skull, a compound-fractured collarbone, a broken shoulder blade, broken ribs, a broken back, a broken pelvis, a broken leg and foot, and other more minor injuries. She also suffered memory loss and a permanent loss of smell.
- Latika suffered a traumatic brain injury which left her with memory loss. She also sustained blunt trauma to her left lung, a broken shoulder blade, a broken left leg, a broken pelvis, and a broken back, and she went into hemorrhagic shock from internal bleeding.
- Burch sustained a broken back and neck, a broken jaw, and several broken ribs. He also had a severe laceration to his scalp and remained in the hospital for eleven days.
- Sims sustained minor injuries, including a dislocated knee and back pain.

The jury convicted Watlington of one count of first-degree murder under the felony murder rule, four counts of assault with a deadly weapon inflicting serious injury, one count of assault with a deadly weapon, four counts of felonious hit and run resulting in serious bodily injury or death, and one count of misdemeanor hit and run. The jury convicted Felton of accessory after the fact to all eleven of Watlington's convictions. Watlington and Felton appeal.

II. Discussion

A. Defendant Watlington

Watlington makes several arguments on appeal. We address each in turn.

1. Assault With a Deadly Weapon Inflicting Serious Injury as the Predicate Felony for Felony Murder

[1] Watlington first argues that the trial court erred by sentencing her to life without parole for first-degree felony murder where the judgment for felony murder was impermissibly based on the felony of assault with a deadly weapon inflicting serious injury. Watlington's argument is meritless.

We first address Watlington's preservation of this issue for appeal. Generally, "[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 party must also obtain a ruling on their request, objection, or motion. *Id.*

Furthermore, "[a] party may not make any portion of the jury charge . . . the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict[.]" N.C. R. App. P. 10(a)(2). However, an error based on the ground that "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law" is preserved by law without such objection. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2023).

Nevertheless,

> an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4).

Watlington presents this issue as a "sentencing error" that is preserved for appellate review absent objection; this mischaracterizes the issue. The essence of Watlington's argument is that the trial court erred by submitting to the jury felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury. This is a jury instruction issue. Watlington failed to object to the felony-murder jury instruction or raise this issue at any point in the trial court. Watlington has also failed to argue on appeal that this issue amounts to plain error. Accordingly, Watlington has failed to preserve this issue for appellate review.

The State, however, does not disagree with Watlington's characterization of this issue as a "sentencing error." The State does not argue that Watlington has failed to preserve this issue for our review and addresses the issue under a de novo review. In our discretion, we will address the parties' arguments as to whether assault with a deadly weapon inflicting serious injury, as a matter of law, can serve as the predicate felony for felony murder.

"Felony murder is murder in the first degree 'irrespective of premeditation or deliberation or malice aforethought.' " *State v. Wilson*, 313 N.C. 516, 537 (1985) (citation omitted). "The elements of felony murder are: (1) [ ] a defendant . . . committed or attempted to commit a predicate felony under N.C. Gen. Stat. § 14-17(a)[ ]; (2) [ ] a killing occurred in the perpetration or attempted perpetration of that felony; and (3) [ ] the killing was caused by the defendant[.]" *State v. Maldonado*, 241 N.C. App. 370, 376 (2015) (quotation marks and citation omitted). "[T]he perpetration or attempted perpetration of any . . . felony committed or attempted with the use of a deadly weapon" is a predicate felony for purposes of felony murder. N.C. Gen. Stat. § 14-17(a) (2023).

Assault with a deadly weapon inflicting serious injury is a felony with the following elements: "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Foreman*, 270 N.C. App. 784, 789 (2020) (citation omitted); *see* N.C. Gen. Stat. § 14-32(b) (2023). "[A]n automobile can be a deadly weapon if it is driven in a reckless or dangerous manner." *State v. Jones*, 353 N.C. 159, 164 (2000) (citation omitted). Assault with a deadly weapon inflicting serious injury is not a specific intent crime. *State v. Woods*, 126 N.C. App. 581, 587 (1997). Instead, it is a general intent crime which only requires the doing of some act. *Id.*; *see also State v. Jones*, 339 N.C. 114, 148 (1994). An individual may be found guilty of assault with a deadly weapon inflicting serious injury if she acts with either "actual intent" or "culpable or criminal negligence from which such intent may be implied." *Id.* at 164-65 (citation omitted). For assault with a deadly weapon inflicting serious injury to serve as the predicate felony for a felony murder conviction, however, the individual must have acted with a "level of intent greater than culpable negligence." *Id.* at 167. That is, the person must have acted with the "actual intent to commit the act that forms the basis of [the] first-degree murder charge." *Id.* at 166 (quotation marks omitted).

Watlington argues that our Supreme Court's holding in *State v. Jones*, 353 N.C. 159, establishes a bright-line rule that assault with a

deadly weapon inflicting serious injury can never serve as the predicate felony for a felony murder charge. Watlington's argument is not correct.

In *Jones*, the "appreciably impaired" defendant crashed his vehicle into another vehicle occupied by six college students. 353 N.C. at 161-62. Two of the students were killed in the collision. *Id.* at 161. The evidence presented at trial indicated that the defendant "perpetrated the assault by operating his automobile, a deadly weapon, in a culpably or criminally negligent manner. His criminal or culpable negligence was established, as a matter of law, when he was convicted of DWI by the jury[.]" *Id.* at 165. Reversing the defendant's felony murder conviction, the Court held that "culpable negligence may not be used to satisfy the intent requirements for a first-degree murder charge." *Id.* at 163. The Court emphasized that all categories of first-degree murder[1] require mental states "greater than culpable or criminal negligence; that is, they all require that the defendant had 'actual intent' to commit the act that forms the basis of a first-degree murder charge." *Id.* at 166. Contrary to Watlington's assertion, however, the Court did not hold that assault with a deadly weapon inflicting serious injury can never serve as the predicate felony for a felony murder charge.

Here, the trial court's instructions reflect a correct statement of the law—that felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury must be committed with the "actual intent to commit the act that forms the basis of [the] first-degree murder charge." *Jones*, 353 N.C. at 166 (quotation marks omitted). The trial court instructed the jury that to find Watlington guilty of first-degree murder under the felony murder rule, the State must prove beyond a reasonable doubt that, among other things, Watlington committed assault with a deadly weapon inflicting serious injury "by intentionally striking Billy Travis, Latika Tucker, or Donnetta Evans with a 2006 Ford Explorer."

Furthermore, the evidence presented at trial was sufficient to support a conclusion that Watlington acted with the intent to strike Latika, Burch, Evans, and Travis. Watlington can be seen on the Exxon security footage conversing with others and participating in the fight for nearly

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1. "[M]urders classified as murder in the first degree by the 1893 enactment were divided into three basic categories: (1) murders perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, (2) premeditated murder, and (3) killings occurring in the commission of certain specified felonies 'or other felony.' " *State v. Davis*, 305 N.C. 400, 423 (1982).

thirty minutes. She then walked to the Explorer and got into the driver's seat. After a brief pause, she backed the vehicle directly over the victims, completely running them over. Watlington then brought the vehicle to a complete stop, shifted the car's gears, and drove forward, hitting and running over the victims a second time. This evidence supports a conclusion that Watlington "had 'actual intent' to commit the act that forms the basis of a first-degree murder charge." *Id.* at 166.

Watlington argues that the jury's acquittal of first-degree murder based upon premeditation and deliberation shows that she did not act intentionally, but rather that she acted with mere negligence. This argument reflects a misunderstanding of the law. As the *Jones* Court clarified, "the actual intent to kill may be present or absent; however, the actual intent to commit the underlying felony is required." *Id.* at 167. Thus, even if the jury did not find that Watlington intended to kill Zanelle, the evidence was sufficient for the jury to find that she was "purposely resolved" to strike Latika, Burch, Evans, and Travis—"the conduct that comprises" the underlying predicate felony. *Id.*

Accordingly, assault with a deadly weapon inflicting serious injury, as a matter of law, can serve as the predicate felony for a felony murder conviction when the defendant acts with the "actual intent to commit the act that forms the basis of [the] first-degree murder charge." *Id.* at 166 (quotation marks omitted). Because the trial court only instructed the jury on assault with a deadly weapon inflicting serious injury committed with actual intent to strike Latika, Burch, Evans, and Travis, and the evidence was sufficient to support the instruction, the trial court did not err by submitting to the jury first-degree felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury.

2. Felony Murder Jury Instruction

[2] Watlington next contends that the trial court plainly erred by failing to instruct the jury that it could not convict Watlington of felony murder if it found that Watlington acted with culpable or criminal negligence as opposed to actual intent. This argument is without merit.

The plain error standard of review is well established:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that

> the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518 (2012) (quotation marks and citations omitted).

When instructing the jury, the trial court's "purpose is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Smith*, 360 N.C. 341, 346 (2006) (quotation marks and citation omitted). When reviewing jury instructions, we consider whether the instruction complained of contains a correct statement of the law and, if so, whether "there [is] evidence upon which to base the instruction given, or to justify the charge to the jury[.]" *State v. Alston*, 228 N.C. 555, 557 (1948). "Furthermore, to constitute plain error, the challenged instruction must result in a miscarriage of justice or the probability of a different verdict than the jury would otherwise have reached." *State v. Fowler*, 353 N.C. 599, 624 (2001) (citation omitted).

Here, the trial court instructed the jury on both first and second-degree murder. For the first-degree murder charge, the trial court instructed the jury as to murder on the basis of malice, premeditation, and deliberation and murder under the felony murder rule. As to felony murder, the trial court instructed the jury only on felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury committed with actual intent to inflict injury:

> Whether or not you find Defendant Watlington guilty of first degree murder on the basis of malice, premeditation, and deliberation, you will also consider whether Defendant Watlington is guilty of first degree murder under the First Degree Felony Murder Rule. Therefore, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, Defendant Watlington *intentionally struck* Billy Travis, Latika Tucker, or Donnetta Evans with a 2006 Ford Explorer thereby inflicting serious injury upon Billy Travis, Latika Tucker, or Donnetta Evans and that while committing assault with a deadly weapon inflicting serious injury, Defendant Watlington killed Zanelle Tucker and that Defendant Watlington's act was a proximate cause of Zanelle Tucker's death and that Defendant Watlington committed assault with a deadly weapon inflicting serious

> injury with the use of a deadly weapon, it would be your duty to return a verdict of guilty of first degree murder under the Felony Murder Rule. *If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first degree murder under the Felony Murder Rule.*

(emphasis added).

In its instruction, the trial court clearly articulated that if the jury did not find beyond a reasonable doubt that Watlington acted intentionally in striking the victims with her vehicle, it was to return a verdict of not guilty of felony murder. Therefore, had the jury found that Watlington acted with mere culpable or criminal negligence as opposed to actual intent, it would have, under the trial court's instructions, returned a verdict of not guilty. Accordingly, the trial court did not err, much less plainly err, in its instructions on the requisite elements for first-degree murder under the felony murder rule.

3. Voluntary Manslaughter Jury Instruction

[3] Watlington next argues that the trial court erred by failing to instruct the jury on voluntary manslaughter. Specifically, Watlington contends that a voluntary manslaughter instruction was warranted because the evidence at trial supported a finding that she acted in the heat of passion suddenly aroused by adequate provocation in killing Zanelle. This argument lacks merit.

"First-degree murder is the unlawful killing—with malice, premeditation and deliberation—of another human being." *State v. Arrington*, 336 N.C. 592, 594 (1994) (citations omitted). "Voluntary manslaughter is the killing of another human being without malice and without premeditation and deliberation under [1] the influence of some passion or [2] heat of blood produced by adequate provocation." *State v. Simonovich*, 202 N.C. App. 49, 53 (2010) (citation omitted).

> [T]he heat of passion suddenly aroused by provocation must be of such nature as the law would deem adequate to temporarily dethrone reason and displace malice. Mere words however abusive are not sufficient provocation to reduce second-degree murder to manslaughter. Legal provocation must be under circumstances amounting to an assault or threatened assault.

State v. Montague, 298 N.C. 752, 757 (1979) (citations omitted). "Voluntary manslaughter is a lesser included offense of first-degree

murder." *Simonovich*, 202 N.C. App. at 53 (citation omitted). "A jury must be instructed on a lesser included offense only when evidence has been introduced from which the jury could properly find that the defendant had committed the lesser included offense." *State v. Woodard*, 324 N.C. 227, 232 (1989) (citation omitted).

Here, there is insufficient evidence that Watlington killed Zanelle in "the heat of blood produced by adequate provocation." *Simonovich*, 202 N.C. App. at 53 (citation omitted). The brawl that broke out at the Exxon was lengthy and physical; however, Watlington walked away from the fight and to the driver's side of the Explorer on her own accord. As she walked away from the fight and got into the driver's seat, Watlington was not under "circumstances amounting to an assault or threatened assault." *Montague*, 298 N.C. at 757 (citation omitted). Nor was she under such circumstances when she sat in the Explorer for a few seconds before backing the Explorer straight over Zanelle, who was on the ground directly behind her. Nor was she under such circumstances when she sat in the Explorer for eight seconds after backing over Zanelle and before driving forward, running over Zanelle again. The evidence "does not permit a reasonable inference that [Zanelle's] killing[] resulted from such provocation as would temporarily dethrone reason and displace malice." *Id.* We therefore find no error in the trial court's decision not to instruct the jury on voluntary manslaughter.

Moreover, even if it had been error not to instruct the jury on voluntary manslaughter, such error would have been harmless because the jury convicted Watlington of felony murder. *See, e.g.*, *State v. Wagner*, 343 N.C. 250 (1996).

4. Watlington's Multiple Hit and Run Counts

[4] Next, Watlington argues that the trial court erred by permitting her to be convicted of multiple counts of hit and run. Specifically, Watlington contends that N.C. Gen. Stat. § 20-166 is ambiguous because it does not clarify whether its unit of prosecution is the conduct of crashing and leaving the scene of the crash or the number of victims injured as a result of the crash. Therefore, Watlington contends, the rule of lenity should apply.

Whether N.C. Gen. Stat. § 20-166 defines its unit of prosecution by the act of crashing and leaving the scene of the crash or instead by the number of persons injured as a result of the crash is an issue of statutory construction. Issues of statutory construction are conclusions of law to be reviewed de novo by this Court. *State v. Patterson*, 266 N.C. App. 567, 570 (2019).

The legislature has the discretion to define the allowable unit of prosecution, subject to constitutional limitations. *State v. Smith*, 323 N.C. 439, 441 (1988). When, however, the legislature does not define the precise unit of prosecution with clarity, the court must determine the allowable unit and must resolve any ambiguity in favor of lenity. *Id.* at 442-43; *State v. White*, 127 N.C. App. 565, 570 (1997). In other words, "the presumption is against multiple punishments in the absence of a contrary legislative intent." *State v. Garris*, 191 N.C. App. 276, 284 (2008) (quotation marks and citation omitted).

N.C. Gen. Stat. § 20-166 provides, in pertinent part,

> (a) The driver of any vehicle who knows or reasonably should know:
>
> > (1) That the vehicle which he or she is operating is involved in a crash; and
> >
> > (2) That the crash has resulted in serious bodily injury, as defined in [N.C. Gen. Stat. §] 14-32.4, or death to *any person*;
>
> shall immediately stop his or her vehicle at the scene of the crash. . . .
>
> (a1) The driver of any vehicle who knows or reasonably should know:
>
> > (1) That the vehicle which he or she is operating is involved in a crash; and
> >
> > (2) That the crash has resulted in *injury*;
>
> shall immediately stop his or her vehicle at the scene of the crash. . . .

N.C. Gen. Stat. § 20-166 (2023) (emphasis added).

Subsection (a)(2) refers to a crash that results in serious bodily injury or death to "any person" while subsection (a1)(2) refers to a crash that results in "injury." *Id.* Neither provision is a "clear expression of legislative intent to punish separately and cumulatively for each and every" person injured in the crash. *Smith*, 323 N.C. at 442 (emphasis and citations omitted). As the legislature has not established the allowable unit of prosecution under this statute, we must resolve this ambiguity in favor of lenity and hold that the unit of prosecution under N.C. Gen. Stat. § 20-166 is the number of crashes from which the defendant fled and not the number of victims injured as a result of the crashes.

Our Supreme Court has come to similar conclusions when construing statutes with similar language. In *Smith*, our Supreme Court concluded that a statute making it unlawful to "disseminate" "any obscene writing, picture, record or other representation or embodiment of the obscene" was ambiguous. 323 N.C. at 441 (quoting N.C. Gen. Stat. § 14-190.1 (1986 & Cum. Supp. 1987)). Similarly, in *State v. Conley*, our Supreme Court held that the criminal statute prohibiting the possession or carrying of "any gun, rifle, pistol, or other firearm" on educational property was ambiguous. 374 N.C. 209, 214 (2020) (emphasis omitted) (quoting N.C. Gen. Stat. § 14-269.2(b) (2019)). The Court determined in each case that the relevant statutory provision failed to provide a "clear expression of legislative intent to punish separately and cumulatively for each and every" prohibited item found in the defendants' possession. *Smith*, 323 N.C. at 442-44 (emphasis omitted); *see also Conley*, 374 N.C. at 214. Resolving such ambiguity in the defendants' favor, the Court determined that the proper unit of prosecution under each statute was the defendant's conduct of possessing the prohibited items, not the number of items found in the defendant's possession. *Id.*; *see also Garris*, 191 N.C. App. at 285 (holding that simultaneous possession of two firearms supports only a single conviction for possession of a firearm by a convicted felon rather than multiple convictions).

Here, Watlington was convicted of four counts of felonious hit and run resulting in serious bodily injury or death and one count of misdemeanor hit and run—a total of five violations of N.C. Gen. Stat. § 20-166 corresponding with each individual injured as a result of the crashes. The five convictions, however, resulted from two crashes: first, when Watlington backed over the victims with the Explorer and second, when Watlington drove forward and hit and ran over the victims with the Explorer a second time. She subsequently left the Exxon. Therefore, Watlington can only be convicted of two violations of N.C. Gen. Stat. § 20-166, one conviction for Watlington's conduct of leaving the scene of each crash. We arrest judgment on three of Watlington's hit-and-run convictions and remand this matter to the trial court for resentencing.

5. Serious Bodily Injury to Billy Travis

Finally, Watlington argues that the trial court erred by denying her motion to dismiss the charge of felonious hit and run resulting in serious bodily injury to Travis. In accordance with our conclusion that Watlington may only be convicted of two counts of hit and run resulting from the two crashes in the instant case, this issue is dismissed as moot.

B. Defendant Felton

Felton also makes several arguments on appeal. We address each in turn.

1. Motion to Dismiss for Insufficient Evidence

Felton first argues that the trial court erred by denying her motion to dismiss because there was insufficient evidence to support her convictions.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62 (2007) (citation omitted). "Upon [a] defendant's motion for dismissal, the question for the [trial c]ourt is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378 (2000) (citation omitted). If there is substantial evidence of each, the motion to dismiss is properly denied. *Id.* "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 (1980) (citations omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192-93 (1994) (citation omitted).

a. Evidence of Accessory After the Fact

[5] Felton first argues that the evidence was insufficient to support her convictions for accessory after the fact because no evidence was presented showing that she took any action making her an accessory after the fact.

The elements necessary to prove accessory after the fact under N.C. Gen. Stat. § 14-7 are: "(1) a felony was committed; (2) the accused knew that the person he received, relieved, or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felony personally." *State v. Earnhardt*, 307 N.C. 62, 68 (1982) (citations omitted); *see* N.C. Gen. Stat. § 14-7 (2023). Circumstantial evidence is permitted, and once the trial court "decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination," show the defendant's guilt beyond a reasonable doubt. *Fritsch*, 351 N.C. at 379 (cleaned up).

Here, the trial court announced what the evidence showed:

> And as the police arrive, Defendant Felton willingly, voluntarily, and knowingly as to what Defendant Watlington had done, gets into the car with Defendant Watlington and allows and in fact condones Defendant Watlington to drive away and flee the scene.
>
> . . . .
>
> It's also uncontroverted that the two defendants, Defendant Watlington and Defendant Felton, were seen a short time later not too far from the crime scene in the same general location. . . . At that time Defendant Felton, with the gold purse on her shoulder, was in exclusive possession of the ignition key to the Ford Explorer.
>
> . . . .
>
> She fled from the car with Defendant Watlington, and it's important that she did this all the while knowing that the police, who had already arrived at the Exxon, were actively looking for the perpetrator of the crime. By taking possession of the key and control of the car and fleeing the car, when she had the ability and capacity to operate the car, . . . she elected to flee from the car with Defendant Watlington after taking exclusive possession of the key or at some point taking exclusive possession of the key. She still fled from the car. By doing so, she aided Defendant Watlington in attempting to escape detection, arrest, or punishment.
>
> Similarly, she took the car keys, the – the part of the Ford Explorer's equipment, the car key, the thing that operated what was used to commit all of the crimes. By taking the car key after abandoning the car, she also concealed who the driver of the car was or at least by taking the car key away from [Watlington], aided the Defendant Watlington in escaping arrest, detection, or punishment.

This evidence, viewed in the light most favorable to the State, was sufficient to show that Felton, after witnessing Watlington hit and run over the victims with the Explorer and leave the scene of the crashes, took the Explorer's car keys, abandoned the Explorer, and concealed Watlington's identity as the Explorer's driver. Accordingly, there was sufficient evidence to support a reasonable inference of Felton's guilt of

accessory after the fact to Watlington's felonies, and the trial court did not err by denying Felton's motion to dismiss.

b. Allegations in the Indictments

[6] Felton next argues that there was a fatal variance between the indictments charging her with accessory after the fact and the evidence presented at trial. Specifically, Felton contends that her possession of the car keys should have been unavailable to the State as a theory of prosecution because it was not alleged in her indictments for accessory after the fact. This argument lacks merit.

A motion to dismiss on account of a fatal variance should be granted "when the prosecution fails to offer sufficient evidence [that] the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." *State v. Tarlton*, 279 N.C. App. 249, 253 (2021) (citation omitted). "In order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to the gist of the offense." *Id.* A variance "does not require reversal unless the defendant is prejudiced as a result." *State v. Glidewell*, 255 N.C. App. 110, 113 (2017) (quotation marks and citation omitted).

A bill of indictment "couched in the language of the statute is generally sufficient to charge the statutory offense." *State v. Palmer*, 293 N.C. 633, 638 (1977). An indictment will generally be deemed sufficiently complete even "without evidentiary matters descriptive of the manner and means by which the offense was committed." *State v. Muskelly*, 6 N.C. App. 174, 176-77 (1969). Furthermore, the fatal variance rule "was not intended as a get-out-of-jail-free card for setting aside convictions based on hyper-technical arguments." *State v. Henry*, 237 N.C. App. 311, 323 (2014) (citation omitted).

Here, each of Felton's accessory-after-the-fact indictments alleges that Felton "did knowingly assist [Watlington] in attempting to escape and in escaping detection, arrest, and punishment by providing a means of escape, to wit: an automobile, to flee the crime scene, and by concealing evidence, to wit: an automobile." When viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference," Felton's taking of the car keys evidences her attempt to assist Watlington escape arrest and conceal the Explorer. *Rose*, 339 N.C. at 192 (citation omitted). Accordingly, the bills of indictment charging Felton with accessory after the fact are not fatally varied from the evidence presented at trial.

c. Multiple Counts of Accessory After the Fact

[7] Felton next argues that the trial court erred by denying her motion to dismiss because there was insufficient evidence that Felton committed more than one count of accessory after the fact. Specifically, Felton contends that N.C. Gen. Stat. § 14-7 is ambiguous as to the applicable unit of prosecution for the crime of accessory after the fact and, as such, the rule of lenity should apply.

As discussed above, the rule of lenity provides that any ambiguity in a criminal statute concerning the unit of prosecution "should be resolved in favor of lenity" toward the defendant. *Smith*, 323 N.C. at 442-43. It is well-established that when interpreting a statute, "a court must consider the statute as a whole and determine its meaning by reading it in its proper context and giving its words their ordinary meaning." *City of Asheville v. Frost*, 370 N.C. 590, 592 (2018) (citation omitted).

N.C. Gen. Stat. § 14-7 governs the crime of accessory after the fact and provides:

> If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a crime, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such crime whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. Unless a different classification is expressly stated, that person shall be punished for an offense that is two classes lower than the felony the principal felon committed[.]

N.C. Gen. Stat. § 14-7.

Unlike in our above analysis of N.C. Gen. Stat. § 20-166, the context of N.C. Gen. Stat. § 14-7 clearly indicates that the legislature intended the allowable unit of prosecution to be each felony for which the principal committed and the accessory assisted after the fact. Additionally, the accessory-after-the-fact statute sets forth different punishments for an accessory after the fact based on the severity of the underlying felony committed by the principal, further demonstrating the legislature's intent. *See id.*

We therefore conclude that the statute is unambiguous, and the legislature intended for an accessory after the fact to be punished for each

felony the principal committed.[2] Accordingly, the rule of lenity is inapplicable, and the trial court did not err by denying Felton's motion to dismiss for this reason.

d. Accessory After the Fact to Hit and Run

[8] Next, Felton contends that the trial court erred by denying her motion to dismiss the charges of accessory after the fact to Watlington's convictions for "leaving the scene." Felton argues, "Even if the evidence were sufficient to show that [] Felton assisted [] Watlington after the assaults and homicide at the gas station by helping [] Watlington get the car from the gas station to where it was parked, that would make [] Felton a co-principal to [] Watlington's crime of leaving the scene, not an accessory after the fact to that crime." Felton mischaracterizes the crime for which Watlington was convicted and the behavior for which Felton was herself convicted.

"An accessory after the fact is one who, knowing that a felony has been committed by another, receives, relieves, comforts or assists such felon, or who in any manner aids him to escape arrest or punishment." *State v. Oliver*, 302 N.C. 28, 55 (1981) (citations omitted). The essential elements of felony hit and run are:

> (1) that the defendant was involved in an accident; (2) that someone was physically injured in this accident; (3) that at the time of the accident the defendant was driving the vehicle; (4) that the defendant knew that he had struck a pedestrian and that the pedestrian suffered physical injury; (5) that the defendant did not stop his vehicle immediately at the scene of the accident; and (6) that the defendant's failure to stop was willful, that is, intentional and without justification or excuse.

State v. Acklin, 71 N.C. App. 261, 264 (1984) (citing N.C. Gen. Stat. § 20-166).

Contrary to Felton's assertion, Watlington was not convicted of merely "leaving the scene." Leaving the scene of the crashes was only one element of her hit-and-run convictions. Here, the evidence, viewed in the light most favorable to the State, was sufficient to show the following: After witnessing Watlington hit and run over the victims with the

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2. We note that Felton was convicted of accessory after the fact to Watlington's convictions of misdemeanor hit and run and misdemeanor assault with a deadly weapon. N.C. Gen. Stat. § 14-7 provides that an individual may be convicted as an accessory after the fact to any *felonies* committed by the principal. Felton has not raised this issue on appeal, and we do not address it.

Explorer and leave the scene of the crashes, Felton aided Watlington to escape arrest or punishment by taking the Explorer's car keys, abandoning the Explorer, and concealing Watlington's identity as the Explorer's driver. Felton's driving away with Watlington was not the behavior for which she was convicted. Accordingly, there was sufficient evidence to support a reasonable inference of Felton's guilt of accessory after the fact to Watlington's felonious hit-and-run convictions, and the trial court did not err by denying Felton's motion to dismiss on this basis.

e. Felton's Multiple Counts of Accessory After the Fact to Hit And Run

[9] Felton also argues that because the evidence supports Watlington being convicted of only one count of hit and run, the trial court erred by denying Felton's motion to dismiss the charge of multiple counts of accessory after the fact to hit and run.

As explained above, Felton may only be convicted of accessory after the fact to Watlington's felony hit and run convictions. As Watlington can only be convicted of two counts of hit and run, Felton may only be convicted of two counts of accessory after the fact to felonious hit and run. We therefore arrest judgment on three of Felton's convictions for accessory after the fact to Watlington's hit-and-run convictions and remand for resentencing.

2. Jury Instruction for Accessory After the Fact

[10] Felton next argues that the trial court plainly erred by instructing the jury on a theory of guilt not alleged in her indictments.

Under the plain error standard of review, a defendant must show that the trial court committed a fundamental error that resulted in prejudice to the defendant. *Lawrence*, 365 N.C. at 518. "[B]ecause plain error is to be applied cautiously and only in the exceptional case, . . . the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]" *Id.* (quotation marks and citations omitted).

An indictment must allege "all the essential elements of the offense endeavored to be charged." *State v. Hunt*, 357 N.C. 257, 267 (2003) (quotation marks and citation omitted). Furthermore, "an indictment couched in the language of the statute is generally sufficient to charge the statutory offense." *Palmer*, 293 N.C. at 638. When instructing the jury, the trial court does not need "to state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence." *State v. Wallace*, 104 N.C. App. 498, 504 (1991) (citations omitted).

The elements of accessory after the fact under N.C. Gen. Stat. § 14-7 are: "(1) a felony was committed; (2) the accused knew that the person he received, relieved, or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felony personally." *Earnhardt*, 307 N.C. at 68 (citations omitted).

Here, each of Felton's accessory-after-the-fact indictments alleges that Felton "did knowingly assist [Watlington] in attempting to escape and in escaping detection, arrest, and punishment by providing a means of escape, to wit: an automobile, to flee the crime scene, and by concealing evidence, to wit: an automobile." Consistent with these indictments, the trial court instructed the jury to consider whether Felton "knowingly and willfully assisted Defendant Meranda Watlington in attempting to escape detection, arrest, and punishment." Felton's possession of the Explorer's car keys when apprehended was circumstantial evidence that she knowingly assisted Watlington in concealing the deadly weapon and of Watlington's identity as the operator of the deadly weapon. Contrary to Felton's contention, this is not a stand-alone theory presented by the State. Therefore, the trial court did not err, much less plainly err, by allowing the jury to use Felton's possession of the car keys to convict Felton of accessory after the fact.

3. State's Closing Argument

[11] Finally, Felton contends that the trial court erred by failing to intervene ex mero motu when the State made the following argument during its closing statement: that Felton "was walking away from the gas station with Meranda Watlington. Were they side by side at the time that the officers got to them? No. But they were walking away together. That is trying to let Meranda Watlington escape detection, arrest, or punishment." We find no merit in this argument.

Because Felton failed to object to the State's closing argument at trial, "the standard of review is whether the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *State v. Anthony*, 354 N.C. 372, 423 (2001) (quotation marks and citation omitted). "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* Therefore, when defense counsel fails to object to the State's improper argument and the trial court does not intervene, "the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179 (2017) (citations omitted).

During a criminal jury trial, "prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Phillips*, 365 N.C. 103, 135 (2011) (quotation marks and citations omitted). A prosecutor's closing argument "may properly be based upon the evidence and the inferences drawn from that evidence." *State v. Diehl*, 353 N.C. 433, 436 (2001) (citation omitted). Furthermore, "[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *Anthony*, 354 N.C. at 427 (citation omitted).

Here, the State's closing argument was neither improper nor misleading. The challenged portion of the State's closing argument stems from the testimony of the law enforcement officer who apprehended Felton and Watlington after the assaults. This officer testified that when he initially encountered Felton and Watlington, Watlington was walking "a little bit further up" from Felton. This initial encounter was captured by the officer's body-worn camera and was shown to the jury. Based upon this evidence, it is not unreasonable for the State to state its inference that Felton and Watlington were together when they were apprehended by law enforcement. Accordingly, as there was no error in the State's closing remarks, the trial court did not abuse its discretion in failing to intervene ex mero motu.

III. Conclusion

For the foregoing reasons, as to Watlington's arguments on appeal, we conclude and order as follows:

- There was no error in submitting to the jury felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury.
- There was no error in the instructions on the elements of felony murder.
- There was no error in failing to instruct the jury on voluntary manslaughter.
- There was error in convicting Watlington for more than two counts of hit and run under N.C. Gen. Stat. § 20-166. The three judgments on Watlington's hit-and-run convictions are arrested and the matter is remanded for resentencing.

- Watlington's argument that the trial court erred by denying her motion to dismiss the charge of felonious hit and run resulting in serious bodily injury to Travis is dismissed as moot.

For Felton's arguments on appeal, we conclude and order as follows:

- There was no error in denying Felton's motion to dismiss her charges of accessory after the fact for insufficient evidence.
- There was no error in denying Felton's motion to dismiss her charges of accessory after the fact for a fatal variance.
- There was no error in denying Felton's motion to dismiss her charges of accessory after the fact on account of ambiguity in N.C. Gen. Stat. § 14-7.
- There was no error in denying Felton's motion to dismiss her charges of accessory after the fact to hit and run for insufficient evidence.
- It was error to convict Felton of more than two counts of accessory after the fact to felonious hit and run. The three judgments on Felton's convictions of accessory after the fact to hit and run are arrested and the matter remanded for resentencing.
- There was no error in the jury instruction for accessory after the fact.
- The trial court did not abuse its discretion by not intervening ex mero motu in the State's closing argument.

In sum, we arrest judgment on three of Watlington's convictions for hit and run and remand for resentencing. We arrest judgment on three of Felton's convictions for accessory after the fact to Watlington's hit and run convictions and remand for resentencing. The remaining convictions remain undisturbed.

NO ERROR IN PART; DISMISSED IN PART; JUDGMENT ARRESTED IN PART AND REMANDED FOR RESENTENCING.

Judges HAMPSON and WOOD concur.

WILLIAMS v. CABRERA

[298 N.C. App. 611 (2025)]

ADRIAN YOLANDA WILLIAMS, PLAINTIFF
v.
JESSICA GRACE CABRERA, DEFENDANT

No. COA23-826

Filed 16 April 2025

1. Domestic Violence—protective order—complaint improperly incorporated—error not prejudicial

The trial court erred by incorporating plaintiff's complaint as additional findings of fact into its order granting plaintiff a one-year domestic violence protective order (DVPO) because, unlike in an ex parte DVPO, the trial court was required to comply with Civil Procedure Rule 52 by specially making its own findings and, here, the court did not demonstrate any processes of logical reasoning before incorporating the complaint's allegations, not all of which were supported by the evidence. However, the error was not prejudicial because the court's remaining findings—including that defendant bumped into plaintiff with her car, causing injury to plaintiff's finger—supported the conclusion that defendant had committed acts of domestic violence.

2. Domestic Violence—protective order—discretionary relief—animal custody and treatment—social media ban

The trial court's order granting plaintiff a one-year domestic violence protective order based on an incident in which defendant backed her car into plaintiff was modified and affirmed. First, the trial court did not abuse its discretion by granting plaintiff custody of one of the parties' two emotional support animals and by ordering defendant to refrain from cruelly treating or abusing any animal possessed by the parties, where the facts of the case warranted this discretionary relief under N.C.G.S. § 50B-3(a). However, the trial court's directive banning defendant from posting or commenting about plaintiff on social media was overbroad and arbitrary because it was not reasonably tailored to the facts, and the appellate court ordered this portion stricken from the DVPO.

Appeal by Defendant from order entered 5 December 2022 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 17 April 2024.

Bull City Legal Services, by Lynne M. Kay, for Defendant-Appellant.

No brief filed on behalf of Plaintiff-Appellee.

CARPENTER, Judge.

Jessica Grace Cabrera ("Defendant") appeals from the trial court's 5 December 2022 domestic violence protective order (the "Order") entered in favor of Adrian Yolanda Williams ("Plaintiff"). On appeal, Defendant argues the trial court erred by entering the Order and granting Plaintiff certain additional relief. After careful review, we affirm the Order as modified.

I. Factual & Procedural Background

Plaintiff and Defendant met in California in 2016 and began a relationship. In August 2017, Defendant adopted an emotional support animal ("ESA"); a dog named Chaco. In August 2020, Plaintiff adopted an ESA; a dog named Melo. On 25 October 2020, Plaintiff and Defendant married in California. Then, in 2021, Plaintiff and Defendant moved to North Carolina with Chaco and Melo.

From August 2022 until 14 September 2022, Plaintiff and Defendant attended therapy to "work[] on their relationship." But, on 15 September 2022, Defendant informed Plaintiff that she was unhappy and wanted to end their marriage. At this time, the parties began discussing how they would resolve custody of Chaco and Melo. Plaintiff suggested a "coparenting" arrangement in which the parties would share custody of Chaco and Melo according to an agreed-upon visitation schedule.

On 21 September 2022, while at home, Plaintiff brought up "coparenting" again and asked if he could take Chaco and Melo to California for three days on a trip. Defendant said no. Plaintiff asked Defendant to "not make th[e] situation any worse than it had to be," but Defendant did not change her mind. Plaintiff then exited the home and called a friend, Lakyia Jones. Jones suggested that Plaintiff attempt to locate the ESA paperwork for Melo.

Back inside the home, Plaintiff could not find the ESA paperwork, so he confronted Defendant. Plaintiff discovered Defendant in the bathroom with the door locked. Plaintiff knocked and asked Defendant if she would open the door, but Defendant refused. Then Plaintiff stepped outside, called the Durham Police Department's non-emergency line for assistance in "resolv[ing] the situation in a peaceful manner," and waited for police to arrive.

A few hours later, Defendant exited the home with Chaco and Melo. At that point, Plaintiff was outside on the phone with Jones. Plaintiff

informed Defendant that the police were on their way to discuss the ESA paperwork. Defendant said, "So what?" and proceeded to get in her car with Chaco and Melo. As Plaintiff stood in the driveway behind Defendant's car, Defendant reversed and struck Plaintiff's body. Plaintiff banged on the back of the car, yelling at Defendant. Plaintiff fell to the ground, temporarily lost possession of his phone, and incurred a minor laceration to his right index finger. Meanwhile, Defendant drove away with Chaco and Melo. Plaintiff remained on the phone with Jones for the duration of the incident.

When police arrived, Plaintiff did not tell the officer about the incident with Defendant and the car. The responding officer accompanied Plaintiff while he packed up and removed some of his personal belongings from the home. The following day, Plaintiff removed the remainder of his belongings. Approximately a week later, Defendant moved into a new residence.

On 10 October 2022, Plaintiff filed a complaint and motion for a domestic violence protective order ("DVPO"). That same day the trial court issued an *ex parte* DVPO. On 5 December 2022, the trial court conducted a hearing to determine whether to issue a one-year DVPO. After the hearing, the trial court entered the Order. In the Order, the trial court concluded that Defendant committed acts of domestic violence on 21 September 2022 by: (1) attempting to cause and intentionally causing bodily injury to Plaintiff; and (2) placing Plaintiff in fear of imminent serious bodily injury. The trial court also concluded there was a danger of serious and immediate injury to Plaintiff.

To support its conclusions, the trial court found that "Defendant bumped into [P]laintiff with her car and took off with his ESA causing him to fear for his emotional health. Additionally, [Plaintiff] had injury to his finger." The trial court, in this section of the Order, incorporated Plaintiff's complaint as further findings of fact stating "[s]ee complaint incorporated herein."

The Order required that Defendant refrain from cruelly treating or abusing an animal owned, possessed, kept or held as a pet by either party and posting or commenting about Plaintiff on social media. Additionally, the trial court granted custody of Melo to Plaintiff. On 21 December 2022, Defendant filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issues

The issues are whether the trial court erred by entering the Order and granting Plaintiff certain discretionary relief.

IV. Analysis

A. DVPO

[1] First, Defendant argues it was improper for the trial court to incorporate Plaintiff's complaint as additional findings of fact because the evidence did not support every allegation in Plaintiff's complaint. Additionally, Defendant asserts the trial court erred by entering the Order because its conclusions were not supported by its findings or competent evidence. While we agree with Defendant that the trial court's incorporation of Plaintiff's complaint was improper, we nonetheless conclude the error was not prejudicial under the facts of this case. The trial court's additional findings contained on the face of the Order are supported by competent evidence and are sufficient to support the conclusion that an act of domestic violence occurred.

1. Standard of Review

This Court reviews a trial court's order issuing a DVPO to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Kennedy v. Morgan*, 221 N.C. App. 219, 220–21, 726 S.E.2d 193, 195 (2012) (quoting *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009)). Findings of fact supported by competent evidence are binding on appeal. *Hensey*, 201 N.C. App. at 59, 685 S.E.2d at 544.

2. Incorporation of Complaint

As an initial matter, we address the trial court's incorporation of Plaintiff's complaint as further findings of fact. As a general rule, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2023). Under Rule 52, the trial court's findings of fact must contain the " 'specific ultimate facts sufficient for an appellate court to determine that the judgment is adequately supported by competent evidence.' " *Shomette v. Needham*, 298 N.C. App. 400, 915 S.E.2d 39 (2025) (quoting *Williamson v. Williamson*, 140 N.C. App. 362, 363–64, 536 S.E.2d 337, 338 (2000)). Although "verbatim recitations of the testimony" do not qualify as findings of fact "because they do not reflect a conscious choice between the conflicting versions of the incident in

question," *Shomette*, 298 N.C. App. at 406, 915 S.E.2d at 44 (quoting *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195, n.1, (1984)), a trial court may recite testimony in its findings so long as it " 'ultimately makes its own findings, resolving material disputes,' " *In re T.N.H.*, 372 N.C. 403, 408, 831 S.E.2d 54, 59 (2018) (quoting *In re C.L.C.*, 171 N.C. App. 438, 446, 615 S.E.2d 704, 708 (2006)).

For an *ex parte* DVPO, however, this Court has relaxed the application of Rule 52 by permitting the trial court to incorporate pleadings in lieu of making its own "findings and conclusions that fully satisfy the requirements of [Rule 52]." *Hensey*, 201 N.C. App. at 63, 685 S.E.2d at 547 (explaining that *ex parte* DVPOs are meant to be "entered on relatively short notice in order to address a situation in which quick action is needed in order to avert a threat of imminent harm").

The issuance of a one-year DVPO does not implicate the same level of expediency as an *ex parte* DVPO, meaning the trial court is required, as in any other civil bench trial on the merits, to comply with Rule 52. *See Hensey*, 201 N.C. App. at 62, 685 S.E.2d at 546 (noting the Rules of Civil Procedure apply in "all actions and proceedings of a civil nature" including an action brought under Chapter 50B). The trial court must "find the ultimate facts essential to support the conclusions of law" by utilizing "processes of logical reasoning, based on the evidentiary facts." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (quoting *In re Anderson*, 151 N.C. App. 94, 95, 564 S.E.2d 599, 601 (2012) (internal quotations omitted)). It is well settled that reciting testimony as findings of fact fails to demonstrate processes of logical reasoning required by Rule 52. *See Williamson*, 140 N.C. App. at 363–64, 536 S.E.2d at 338. It follows that the trial court's mere recitation or wholesale incorporation of allegations from a pleading is similarly inadequate under Rule 52. *See id.* at 363–64, 536 S.E.2d at 338. Indeed, allegations in a complaint have been subject to less scrutiny and are less reliable than testimonial evidence.

Put simply, the trial court fails to resolve the material disputes in the evidence where it wholly incorporates a plaintiff's complaint without demonstrating "processes of logical reasoning" required by Rule 52. *See In re Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337. Moreover, by employing this disfavored method of fact finding, the trial court runs the risk of improperly delegating its fact-finding duty. *See In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004), *superseded on other grounds by statute*, 2013 N.C. Sess. Law 129, § 25 (N.C. 2013); *Jay*

v. Jay, 298 N.C. App. 50, 912 S.E.2d 873 (2025) (Carpenter, J., dissenting).[1] Ultimately, without adequate findings, this Court cannot properly assess whether issuance of a DVPO is supported by competent evidence. *See Williamson*, 140 N.C. App. at 363–64, 536 S.E.2d at 338.

In the instant case, to support its conclusion that Defendant committed acts of domestic violence, the trial court found that: "Defendant bumped into [P]laintiff with her car and took off with his ESA causing him to fear for his emotional health. Additionally, [Plaintiff] had injury to his finger." The trial court also purported to incorporate Plaintiff's complaint as further findings of fact. The trial court did not demonstrate processes of logical reasoning, such as annotating, striking through, or otherwise expounding upon Plaintiff's complaint before incorporating it as further findings. This falls short of the requirements of Rule 52. *See Williamson*, 140 N.C. App. at 364, 536 S.E.2d at 339; *In re Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337. Accordingly, it was improper for the trial court to incorporate Plaintiff's complaint as further findings of fact.

3. Grounds for DVPO

Notwithstanding this error, we analyze the trial court's remaining findings of fact appearing on the face of the Order. Although sparse, they are sufficiently detailed to identify the basis for an act of domestic violence.

"To support entry of a DVPO, the trial court must make a conclusion of law 'that an act of domestic violence occurred.' " *Kennedy v. Morgan*, 221 N.C. App. 219, 223, 726 S.E.2d 193, 196 (2012) (quoting N.C. Gen. Stat. § 50B–3(a) (2011)). "The conclusion of law must be based upon the findings of fact." *Id.* at 223, 726 S.E.2d at 196. "While the trial court need not set forth the evidence in detail it does need to make findings of ultimate fact which are supported by the evidence; the findings must identify the basis for the 'act of domestic violence.' " *Id.* at 224, 726 S.E.2d at 196 (quoting N.C. Gen. Stat. § 50B–3(a) (2011)). The trial court is required to grant a DVPO if it concludes that at least one act of domestic violence has occurred. N.C. Gen. Stat. § 50B–3(a) (2023). In other words, because a single act of domestic violence is sufficient, the trial court's issuance of a DVPO will be upheld if the findings support at

1. In a recent case, a majority panel of this Court upheld a one-year DVPO which incorporated the plaintiff's complaint as further findings of fact. *Jay*, 298 N.C. App. at ___, 912 S.E.2d at ___. The Court distinguished *Hensey* but did not explicitly take a position on the incorporation issue, deferring to the trial court's credibility determination in concluding that the evidence supported the findings. *Id.* at ___, 912 S.E.2d at ___ (citing *Hensey v. Hennessy*, 201 N.C. App. 56, 685 S.E.2d 541 (2009)).

least one act of domestic violence. *See Keenan v. Keenan*, 285 N.C. App. 133, 136, 877 S.E.2d 97, 101 (2022).

Here, the trial court concluded Defendant committed acts of domestic violence, including: (1) attempting to cause and intentionally causing bodily injury to the Plaintiff; and (2) placing Plaintiff in fear of imminent serious bodily injury. To support its conclusions, the trial court found that: "Defendant bumped into [P]laintiff with her car and took off with his ESA causing him to fear for his emotional health. Additionally, [Plaintiff] had injury to his finger."

During the hearing, Plaintiff testified that Defendant "reversed her vehicle into my physical body." Plaintiff also testified to "banging on the back window [of Defendant's car] screaming her name and asking her to stop." After being hit by the car, Plaintiff incurred an injury to his index finger. Plaintiff's testimony supports the trial court's finding that "Defendant bumped into Plaintiff with her car" and that Plaintiff "had injury to his finger." These findings, in turn, support the trial court's conclusion that Defendant committed an act of domestic violence by causing bodily injury to Plaintiff. Thus, notwithstanding the trial court's improper incorporation of Plaintiff's complaint into the Order, the trial court did not prejudicially err by granting the DVPO because its remaining findings support the conclusion that an act of domestic violence occurred. *See Kennedy*, 221 N.C. App. at 223, 726 S.E.2d at 196.

We hold the trial court must find facts in accordance with the requirements of Rule 52, demonstrating processes of logical reasoning in its resolution of material conflicts in the evidence, when granting or denying a plaintiff's request for a one-year DVPO. Where a trial court incorporates a pleading in its findings of fact, our reasoning applies with equal force regardless of whether the pleading was verified or unverified.

B. Discretionary Relief

[2] Next, Defendant asserts that the trial court erred by granting Plaintiff certain additional relief. Specifically, Defendant argues the trial court lacked authority to: (1) grant Plaintiff custody of Melo; (2) order that Defendant refrain from cruelly treating or abusing an animal owned, possessed, kept, or held as a pet by either party residing in the household; (3) order that Defendant refrain from posts or comments about Plaintiff on social media; and (4) grant Plaintiff the care, custody, and control of an animal owned, possessed, kept, or held as a pet by either party residing in the household. Defendant relies on her primary argument here, arguing that because entry of the DVPO was improper, Plaintiff was not entitled to additional relief. We disagree.

Our review of the relevant caselaw does not reveal a clear standard of review for evaluating Defendant's specific challenge. Section 50B–3(a) provides a non-exhaustive list of "types of relief" that the trial court "may" include in a DVPO after concluding that an act of domestic violence has occurred. N.C. Gen. Stat. § 50B–3(a). When this Court examines an appellant's challenge to the trial court's grant of discretionary relief in a civil no contact order—a distinct but related concept—we review for abuse of discretion. *See Angarita v. Edwards*, 278 N.C. App. 621, 633, 863 S.E.2d 796, 805 (2021) (holding the trial court did not abuse its discretion by ordering the defendant to obtain a mental-health evaluation in a no-contact order). It logically flows that any additional permissive relief the trial court grants in a DVPO involves an exercise of discretion. Accordingly, we conclude abuse of discretion is the appropriate standard of review.

A trial court abuses its discretion if its ruling is either manifestly unsupported by reason or 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) (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)). When issuing a DVPO, the trial court does not have " 'unfettered discretion to order a broad range of remedies' " simply because the trial court believes the relief is " 'necessary for the protection of any party or child.' " *Russell v. Wofford*, 260 N.C. App. 88, 94, 816 S.E.2d 909, 913 (quoting *State v. Elder*, 368 N.C. 70, 73, 773 S.E.2d 51, 52 (2015)). Stated differently, although the trial court has broad discretion under section 50B–3(a) to impose additional relief, it cannot exercise "unfettered discretion" in doing so. *See id.* at 94, 816 S.E.2d at 913.

Here, after concluding Defendant committed acts of domestic violence, the trial court ordered that Defendant refrain from cruelly treating or abusing an animal held as a pet by either party and posting or commenting about Plaintiff on social media. The trial court also awarded Plaintiff custody of Melo.

Section 50B–3 expressly provides that the trial court may direct a party to refrain from cruelly treating or abusing an animal possessed by the parties. *See* N.C. Gen. Stat. § 50B–3(a)(9)(b1). Section 50B–3(a) further states that the trial court may provide for possession of personal property, including custody and control of an animal. *Id.* at § 50B–3(a)(8). This relief is authorized and warranted in this case. Accordingly, the trial court did not abuse its discretion by granting Plaintiff custody of Melo or by ordering that Defendant refrain from cruelly treating or abusing any animal possessed by the parties.

Section 50B–3 does not explicitly provide that the trial court may require a party to refrain from posting about another party on social media, but the list of possible relief is non-exhaustive. In other words, it is possible for the trial court to require a party to refrain from posting threatening language about another party on social media if the facts justify such relief. That being said, the directive in the instant case is overbroad and not reasonably tailored to the facts at hand. Because the trial court's social media directive was arbitrary, we strike that portion of the Order.

V. Conclusion

In sum, the trial court did not prejudicially err by entering the Order and did not abuse its discretion by granting Plaintiff custody of Melo or ordering that Defendant refrain from engaging in animal cruelty. The trial court's directive that Defendant refrain from posting about Plaintiff on social media is stricken from the Order. Accordingly, we affirm the Order as modified.

MODIFIED AND AFFIRMED.

Judges WOOD and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 APRIL 2025)

IN RE M.H.B. No. 24-533	Gaston (22JT000041) (22JT000042)	Affirmed
KUSTRA v. GRIFFING No. 24-766	Gaston (23CVS003647)	Dismissed
MELVIN v. N.C. DEP'T OF THE SEC'Y OF STATE No. 24-769	N.C. Industrial Commission (TA-030717)	Affirmed
STATE v. BOGGS No. 24-470	Mecklenburg (18CRS210502) (18CRS210503)	No Error in Part and Dismissed in Part
STATE v. BOHL No. 24-592	Hoke (21CRS050693-460) (21CRS051001-460)	No Error
STATE v. BULLOCK No. 24-469	Durham (07CRS050838)	No Error
STATE v. DRAYTON No. 23-1087	Davidson (18CRS56929) (18CRS56931) (19CRS906)	Dismissed
STATE v. DUNCAN No. 24-501	Wake (19CR215611-910) (19CR215613-910)	No Error.
STATE v. FISHBACK No. 24-540	Cherokee (23CRS007003)	Dismissed
STATE v. LOTSON No. 24-56	Wake (18CRS210227-910)	No Error
STATE v. PARCHMENT No. 24-580	Forsyth (21CRS059858) (21CRS059862)	No Error
STATE v. PROCTOR No. 24-891	Gaston (18CRS000734) (18CRS051101) (18CRS051102) (18CRS701330)	No Error; Remanded For Correction of A Clerical Error.

STATE v. ROBINSON No. 24-147	Mecklenburg (17CRS202088)	No Error
STATE v. ROBINSON No. 24-735	Wake (21CR216345-910) (21CR216346-910) (21CR216347-910) (23CR024847-910)	No Error
STATE v. THOMPSON No. 24-660	Union (21CRS053944)	No Error
STATE v. WALTON No. 24-886	Wake (21CR212029-910) (23CR047315-910)	No error in part and dismissed in part.
STEWART v. BRICKMAN No. 24-710	Mecklenburg (20CVD017711)	Affirmed in Part, Vacated in Part, and Remanded

RONALD ARRINGTON, AVONDA ARRINGTON
AND RONITA ARRINGTON, PLAINTIFFS
v.
MARVIN NELSON ARRINGTON, SR.
AND DELORIS DAVIS HAYES, DEFENDANTS

No. COA24-258

Filed 7 May 2025

Appeal and Error—interlocutory order—awarding considerable amount of attorney fees—validity dependent upon pending claims—no substantial right shown

In a lawsuit between family relatives about real property that was part of plaintiffs' inheritance but which defendants allegedly obtained through fraudulent means, where the trial court granted summary judgment to plaintiffs on only three of their eleven claims, defendants' appeal of an interlocutory order requiring them to pay over $25,000 in attorney fees to plaintiffs—pursuant to N.C.G.S. § 47B-6—was dismissed for lack of jurisdiction because defendants failed to show a substantial right that would be impaired absent immediate review. First, the fact that they were ordered to pay a "significant amount of money" in attorney fees did not, by itself, establish a deprivation of a substantial right. Second, because the validity of the award was tied to the eight substantive claims that were still pending in the trial court, defendants' rights could be fully and adequately protected in a single appeal after final judgment, and appellate review of the fee award before then would have created the risk of a fragmentary appeal.

Appeal by defendants from order entered 6 November 2023 by Judge Andrew Womble in Superior Court, Edgecombe County. Heard in the Court of Appeals 10 September 2024.

Howard Stallings Law Firm, by Douglas D. Noreen and Sheri M. Dickson, for plaintiffs-appellees.

Couch & Associates, PC, by C.A. Couch, for defendants-appellants.

STROUD, Judge.

Appeal by Marvin Nelson Arrington Sr. and Deloris Davis Hayes ("Defendants") from order entered 6 November 2023. On appeal, Defendants argue that the trial court erred in granting Ronald Arrington,

Avonda Arrington, and Ronita Arrington's ("Plaintiffs") motion for attorney fees based on North Carolina General Statute Section 47B-6, which allows a prevailing party to recover costs and "a reasonable attorney's fee" for the intentional registration of a notice "for the purpose of asserting false or fictitious claims to real property[.]" N.C. Gen. Stat. § 47B-6 (2023). The trial court previously granted partial summary judgment in Plaintiffs' favor on some, but not all, of Plaintiffs' claims arising from Defendants' alleged registration of a false or fictitious claim to real property, so the Order granting attorney fees is an interlocutory order.

Defendants have appealed *only* the interlocutory Order granting attorney fees and have raised no argument regarding the substantive claims on which the partial summary judgment order against them was granted. Defendants have not demonstrated a substantial right which would be impaired without immediate appellate review of the Order granting attorney fees. Interlocutory review of the Order granting attorney fees would create the potential for a fragmentary appeal, since the legal basis of the award of attorney fees depends on the substantive claims. Defendants have not sought interlocutory review of the partial summary judgment order regarding those substantive claims and would have a right to appellate review once *all* claims have been finally resolved by the trial court. Therefore, the appeal is dismissed.

I. Factual Background and Procedural History

On 27 February 2023, Plaintiffs filed a complaint against Defendants alleging many claims identified as follows:

> Count One: "Request for Declaratory Relief to Invalidate Power of Attorney"
>
> Count Two: "Violation of Terms of the Power of Attorney"
>
> Count Three: "Breach of Fiduciary Duty Based on [Power of Attorney]"
>
> Count Four: "Fraud"
>
> Count Five: "Constructive Fraud"
>
> Count Six: "Unjust Enrichment"[1]
>
> Count Eight: "Action to Quiet Title"
>
> Count Nine: "Punitive Damages"

1. We note that Plaintiffs' complaint *does not* contain a Count Seven, hence the omission from our list of claims.

Count Ten: "Undue Influence"

Count Eleven: "Intentional Interference with Inheritance[.]"

Finally, Plaintiffs sought to "recover from Defendants their attorney fees pursuant to N.C. Gen. Stat. §§ 6-21 and/or 47B-6[.]"

These claims arise from Marvin Arrington, Sr.'s ("Defendant Arrington") actions in fraudulently obtaining power of attorney from Nannie B. Arrington ("Decedent") who was eighty-eight years old and in hospice care. On the day Decedent died, 31 October 2019, Defendant Arrington obtained, and then immediately used, the power of attorney to deed Decedent's real property to himself. Under Decedent's will, Plaintiff Ronald Arrington would have inherited a life estate in the real property, and upon his death, the real property was to be sold and the proceeds of the sale distributed equally to Defendant Arrington; Plaintiff Avonda Venee Arrington; and Plaintiff Ronita Channel Arrington, or if one of them was deceased, to their children. On 31 January 2020, Defendant Arrington transferred the property to himself and his wife, Deloris Davis Hayes ("Defendant Hayes") and obtained an equity line of credit against the property in the amount of $60,000.00 on 30 March 2020.

On 6 June 2023, Plaintiffs filed a motion for summary judgment which came on for hearing 21 August 2023. As discussed above, by order entered 7 September 2023, the trial court granted Plaintiffs' motion for summary judgment "as to Counts One, Two, and Eight[,]" and denied Plaintiffs' motion for summary judgment "[a]s to Counts Four, Five, Six, Nine, Ten[,] and Eleven[.]" The trial court also decreed that "Plaintiffs' Motion for Attorneys' Fees is not ruled on at this time and may be reset for hearing by Plaintiff at a later date for determination."

The matter of attorney fees came on for hearing 6 November 2023, and on that same day, the trial court entered an Order for attorney fees and ordered Defendants pay $25,002.89 to Plaintiffs within ninety days. The Order for attorney fees *did not* address the remaining pending claims on which summary judgment was denied: Counts "Four, Five, Six, Nine, Ten[,] and Eleven[.]" Although the Order for attorney fees did not cite the basis of the attorney fee award, Plaintiffs' complaint requested attorney fees under North Carolina General Statute Sections 47B-6 and 6-21. North Carolina General Statute Section 47B-6, which prohibits registering a false claim, provides for an award of attorney fees to "the prevailing party:"

> No person shall use the privilege of registering notices hereunder for the purpose of asserting false or fictitious claims to real property; and in any action relating thereto

> if the court shall find that any person has intentionally registered a false or fictitious claim, the court may award to the prevailing party all costs incurred by him in such action, including a reasonable attorney's fee.

Id. Plaintiffs' motion for attorney fees also cited, in the alternative, North Carolina General Statute Section 6-21, which states that, "[c]osts in the following matters shall be taxed . . . in the discretion of the court" with costs defined to include "reasonable attorney fees in whatever amounts the court in its discretion determines and allows." N.C. Gen. Stat. § 6-21 (2023). However, the claims upon which the trial court granted summary judgment here do not include any of the types of claims listed in North Carolina General Statute Section 6-21. The trial court's award of attorney fees could be based only upon North Carolina General Statute Section 47B-6, and Defendants' arguments on appeal are also primarily based on North Carolina General Statute Section 47B-6. Defendants filed timely written notice of appeal of the Order for attorney fees; however, Defendants have not appealed the 7 September 2023 order granting partial summary judgment on Counts "One, Two, and Eight[.]"

II. Appellate Jurisdiction

North Carolina General Statute Section 7A-27(b)(3)(a) provides that "appeal lies of right directly to the Court of Appeals . . . [f]rom any interlocutory order or judgment" that affects a "substantial right." N.C. Gen. Stat. § 7A-27(B)(3)(a). On appeal, Defendants argue that "the trial court erred in granting Plaintiffs' motion for summary judgment regarding attorneys' fees [because] it made no determination as to whether the fee was reasonable." Defendants also contend that the trial court "made no finding of fact that either Defendant intentionally registered a false or fictitious claim so therefore attorney fees could not have been awarded under [North Carolina General Statute Section 47B-6]."

Neither the partial summary judgment order nor the Order awarding attorney fees resolved all pending claims; therefore, the Order on appeal is 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." (citation omitted)). Defendants contend that they have a "substantial right" justifying an interlocutory appeal of the Order because "Defendants are ordered to make immediate payment of a significant amount of money." Defendants then cite to several cases to support their claim that an order requiring the "immediate payment of a significant amount of money" constitutes a "substantial right" to allow

for appellate review of this interlocutory Order.[2] Despite Defendants' long list of cited cases, the fact that an order requires the "immediate payment of a significant amount of money" does not, *without more*, give this Court jurisdiction to consider an interlocutory appeal. Defendants do not explain how the cases cited in support of their claim of a "substantial right" apply to this appeal other than to contend that the fees awarded were a "significant amount of money" which they were to pay "immediately."

In actuality, the cases cited do not support Defendants' claim of a substantial right. The phrase "immediate payment of a significant amount of money" is *used* in eight reported cases from this Court, including four of the cases cited by Defendants,[3] but context is crucial in the analysis of whether an interlocutory order affects a substantial right. We will briefly address why *none* of the cases cited by Defendants support their claim of a substantial right.

In *Estate of Redden v. Redden*, the defendant appealed a partial summary judgment order that disposed of a conversion claim regarding ownership of a bank account—while *also* ordering the defendant to pay the plaintiff $150,000.00 plus costs; this Court affirmed summary judgment on the conversion claim but remanded on the issue of damages for conversion. 179 N.C. App. 113, 119-20, 632 S.E.2d 794, 799 (2006).

In *Beck v. American Bankers Life Assurance Company*, the defendant appealed a "somewhat ambiguous" partial summary judgment order for the plaintiff in a wrongful termination claim. 36 N.C. App. 218, 220, 243 S.E.2d 414, 416 (1978). There, the summary judgment order required "immediate payment to [the] plaintiff of a substantial sum of money, the exact amount of which the parties were directed to determine;" a later "supersedeas bond filed by [the] defendant" recited that

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2. Defendants cite to: *Wachovia Realty Invs. v. Hous., Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977); *Beck v. Am. Bankers Life Assurance Co.*, 36 N.C. App. 218, 243 S.E.2d 414 (1978); *Atkins v. Mitchell*, 91 N.C. App. 730, 373 S.E.2d 152 (1988); *Estate of Redden ex rel. Morley v. Redden*, 179 N.C. App. 113, 632 S.E.2d 794 (2006); *In re Fifth Third Bank, Nat'l Ass'n-Vill. of Penland Litig.*, 217 N.C. App. 199, 719 S.E.2d 171 (2011); *Beasley v. Beasley*, 259 N.C. App. 735, 816 S.E.2d 866 (2018); *Porters Neck Ltd. v. Porters Neck Country Club, Inc.*, 276 N.C. App. 95, 855 S.E.2d 819 (2021), to support their contention that the "immediate payment of a significant amount of money" entitles them to appellate review of the interlocutory Order.

3. The cases cited by Defendants that use the *exact* language "immediate payment of a significant amount of money" are *Redden*, 179 N.C. App. at 117, 632 S.E.2d at 798; *Fifth Third Bank*, 217 N.C. App. at 205, 719 S.E.2d at 175; *Beasley*, 259 N.C. App. at 742, 816 S.E.2d at 873; and *Porters Neck*, 276 N.C. App. at 99, 855 S.E.2d at 824.

"the amount of commissions has now been determined as $21,500.73." *Id*. This Court determined that the language of the partial summary judgment order plus the bond would be treated as "a final judgment that [the] plaintiff [wa]s presently entitled to recover of [the] defendant the sum of $21,500.73" which this Court stated was "presently appealable." *Id*. at 221, 243 S.E.2d at 416. This Court then reversed and remanded based on a genuine issue of material fact as to the amount of commissions owed. *Id*. at 221, 243 S.E.2d at 417.

In *Atkins v. Mitchell*, one of three defendants appealed from a partial summary judgment against the defendant for $1,054,916.80, with "claims against the other two defendants [ ] still pending, awaiting the outcome of th[e] appeal." 91 N.C. App. 730, 731, 373 S.E.2d 152, 153 (1988). This Court held that the defendant had demonstrated a substantial right based on two cases: "*Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977); [and] *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240, *appeal dismissed*, 301 N.C. 92, 265 S.E.2d. 240 (1980)." *Id*. at 731-32, 373 S.E.2d at 153. Since the *Atkins* court did not further explain its ruling beyond citing these two cases, we note that the ruling in *Equitable Leasing* was specifically based on *Wachovia Realty*. *See Equitable Leasing Corp.*, 46 N.C. App. at 172, 265 S.E.2d at 247 ("In the case *sub judice*, however, we believe we are bound by [*Wachovia Realty*] *Investments* to hold that the trial court's entry of summary judgment for a monetary sum against [the] defendant [ ] affects a 'substantial right' of th[e] defendant.").

In the case relied on by both *Atkins* and *Equitable Leasing*, *Wachovia Realty*, our Supreme Court held that the defendant demonstrated a substantial right supporting appellate review of an interlocutory order because "[s]upplemental proceedings in execution ha[d] been instituted and an order ha[d] been entered by the Clerk of the Superior Court declaring the judgment a lien upon funds alleged to be ow[ed] to [the defendant], from the Housing Authority of the City of Winston-Salem." *Wachovia Realty Invs.*, 292 N.C. at 99, 232 S.E.2d at 671. The Court reversed partial summary judgment where the trial court "was clearly in error in rendering summary judgment for a specified amount, the alleged unpaid balance due upon the note, while retaining for hearing and determination the claim of [the defendant] that it [wa]s entitled to a set-off or credit in approximately the same amount." *Id*. at 98-99, 232 S.E.2d at 671.

In *In re Fifth Third Bank, National Association – Village of Penland Litigation*, the plaintiffs were several investors who had obtained loans from the defendant Bank to invest in "a real estate development known

as the Village of Penland." 217 N.C. App. 199, 202, 719 S.E.2d 171, 173 (2011). They "filed a complaint against [the defendant Bank] and others" arising from the real estate development.[4] *Id.* at 203, 719 S.E.2d at 174. The developers failed to use the plaintiffs' funds to develop the Village of Penland and "several individuals associated with the developers entered pleas of guilty to various federal criminal offenses arising from project-related activities." *Id.* at 202, 719 S.E.2d at 174. The development failed, the plaintiff investors "defaulted on their loan payments" to the defendant Bank, and the case on appeal arose "from a dispute between the parties over the extent to which [the p]laintiffs are obligated to repay the loans that they obtained from [the d]efendant [Bank]." *Id.*

The plaintiffs appealed an order granting partial summary judgment that awarded the defendant Bank "the principal amount due under the promissory note plus interest, attorney's fees, and the costs." *Id.* at 204, 719 S.E.2d at 175. Although they initially brought fourteen claims against the defendant Bank, the plaintiffs later dismissed all but two claims and the trial court dismissed those claims and entered judgment against the plaintiffs for the principal amount due under the promissory notes, plus interest, costs, and attorney fees. *Id.* The plaintiffs appealed, and after considering the substantive claims dismissed, this Court affirmed the partial summary judgment order on all claims, including the plaintiffs' substantive claims against the defendant Bank *and* the defendant Bank's counterclaim on the promissory note. *Id.* at 215, 719 S.E.2d at 181.

In *Beasley v. Beasley*, the plaintiff appealed from an attorney fee order based on claims for child custody, child support, and postseparation support; one judge, with one judge concurring in result only, determined a substantial right was shown because the "order for attorney's fees [ ] completely dispose[d] of that issue as it relate[d] to other substantive claims;" the third judge dissented. 259 N.C. App. 735, 741, 816 S.E.2d 866, 872 (2018). The rationale in *Beasley* extensively discussed North Carolina General Statute Section 50-19.1, which authorizes interlocutory appeals of orders resolving certain claims in domestic cases, and this statute's interaction with the "substantial right" doctrine. *See id.* ("Notably, neither *Duncan* nor *Comstock* (nor any other case) has interpreted [North Carolina General Statute Section] 50-19.1 through the particular factual lens facing us in the instant appeal.").

In *Porters Neck Limited v. Porters Neck Country Club, Inc.*, the defendant appealed an interlocutory order awarding sanctions under North Carolina Rules of Civil Procedure 11 and 37. 276 N.C. App. 95, 855

4. The opinion does not identify the other defendants.

S.E.2d 819 (2021). This Court noted that the order required the "immediate payment of a significant amount of money" because the order required the defendant "to immediately pay attorneys fees as sanctions to [the p]laintiff totaling in excess of $48,000." *Id.* at 99, 855 S.E.2d at 824-25. This Court also noted that "[t]he reason for the rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts." *Id.* at 99, 855 S.E.2d at 824 (internal quotation marks, brackets, and citation omitted). We note that in *Porters Neck*, the discovery sanction issues were based on Rules 11 and 37 of the Rules of Civil Procedure and were entirely independent of the substantive issues arising from the claims in the case involving "breach of contract, unfair and deceptive trade practices, and tortious interference with contract," and "an accounting, an injunction against continued breach, and [ ] punitive damages[.]" *Id.* at 97, 855 S.E.2d at 823. Thus, considering the interlocutory appeal of the sanctions order would not create a fragmentary appeal where the substantive claims were not the basis for the attorney fee order.

All these cases cited by Defendants involve interlocutory appeals of a ruling on a substantive claim with an award of money damages and in some instances the award included some attorney fees. Defendants have not cited any case where the order on appeal was solely an order for attorney fees based *specifically* on a statute which allows an award of attorney fees based on the prevailing party's success on a particular substantive claim and the appellant appealed only the attorney fee award without raising any argument about the substantive claim, but that is the situation presented by this case. One case, *Porters Neck*, addressed an attorney fee award independent of the substantive claims pending in the action, since that award was a sanction based on Rules 11 and 37. *Id.* However, as noted above, in *Porters Neck* there was no risk of a fragmentary appeal. *See id.* In other words, this Court's ruling on the sanctions issue in *Porters Neck* would not affect any subsequent appeal of the trial court's later rulings on the substantive claims.

Although Defendants did not cite it—most likely because it was reversed in part and vacated in part by our Supreme Court—one of the cases in which this Court used the phrase "immediate payment of a significant amount of money" was *Wing v. Goldman Sachs Trustee Company, N.A.*, 274 N.C. App. 144, 150, 851 S.E.2d 398, 402 (2020), *rev'd in part, vacated in part*, 382 N.C. 288, 876 S.E.2d 390 (2022) (*Wing I*).[5]

5. In *Wing I*, this Court used the phrase "immediate payment of a significant amount of money" in a block quote that cited *Beasley*, 259 N.C. App. at 742, 816 S.E.2d at 872-73,

But our Supreme Court's opinion in *Wing* (*Wing II*) provides excellent guidance in analysis of this interlocutory appeal issue. *See Wing v. Goldman Sachs Trustee Company, N.A.*, 382 N.C. 288, 876 S.E.2d 390 (2022).

In *Wing II*, our Supreme Court addressed the substantive issue of the "extent of a trustee's duties and powers concerning litigation challenging trust amendments." *Id.* at 289, 876 S.E.2d at 393. There, the interlocutory order in question was an order requiring Goldman Sachs, trustee of the trust in dispute in the case, to "make distributions to [the defendant trust beneficiaries] for payment for legal fees incurred by them in the above-captioned cases with respect to their defense of this matter." *Id.* at 291-92, 876 S.E.2d at 394.

In *Wing I*, the Court of Appeals had determined that there was a substantial right justifying an interlocutory appeal and noted that one of the factors justifying an immediate appeal was the "significant amount" of money involved:

> As this Court stated in *Beasley*, [the defendant] has paid out far more than an 'insignificant amount' in Trust funds for Sellers' and Cone's legal fees. The disbursements for legal fees and expenses already surpass $2 million dollars, more than forty times the amount this Court referenced in *Beasley* as 'a not insignificant amount.'

Wing I, 274 N.C. App. at 149, 851 S.E.2d at 402 (citation omitted).

The Supreme Court granted discretionary review of this Court's opinion in *Wing I* and agreed with this Court's result in allowing the interlocutory appeal but expanded upon the rationale. The Supreme Court explained how to analyze the "substantial right" issue, but notably did not focus on the amount of money involved. Instead, the Court focused on the substantive effects of the "pay order" requiring the trustee to make certain payments:

> The substantial right test for appealability of interlocutory orders is that the right itself must be substantial and the deprivation of that right must potentially work injury if not corrected before appeal from final judgment. If [the] appellant's rights would be fully and adequately protected by an exception to the order that could then be assigned

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which was *also* cited in Defendants' brief. *See Wing I*, 274 N.C. App. at 149, 851 S.E.2d at 401-02 (citing *Beasley*).

> as error on appeal after final judgment, there is no right to an immediate appeal.
>
> An assessment of whether an order impacts a substantial right often requires considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. It is the appellant's burden to present appropriate grounds for acceptance of an interlocutory appeal, and not the duty of this Court to construct arguments for or find support for [the] appellant's right to appeal.

Wing II, 382 N.C. at 293-94, 876 S.E.2d at 395-96 (citation and quotation marks omitted).

Wing II involved a complex case arising from complaints alleging that the plaintiffs' father, decedent Ralph L. Falls Jr., had "lacked the capacity to amend [his Revocable Declaration of] Trust and that [the defendant trust beneficiaries] had 'unduly influenced decedent.' " *Id.* at 290, 876 S.E.2d at 394. The plaintiffs also brought claims against the trustee, Goldman Sachs, regarding distributions to the defendant trust beneficiaries, "which they claim were invalid given that there were pending judicial proceedings challenging the Trust amendments' validity." *Id.*

However, the trial court's ruling on appeal was not simply an award of attorney fees; the order on appeal also granted the defendants' motions to pay fees from the trust and ordered that:

> [The d]efendant Goldman Sachs, as Trustee of the Revocable Trust . . . *shall*, in the proper exercise of its business judgment, make distributions to [the defendant trust beneficiaries] for payment for legal fees incurred by them in the above-captioned cases with respect to their defense of this matter. This Order is without prejudice to any party's *other* remaining claims and defenses in these matters. (Emphases in original). Notably, the trial court employed the word 'shall' and did not explicitly indicate that the order was without prejudice to Wing's claim for wrongful distribution against [the defendant] Goldman Sachs.

Id. at 295, 876 S.E.2d at 396 (emphases in original).

The Supreme Court observed that:

> Given this procedural context and record, the Pay Order does not purport to simply allow [the defendant] Goldman

> Sachs to pay costs from the Trust as [the] defendant beneficiaries contend. Rather, the record supports the Court of Appeals' conclusion that the order affirmatively order[s] payments by a trustee with distributions from a trust to some purported beneficiaries, and not others, when the rightful beneficiaries are disputed, . . . and [i]f Wing prevails on her claims of wrongful distribution [against Goldman Sachs], no return of funds or credit to offset future payments is guaranteed[.]

Id. at 295, 876 S.E.2d at 396-97 (citation and quotation marks omitted).

In turn, the Supreme Court determined that there was a substantial right justifying an interlocutory appeal. In addition to the possibility that the plaintiffs may be *unable* to recover any funds wrongfully paid from the trust "even if they successfully established themselves as the rightful beneficiaries under the Trust," the Court also noted the importance of the need for the trustee to have clear guidance on how to administer the trust during the pending litigation:

> Moreover, it is also important to ensure that persons serving as trustees be able to obtain definitive instructions concerning the manner in which a trust should be administered. Thus, in this case, the right to collect from [the defendant] Goldman Sachs, as trustee, for the distributions during a pending judicial proceeding contesting the validity of the trust during that time period might be lost absent an appeal before final judgment of the Pay Order.

Id. at 296-97, 876 S.E.2d at 397. Our Supreme Court ultimately concluded that "for all of these reasons, we are convinced that, absent an appeal before final judgment, a substantial right of [the] plaintiffs will potentially be impaired in the absence of an immediate appeal from the pay order." *Id.* at 297, 876 S.E.2d at 398.

This case is entirely unlike *Wing*. Here, Defendants have appealed *only* the attorney fee award; they did not even attempt an interlocutory appeal of the partial summary judgment order, nor its substantive rulings on the claims on which the attorney fee award was based. If we were to review the Order awarding attorney fees, we must assume the trial court's ruling on some of the underlying claims in the partial summary judgment order was correct, and thus Plaintiffs were entitled to recover attorney fees under North Carolina General Statute Section 47B-6, as the trial court ordered.

But there are other substantive claims still pending, and after the trial court disposes of all claims, both Plaintiffs and Defendants would then have a right to appeal as to any claims on which they did not prevail. Our consideration of the attorney fee issue now would create the potential for a fragmentary appeal, since after resolution of all substantive claims, either party could appeal and this Court might find legal error as to one or more of the substantive claims supporting the attorney fee award. Here, the attorney fee award depends on Plaintiffs' success on at least some of the substantive claims. Defendants have appealed only the Order awarding attorney fees, and they argue only that the trial court did not make all the findings of fact required for the award of attorney fees under North Carolina General Statute Section 47B-6.

Defendants have not yet challenged the trial court's rulings on the substantive claims in the partial summary judgment order. Defendants' interlocutory appeal is premature and would create potential for a fragmentary appeal. Again, the *only* factor Defendants note to assert a substantial right is the "significant amount of money" of fees awarded. Even if we assume the amount of fees ordered is a "significant amount of money" to Defendants, this factor alone does not establish deprivation of a "substantial right" which, in accordance with our Supreme Court's holding in *Wing II*, "must potentially work injury if not corrected before appeal from final judgment." *Id.* at 293, 876 S.E.2d at 395. Here, Defendants' "rights would be fully and adequately protected by an exception to the [O]der that could then be assigned as error on appeal after final judgment," therefore, "there is no right to an immediate appeal." *Id.*

Upon appeal after a final judgment, Defendants may assign as error the Order awarding attorney fees, and their rights can be "fully and adequately protected" in that appeal. If Defendants prevailed on a later appeal, Plaintiffs could be ordered to repay any attorney fees awarded in error in the interlocutory order. Defendants have failed to demonstrate deprivation of a substantial right which "must potentially work injury if not corrected before appeal from final judgment." *Id.* We must therefore dismiss Defendants' interlocutory appeal.

III. Conclusion

As we do not have jurisdiction to consider Defendants' interlocutory appeal, it is dismissed.

DISMISSED.

Judges HAMPSON and GORE concur.

LLOYD G. BROWN, ET AL., PLAINTIFFS
v.
NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY,
AN AGENCY OF THE STATE OF NORTH CAROLINA, ET AL., DEFENDANTS

No. COA24-128

Filed 7 May 2025

1. Public Officers and Employees—foresters—fire fighting—overtime compensation—statutory mandate

In an action filed by a group of current and former foresters for the North Carolina Forest Service seeking overtime compensation for time spent fighting forest fires, the trial court correctly interpreted N.C.G.S. § 106-903—based on clear legislative intent, as evidenced by legislative history and the plain language of the statute, which mandates that the agency "shall" provide overtime compensation—as requiring the State to pay foresters monetary compensation for any overtime hours accrued that were not otherwise compensated for with compensatory time (either because the time was not taken or had been erroneously forfeited). Further, once the benefits had been earned, they could not be rescinded by the State.

2. Public Officers and Employees—foresters—fire fighting—overtime compensation—third-party beneficiaries to federal reimbursement contracts

In an action filed by a group of current and former foresters for the North Carolina Forest Service (NCFS) seeking overtime compensation from the N.C. Department of Environmental Quality (defendant) for time spent fighting forest fires, the trial court properly held that the foresters were intended third-party beneficiaries to certain federal reimbursement contracts for fighting fires on federal land (the "Master Agreements," entered into between the NCFS and federal agencies periodically, each effective for a term of five years) and that, as a result, the foresters were entitled to reimbursement on a time-and-a-half basis for overtime hours worked fighting fires on federal land. Further, the trial court properly denied defendant's ultra vires defense, since, by statute, the Department was required to provide overtime compensation to the foresters.

3. Public Officers and Employees—foresters—fire fighting—overtime compensation—calculation of payments—genuine issue of material fact

In an action filed by a group of current and former foresters for the North Carolina Forest Service seeking overtime compensation for time spent fighting forest fires, the trial court properly dismissed the State's recoupment defense—in which the State asserted that any payments owed to the foresters should be set off or reduced by the amount of any purported overpayments to the foresters—since there was no statute of limitations for when the State could seek repayment. Thus, the State could still seek recoupment of any overpayments through established administrative procedures. Further, where there remained a genuine issue of material fact regarding the percentage of the Evans Road fire that occurred on state versus private lands, and, thus, whether funds earmarked by the State from the federal government covered 100% or 60% of the foresters' overtime worked to contain that fire, the matter was remanded to the trial court to hold an evidentiary hearing.

4. Public Officers and Employees—foresters—fire fighting—overtime compensation—recalculation of retirement and federal benefits

In an action filed by a group of current and former foresters for the North Carolina Forest Service seeking overtime compensation for time spent fighting forest fires, the trial court properly ordered the State retirement system and other federal benefits programs to recalculate the foresters' retirement benefits in order to make retroactive adjustments, based on an under-reporting of compensation with regard to overtime hours, where the trial court's calculations were not speculative and where the parties had stipulated to the number of overtime hours and the value of those hours with regard to each class of foresters.

5. Public Officers and Employees—foresters—fire fighting—overtime compensation—calculation—straight time versus time-and-a-half

In an action filed by a group of current and former foresters for the North Carolina Forest Service seeking overtime compensation for time spent fighting forest fires, the trial court did not err by strictly construing N.C.G.S. § 106-903 and determining that the foresters had been fully compensated for their overtime hours by the State's payments to them on a straight time basis, in contrast to the foresters' claim in their cross appeal that they should have been compensated for overtime on a time-and-a-half basis.

Appeal by defendant from judgment entered 23 November 2022 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 12 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General, Mary L. Lucasse, and Assistant Attorney General, Scott A. Conklin, for the State.

Elliot Morgan Parsonage, PLLC, by Robert M. Elliot, Daniel C. Lyon, and Elizabeth B. Hilker, for the plaintiffs-appellants.

TYSON, Judge.

North Carolina Forest Service's ("NCFS") current and former employees ("foresters") sued the North Carolina Department of Environmental Quality ("DEQ"), the agency responsible for paying them overtime compensation. The trial court granted declaratory judgment in favor of Class 1B and Class 2 foresters, finding and concluding those foresters were owed overtime compensation. The State appeals those portions of the trial court's order. The foresters cross appeal the portions of the trial court's judgment concluding Class 1B foresters should be paid straight time for overtime wages, versus time-and-a-half. The foresters consequently argue Class 1A foresters should have been certified. We affirm in part and remand for additional findings of fact concerning the Evans Road Fire.

I. Background

NCFS is charged with promoting and protecting North Carolina's forests from wildfires, natural disasters, insects, and disease. Over the course of this litigation, the organizational structure of the NCFS has changed, the nomenclature used to refer to the foresters has changed, and NCFS has been transferred between state agencies.

In 2011, the North Carolina General Assembly transferred the Division of Forest Resources ("DFR") from the North Carolina Department of Environment and Natural Resources ("DENR") to the Commissioner of Agriculture and the North Carolina Department of Agriculture and Consumer Services ("Agriculture"). S.L. 2011-145, s. 13.25(a). In 2013, DFR was renamed the North Carolina Forest Service, i.e., NCFS. S.L. 2013-155, s. 23. In 2015, DENR was restructured and renamed the DEQ. S.L. 2015-241, s. 14.30(c). Throughout this opinion, "Department" will be used to reference whichever agency or department the NCFS was supervised under during the requisite period, and NCFS will be used instead of DFR.

A group of thirty-four foresters ("Plaintiffs") filed a complaint on behalf of themselves and others similarly situated on 1 December 2008. Plaintiffs were current or former foresters employed by NCFS. The complaint listed DENR, the then-acting Secretary of DENR, and the State of North Carolina as Defendants. Plaintiffs asserted state and federal law claims against Defendants for overtime payments purportedly earned while they were fighting forest fires.

In their first claim, Plaintiffs sought and requested relief pursuant to N.C. Gen. Stat. § 113-56.1 (2007), recodified as N.C. Gen. Stat. § 106-903 (2011) (the "Statutory Claim"). Plaintiffs also brought two separate claims under the federal Fair Labor Standards Act ("FLSA"). *See* 29 U.S.C. §§ 201 to 219 (2024). The trial court granted Defendants' motion to dismiss the complaint based upon sovereign immunity. On appeal, this Court reversed the superior court, holding in part the State had waived sovereign immunity. *Brown v. N.C. Dep't of Env't & Natural Res.* ("*Brown I*"), 212 N.C. App. 337, 342, 714 S.E.2d 154, 158 (2011), *disc. review denied*, 365 N.C. 570, 724 S.E.2d 525 (2012) (table).

After remand to Wake County Superior Court, Plaintiffs filed a supplemental complaint. This complaint listed DENR, Agriculture, the then-acting Secretary of DENR, and the Commissioner of Agriculture as Defendants. Defendants answered. Following discovery, Defendants filed a Motion for Partial Judgment on the Pleadings, which was granted as to Plaintiffs' Second Claim for Relief under the FLSA.

Defendants filed a Motion for Partial Summary Judgment on 2 April 2013. Following hearings, the trial court entered its 2 October 2013 Memorandum and Opinion. The trial court held the statute provides for overtime wages to be paid at an hour-for-hour rate ("straight time"). In addition, the trial court "interpret[ed] the statute to mean that Defendants were and are obligated to pay overtime compensation," but it nevertheless denied the motion for summary judgment because "genuine issues of material fact, including the amount of other funds available in the Department, additional legal or practical constraints on the interdepartmental transfer of funds, and the amount of compensation owed to Plaintiffs," existed.

Over Defendants' objection, the trial court permitted Plaintiffs to again amend their complaint on 17 March 2014. Plaintiffs added four contractual claims, alleging the State had failed to pay overtime compensation at a time-and-a-half rate to professional employees who had earned overtime fighting fires on federal or non-state-owned land. Plaintiffs asserted Defendants were reimbursed for costs pursuant to contracts with federal agencies at a time-and-a-half rate. Defendants

answered the Amended Complaint. Plaintiffs then voluntarily dismissed their remaining FLSA claim, which was Plaintiffs' third claim for relief.

Following a hearing on Defendants' motion for partial summary judgment on the newly-added contract claims, the trial court granted summary judgment in favor of Defendants on Plaintiffs' fourth claim for breach of contract and seventh claim for breach of fiduciary duty on 20 December 2017. The trial court denied the motion regarding Plaintiffs' fifth claim for an implied-in-fact contract and sixth claim alleging Plaintiffs were third-party beneficiaries of contracts with federal agencies ("Contract Claim"). Plaintiffs then voluntarily dismissed their fifth claim for breach of an implied-in-fact contract.

This appeal is based on the trial court's orders regarding two remaining claims: (1) the Statutory Claim pursuant to N.C. Gen. Stat. § 106-903; and, (2) the Contract Claim for overtime wages earned fighting fires on lands under federal jurisdiction, for which the Forest Service had received reimbursement, in whole or in part, for its fire suppression costs.

Over Defendants' objection, the trial court certified Class 1B foresters for the Statutory Claim and Class 2 foresters for the Contract Claim. The trial court determined Defendants' liability in favor of Plaintiffs in its 27 January 2021 Declaratory Judgment Order.

Following further discovery, Plaintiffs sought rulings on two issues concerning class damages. The trial court's 15 November 2021 Order denied Defendants' claim and affirmative defense for recoupment wages and held Class 2 Plaintiffs are "entitled to overtime compensation at the rate of 'one and one half times base pay' for 100% of the overtime worked on the Evans Road Fire[.]" The trial court further ordered the parties to determine whether they could agree to stipulate the damages.

The parties stipulated to the identity of 152 class members, the overtime hours worked by each of the Class 1B and Class 2 members, and the value of those overtime hours. In its 23 November 2022 Order, the trial court "award[ed] each individual class member the number of overtime hours worked, and the value of those hours as set forth in the attached Spreadsheet." The trial court held any Class 1B or Class 2 member "who has vested in the North Carolina Retirement System [ ] and retired is entitled to receive additional retirement benefits[.]"

The trial court, however, held Plaintiffs had not provided any testimony from an actuarial expert witness regarding damages due to individual class members for additional retirement benefits or social security benefits and had "waived their right to provide expert testimony

on these issues." The trial court further ordered "[a]fter there is a final determination of any overtime due[,]" the Defendants "will be responsible for paying any amount required by the Retirement System or the federal agencies administering Social Security and Medicare as a result of any retroactive adjustments."

Defendants filed their notice of appeal on 22 December 2022. Plaintiffs cross-appealed.

The parties have jointly moved this Court for an order dismissing the 146 class members who have settled or withdrawn their claims against Defendants. We allowed the joint motion, and there are six remaining Plaintiffs and/or class members who have not settled their claims with Defendants: Lloyd Brown, Gary Curcio, Hugh Hassell, William Palmer, Marvin Reed (deceased 2021), and James Williams (deceased 2011).

II. Jurisdiction

The orders entered by the trial court from 2013 to 2022, culminating with the trial court's 23 November 2022 order awarding specific damages to the foresters, constitute a final judgment in this case. This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 1-279.1 and 7A-27(b)(4) (2023).

III. Issues

Defendant first argues the trial court erred by concluding Class 1B Plaintiffs were entitled to monetary payments for overtime work pursuant to N.C. Gen. Stat. § 106-903 (2011).

Defendant next argues the trial court erred by concluding the foresters should be reimbursed on a time-and-a-half basis for overtime hours spent fighting fires pursuant to certain federal reimbursement contracts. Defendant asserts, if this Court concludes the foresters are third-party beneficiaries to the federal reimbursement contracts and concludes they should be paid on a time-and-a-half basis, the trial court erred in calculating the payments due to the foresters. More specifically, Defendant argues the trial court erred by striking Defendants' affirmative defense for a setoff to recoup any overpayments to the foresters; Defendant further asserts the trial court erred by awarding Class 2 plaintiffs 100% of overtime hours worked on the Evans Road fire.

Defendant lastly argues the trial court erred by requiring the State retirement system and certain federal benefits programs to recalculate the class members' benefits pursuant to the number of overtime hours worked at the respective overtime wages.

In Plaintiffs' cross appeal, Plaintiffs argue the trial court erred by concluding "overtime compensation," as defined in N.C. Gen. Stat. § 106-903, should be paid on a straight time basis. Plaintiffs argue, if this Court agrees N.C. Gen. Stat. § 106-903 requires the foresters to be paid on a time-and-a-half basis, the trial court erred by failing to certify Class IA.

IV. Overtime Compensation Statute

A. Standard of Review

[1] "Issues of statutory construction are questions 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). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

"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) (citations and internal quotation marks omitted).

B. Statutory History

At the time the foresters filed suit, North Carolina General Statutes provided: "The Department *shall*, within funds appropriated to the Department, provide overtime compensation to the professional employees of the Division of Forest Resources involved in fighting forest fires." N.C. Gen. Stat. § 113-56.1 (2007) (emphasis supplied).

N.C. Gen. Stat. § 113-56.1 was purportedly enacted in 1982 "after the director of [NCFS] advised legislators that the Department's ability to offer only compensatory time, and not monetary compensation for overtime hours, hampered the Department's ability to deliver services and programs." The reason the compensatory time policy negatively impacted NCFS's recruitment and retention was because foresters "in heavy fire districts necessarily took their compensatory time during non-emergency periods and had insufficient time to perform their normal duties, thereby undermining forest management and other programs."

N.C. Gen. Stat. § 113-56.1 was later recodified as N.C. Gen. Stat. § 106-903 in 2011. This Court previously held, in *Brown I*, "the State has statutorily committed itself to provide a right to overtime compensation. By the use of the word 'shall' the statute unambiguously provides a right to overtime compensation." 212 N.C. App. at 342, 714 S.E.2d at 158.

Plaintiffs argue N.C. Gen. Stat. § 106-903 provides the foresters must be paid monetary compensation for any overtime hours accrued and not

otherwise compensated for with compensatory time. Defendants argue the State's general compensatory time policy satisfies the overtime compensation requirement outlined in N.C. Gen. Stat. § 106-903.

C. Statutory Construction

This Court has explained the purpose of statutory construction is to comply with the intent of the legislature:

> The principal goal of statutory construction is to accomplish the legislative intent. The process of construing a statutory provision must begin with an examination of the relevant statutory language. If the statute's plain language is clear and unambiguous, this Court applies the statute as written and does not engage in further statutory construction. However, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent.

In re McClatchy Co., LLC, 386 N.C. 77, 86, 900 S.E.2d 765, 772 (2024) (citations, alterations, and internal quotation marks omitted).

Black's Law Dictionary defines "compensation" as, "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages." *Compensation*, *Black's Law Dictionary* 354 (11th ed. 2019). Because the plain language of "compensation" is not clear on whether it should be monetary or compensatory, we must determine the legislature's intent. The Director of the NCFS had advised legislators of the Department's ability to only offer compensatory time off as compensation, and not monetary compensation, impeded NCFS's ability to deliver important services prior to the enactment of N.C. Gen. Stat. § 113-56.1, which was later recodified as N.C. Gen. Stat. § 106-903 in 2011. Following this advice, the legislature granted the Director's request through appropriations bills enacted in 1981 and 1982, which provided appropriations for monetary overtime compensation for foresters. This history illustrates a clear legislative intent to enact legislation to provide monetary compensation for foresters who had worked overtime.

This Court has held once wages or benefits are earned and accrued under a statutory scheme, an employer may not rescind those benefits. *See Narron v. Hardee's Food Systems, Inc.*, 75 N.C. App. 579, 583, 331 S.E.2d 205, 208 (1985), *overruled on other grounds by J & B Slurry Seal Co. v. Mid–South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E.2d 812 (1987) ("Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them[.]");

Hubbard v. City of Cumberland, 143 N.C. App. 149, 153, 544 S.E.2d 587, 590 (2001) ("Defendant County has a statutory duty to provide the salaries to which it has committed itself in the enacted budget ordinance."); *Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 10, 454 S.E.2d 278, 282 (1995) (explaining "once the employee has earned the wages and benefits under this statutory scheme the employer may not rescind them," although certain benefits, such as vacation pay, may be forfeited "so long as the employer notifies the employee of the conditions of such a forfeiture prior to the time he earns such benefits").

Here, the trial court held the State had satisfied its obligations and mitigated the damages for foresters, who had accrued compensatory time and used their compensatory time according to the State's compensatory time policy. The State has not satisfied its obligations towards foresters who had accrued compensatory time, but such compensatory time was either not taken or erroneously forfeited.

The trial court correctly concluded the legislature intended for N.C. Gen. Stat. § 106-903 to provide overtime compensation to the foresters. *See In re McClatchy*, 386 N.C. at 86, 900 S.E.2d at 772. N.C. Gen. Stat. § 106-903 mandates NCFS to provide overtime compensation to employees who accrued overtime while fighting fires. *Id.* Once those benefits have been earned, the State may not rescind those benefits. *Narron*, 75 N.C. App. at 583, 331 S.E.2d at 208; *Hubbard*, 143 N.C. App. at 153, 544 S.E.2d at 590; *Hamilton*, 118 N.C. App. at 10, 454 S.E.2d at 282. That portion of the trial court's order is affirmed.

V. Contract Claim

[2] Defendants argue the trial court erred by concluding the foresters were third-party beneficiaries to certain federal reimbursement contracts for fighting fires on federal land and by ordering foresters should be reimbursed on a time-and-a-half basis. If this Court agrees the foresters were third-party beneficiaries to the federal contracts, Defendants argue the parties acted *ultra vires* by signing the contracts.

A. Standard of Review

Defendants dispute the trial court's conclusions of law contained in a declaratory judgment.

> [I]n a declaratory judgment action where the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. If we determine that the challenged findings are supported by competent evidence, they are

> conclusive on appeal. We review the trial court's conclusions of law *de novo*.

Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 596-97, 632 S.E.2d 563, 571 (2006) (citations omitted), *disc. review denied*, 361 N.C. 350, 644 S.E.2d 5 (2007).

B. Third-Party Beneficiary

The record contains evidence tending to show the State had periodically entered into a "Master Cooperative Wildland Fire Management and Stafford Act Response Agreement" ("Master Agreement"). The Master Agreement was entered between agencies of the federal government and NCFS, and provides for cooperation between both agencies fighting forest fires, for the coordination and exchange of personnel, equipment, supplies, services, and for funding. Each Master Agreement was effective for a term of five years and provided for an Annual Operating Plan (AOP) for each of the five years. These agreements are collectively referred to as "Reimbursement Agreements."

From 2004 until 2008, NCFS sought and received reimbursement from the federal government under the Reimbursement Agreements for the foresters' overtime work at a time-and-a-half rate. In turn, Class 2 Plaintiffs were generally paid overtime compensation at a time-and-a-half rate for their work on Reimbursable Incidents.

In June 2008, NCFS entered into the 2008 Master Agreement, which incorporated AOPs for each year of the agreement from 2008 to 2012. The 2008 Master Agreement was signed by William G. Ross, Secretary for NCFS, and Michael Bryant, Director of Purchasing and Services for NCFS. The 2008 Master Cooperative Agreement, included the following language: "**Authorized Representatives**: By signature below, all signatories to this agreement certify that the individuals (Agency Representative, Agency Administrator, Unit Administrator, Unit Administrator) listed in this document are authorized to act in their respective areas for matters related to this Agreement."

The AOPs for the years 2008 to 2010 each contain the following language: "Overtime will be paid at one and one half times base pay for all NC[FS] personnel (non-exempt and exempt.)." The 2011 and 2012 AOPs were silent as to the rate at which overtime compensation would be paid to Class 2 plaintiffs.

In 2008, fighting a fire identified as the "Evans Road Fire," required substantial overtime hours by Class 2 plaintiffs. The State sought and received reimbursement of overtime compensation from the federal

government at the rate of time-and-a-half base pay pursuant to the 2008 AOP. The State determined that, due to its general policies requiring payment of any overtime compensation permitted to professional and other exempt employees at a straight time rate, the Class 2 plaintiffs should not be paid overtime compensation at the rate of time-and-a-half of base pay, as was contemplated by the Reimbursement Agreements. The State held approximately $250,000 in funds received from the federal government regarding the Evans Road Fire.

"To establish a claim based on the third party beneficiary contract doctrine, a complaint's allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit." *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 405-06, 263 S.E.2d 313, 317 (1980) (citation omitted).

"The practice of allowing third-party beneficiaries not in privity of contract to bring an action in their own name to enforce the contract made for their benefit was recognized in North Carolina as early as 1842." *Carl v. State*, 192 N.C. App. 544, 551, 665 S.E.2d 787, 794 (2008) (citation and quotation marks omitted). "The rule is well established in this jurisdiction that a third person may sue to enforce a binding contract or promise made for his benefit even though he is a stranger both to the contract and to the consideration." *Id.* (citation and quotation marks omitted).

> A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person. It is not enough that the contract, in fact, benefits the third party, if, when the contract was made, the contracting parties did not intend it to benefit the third party directly.

Revels v. Miss Am. Org., 182 N.C. App. 334, 336, 641 S.E.2d 721, 723 (2007) (citation, alterations, and internal quotation marks omitted).

"In determining the intent of the contracting parties, the court should consider the circumstances surrounding the transaction as well as the actual language of the contract." *Holshouser v. Shaner Hotel Grp. Props. One*, 134 N.C. App. 391, 400, 518 S.E.2d 17, 25 (1999), *aff'd*, 351 N.C. 330, 524 S.E.2d 568 (2000) (citation, alterations, and internal quotation marks omitted).

"[C]ontracts are to be construed consistently with reason and common sense." *See Variety Wholesalers, Inc. v. Salem Logistics Traffic*

Servs., *LLC*, 365 N.C. 520, 525, 723 S.E.2d 744, 748 (2012) (citation and internal quotation marks omitted).

The trial court properly held the foresters were intended beneficiaries of the Master Agreement, as the AOPs directly referenced the rate the foresters were to be paid for the overtime hours spent fighting fires on federal lands. *See id.*; *United Leasing*, 45 N.C. App. at 405-06, 263 S.E.2d at 317. Additionally, "the circumstances surrounding the transaction" indicate the contracting parties directly intended to compensate the foresters for overtime hours spent *fighting fires on federal land*. *Holshouser*, 134 N.C. App. at 400, 518 S.E.2d at 25 (citation, alterations, and internal quotation marks omitted). Defendants' argument is overruled.

C. *Ultra Vires*

"As a creature of the Legislature, an agency of the State can only exercise (1) the powers granted in express terms; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the agency." *Carl*, 192 N.C. App. at 553, 665 S.E.2d at 795 (citation, alteration, and internal quotation marks omitted).

An agency "may exercise only such authority as is vested in it by statute." *Utilities Com. v. Motor Lines, Inc.*, 240 N.C. 166, 168, 81 S.E.2d 404, 406 (1954). "When a State agency attempts to enter into a contract which does not come within the scope of its powers, the contract thereby formed is *ultra vires*." *Carl*, 192 N.C. App. at 553, 665 S.E.2d at 795 (citation omitted).

Defendants' *ultra vires* defense is without merit. N.C. Gen. Stat. § 106-903 (2011) expressly allowed the Department to "provide overtime compensation to the professional employees of the Division of Forest Resources involved in fighting forest fires." This Court has previously held "the State has statutorily committed itself to provide a right to overtime compensation." *Brown I*, 212 N.C. App. at 342, 714 S.E.2d at 158. The trial court properly denied Defendants' defense of *ultra vires* regarding overtime compensation; Defendants were expressly required by statute to provide overtime compensation to foresters. *See Pritchard v. Elizabeth City*, 81 N.C. App. 543, 552, 344 S.E.2d 821, 826 (1986).

VI. Payments

[3] Defendants argue the payments to the remaining Plaintiffs should be reduced in two ways. First, Defendants argue any payments owed to the foresters should be setoff or reduced by the amount of any

purported overpayments to the foresters throughout certain weeks of their career with NCFS. For example, if any foresters misreported or overstated their hours, Defendants argue those Plaintiffs' awards should be reduced.

Second, Defendants argue they were only reimbursed by the federal government for 60% of the costs of the Evans Road fire, because 40% of that fire burned on state property. Defendants argue the Plaintiffs should only be awarded time-and-a-half for 60% of the overtime hours accrued while fighting the Evans Road fire.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

Defendants dispute the trial court's decision regarding several questions of fact. "[I]n a declaratory judgment action where the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. If we determine that the challenged findings are supported by competent evidence, they are conclusive on appeal." *Calhoun*, 178 N.C. App. at 596-97, 632 S.E.2d at 571 (citations omitted). "We review the trial court's conclusions of law de novo." *Id.*

B. Overpayments

We first address Defendants' setoff argument. Our General Statutes specify the State is required to recoup any "overpayment of State funds to any person in a State-funded position[.]" N.C. Gen. Stat. § 143-64.80(a) (2023). Such overpayments "shall be recouped by the entity that made the overpayment and, to the extent allowed by law, the amount of the overpayment may be offset against the net wages of the person receiving the overpayment." *Id.*

No State agency has the authority to "forgive repayment of an overpayment of State funds," and the agency "shall have a duty to pursue the repayment of State funds by all lawful means available, including the filing of a civil action in the General Court of Justice." N.C. Gen. Stat. § 143-64.80(b) (2023).

Previously, this Court heard claims for recoupment of overpayments. The plaintiff was personally provided notice about any overpayments

and given an opportunity to challenge any overpayment in a hearing before the Office of Administrative Hearings ("OAH"). *See Moss v. N.C. Dep't of State Treasurer*, 282 N.C. App. 505, 508, 872 S.E.2d 113, 116 (2022). The OAH has also adjudicated similar issues where the State had sought recoupment pursuant to N.C. Gen. Stat. § 143-64.80 for State overpayments, and OAH issued its opinions following a hearing. *See Townsend v. N.C. Ret. Sys.*, 2010 NC OAH LEXIS 207 (Feb. 19, 2010); *Watson v. N.C. Dep't. of State Treasurer, Ret. Sys. Div.*, 2012 N.C. OAH Lexis 79 (Nov. 1, 2012).

Here, the trial court held "there is an established administrative procedure available for the State to recoup overpayments which would include proper notice to the individual class members affected, and [to] permit discovery and the right of the members to defend the claims on individual ground."

We agree with the trial court. N.C. Gen. Stat. § 143-64.80 does not contain a statute of limitations for when the State may seek repayment. We affirm the trial court's dismissal of the State's recoupment defense without prejudice. The State may provide notice of any repayments sought against the foresters and seek to recoup those overpayments under the "established administrative procedure."

C. Evan's Road Fire

Evidence before the trial court tended to show NCFS and the U.S. Fish and Wildlife Service ("USFWS") executed a memorandum of understanding on 4 June 2008. The Memorandum of Understanding was "entered into for the purpose of combating the Evans Road Fire" and contained the following language:

> Fire suppression costs will be pro-rated based on the percentage of ownership of the total acres burned. Any billing for reimbursement will be based on these percentages. Final acreage will be determined at time of containment. If the fire should escape containment lines[,] the calculated pro-rated percentages will be used for cost incurred between the date of containment and the date of escape. A new pro-rated percentage will be calculated to cover cost[s] incurred after the fire escapes.

The incident summary form for the Evans Road fire provided 40% of the acreage the fire spanned was on either North Carolina lands or on private lands. NCFS's final cost summary estimated the State shared 40% of the costs spent fighting the fire.

Evidence in the record also tended to show the federal government paid the State for 100% of the overtime hours the firefighters spent working on the Evans Road fire, both from FEMA and the USFWS. The trial court found:

> 24. The State documented its receipt of these funds which were earmarked for the Class 2 plaintiffs in Deposition Exhibit 149 (Exhibit 6 presented in support of this motion). The document is clear as to the intent of those funds:
>
> > Pending Obligation: .5 overtime for exempt employees* These funds must be reserved for payment to employees pending O[vertime] Lawsuit. If determined funds are not to be paid to employees then the State did not incur the expense and funds must be returned to FEMA and USFWS.

The trial court also found the State had agreed all of Class 2 members' overtime hours totaled $247,562.04 and the State had received $250,000 from the federal government for the overtime hours worked by the foresters, which would cover 100% of the overtime hours owed to the Class 2 foresters.

The trial court concluded "based on the evidence presented, there is no genuine issue of material fact as to this claim, that the State has received the funds representing 100% of the overtime worked on the Evans Road Fire" and thus all Class 2 plaintiffs should receive time-and-a-half for all overtime hours spent on the Evans Road Fire.

A genuine issue of material fact exists regarding whether the funds earmarked by the State from the federal government covered 100% or 60% of the overtime hours earned by the foresters. This issue is remanded to the trial court to hold an evidentiary hearing. *See In re Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

VII. Speculative Damages

[4] Defendants argue the trial court's order directing the State's retirement system and other federal benefits programs to recalculate the foresters' benefits pursuant to the overtime hours worked is speculative and based on insufficient evidence.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is

entitled to a judgment as a matter of law.' " *In re Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (quoting *Forbis*, 361 N.C. at 523-24, 649 S.E.2d at 385).

> [I]n a declaratory judgment action where the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. If we determine that the challenged findings are supported by competent evidence, they are conclusive on appeal. We review the trial court's conclusions of law *de novo*.

Calhoun, 178 N.C. App. at 596-97, 632 S.E.2d at 571 (citations omitted).

B. Analysis

"Damages which are uncertain and speculative, or which are not the natural and probable result of the breach, are too remote to be recoverable." *Johnson v. R. R.*, 184 N.C. 101, 105, 113 S.E. 606, 608 (1922) (citation omitted).

"The objective of compensatory damages is to restore the plaintiff to his original condition or to make the plaintiff whole." *Watson v. Dixon*, 352 N.C. 343, 347, 532 S.E.2d 175, 178 (2000) (citing *Bowen v. Fidelity Bank*, 209 N.C. 140, 144, 183 S.E. 266, 268 (1936) ("[C]ompensatory damages are allowed as indemnity to the person who suffers loss in satisfaction and recompense for the loss sustained. The purpose of the law is to place the party as near as may be in the condition which he would have occupied had he not suffered the injury complained of.")).

The trial court made the following findings of fact and conclusions of law:

> 2. In response to this Court's DJ Order, the parties have stipulated to the number of overtime hours and the value of those overtime hours for Class IB and Class 2 members. A spreadsheet prepared by Craig Clarke on July 2, 2021, updated on September 9, 2022, and updated again following the September 16, 2022 hearing ("the Spreadsheet") shows the parties' stipulations including the overtime hours worked by each individual who is a member of Class IB and Class 2. The Spreadsheet includes additional stipulated information for each claimant (for example, the period of time worked by each claimant, the rate of pay for each claimant as of July 2, 2021 (or at the date of separation or retirement if prior to July 2, 2021), and the end date after which no additional overtime hours subject

to the DJ Order was earned by each claimant). The parties have represented to this Court that during discovery, the defendants provided information and spreadsheets for each individual claimant providing the backup information supporting the information in the Spreadsheet. The plaintiffs had an opportunity to review that information and to depose the defendant's representative at the North Carolina Forest Services, Craig Clarke, regarding the information provided. Attached under seal pursuant to the Consent Protective Order Filed June 5, 2013, is the Spreadsheet stipulated to by the parties. By this Order, the Court awards each individual class member the number of overtime hours worked, and the value of those hours as set forth in the attached Spreadsheet.

3. Based on the Spreadsheet, the parties have stipulated that when totaled, the overtime hours and the value of the individual calculations for Class IB equals $233,777.12 and the value of Class 2 equals $247,562.04. By stipulating to these gross amounts, the parties have also stipulated to the overtime hours calculated for each individual class member and the value of overtime hours. Therefore, any damages allocated to individual class members are and must be based on the individual calculations in the Spreadsheet.

4. Any member of Class IB or Class 2 who has vested in the North Carolina Retirement System ("Retirement System") and retired is entitled to receive additional retirement benefits based on an underpayment of overtime as set forth in this order awarding overtime to individual claimants pursuant to the DJ Order.

. . .

6. The Plaintiffs have not provided any testimony from an actuarial expert witness regarding damages due individual class members for additional retirement benefits or social security benefits. The discovery cutoff has passed. The Plaintiffs have waived their right to provide expert testimony on these issues.

7. The Retirement System is not a party to this litigation.

8. After there is a final determination of any overtime due to the Plaintiffs, the defendant agencies shall submit a

> request to the Retirement System for retroactive adjustments for each claimant due to the underreporting of compensation. This Court understands that the Retirement System will calculate the cost payable by the defendant agency as a result of the underreporting of compensation. If the defendant agencies' correction affects any individual's retirement benefit, the defendant agencies will be required to pay the costs to the Retirement System so that it will adjust the retirement benefits for any affected individual to reflect the actual compensation set forth in this order.
>
> 9. Any information required by the Retirement System to determine whether there is an impact to an individual's retirement benefit (for example, the last date overtime was earned), will be based on the information known to the Retirement System or the stipulated information included in the Spreadsheet.
>
> 10. After there is a final determination of any overtime due to the Plaintiffs, the defendant agencies shall also inform the relevant federal agencies administering Social Security and Medicare that it has made retroactive adjustments for each claimant due to the underreporting of compensation. Defendant agencies will be responsible for paying any amount required by the federal agencies to those federal agencies as a result of the underpayment.

Here, the damages the trial court determined in this case are not speculative. *See Johnson*, 184 N.C. at 105, 113 S.E. at 608. The damages owed to the foresters were calculated using the number of overtime hours owed and the respective overtime rate for each class. The parties stipulated to the number of overtime hours due to each forester when calculating the damages due to both Class 1B and Class 2 foresters. The trial court's award "restore[s] the plaintiff[s] to [their] original condition" and "make[s] the plaintiff[s] whole." *Watson*, 352 N.C. at 347, 532 S.E.2d at 178. Defendants' arguments are overruled.

VIII. Cross-Appeal

[5] Plaintiffs argue the trial court erred by concluding "overtime compensation" in N.C. Gen. Stat. § 106-903 includes overtime wages paid on a straight time basis. The Plaintiffs further argue, if this Court agrees N.C. Gen. Stat. § 106-903 mandates the foresters must be paid on a time-and-a-half basis, the trial court erred by failing to certify Class IA.

A. Standard of Review

As stated previously, "[o]ur standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (quoting *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385).

"Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (citation and internal quotation marks omitted).

"Issues of statutory construction are questions of law, reviewed *de novo* on appeal." *McKoy*, 202 N.C. App. at 511, 689 S.E.2d at 592.

A trial court's "evaluation of the legal criteria to establish a class, [is reviewed] de novo." *Surgeon v. TKO Shelby, LLC*, 385 N.C. 772, 776, 898 S.E.2d 732, 736 (2024). "[T]he trial court may, in its discretion, certify a class" only after the "legal prerequisites are met." *Id.* at 777, 898 S.E.2d at 737. "This Court reviews a trial court's class certification order for abuse of discretion." *Id.* at 776, 898 S.E.2d at 736.

B. Analysis

N.C. Gen. Stat. § 106-903 (2011), which was previously codified as N.C. Gen. Stat. § 113-56.1 (2007) at the time the foresters initiated this suit, provided: "The Department *shall*, within funds appropriated to the Department, provide overtime compensation to the professional employees of the Division of Forest Resources involved in fighting forest fires." N.C. Gen. Stat. § 106-903 (2011) (emphasis supplied).

This Court has previously held "the State has statutorily committed itself to provide a right to overtime compensation" by enacting N.C. Gen. Stat. § 113-56.1 (2007) and later N.C. Gen. Stat. § 106-903 (2011). *Brown I*, 212 N.C. App. at 342, 714 S.E.2d at 158.

The statute, however, does not specify whether overtime compensation must be paid on a straight time or a time-and-a-half basis. The trial court held in its 2 October 2013 Order:

> The legislature did not clearly and unequivocally state the rate of the overtime pay, as the statute is silent on that issue. Given the evidence of state personnel policy in effect when the statute was enacted, as well as the practice at that time by the Department of providing for straight time

> overtime for FLSA-exempt employees involved in fighting fires, and applying the canons of strict construction stated in the Stone and FAA decisions, the undersigned concludes that the statute provides for overtime paid at a rate of hour for hour.

The trial court relied on *Stone v. N.C. Dept. of Labor*, which held statutes that "permit suit in derogation of sovereign immunity" and "[s]tatutes in derogation of the common law [ ] should be strictly construed." 347 N.C. 473, 479, 495 S.E.2d 711, 714-15 (1998) (first citing *Floyd v. N.C. State Highway & Pub. Works Comm'n*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955), *overruled in part on other grounds by Barney v. N.C. State Highway Comm'n*, 282 N.C. 278, 284-85, 192 S.E.2d 273, 277 (1972); and then citing *McKinney v. Deneen*, 231 N.C. 540, 542, 58 S.E.2d 107, 109 (1950)).

The trial court also relied upon *F.A.A. v. Cooper*, which provides:

> Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires. Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government.

566 U.S. 284, 290-91, 182 L. Ed. 2d 497, 508 (2012) (citations omitted).

The rationale in *F.A.A.* is consistent with our State's precedents. "State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983); *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016). The trial court did not err by holding NCFS had complied with the statute by paying the foresters overtime pay on a straight time basis.

It is unnecessary for us to address whether the trial court erred by denying the Class 1A certification. The trial court's denial of Class 1A was based upon its prior holding that overtime compensation due under N.C. Gen. Stat. § 106-903 (2011) is satisfied by paying the foresters on a straight time basis.

IX. Conclusion

N.C. Gen. Stat. § 106-903 requires NCFS to provide overtime compensation to the foresters. *See In re McClatchy*, 386 N.C. at 86, 900

S.E.2d at 772. Once those benefits have been earned, the State may not rescind them. *Narron*, 75 N.C. App. at 583, 331 S.E.2d at 208; *Hubbard*, 143 N.C. App. at 153, 544 S.E.2d at 590; *Hamilton*, 118 N.C. App. at 10, 454 S.E.2d at 282. The trial court did not err by concluding the Class 1B foresters were entitled to monetary compensation for overtime hours worked if the accrued compensatory time was not used or taken.

The trial court properly held the foresters were intended beneficiaries of the Master Agreement, as the AOPs directly referenced the rate the foresters were to be paid for the overtime hours spent fighting fires. *See United Leasing*, 45 N.C. App. at 405-06, 263 S.E.2d at 317; *Variety Wholesalers*, 356 N.C. at 525, 723 S.E.2d at 748; *Holshouser*, 134 N.C. App. at 400, 518 S.E.2d at 25; *Revels*, 182 N.C. App. at 336, 641 S.E.2d at 723. The trial court properly denied Defendants' defense of *ultra vires* regarding overtime compensation when they were expressly required to provide overtime compensation to foresters pursuant to N.C. Gen. Stat. § 106-903. *See Pritchard*, 81 N.C. App. at 552, 344 S.E.2d at 826.

We affirm the trial court's dismissal of the State's recoupment defense without prejudice. The State may provide notice of any repayments sought against the foresters and seek to recoup those overpayments under the "established administrative procedure." *See Moss*, 282 N.C. App. at 508, 872 S.E.2d at 116; *Townsend*, 2010 NC OAH LEXIS 207 (Feb. 19, 2010); *Watson*, 2012 N.C. OAH Lexis 79 (Nov. 1, 2012).

A genuine issue of material fact exists regarding whether the funds earmarked by the State from the federal government covered 100% or 60% of the overtime hours accrued by foresters working on the Evans Road Fire. This issue is remanded to the trial court to hold an evidentiary hearing regarding whether the funds provided by the federal government were intended to cover 100% or 60% of the overtime hours spent on the Evans Road Fire. *See In re Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

The trial court's damages regarding certain retirement benefits and federal benefits due to the foresters for overtime hours worked are not speculative. *See Johnson*, 184 N.C. at 105, 113 S.E. at 608. The trial court's award "restore[s] the plaintiff[s] to [their] original condition" and "make[s] the plaintiff[s] whole." *Watson*, 352 N.C. at 347, 532 S.E.2d at 178 (citation omitted).

The trial court did not err by strictly construing N.C. Gen. Stat. § 106-903 and finding the foresters were fully compensated for overtime hours paid on a straight time basis. *See Guthrie*, 307 N.C. at 537-38, 299 S.E.2d at 627; *Irving*, 368 N.C. at 611, 781 S.E.2d at 284. Except for the remand to determine the allocation of federal funds reimbursed for

costs incurred in fighting the Evans Road Fire, the orders appealed from are affirmed. *It is so ordered.*

AFFIRMED IN PART AND REMANDED.

Judges HAMPSON and GRIFFIN concur.

GLORIA CARTER, PLAINTIFF
v.
HOME2 SUITES BY HILTON CHARLOTTE I-77 SOUTH, AND
HILTON WORLDWIDE HOLDINGS, INC., DEFENDANTS

No. COA24-804

Filed 7 May 2025

Jurisdiction—personal—no minimum contacts shown—due process rights violated—denial of motion to dismiss reversed

In an action for wrongful eviction, breach of contract, and illegal sales tax—brought by an individual against a Charlotte hotel where she had stayed and a Delaware company (the parent holding company of the Hilton hotel and hospitality business) ("Hilton")—the trial court erred in denying Hilton's motion to dismiss for lack of personal jurisdiction where the court's unchallenged findings of fact were that Hilton: was not incorporated or headquartered in North Carolina, was not registered or licensed to do business in the state, did not lease or own any real property in the state, and was not a party to any franchise agreement with the Charlotte hotel. Accordingly, even though two other findings of fact challenged by plaintiff were not supported by the evidence, the order denying Hilton's motion to dismiss was reversed because Hilton did not have minimum contacts with North Carolina sufficient to permit maintenance of a suit that did not offend due process concerns.

Appeal by defendant from order entered 9 May 2024 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 February 2025.

Maxwell & Price, LLP, by Amanda Price, Esq., for Plaintiff-Appellee.

Robinson Gooding Law, by William C. Robinson and Dorothy M. Gooding, for Defendant-Appellant.

COLLINS, Judge.

Defendant Hilton Worldwide Holdings, Inc., appeals from the trial court's order denying its Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. Hilton Worldwide argues that North Carolina's long-arm statute does not authorize personal jurisdiction over it, and that the exercise of personal jurisdiction over it would violate due process. We agree that the exercise of personal jurisdiction over Hilton Worldwide would violate due process, and we reverse the trial court's order.

I. Background

Plaintiff Gloria Carter filed a verified complaint on 17 February 2023 against Home2 Suites by Hilton Charlotte I-77 South and Hilton Worldwide for wrongful eviction, breach of contract, and illegal sales tax allegedly arising from her stay at Home2 Suites. Plaintiff alleged that the trial court had jurisdiction "because all of the transactions and occurrences happened in North Carolina and by virtue of NC Code § 11-921" and "because the Defendant is a business incorporated in North Carolina." An unverified, un-file-stamped, and un-dated "Amendment to Complaint" appears in the record which reads in its entirety,

> Pursuant to Rule 15 of North Carolina Rules of Civil Procedure, Plaintiff moves to add TWC Charlotte II LLC as a Defendant in the proceedings and to amend the original complaint to reflect "Hilton Worldwide Holdings, Inc. is a corporation incorporated in Delaware and doing business in North Carolina[.]"

Hilton Worldwide filed a motion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(2) contesting personal jurisdiction. Hilton Worldwide attached to its motion a sworn affidavit from its Vice President, James O. Smith, in which he averred as follows:

> 3. [Home2 Suites] . . . is independently owned and operated by TWC Charlotte II LLC, pursuant to the Franchise Agreement attached as **Exhibit A**.
>
> 4. [Hilton Worldwide] is the parent holding company of the Hilton hotel and hospitality business. [Hilton Worldwide] is incorporated in Delaware and headquartered in Virginia. [Hilton Worldwide] has no employees and is the issuer of common stock listed for trading on the New York Stock Exchange.

> 5. [Hilton Worldwide] is not registered or licensed to do business in the state of North Carolina.
>
> 6. [Hilton Worldwide] does not hold title to or lease any real property in the state of North Carolina.
>
> 7. [Hilton Worldwide] is not a party to any franchise agreement for any hotel or resort located in the state of North Carolina.
>
> 8. [Hilton Worldwide] is not a party to any agreement related to [Home2 Suites].
>
> 9. At no time has [Hilton Worldwide] owned, operated, managed, or controlled the day-to-day operations of [Home2 Suites].
>
> 10. At no time has [Hilton Worldwide] employed the personnel working at [Home2 Suites] or controlled or supervised the staff at [Home2 Suites].
>
> 11. [Hilton Worldwide] has never held title to or leased the real property associated with [Home2 Suites].
>
> 12. [Hilton Worldwide] does not control nor operate [Home2 Suites'] facilities, systems, or equipment in any way.

Attached to Smith's affidavit was the Franchise Agreement referenced in the affidavit as Exhibit A. The Franchise Agreement between Hilton Franchise Holding LLC, as Franchisor, and TWC Charlotte II LLC, as Franchisee, granted TWC Charlotte a license to operate Home2 Suites and outlined the roles and responsibilities of the parties to the agreement. Hilton Worldwide is not a party to the Franchise Agreement.

Plaintiff filed an unverified response to Hilton Worldwide's motion to dismiss and did not submit any affidavits. After the hearing, the trial court entered an order denying Hilton Worldwide's motion, finding as follows:

> 3. Hilton Worldwide [] is the parent holding company of the Hilton hotel and hospitality business.
>
> 4. Hilton Worldwide [] is incorporated in Delaware and headquartered in Virginia.
>
> 5. Hilton Worldwide [] has no employees.
>
> 6. Hilton Worldwide [] is not registered or licensed to do business in the State of North Carolina.

7. Hilton Worldwide [] does not hold title to or lease any real property in the State of North Carolina.

8. TWC Charlotte [] owns and operates a hotel under the trade name "Home2 Suites []" . . . .

9. TWC Charlotte [] operates the "Home2 Suites []" pursuant to the Franchise Agreement between Hilton Franchise [] and TWC Charlotte [].

10. The Franchise Agreement is attached as Exhibit A to the Affidavit of James O. Smith.

11. Hilton Franchise [] is defined as "we," "us," "our" or "Franchisor" in the Franchise Agreement.

12. Hilton Franchise [] is an Affiliate of Hilton Worldwide [].

13. Hilton Worldwide [] is not a party to the Franchise Agreement between Hilton Franchise [] and TWC Charlotte [].

14. Hilton Worldwide [] does not own or lease the real property associated with the Home2 Suites [].

15. Plaintiff Gloria Carter alleges that she was wrongfully evicted from the Home2 Suites [].

16. Plaintiff Gloria Carter's claims arise out of her use of the Reservation System.

17. Pursuant to the Franchise Agreement, TWC Charlotte [] was required to use the Reservation System when operating Home2 Suites [].

18. Pursuant to a non-sworn or attested to document with the words "opencorporates" shown by Plaintiff's counsel at the hearing, Hilton Worldwide [] is the "Controlling Company" of Hilton Franchise [].

Based upon its findings, the trial court concluded:

1. The Court has grounds for personal jurisdiction over Hilton Worldwide [] under the North Carolina long arm statute G.S. § 1-75.4.

2. Hilton Worldwide [] has sufficient minimum contacts with the State of North Carolina and the Court's exercise

> of jurisdiction over Hilton Worldwide [] satisfies the Due Process Clause of the United States Constitution.

Hilton Worldwide appealed to this Court.

II. Discussion

A. Appellate Jurisdiction

We first address our jurisdiction to hear this appeal. "An order denying a motion to dismiss is interlocutory because it leaves the matter for further action by the trial court." *Semelka v. Univ. of N.C.*, 289 N.C. App. 198, 207 (2023) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Bartlett v. Est. of Burke*, 285 N.C. App. 249, 254 (2022) (citation omitted). "Our General Statutes recognize a limited right to an immediate appeal from an interlocutory order denying a motion to dismiss for lack of personal jurisdiction." *Id.* at 255 (citing N.C. Gen. Stat. § 1-277(b) (interested parties may immediately appeal adverse rulings as to the jurisdiction of the court over the person or property of defendant)).

This right of immediate appeal of an adverse personal jurisdiction ruling is limited, however, to "minimum contacts" rulings—that is, rulings on "whether the court has power . . . to require the defendant to come into court to adjudicate the claim," pursuant to Rule 12(b)(2), as opposed to rulings on the sufficiency of service pursuant to Rule 12(b)(5) or the sufficiency of process pursuant to Rule 12(b)(4). *Love v. Moore*, 305 N.C. 575, 579 (1982). As the issue before us is whether Hilton Worldwide has sufficient minimum contacts with North Carolina to authorize the trial court's exercise of personal jurisdiction, this appeal is properly before this Court.

B. Standard of Review

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record." *Bell v. Mozley*, 216 N.C. App. 540, 543 (2011) (cleaned up). "We review de novo the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant." *Id.* (citation omitted).

Where a defendant supplements its "motion to dismiss with an affidavit or other supporting evidence," the allegations in the plaintiff's complaint cannot "be taken as true or controlling and [the] plaintiff cannot rest on the allegations of the complaint." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693 (2005) (cleaned

up). Further, if a plaintiff offers no competing affidavit or other evidence, "to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit which are uncontroverted because of the plaintiff's failure to offer evidence[.]" *Id*. at 693-94 (parentheses and citations omitted). "The burden is upon the plaintiff to establish by a preponderance of the evidence that personal jurisdiction exists." *Sherlock v. Sherlock*, 143 N.C. App. 300, 301 (2001) (citations omitted).

Plaintiff concedes that Hilton Worldwide "support[ed] its Motion to Dismiss with the Affidavit of James O. Smith, and Plaintiff fil[ed] no affidavit, sworn testimony, or evidence in response." Plaintiff further concedes that "the allegations of Plaintiff's Complaint are not taken as 'true or controlling' and Plaintiff may not rest on the allegations of her Complaint." Plaintiff essentially argues, however, that the Franchise Agreement is sufficient evidence to establish the trial court's personal jurisdiction over Hilton Worldwide.

C. Findings of Fact

Hilton Worldwide first argues that findings of fact 16, 17, and 18 are not supported by the evidence. We address each finding in turn.

Finding of fact 16 states, "Plaintiff Gloria Carter's claims arise out of her use of the Reservation System." Nowhere in Plaintiff's complaint does she reference a "Reservation System" or allege that her claims arose out of using a "Reservation System." Further, nowhere in her complaint does she tie a "Reservation System" to Hilton Worldwide. Plaintiff concedes that her complaint does not reference a "Reservation System" but argues that "[t]he suit does not need to mention the Reservation System or Service, as it is referenced Franchise Agreement (sic) because it is the only means by which the Franchisee is able to make reservations."

The Franchise Agreement indicates that Hilton Franchise will provide TWC Charlotte with a "Reservation Service." However, the Franchise Agreement does not show how Plaintiff's claims arose from her use of the Reservation Service, nor does it indicate that Hilton Worldwide provided, controlled, managed, maintained, or operated this service. Additionally, as explained next, the Reservation Service is not the sole way for Home2 Suites to accept reservations. Accordingly, this finding of fact is not supported by the evidence and we will disregard it in our analysis.

Finding of fact 17 states, "Pursuant to the Franchise Agreement, TWC Charlotte [] was required to use the Reservation System when

operating Home2 Suites []." Section 5.1.10 of the Franchise Agreement provides as follows:

> [TWC Charlotte must] participate in and use the Reservation Service, including any additions, enhancements, supplements or variants we develop or adopt, and honor and *give first priority* on available rooms to all confirmed reservations referred to [Home2 Suites] through the Reservation Service. The only reservation service or system you may use for outgoing reservations referred by or from [Home2 Suites] to other Network Hotels will be the Reservation Service *or other reservation services we designate*[.]

(Emphasis added).

Although, by the terms of the Franchise Agreement, Hilton Franchise requires TWC Charlotte to participate in and use the Reservation Service, the Franchise Agreement also contemplates that the Reservation Service is not the only method by which reservations may be made. TWC Charlotte must "give first priority" on available rooms to reservations referred to Home2 Suites through the Reservation Service, implying that some reservations will not be referred through the Reservation Service and will be given lesser priority. Furthermore, the Franchise Agreement specifically provides that Hilton Franchise may designate "other reservation services" to use for outgoing reservations referred by or from Home2 Suites to other Network Hotels. Accordingly, only to the extent that Hilton Franchise requires TWC Charlotte to use the Reservation Service as the way to accept reservations under certain conditions is this finding of fact supported by the evidence.

Finding of fact 18 states, "Pursuant to a non-sworn or attested to document with the words 'opencorporates' shown by Plaintiff's counsel at the hearing, Hilton Worldwide [] is the 'Controlling Company' of Hilton Franchise []." It is accurate that the record contains "a non-sworn or attested to document" with a screenshot of a web page displaying the title "opencorporates" and the description "The Open Database Of The Corporate World." The screen shot displays various fields of information including "HILTON FRANCISE HOLDING LLC" and "Controlling Company HILTON WORLDWIDE HOLDINGS INC."

This finding of fact indicates that the "non-sworn or attested to document" was not admissible to controvert Hilton Worldwide's affidavit, and Plaintiff does not argue otherwise. Furthermore, this finding is merely a recitation of what the document indicates on its face and is not

a substantive finding that Hilton Worldwide controls Hilton Franchise. We will therefore disregard this purported finding in our analysis. *See Lane v. Am. Nat'l Can Co.*, 181 N.C. App. 527, 531 (2007) ("This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence[.]") (citations omitted).

D. Personal Jurisdiction

"North Carolina applies a two-step analysis to determine whether a non-resident defendant is subject to *in personam* jurisdiction." *Bartlett*, 285 N.C. App. at 255 (citation omitted). First, North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, must authorize jurisdiction. *Id.* Second, if the long-arm statute allows personal jurisdiction, the "exercise of [such] jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.* (quotation marks and citation omitted).

Plaintiff contends that N.C. Gen. Stat. § 1-75.4(1)(d), which confers personal jurisdiction "[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who . . . [i]s engaged in substantial activity within this State," authorizes the exercise of personal jurisdiction over Hilton Worldwide. N.C. Gen. Stat. § 1-75.4(1)(d) (2023). N.C. Gen. Stat. § 1-75.4(1)(d) "grants the courts of North Carolina the opportunity to exercise jurisdiction over [a] defendant to the extent allowed by due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676 (1977). "In other words, when evaluating the existence of personal jurisdiction pursuant to [N.C. Gen. Stat.] § 1-75.4(1)(d), the question of statutory authorization collapses into the question of whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 617 (2000) (cleaned up). Accordingly, we proceed directly to the due process inquiry.

Due process requires that a defendant "have certain minimum contacts" with this forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (citations omitted); *see also Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705 (1974) ("Unless a nonresident defendant has had 'minimum contacts' with the forum state, the state may not exercise jurisdiction over him."). Although courts "have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction," *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), only the latter is at issue here.

Specific jurisdiction exists where "the controversy arises out of the defendant's contacts with the forum state[.]" *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 366 (1986). It "depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919 (quotation marks and citation omitted). Jurisdiction cannot be based on "a defendant's 'random, fortuitous, or attenuated' contacts with the forum state[.]" *Beem USA Limited-Liability Ltd. P'ship v. Grax Consulting LLC*, 373 N.C. 297, 303 (2020) (quoting *Walden v. Fiore*, 571 U.S. 277, 286 (2014) (citation omitted)). Rather, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citation omitted). The determination of the existence of minimum contacts "depends upon the particular facts of each case." *Chadbourn*, 285 N.C. at 705 (citations omitted).

"[W]hen a subsidiary of a foreign corporation is carrying on business in a particular jurisdiction, the parent is not automatically subject to jurisdiction in the state." *Ash v. Burnham Corp.*, 80 N.C. App. 459, 462 (1986) (citing 4 Wright and Miller, Federal Practice and Procedure: Civil § 1069, at 255-56 (1969); *Mills, Inc. v. Transit Co.*, 265 N.C. 61 (1965)). "Thus, if the subsidiary's presence in the state is primarily for the purpose of carrying on its own business and the subsidiary has preserved some semblance of independence from the parent, jurisdiction over the parent may not be acquired on the basis of the local activities of the subsidiary." *Id.*; *accord Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925).

Here, the trial court's findings indicate that Hilton Worldwide is not incorporated in North Carolina, is not headquartered in North Carolina, has no employees in North Carolina (or elsewhere), is not registered or licensed to do business in North Carolina, does not hold title to or lease any real property in North Carolina, does not own or lease the real property associated with Home2 Suites, and is not a party to the Franchise Agreement between Hilton Franchise and TWC Charlotte pursuant to which TWC Charlotte independently owns and operates Home2 Suites.

Although the trial court also found that "Hilton Franchise [] is an Affiliate of Hilton Worldwide" and that "Hilton Worldwide [] is the parent holding company of the Hilton hotel and hospitality business," Hilton Worldwide as "the parent is not automatically subject to jurisdiction in the state." *Ash*, 80 N.C. App. at 462 (citations omitted). There are no findings of fact that would support a conclusion that Hilton Franchise, and

by extension TWC Charlotte and Home2 Suites, are not "separate and independent" from Hilton Worldwide. *Id.* Furthermore, the Franchise Agreement does not indicate that Hilton Franchise, and by extension TWC Charlotte and Home2 Suites, are not "separate and independent" from Hilton Worldwide. *Id.* Accordingly, jurisdiction over Hilton Worldwide may not be acquired on the basis of any local activities of Hilton Franchise or, by extension, TWC Charlotte or Home2 Suites.

The findings of fact that are supported by competent evidence do not support a conclusion that Hilton Worldwide "ha[d] certain minimum contacts" with North Carolina "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co.*, 326 U.S. at 316 (citations omitted). Accordingly, the trial court erred by denying Hilton Worldwide's motion to dismiss.

III. Conclusion

Because Plaintiff has failed to carry her burden to show that personal jurisdiction exists over Hilton Worldwide, the trial court's order denying Hilton Worldwide's Rule 12(b)(2) motion to dismiss is reversed.

REVERSED.

Judges ZACHARY and GORE concur.

PAUL DU PLESSIS, PLAINTIFF
v.
DEBORAH DU PLESSIS, DEFENDANT

No. COA24-434

Filed 7 May 2025

Divorce—alimony overpayments—unjust enrichment—court's discretion to order reimbursement—equitable remedy

In a divorce case, where plaintiff ex-husband claimed to have overpaid defendant ex-wife $36,010 in alimony payments and $3,600 in attorney fees, the trial court had discretionary authority at equity to order that plaintiff be reimbursed for the overpayments. Additionally, plaintiff's claim met all of the elements of unjust enrichment (since he conferred a benefit to defendant, which she continually accepted, in the form of alimony payments for specific dollar amounts pursuant to a court order), for which restitution

was the proper remedy. Therefore, because the trial court mistakenly concluded that it lacked authority to order the reimbursement, the court's order denying plaintiff's motion for reimbursement was vacated and the matter was remanded for a new hearing to determine whether the purported overpayments should be reimbursed.

Appeal by Plaintiff from order entered 5 October 2023 by Judge Roy H. Wiggins in Mecklenburg County District Court. Heard in the Court of Appeals 29 January 2025.

Plumides, Romano & Johnson, PC, by Attorney Richard B. Johnson, for Plaintiff–Appellant.

Conrad Trosch & Kemmy, PA, by Attorney Andrew C. Rheingrover, for Defendant–Appellee.

MURRY, Judge.

Paul Du Plessis (Plaintiff) appeals from an order denying his motion for reimbursement of $36,010 in alimony overpayments and $3,600 in attorney's fees. For the reasons below, this Court vacates the trial court's order in part and remands for a new hearing to determine whether the overpayments of alimony and attorneys' fees should be reimbursed.

I. Background

Plaintiff and Deborah Du Plessis (Defendant) married on 9 December 1995 and divorced on 16 June 2015. They had two minor children at the time of their divorce. On 8 October 2015, the trial court ordered Plaintiff to pay Defendant $1,800 per month as alimony, $6,365 in child support arrearages, and $9,000 of Defendant's attorney's fees. Three years later, Defendant moved to modify the amount of alimony, alleging an increase in her reasonable needs and expenses, an increase in Plaintiff's income, and the imminent termination of child support once their younger child reached the age of 18.

After two December 2019 hearings, the trial court found that Defendant could not financially "bridge[ ] the gap between her needs and the $1,800[ ] per month alimony award." The trial court re-calculated and adjusted the parties' respective net income levels and expenses. It then concluded that Plaintiff had underpaid Defendant over the previous three years, putting $33,327 in arrears. As a result, the trial court increased Defendant's monthly alimony payment to $3,249 and increased the term of alimony by two years and nine months. Plaintiff

appealed this order on 30 June 2020, which proceeded through litigation with additional appeal and remand to and from this Court.[1]

On 6 January 2022 and 4 April 2023, Plaintiff moved for reimbursement, requesting $36,010 and $3,600 in alimony overpayments and attorney's fees, respectively. After a 17 July 2023 hearing, the trial court denied the motion on 4 October 2023. Specifically, the trial court held that, while it "may . . . discretion[arily] . . . credit . . . a party for overpayment" of alimony, it lacked "the authority to [summarily] enter a money judgment" (First Holding). (Citing *Brinkley v. Brinkley*, 135 N.C. App. 608 (1999).) The trial court also held that it lacked the specific "authority to [o]rder a refund for the overpayment of alimony and attorney's fees" (Second Holding).[2] Plaintiff timely appealed this denial on 6 November 2023.

II. Jurisdiction

This Court has jurisdiction to hear Defendant's appeal because the trial court's denial of his motion for financial reimbursement is a "final judgment of a district court in a civil action." N.C.G.S. § 7A-27(b)(2) (2023).

III. Analysis

On appeal, Plaintiff argues the trial court erred by denying his reimbursement request for purportedly overpaid alimony to Defendant. This Court generally reviews decisions concerning alimony awards only for an abuse of discretion. *Bookholt v. Bookholt*, 136 N.C. App. 247, 249–50 (1999). However, conclusions of law are "reviewable *de novo* on appeal." *Rockwell v. Rockwell*, 77 N.C. App. 381, 383 (1985). Despite their "designat[ions] as . . . finding[s] of fact" in the order itself, *id.*, each Holding "involves the application of legal principles" to fact patterns, *Berens v. Berens*, 247 N.C. App. 12, 19 n.3 (2016), that require "treat[ment] as . . . conclusion[s] of law on appeal." *Rockwell*, 77 N.C. App. at 383. For the reasons below, this Court holds that the trial court erred only in concluding that it lacked the authority to order reimbursement for the overpayment of alimony and attorneys' fees.

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1. On 2 November 2021, this Court reversed the trial court's order for an abuse of discretion, reasoning that no significant financial change had occurred that would warrant modification of the parties' alimony order. *Du Plessis v. Du Plessis*, 280 N.C. App. 299, 2021 WL 5067592 (2021) (unpublished table decision).

2. Throughout, "First Holding" and "Second Holding" correspond to the trial court's Findings of Fact #20–#21. Because these are more properly characterized as conclusions of law than as findings of fact, they have been so designated here.

A. Alimony Reimbursement

Our appellate courts have not specifically addressed whether district courts may order reimbursement for alimony overpayments. However, we analogize those reimbursements to overpayments credited for postseparation support and child support. *E.g.*, *Miller v. Miller*, 243 N.C. App. 546 (2015) (postseparation support); *Lasecki v. Lasecki*, 257 N.C. App. 24 (2017) (child support). Trial courts have resolved these latter two situations by crediting the supporting spouse for overpayment either by directly issuing a credit or by reducing the amount of arrearage or future support payments. *See*, *e.g.*, *Miller*, 243 N.C. App. 531–33 (recognizing trial court's authority to credit husband for income overpayment amidst equitable distribution determination); *Lasecki*, 257 N.C. App. at 39 (noting plaintiff's credit for child-support overpayment via "reduction in . . . calculation of his total . . . arrearage); Order Temp. Child Supp., Postsep. Supp., & Att'ys' Fees, *Altman v. Altman*, No. 23 CV027626-910, 2024 N.C. Trial Order LEXIS 121 (D. Ct. Apr. 3, 2024) (reducing defendant's monthly postseparation support payment based on earlier overpayment); Order Retro. Child Supp., Postsep. Supp., Alimony, & Att'y's Fees, *Berens v. Berens*, No. 13-CVD-11484 (AVB), 2018 N.C. Trial Order LEXIS 2 (D. Ct. Jul. 20, 2018) (crediting plaintiff for postseparation overpayment). A trial court's reimbursement of a supporting spouse for alimony overpayment aligns with similar treatment of postseparation support and child support overpayments.

The present case can be distinguished from *Brinkley v. Brinkley*, 135 N.C. App. 608 (1999), which the trial court cited to support its denial of Plaintiff's request for reimbursement. In *Brinkley*, the court reversed the trial court's order crediting the defendant for overpayment of his court-ordered child-support obligation. *Id.* at 613. The Court held that the overpayment could not properly be regarded as child support because the defendant voluntarily paid the extra money to establish a college fund for his child. *Id.* Those "amounts voluntarily paid" toward that fund "could not be considered *child support* within the normal meaning of th[e] term" because the father "could not be required to pay college expenses for his child. *Id.* Here, however, Plaintiff's overpayment was involuntary and contributed directly to his court-ordered alimony obligation, not to any separate fund. Thus, appropriate relief for Plaintiff would consist of reimbursement of the alimony overpayment. The Court in *Brinkley* addressed credits for prospective child-support obligations and acknowledged "no hard and fast rules when dealing with the issue of child[-]support credits." *Id.* at 612 (quotation omitted). The Court noted "that the imposition of a credit is not an automatic right

even when the trial court finds that one party has overpaid his child support obligation," but it may be appropriate "when an injustice would exist if credit were not given." *Id.* (quotation omitted); *see Barham v. Barham*, 286 N.C. App. 764, 770 (2022).

Albeit noncontrolling here, numerous persuasive cases from other jurisdictions illustrate the validity of judicial reimbursement as an equitable remedy for alimony overpayments. *E.g.*, *Smith v. Smith*, 928 So. 2d 287 (Ala. Civ. App. 2005) (holding that husband was entitled to alimony reimbursement after previous payment order was overturned on appeal); *In re Marriage of Dandona & Araluce*, 91 Cal. App. 4th 1120 (2001) (holding that supporting spouse may recover overpayments of spousal and child support via retroactive order modifying their respective amounts of such support); *Wolff v. Wolff*, 93 Mass. App. Ct. 1122 (2018) (affirming trial court's order for wife to reimburse husband for alimony overpayment); *DeBlanc v. Mitchell*, 368 So. 2d 1138 (La. Ct. App. 1979) (holding husband's alimony overpayment as recoverable by wife due to clerical error); *Steffens v. Peterson*, 503 N.W.2d 254 (S.D. 1992) (awarding husband alimony reimbursement after retroactive termination of his previous obligations); *Jekot v. Jekot*, 362 S.W.3d 76 (Tenn. Ct. App. 2011) (allowing husband to recover alimony overpayment either by direct reimbursement or by crediting his future obligations). By allowing similar reimbursement as an equitable remedy, North Carolina aligns with these other jurisdictions.

This reimbursement authority continues our previous holding in this case. In 2021, this Court held that the trial court abused its discretion in finding a substantial change in circumstances that warranted modification of the parties' original alimony order. *See Du Plessis v. Du Plessis*, 280 N.C. App. 299, 2021 WL 5067592 (2021) (unpublished table decision). The trial court only had the power to modify the alimony order if a substantial change of financial circumstances had occurred since the order's initial entrance—a condition precedent that the court acknowledged had not occurred. *Id.* at * 4. Given that this Court reversed the trial court's alimony increase as an abuse of discretion, we hold the trial court has the authority at equity to allow Plaintiff to recover the $36,010 he overpaid under that order.

B. Unjust Enrichment

Plaintiff's overpayment reimbursement also prevents Defendant's unjust enrichment. Plaintiff argues that an otherwise inequitable result here would irreparably harm him. Because the term of his alimony to Defendant has ended, he has no opportunity to credit any overpayment towards a future obligation. We agree.

Unjust enrichment is "based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another." *Hinson v. United Fin. Servs., Inc.*, 123 N.C. App. 469, 473 (1996) (quotation omitted). To successfully claim unjust enrichment, a plaintiff must demonstrate that a defendant received "property or benefits . . . under circumstances" that created "a legal or equitable obligation" for that defendant "to account for the benefits received." *JPMorgan Chase Bank, Nat'l Ass'n v. Browning*, 230 N.C. App. 537, 542 (2013) (quotation omitted). More specifically, unjust enrichment requires a *prima facie* showing that (1) one party conferred to another (2) a measurable benefit (3) that was accepted (4) but which was conferred neither officiously (5) nor gratuitously. *Id.* at 541–42.

Here, Plaintiff meets all five elements of unjust enrichment. He conferred a benefit to Defendant by paying her alimony under the legal direction of the modified order, thus meeting the first, fourth, and fifth elements. He also meets the second and third elements because the alimony payments were specific dollar amounts that Defendant duly accepted by continually receiving them. Thus, all the elements to show a *prima facie* case of unjust enrichment have been met by Plaintiff's overpayment of alimony to Defendant. Restitution made by the unjustly enriched party to the party that has conveyed the benefit is a proper remedy for unjust enrichment. *See Hinson*, 123 N.C. App. at 473. We hold that the trial court has the authority to allow reimbursement to be made to Plaintiff for his overpayment of alimony as a remedy for unjust enrichment.

IV. Conclusion

For the reasons discussed above, this Court holds that the trial court has the discretionary authority to order reimbursement for the overpayments of alimony and attorneys' fees. Thus, this Court vacates the First and Second Holdings and remands for a new hearing to determine whether the overpayments of alimony and attorneys' fees should be reimbursed.

VACATED IN PART AND REMANDED.

Judges ARROWOOD and GORE concur.

FINE LINE HOMES, LP, PLAINTIFF
v.
ANITA LUTHRA AND SARINA STEINBACHER, DEFENDANTS

No. COA24-1033

Filed 7 May 2025

Liens—pleading—N.C.G.S. § 44A-12—strict compliance required—date of last furnishing of labor or materials—dismissal proper

In an action arising from plaintiff construction company's contract with defendant for the construction of a single-family residence, the trial court properly dismissed plaintiff's lien enforcement claim after requiring strict compliance with the enumerated elements of N.C.G.S. §§ 44A-12 and 44A-13 (providing content and timing requirements for filing a claim of lien on real property), including the date of the last furnishing of labor or materials—an element which plaintiff failed to plead. Accordingly, the Court of Appeals affirmed the trial court's dismissal of plaintiff's lien enforcement claim and declined to reach the merits of plaintiff's additional appellate argument regarding the purported lien.

Appeal by plaintiff from order entered 3 July 2024 by Judge Lori I. Hamilton in Davidson County Superior Court. Heard in the Court of Appeals 8 April 2025.

The Cooper Legal Firm, P.C., by Stephanie L. DeMaioribus (Cooper), for plaintiff-appellant.

Sarina Steinbacher and Anita Luthra, pro se, for defendants-appellees.

FLOOD, Judge.

Plaintiff Fine Line Homes, LP, appeals from the trial court's order dismissing Plaintiff's lien enforcement claim. On appeal, Plaintiff argues the trial court erred in requiring strict compliance with the enumerated elements of N.C.G.S. § 44A-12 to create a valid lien, and in concluding that Plaintiff's lien filing was unenforceable. Upon review, we conclude the trial court did not err in concluding Plaintiff's lien filing was defective, as the date of the last furnishing is required on a lien filing per statute and our case law. We further conclude the trial court properly

dismissed Plaintiff's lien enforcement claim, as the lien filing was defective without the date of the last furnishing.

I. Factual and Procedural Background

On 20 June 2022, Plaintiff and Defendant Anita Luthra entered into a contract, whereby Plaintiff provided labor, services, materials, and equipment for the construction of a single-home residence at 517 Dorado Drive, Davidson County, North Carolina (the "Property"), and which Defendant Luthra signed in her capacity as one of the Property owners. Defendant Sarina Steinbacher did not sign the contract, but is a co-owner of the Property with Defendant Luthra.

On or about 3 March 2023, Defendant Luthra terminated Plaintiff's services. After Defendant Luthra failed to pay Plaintiff for the services provided, on 19 April 2023, Plaintiff filed a mechanic's lien on Defendants' Property, in the amount of $44,554.77. Plaintiff then filed a verified complaint (the "Complaint") against Defendants on 22 August 2023 in Davidson County District Court, requesting the trial court enforce the lien, and in the alternative, provide relief by quantum meruit.

Both Defendants filed separate answers. Defendant Steinbacher filed a pro se answer (the " Steinbacher Answer"), whereby she: denied being a party to the dispute as she did not sign the contract; claimed she was "being asked to pay for goods and services that were never delivered, such as a carport and vinyl rails around the stairs"; accused Plaintiff of making the "home [three] rooms instead of [four] as per [the] contract"; accused Plaintiff of "shoddy workmanship" and that "some work is not up to code such as the basement[,] stairs[,] and [the] front porch"; denied both claims of relief sought by Plaintiff; and, in relevant part, requested the trial court "dismiss the Complaint with prejudice[.]"

In Defendant Luthra's answer (the "Luthra Answer"), Defendant Luthra denied both of Plaintiff's claims for relief, moved to dismiss, and filed counterclaims of: unfair and deceptive trade practices, fraud, fraud in the inducement, false lien filing, breach of contract, breach of warranty, negligence, and quantum merit. In relevant part, the Luthra Answer alleged:

> Plaintiff is barred from bringing a claim to enforce a lien because Plaintiff's lien is defective. Plaintiff's lien is defective because it does not contain a completion date or date of last work performed, and therefore, Plaintiff's claim to enforce the lien is not timely filed. Since Plaintiff's claim to enforce the lien is not timely filed, Plaintiff's claim to

> enforce the lien should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

On 2 November 2023, Plaintiff filed a motion for entry of default against Defendants and a motion to transfer the matter to Davidson County Superior Court. The trial court denied Plaintiff's motion for entry of default, but granted the motion to transfer the matter to Davidson County Superior Court due to the monetary amounts requested. Plaintiff then filed a reply to Defendant Luthra's counterclaims, requesting they be denied.

On 22 January 2024, the trial court held a hearing regarding Defendants' and Plaintiff's competing motions to dismiss. After Defendant Luthra's counsel argued for the dismissal of Plaintiff's lien claim, the trial court granted Defendants' motions to dismiss, stating:

> I am going to grant counsel's motion[s] to have that cause of action specifically as it relates to the lien dismissed and that -- and order that that lien be cancelled. I -- I'm gonna read the statute requiring substantial compliance to mean that the -- the filer of that claim of lien must substantially comply with the requirements of the statute and that perhaps you might leave off a street or a drive or you might -- you know, there may be some clerical error, but that each one of these things is substantially required. And one of the things that is substantially required . . . . and, in fact, is necessary is for the public to be on notice that there's a lien on a piece of property and how long that will be valid is the date upon which labor or materials were last furnished.

The trial court verbally denied Defendants' motions to dismiss Plaintiff's quantum meruit claim, and denied Plaintiff's motion to dismiss Defendant Luthra's counterclaims until receiving further briefing, but an order was not entered until 3 July 2024 (the "3 July Order"). In the 3 July Order, the trial court provided it was dismissing with prejudice Plaintiff's lien enforcement claim "because the last date of work was not listed on the lien[,] making the lien defective." After the hearing, and after reviewing subsequent briefings, the trial court entered an order on 22 March 2024, denying Plaintiff's motion to dismiss Defendant Luthra's counterclaims as to: fraud, unfair and deceptive trade practices, and false lien filing.

On 3 July 2024, Plaintiff filed a notice of interlocutory appeal with the trial court, and appealed to this Court regarding the trial court's

dismissal of Plaintiff's lien enforcement claim. On 5 July 2024, Plaintiff filed a motion with the trial court for stay pending interlocutory appeal, which was granted.

II. Jurisdiction

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *RM Contractors, LLC v. Wiggins*, 294 N.C. App. 172, 173 (2024) (citation and internal quotation marks omitted). "A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court." *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199 (2002) (citations omitted).

"There are, however, exceptions to the general rule prohibiting us from hearing appeals from interlocutory orders." *Wiggins*, 294 N.C. App. at 174 (citing N.C.G.S. § 7A-27(b)(3) (2023)). "One exception is the substantial-right exception, which allows us to review an interlocutory order if the order affects a 'substantial right.' " *Wiggins*, 294 N.C. App. at 174 (citation omitted). "An interlocutory order affects a substantial right if the order deprives the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Suarez v. Am. Ramp Co.*, 266 N.C. App. 604, 608 (2019).

This Court recently held in *Wiggins* that an order striking a plaintiff's lien on real property affects a substantial right, since the striking of a lien may cause one to lose their "priority position" against other creditors. 294 N.C. App. at 176. Here, the 3 July Order granting Defendants' motions to dismiss in part is interlocutory, as there are other claims pending in this action, including Plaintiff's quantum meruit claim and Defendant Luthra's fraud, unfair and deceptive trade practices, and false lien filing claims. As the 3 July Order dismisses Plaintiff's lien enforcement claim, the interlocutory order affects a substantial right. *See id.* at 176. We therefore have jurisdiction over Plaintiff's appeal, and proceed to the merits of Plaintiff's arguments.

III. Analysis

On appeal, Plaintiff argues the trial court erred in: (A) requiring strict compliance with the enumerated elements in N.C.G.S. § 44A-12 (2023) in order to create a valid lien, and (B) concluding that Plaintiff's lien filing was unenforceable when the evidence in the pleadings did not support that conclusion of law. We address each argument, in turn.

A. N.C.G.S. § 44A-12

Plaintiff first argues the trial court erred in requiring strict compliance with the enumerated elements in N.C.G.S. § 44A-12 in order to

create a valid lien. Specifically, Plaintiff contends the plain language of N.C.G.S. § 44A-12 requires only substantial compliance. We disagree and hold the date of the last furnishing is required on a lien filing per statute and our case law.

Questions of statutory interpretation are reviewed de novo. *State v. Williams*, 911 S.E.2d 286, 294 (N.C. Ct. App. 2024) (citation omitted). "Where statutory language is clear and unambiguous, this Court eschews statutory construction in favor of giving the words their plain and definite meaning." *Id.* at 295.

N.C. Gen. Stat. § 44A-12, titled "[f]iling claim of lien on real property," provides guidance on where, when, and how all lien claims on real property must be filed. *See* N.C.G.S. § 44A-12. The statute further provides that "[a]ll claims of lien on real property *must* be filed using a form *substantially* as follows[,]" including the names and addresses of the parties involved, general descriptions of the property and work, and the following:

> (5) Date upon which labor or materials were first furnished upon said property by the claimant:
>
> (5a) *Date upon which labor or materials were last furnished upon said property by the claimant:*

N.C.G.S. § 44A-12(c) (emphasis added).

N.C. Gen. Stat. § 44A-12(b) also provides that "[c]laims of lien on real property may be filed at any time after the maturity of the obligation secured thereby *but not later than 120 days after the last furnishing of labor or materials* at the site of the improvement by the person claiming the lien." N.C.G.S. § 44A-12(b) (emphasis added); *see also Laws. Title Ins. Corp. v. Zogreo, LLC*, 208 N.C. App. 88, 95 (2010); N.C.G.S. § 44A-11 (2023) (providing that, in order to perfect a mechanic's lien, the claim of lien must be filed pursuant to N.C.G.S. § 44A-12). This Court has previously stated that section (c)(5a) was added by the Legislature "to *require* that all claims of lien state the date upon which labor or materials were last furnished." *Brown v. Middleton*, 86 N.C. App. 63, 68 (1987); *see also* 1977 N.C. Sess. Laws c. 369 H.B. 526. Our Supreme Court has explained that a mechanic's lien "is lost if the steps required for its perfection are not taken in the manner and within the time prescribed by law." *Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 667 (1978).

N.C. Gen. Stat. § 44A-13 provides,

> [a]n action to enforce a claim of lien on real property may be commenced in any county where venue is otherwise

> proper. No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the claim of lien on real property.

N.C.G.S. § 44A-13(a) (2023); *see also Laws. Title Ins. Corp.*, 208 N.C. App. at 95 ("[T]he contractor must bring a lien enforcement action in the superior court within 180 days of the last furnishing of labor or materials at the site of the improvement."). The date of the last furnishing of labor or materials is therefore required to determine whether the contractor has brought both the filing and the enforcement action within the statutory time period, which must be completed in order to perfect and enforce a mechanic's lien. *See* N.C.G.S. §§ 44A-11, 44A-12(b), 44A-13; *Laws. Title Ins. Corp.*, 208 N.C. App. at 95.

Here, Plaintiff—conceding it left off the date of the last furnishing in its lien filing—argues that, where "[t]he Legislature could have chosen that it 'must comply,' . . . but instead they chose that it should 'substantially comply,' " Plaintiff substantially complied where it included everything else except for the date of the last furnishing. Plaintiff's argument, however, ignores the statutory requirements of N.C.G.S. §§ 44A-12(b) and 44A-13, which necessitate inclusion of the date of the last furnishing, in order to determine the statutory time period for lien perfection and enforcement. *See* N.C.G.S. §§ 44A-12(b), 44A-13; *Laws. Title Ins. Corp.*, 208 N.C. App. at 95. While Plaintiff correctly provides that the Legislature used the phrase "must be filed using a form substantially as follows," the statutory history suggests, and our case law confirms, the Legislature amended N.C.G.S. § 44A-12 in 1977, "whereby subsection (c)(5a) was added to *require* that all claims of lien state the date upon which labor or materials were last furnished." *Brown*, 86 N.C. App. at 68; *see also* 1977 N.C. Sess. Laws c. 369 H.B. 526.

Accordingly, because the date of furnishing is necessary to the perfection and enforcement of a mechanic's lien, and because this Court has provided that section (c)(5a) was added by the Legislature "to *require* that all claims of lien state the date upon which labor or materials were last furnished," *Brown*, 86 N.C. App. at 68, we conclude the trial court did not err in finding Plaintiff's lien defective where Plaintiff left off the date of the last furnishings of labor or materials. *See* N.C.G.S. §§ 44A-12(b), 44A-13; *Laws. Title Ins. Corp.*, 208 N.C. App. at 95.

B. Pleadings

Plaintiff additionally argues the trial court erred in concluding Plaintiff's lien filing was unenforceable, where the evidence in the

pleadings did not support that conclusion of law. Plaintiff contends that "[t]he Complaint on its face presented all of the legally required elements of a lien foreclosure action between [] Plaintiff [] and [] Defendants[,]" and "[t]he lien foreclosure claim presented in the Complaint [that] was filed under N.C.[G.S.] § 44A-12 is valid and presents a cognizable legal claim which defeats a N.C. R. Civ. P. 12(b)(6) motion[.]" We disagree.

Pursuant to a Rule 12(b)(6) motion to dismiss, "[t]his Court reviews *de novo* whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted." *Green v. Kearney*, 203 N.C. App. 260, 266 (2010) (citation and internal quotation marks omitted) (cleaned up). In making this determination, this Court must consider whether, on the face of the plaintiff's complaint, construed liberally, the complaint (1) is supported by law, (2) "reveals the absence of facts sufficient to make a good claim[,]" or (3) "discloses some fact that necessarily defeats the plaintiff's claim." *Burgin v. Owen*, 181 N.C. App. 511, 512 (2007) (citation and internal quotation marks omitted).

Because, as set forth above, we conclude that the date of the last furnishing was required under N.C.G.S. § 44A-12, and Plaintiff concedes it did not include such date in its claim of lien, we dismiss Plaintiff's argument that its Complaint presented a cognizable legal claim upon which relief could be granted. *See Green*, 203 N.C. App. at 266. We thus affirm the trial court's granting of Defendant's motion to dismiss Plaintiff's lien enforcement claim.

IV. Conclusion

Upon review, we conclude the trial court did not err in concluding Plaintiff's lien filing was defective, as the date of the last furnishing is required on a lien filing per statute and our case law. Further, the trial court properly dismissed Plaintiff's lien enforcement claim as the lien filing was defective without the date of the last furnishing. We therefore affirm the trial court's granting of Defendant's motion to dismiss Plaintiff's lien enforcement claim.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

GREEN v. BRANCH

[298 N.C. App. 677 (2025)]

MARINO M. GREEN, PLAINTIFF
v.
FELICIA L. BRANCH, DEFENDANT

No. COA24-183

Filed 7 May 2025

Judges—recusal—authority to enter substantive order in same case—order vacated—remanded for new hearing

Where a trial judge in a domestic case concluded a hearing on permanent child custody in March 2019, but no written order was issued that year, and the judge subsequently recused himself from the matter in 2021 after granting plaintiff's motion to recuse, the judge thereafter lacked authority to enter any substantive order in the case. Despite the judge's remarks at the recusal hearing that he was recusing based on having a heavy caseload, nothing in the written order of recusal indicated that the recusal was temporary or limited in any way; not only did the written order state that the basis for the recusal was the granting of plaintiff's motion to recuse but, in addition, the judge specifically assigned the case to another judge. Therefore, the judge's issuance of an order in 2023 *nunc pro tunc* to 27 May 2019, ruling on matters he had heard at the March 2019 hearing, was vacated and the matter was remanded for a new hearing and entry of a new order.

Appeal by plaintiff from order entered 29 September 2023 by Judge Clayton Jones in District Court, Durham County. Heard in the Court of Appeals 10 September 2024.

Meynardie & Nanney, PLLC, by Joseph H. Nanney, Jr., for plaintiff-appellant.

Felicia L. Branch, pro se, defendant-appellee.

STROUD, Judge.

Plaintiff-Appellant appeals from an Order entered by the trial court on 29 September 2023. Because the trial judge had entered an Order of Recusal without any limitation before his entry of the Order on appeal, he had no authority to enter the Order on appeal. We vacate the Order and remand for a new hearing.

I. Background

The determinative issue on appeal is whether the trial judge lacked authority to enter an Order ruling upon several claims and motions after his recusal from the case. For this reason, we need not address the factual background of the parties' substantive claims in detail, but the procedural history is necessary. In summary, Plaintiff and Defendant were married in 2003 and separated in December 2015. The parties had three children together during their marriage. On 29 January 2016, Plaintiff filed a complaint against Defendant asserting claims for child custody, child support, post-separation support and alimony, equitable distribution, and attorney's fees. Defendant filed her answer and counterclaim on 3 March 2016.

The trial court entered a Consent Order on 18 August 2016. This Consent Order indicated the parties "had reached a full settlement on the issues of temporary custody, post-separation support, alimony, equitable distribution and attorney's fees, although the parties reserve the right to return to this court for a permanent custody hearing if necessary[.]" The Consent Order set out provisions regarding the sale of the former marital residence and distribution of the net proceeds; distribution of various items of marital property, including a direction for entry of a qualified domestic relations order ("QDRO") to distribute a retirement account; joint legal custody of the minor children; temporary physical custody including a detailed weekly schedule; a direction for preparation of an order appointing a named GAL "to help . . . resolve the issue of permanent custody[ ]"; and waiver of Plaintiff's claims for post-separation support or alimony.

On 17 July 2018, Plaintiff filed an amended motion to show cause. In this motion, Plaintiff alleged Defendant "willfully violated" the 18 August 2016 Consent Order by: (1) interfering with Plaintiff's physical access and visitation with the minor children; (2) preventing contact between Plaintiff and the minor children; and (3) failing to select a mutually agreed upon realtor to list the marital residence. On 24 July 2018, the Honorable Pat Evans held a pre-trial conference regarding Plaintiff's amended motion to show cause, child custody, "and child support."[1] The Pretrial Conference Order set a date for hearing of 17 September 2018. The motions were apparently not heard on 17 September; on 27 September 2018, the Durham Family Court Case Coordinator filed a

1. Our record does not include a motion for modification of child support, but this issue was included in matters addressed in the Pretrial Conference Order.

Calendar Request and Notice of Hearing for "[t]rial/[h]earing" of "[custody]" on 21 November 2018.

Plaintiff apparently filed a "Motion for Recusal, Change of Venue and Summary Judgement (sic)" on 24 October 2018, although the 2018 motion for recusal is not in our record.[2] On 21 November 2018, Judge Evans heard Plaintiff's motion for recusal and denied "all requests for relief contained in said [m]otion[.]" The 21 December 2018 order of recusal states that after denial of Plaintiff's motion for recusal, "[t]rial began . . . on the outstanding issues of permanent child custody, and such trial shall be continued on or about February 20, 2019." Therefore, according to the 2018 order of recusal and the Narrative of Proceedings filed in this appeal, the hearing regarding permanent child custody began before Judge Evans in November 2018.[3]

On 7 March 2019, District Court Judge Clayton Jones began hearing "the remainder of the trial" on permanent child custody which Judge Evans had started in November 2018.[4] We note we do not have a transcript of this hearing but our record on appeal includes a "Narrative of the Proceedings in the Final Child Support, Child Custody Trial Pursuant to Rule 9(c) [of the North Carolina Rules of Appellate Procedure]." Judge Jones conducted the hearing on the issues of child custody and child support.[5] According to the Narrative of Proceedings,

> [t]he [c]ourt made an oral ruling from the bench finding no willful contempt with respect to Plaintiff[ ]'s motions, determined physical and legal custody would remain the same as the [C]onsent [O]rder, named the realtor the parties would use, ruled that Defendant[ ] could buy out Plaintiff[ ], [and] determined child support arrears due to Defendant[.]

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2. Because this 2018 motion for recusal is not in our record, it is unclear which District Court Judge Plaintiff requested to recuse in October 2018, but it appears to have been Judge Pat Evans.

3. The briefs of both parties agree that Judge Evans began hearing the matter of permanent custody in November 2018 but Judge Clayton Jones "conducted the remainder of the trial" in February and March of 2019.

4. The Narrative of Proceedings states in the first sentence that "Defendant-Appellee *continues* direct testimony with respect to child custody." (Emphasis added.)

5. Our record does not include any motions regarding child support, and according to the Narrative of Proceedings, no motion regarding child support had been filed, but the trial court stated "that he wanted to make sure that support was being provided."

In addition, "[t]he [c]ourt directed [Defendant's] Attorney . . . to draft the [c]ourt's oral ruling to writing and submit it by May 27, 2019." Our record has no indication that a draft order was prepared or submitted in 2019.

On 23 September 2021, Plaintiff filed a Motion for Recusal of Judge Clayton Jones and Change of Venue (the "Motion for Recusal"). In the *pro se* Motion for Recusal, Plaintiff requested Judge Jones to recuse himself, contending he "express[ed] personal bias against . . . Plaintiff and Consent Order in court 2/20/19 and 3/17/19," and had "an apparent conflict of interest" in the matter. The Motion for Recusal made additional detailed factual allegations regarding his reasons for believing Judge Jones was personally biased against him that we need not address in detail.

On 29 September 2021, Judge Jones conducted a hearing on the Plaintiff's Motion for Recusal.[6] The Narrative of Proceedings of this hearing as to the Motion for Recusal states:

> The [c]ourt then asked his clerk to put the case on the Honorable Dave Hall's calendar. Defendant[ ] informed the court that she had not been served the [M]otion for [R]ecusal and change venue. The court directed the clerk to provide her with a copy of everything. The [c]ourt then addressed the parties and stated that he had not fully read the [Motion for Recusal], that the [c]ourt would recuse himself because he had 46 cases on his calendar that week, that he would not be putting a basis on the recusal order, that [he] "just [didn't] really want to deal with it," and he would recuse himself and transfer the case somewhere else. The [c]ourt denied Plaintiff[ ]'s motion to change venue, recused himself and stated that he would take one of Judge Hall's cases.

On the same day, Judge Jones entered an Order of Recusal (the "Order of Recusal"). The Order of Recusal states:

> The undersigned Judge for the Fourteenth Judicial District hereby recuses herself/himself in the above-entitled action for the following reason(s):

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6. The record includes a Narrative of Proceedings pursuant to North Carolina Rule of Appellate Procedure 9(c). The Narrative of Proceedings indicates the parties and trial court first discussed a "motion for contempt" filed by Plaintiff, although it is not clear which motion they were referring to.

Plaintiff filed a motion to have Judge Jones recused from this case and Judge Jones granted [P]laintiff's motion.

The original of this order should be placed in the court file.

The case is now assigned to the Honorable O. David Hall.

(Emphasis in original.)

Two years later, after recusing himself from "this case," Judge Jones entered an Order on 29 September 2023 *nunc pro tunc* to 27 May 2019, ruling on the matters heard at the hearing concluded on 7 March 2019, which started before Judge Evans on 21 November 2018. In general, this Order addresses sale of the marital residence, legal and physical custody of the minor children, and child support; it also established child support arrears of $20,737.94 and denied Plaintiff's "show cause matters."

The trial court's 29 September 2023 Order was served on the parties by the Family Court Case Manager on 27 October 2023. Plaintiff timely filed notice of appeal as to this Order on 21 November 2023. The Order of Recusal was not appealed.

II. Recusal

Plaintiff argues the trial court, specifically Judge Jones, erred in entering the 29 September 2023 Order after he recused himself on 29 September 2021. He contends Judge Jones "had no authority to enter the [O]rder" following his recusal and that this Order "must be vacated." We agree. Because the determinative issue on appeal is whether Judge Jones had authority to enter the Order, we will not address Plaintiff's remaining arguments as to the substance of the Order itself.

Citing *Romulus v. Romulus*, Plaintiff argues our standard of review as to whether Judge Jones had authority to enter the Order after his recusal is a question of law of which we review *de novo*. 216 N.C. App. 28, 31-32, 715 S.E.2d 889, 892 (2011) (whether a trial judge had statutory authority and subject matter jurisdiction to enter an order was "a question of law or legal inference which is reviewed *de novo*" (citations and quotation marks omitted)). Defendant does not oppose Plaintiff's argument regarding the proper standard of review for this issue. Although no case has explicitly identified the standard of review for this particular legal question, a close reading of prior cases cited in this opinion reveals that the cases have considered the issue as a legal question subject to *de novo* review. "A question of law is reviewed *de novo*. Under the *de novo* standard, the Court considers the matter anew and freely substitutes its own judgment for that of the lower court." *In re A.M.*,

220 N.C. App. 136, 137, 724 S.E.2d 651, 653 (2012) (citation and quotation marks omitted).

In his brief, Plaintiff cites this Court's opinion in *Hudson v. Hudson*, 293 N.C. App. 87, 900 S.E.2d 131 (2024). In *Hudson*, this Court discussed whether a trial judge had authority to enter an order after her recusal from the case:

> Once a trial judge has been disqualified or has recused herself, that judge may not enter an order or judgment in the case in which she was presiding. *See Motors Corp. v. Hagwood*, 233 N.C. 57, 58-61, 62 S.E.2d 518, 518-20 (1950) (explaining that a hearing conducted by a trial court who already had retired, but was attempting to serve as an emergency judge, was *coram non judice*, and the judgment entered was vacated). *Accord Bolt v. Smith*, 594 So.2d 864, 864 (Fla. Dist. Ct. App. 1992) ("Once a trial judge has recused himself, further orders of the recused judge are void and have no effect."); *Byrd v. Brown*, 613 S.W.2d 695, 699-700 (Mo. Ct. App. 1981) (holding that the trial judge lacked "authority" over the case once the judge was disqualified and, therefore, the judge's subsequent orders were "void"). Therefore, in addition to the stay pending appeal, the trial judge's recusal also operated to divest her of authority to enter the subsequent order awarding attorneys' fees.

Id. at 90, 900 S.E.2d at 133-34 (citations, quotation marks, and brackets omitted).

Plaintiff also cites opinions from the Federal Third Circuit in advancing his argument. In *Moody v. Simmons*, the trial judge repeatedly stated at a hearing that he would have to recuse from the case. *See* 858 F.2d 137, 140 (3d Cir. 1988). At the end of a particularly contentious hearing, the trial judge stated again he would be recusing "because there have been a lot of acid type remarks made here[.]" *Id.* (original brackets omitted). "Thus, the [29 January 1988] hearing, which is said to have consumed six and one-half hours, concluded the same way it had begun—with the judge stating his intention to recuse himself from the case." *Id.* Despite these statements, the trial judge later entered a substantive order "accompanied by 48 pages of 'findings of fact,' many of which, congruent with the judge's earlier remarks, are highly critical of [the] Trustee's counsel." *Id.* at 140-41. After issuing the "substantive" order, "the district judge entered an order recusing himself from further proceedings in the bankruptcy case." *Id.* at 141. The Federal Third

Circuit Court set aside the order entered by the trial judge after he had announced that he would recuse from the case, stating that "[o]nce a judge has disqualified himself, he or she may enter no further orders in the case. His power is limited to performing ministerial duties necessary to transfer the case to another judge (including the entering of 'housekeeping' orders)." *Id.* at 143 (citations omitted).

The Federal Fourth Circuit also discussed a judge's lack of authority to enter an order where the judge had previously entered an order of recusal from the case in *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337 (4th Cir. 2024). In *Duke Energy*, Judge Bell recused himself from the case because a lawyer from his former firm appeared representing one of the parties. *See id.* at 343. He had followed his "standing prophylactic policy, adopted when he ascended the bench, to recuse himself from cases involving lawyers from his former firm," and the case was assigned to another judge. *Id.* at 367. About two years later, the other judge developed a conflict, and the case was re-assigned to Judge Bell, "who had by then abandoned his initial prophylactic policy." *Id.* But NTE filed a motion for his recusal, "arguing that once a judge has recused himself in a case, he should not later return to that case, regardless of whether the original recusal was necessary or whether the original conflict had been resolved." *Id.* Judge Bell determined that "his prior withdrawal 'did not reflect a considered "recusal," ' " and he denied the motion to recuse. *Id.* He later entered an order granting summary judgment for Duke Energy, and NTE appealed both the summary judgment order and the order denying the motion to recuse. *See id.* On appeal, the Fourth Circuit vacated the summary judgment order and then addressed NTE's argument regarding the denial of its motion for recusal. *See id.* at 368. NTE argued that if the district court's order was vacated, the case should be remanded to "a different district judge, as its motion to recuse Judge Bell under 28 U.S.C. § 455(a) should have been granted. Indeed, NTE argue[d] that Judge Bell's refusal to recuse himself serves as an independent ground to vacate the summary judgment." *Id.* at 367.

The Fourth Circuit agreed that Judge Bell should have granted the motion to recuse and remanded the case to a different judge:

> No one contends that Judge Bell acted inappropriately when he disqualified himself initially, nor does anyone contend that Judge Bell acted inappropriately when he abandoned the initial prophylactic recusal policy. Rather, the question presented here is whether a judge, once he recuses himself from a case, can return to the same case later if circumstances have changed such that he no

> longer perceives himself to have a conflict or an appearance of one.
>
> For good reasons, especially for the appearance of impartiality, we have held that once a judge is recused, the judge is *out of service* insofar as that case is concerned and that he should take no action which would possibly affect the outcome of the case. Such a brightline rule can be applied with ease and promotes the goal of ensuring public confidence in the impartiality of the judicial process. It also accords with the practices adopted by several other jurisdictions, which have implemented a "once recused, always recused" rule. *See United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1997) (holding that a judge who recused himself after granting the defendant a new trial should not have ruled on a motion for reconsideration); *El Fenix de P.R. v. M/Y JOHANNY*, 36 F.3d 136, 141 (1st Cir. 1994) (holding that a judge who has recused himself cannot reconsider the order of recusal); *Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988) (holding that a judge should not have continued to enter non-ministerial orders after announcing his intention to disqualify himself because his daughter worked for one of the parties).
>
> In this case, because Judge Bell had previously recused himself for a potential conflict, prudence instructs that he should not have reentered the case, even after what the docket identified as a "conflict" had been resolved. That rule serves the judicial process well, and we adhere to it.

Id. at 368 (emphasis in original) (citations, quotation marks, and brackets omitted).

We are not bound by the federal cases cited by Plaintiff, but these cases provide a thoughtful analysis of questions of recusal which we find persuasive. *See Woody v. AccuQuest Hearing Ctr., LLC*, 284 N.C. App. 540, 549, 877 S.E.2d 1, 8 (2022) ("[W]ith regard to matters of North Carolina state law, neither this Court nor our Supreme Court is bound by the decisions of federal courts, including the Supreme Court of the United States, although in our discretion we may conclude that the reasoning of such decisions is persuasive." (citation, quotation marks, and brackets omitted)). These cases support the common-sense consensus that trial judges lack authority to take any action in a case after the judge has been recused by a court order, particularly where the recusal order did not limit the duration or purposes of the recusal.

In *Hudson*, this Court concluded that the trial judge lacked authority to enter an order following her recusal from the case. *See Hudson*, 293 N.C. App. at 90-91, 900 S.E.2d at 133-34. Accordingly, this Court vacated the order entered by the trial judge after her recusal and remanded the matter to the trial court for a new hearing. *See id.* at 92, 900 S.E.2d at 134. "This Court is bound by its prior decisions encompassing the same legal issue." *In re T.M.H.*, 186 N.C. App. 451, 455, 652 S.E.2d 1, 3 (2007) (citation omitted). We are bound by our prior precedent in *Hudson* that a trial judge lacks authority to enter substantive orders in cases after the judge has recused himself from the case without any limitation or qualification to that recusal. And as the Fourth Circuit noted, our application of this precedent "eliminates gray areas, public confusion, and any question about the integrity of the judicial process." *Duke Energy*, 111 F.4th at 368.

Defendant's argument on appeal relies heavily on Judge Jones's statements at the hearing that "he had not read the motion for recusal and change of venue" and that he "stated . . . he had quite a number of cases that week and granted the motion to recuse specifically with no basis given and assigned the case to another judge." But we are bound by the Order of Recusal the trial court entered, not by his statements in rendering the ruling. It is well-established that the written, filed order is controlling, even if the trial court's statements in open court do not match the exact terms of the written order:

> The trial judge's comments during the hearing as to its consideration of the entire case file, evidence and law are not controlling; the written court order as entered is controlling. A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment.

Fayetteville Publ'g Co. v. Advanced Internet Techs., Inc., 192 N.C. App. 419, 425, 665 S.E.2d 518, 522 (2008) (citations and quotation marks omitted).

Although Judge Jones mentioned his heavy case load at the hearing on the Motion for Recusal, the Order of Recusal clearly states as the reason for recusal that "Plaintiff filed a motion to have Judge Jones recused from this case and Judge Jones granted [P]laintiff's motion."[7] The Order

7. Defendant essentially asks this Court to assume Judge Jones did not read Plaintiff's Motion for Recusal before entering the Order of Recusal based on his statements. But

of Recusal also assigned the case to the Honorable O. David Hall. The clear terms of this Order of Recusal indicate Judge Jones recused himself based on Plaintiff's Motion for Recusal *and* he assigned the case to another judge, indicating that he was not simply continuing the case to another day or limiting his recusal in any way.

Defendant further argues though Judge Jones recused himself, "[h]e did not disqualify himself from the parties' case." She contends "the terms disqualification and recusal are often used interchangeably. By using the terms interchangeably, confusion arises as is evidenced in this case. Disqualification of a judge requires recusal. However, recusal does not necessarily indicate disqualification."

> Black's Law Dictionary defines *recusal* as "removal of oneself as judge or policy-maker in a particular matter, esp. because of a conflict of interest." *Disqualification* is defined as "something that incapacitates, disables, or makes one ineligible; esp., a bias or conflict of interest that prevents a judge or juror from impartially hearing a case, or that prevents a lawyer from representing a party."

State v. Smith, 258 N.C. App. 682, 686, n. 2, 813 S.E.2d 867, 869, n. 2 (2018) (emphasis in original) (citations and brackets omitted).

In making her argument, Defendant directs this Court to the North Carolina Code of Judicial Conduct Canon 3(C)(1), which provides "a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to . . . personal bias or prejudice concerning a party[.]" N.C. C.J.C. Canon 3(C)(1)(a). Defendant contends that because Judge Jones gave no reason for granting the recusal, other than explaining he had a heavy caseload, he did not "disqualify" himself due to any "impartiality" reasons under Canon 3. Further, "[r]emoving himself from the case due to time constraints . . . d[id] not prohibit . . . Judge [Jones] from being reassigned the case at a future date for further proceedings or orders."

Canon 3 is inapplicable to this case as it outlines grounds and circumstances in which "a judge *should disqualify* himself/herself in a proceeding[.]" *Id.* (emphasis added). It is not a matter for this Court to determine whether Judge Jones should have disqualified himself

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even if Judge Jones had not read the Motion for Recusal before his statements in open court, we will not assume he did not read the Motion for Recusal after his statements in open court and before he entered the written order which explicitly granted Plaintiff's Motion for Recusal.

under the Code of Judicial Conduct due to alleged bias, nor to determine whether his recusal was required under these circumstances as the Order of Recusal itself was not appealed. *See Hudson*, 293 N.C. App. at 88, 900 S.E.2d at 132-33 ("The recusal order was not appealed, and we express no opinion on whether [the trial judge] was in fact required to recuse. The order of recusal is the law of the case."). And even if we assume there is some relevant difference between the words "disqualification" and "recusal" for purposes of this case, we are bound by the trial court's Order of Recusal. Judge Jones recused himself and his reason for recusal was that he granted the Plaintiff's Motion for Recusal.

Defendant cites no caselaw, nor can we find caselaw, supporting the claim that a trial court's heavy caseload is a proper reason for some sort of temporary recusal, so the judge may then resume participation in the case when his calendar permits. And here, Judge Jones simply recused himself and specifically assigned the case to another judge; he did not continue the case to another date due to the heavy caseload. Although it is unfortunately a common occurrence for a judge not to be able to hear a calendared case due to the time needed to dispose of other cases on the calendar, the case is then continued to another court date. A heavy caseload is not a basis for a judge to recuse himself from a case, and we will not assume this rationale, especially where the trial court's Order of Recusal states that the recusal is based on Plaintiff's Motion for Recusal, not the crowded calendar.

In *Hudson*, this Court determined that "where the recusal order itself provides the recusal was based upon perceived bias against one party, [the trial judge] had no authority to enter the order on appeal after her recusal." *Id.* at 90, 900 S.E.2d at 134. The trial judge in *Hudson* recused herself "to 'promote justice' and to allow 'all parties to feel heard' " even though "recusal was not necessarily required under the Code of Judicial Conduct." *Id.* at 91, 900 S.E.2d at 134 (brackets omitted). Here, the Order of Recusal contained no specific reason for Judge Jones's recusal other than Plaintiff's Motion for Recusal, and Plaintiff's Motion for Recusal alleged bias and conflict of interest. Again, we express no opinion on the substance of Plaintiff's allegations in his Motion for Recusal or whether Judge Jones was actually required to recuse, since Judge Jones did not specifically address the allegations, but we must accept the trial court's Order of Recusal as it is written.

We also note that on remand a new hearing is required in these circumstances. In *Hudson*, this Court noted

> [o]ur Supreme Court determined in *Lange* that Rule 63 would give a newly assigned judge discretion to enter the

> same order on behalf of the judge who heard the matter if this was based only on that judge's retirement, but if the recused judge was properly recused, Rule 63 would not allow the newly assigned judge the discretion to enter the same order on behalf of the recused judge. Therefore, not only did [the trial judge] lack . . . authority to enter the order after her recusal, on remand the trial court must hold a new hearing.

Id. (citing *Lange v. Lange*, 357 N.C. 645, 648, 588 S.E.2d 877, 879-80 (2003)). As in *Hudson*, because Judge Jones heard the evidence in the hearing that concluded on 7 March 2019,[8] but he subsequently recused himself from the case on 29 September 2021, we must vacate the trial court's Order and remand for a new hearing before another judge. *See id.*

III. Conclusion

We vacate the trial court's 29 September 2023 Order as Judge Jones did not have authority to enter the Order after the Order of Recusal entered on 21 September 2021, and we remand this matter to the trial court for a new hearing and entry of a new order.

VACATED AND REMANDED.

Judges HAMPSON and GORE concur.

8. Judge Evans heard the first day of the hearing on 21 November 2018, according to our record, but she did not hear the portions of the hearing on 20 February 2019 and 7 March 2020.

IN RE I.M.S.

[298 N.C. App. 689 (2025)]

IN THE MATTER OF I.M.S.

No. COA24-807

Filed 7 May 2025

Termination of Parental Rights—neglect—likelihood of future neglect—unstable housing—failure to engage in recommended services—forfeiture of visitation

An order terminating a mother's parental rights in her minor daughter based on neglect was affirmed where clear, cogent, and convincing evidence supported the trial court's findings of fact, including that the probability of future neglect would be high if the child were returned to her mother's care. Notably, the court found that: the mother had a history of housing instability—which included living with her daughter inside of a van parked at a gas station—and lacked appropriate resources to care for the child; the mother did not engage in most of the services recommended to her by the department of social services (DSS), including parenting classes and treatment for substance abuse and post-traumatic stress disorder; throughout the case, the mother did not provide evidence of having stable housing or income; and, since the child was brought into DSS's custody, the mother repeatedly left the state for months at a time, during which she forfeited in-person visitation with the child.

Appeal by Respondent Mother from order entered 21 May 2024 by Judge J. Rex Marvel in Mecklenburg County District Court. Heard in the Court of Appeals 23 April 2025.

Mecklenburg County Attorney's Office, by Kristina A. Graham, for Petitioner-Appellee Mecklenburg County Department of Social Services.

Administrative Office of the Courts, by Brittany T. McKinney, for Guardian ad Litem.

J. Thomas Diepenbrock for Respondent-Appellant Mother.

COLLINS, Judge.

Respondent Mother ("Mother") appeals from the trial court's order terminating her parental rights to her minor child Imelda[1] on the following four grounds: neglect; willfully leaving the child in placement outside the home for more than 12 months without correcting the conditions which led to the child's removal; dependency; and the parental rights of the parent, with respect to another child, have been terminated involuntarily. We affirm.

I. Background

Petitioner Mecklenburg County Department of Social Services, Division of Youth and Family Services ("YFS") filed a petition in August 2022 alleging that Imelda was neglected and dependent and received nonsecure custody of her. The trial court entered an Adjudication Order on 5 January 2023 adjudicating Imelda neglected and dependent. Mother stipulated to the following allegations in the Partially Mediated Agreement, which the trial court incorporated in its Adjudication Order as findings of fact:

> (a) Youth and Family Services (YFS) became involved with this family upon receipt of a Child Protective Services (CPS) report requiring an immediate response on August 3, 2022, alleging neglect due to concerns that [Mother] and [Imelda] were currently living out of a van with no A/C, [Mother] refused to go to a shelter, and she had no money for housing or any food to provide [Imelda] other than milk. [Mother] has no personal knowledge of the report received.
>
> (b) The report also indicated that [Mother] and [Imelda] arrived in Charlotte, NC from Louisville, KY on or about July 5, 2022, at which time she contacted her brother to let him know she was in North Carolina. She and [Imelda] were unable to stay with the maternal uncle, so since her arrival in the area, [Mother] and [Imelda] have stayed in various hotels between Charlotte and Gastonia. [Mother] has no personal knowledge of the report received.
>
> (c) On the evening of August 3, 2022, [Mother] and [Imelda] were found by petitioner in [Mother's] mini van parked in the lot of the QT gas station on South

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

Blvd. The petitioner observed the van to be packed full of [Mother's] and [Imelda's] belongings. There was no space for [Imelda] to lie down and she was sleeping in her car seat. [Imelda] was observed to have a scratch on her nose. [Mother] advised the petitioner that the scratch happened when [Imelda] fell at the waterpark.

(d) The petitioner observed there to be no food for [Imelda] in the vehicle. [Mother] informed the petitioner that they have just eaten. The petitioner observed only one container of milk. [Mother] stated that she doesn't have any FNS benefits to purchase food. [Mother] reported that she applied for WIC and food stamps but has not received the benefits yet due to her case not being closed in KY.

(e) When the petitioner first approached the vehicle, she observed a gentleman to be sitting in the van with [Mother] and [Imelda]. When asked who the gentleman was, [Mother] admitted that she didn't know him. She stated that he was walking through the parking lot, saw that she was a nice person, and asked her to give him a ride up the hill.

(f) [Mother] admitted that her vehicle doesn't currently have working A/C, however [Mother] stated that she purchased a fan for [Imelda]. [Mother] informed the petitioner that the van was having issues with the battery, but she has jumper cables. The temperatures in the Charlotte area have been in the 90s over the past few weeks.

(g) [S]he is waiting to receive a large tax refund and she plans to obtain housing once she receives that money.

(h) [Mother] indicated that she has no other family in this area other than her brother. [Mother] was first hesitant to share her brother's contact information with the department. She first contacted her brother directly to ensure it was appropriate for her to share his contact information. [Mother] then provided his contact information to the petitioner. The petitioner contacted the maternal uncle, and he was either unable or unwilling to provide care for [Imelda]. [Mother] has no personal

knowledge of the content of the conversation that took place between the petitioner and maternal uncle.

(i) The maternal uncle shared with the petitioner multiple concerns that he has regarding [Imelda's] well-being in the care of [Mother]. The uncle stated that he has attempted to help [Mother] and [Imelda] get into shelters in Charlotte and Gastonia, but [Mother] hasn't followed through and has refused to go to a shelter which is why she and [Imelda] are now residing in the van. [Mother] has no personal knowledge of the content of the conversation that took place between the petitioner and the maternal uncle. The uncle paid for [Mother] and [Imelda] to stay in a hotel for approximately 4 days last week.

(j) Upon information and belief, [Mother] has 5 other children of whom she lost custody of in Florida or in Puerto Rico.

(k) [Mother] admitted that she has CPS history involving [Imelda] in Kentucky. She stated that she doesn't recall what the CPS issues were in her case.

(l) The petitioner explored paternity with [Mother]. She stated that [Imelda's] biological father is Andrew Soto, he is approximately 35 years old, and he is a Hispanic/Male. She stated that she doesn't know his whereabouts or how to contact him because he left after [Imelda] was conceived in Louisville, KY.

(m) Petitioner questioned the maternal uncle about paternity, and he confirmed that the name of the biological father is Andrew Soto, and he is believed to live in the Charlotte area. [Mother] has no personal knowledge of this conversation.

The trial court entered a Disposition Order maintaining custody of Imelda with YFS.

In April of 2023, the trial court held a permanency planning hearing and ordered a primary plan of reunification and a secondary plan of adoption. In August of 2023, the trial court ordered a primary plan of adoption and a secondary plan of reunification.

YFS filed a Motion to Terminate Parental Rights on 13 September 2023. Following a hearing, the trial court entered a Termination of

Parental Rights Order terminating Mother's parental rights. The trial court concluded that there were four grounds to terminate Mother's parental rights: Mother had neglected Imelda and "it is probable that there would be a repetition of neglect . . . if [Imelda] is returned to" Mother's care, N.C. Gen. Stat. § 7B-1111(a)(1), Mother had "willfully left [Imelda] in placement outside of 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 [Imelda]," *id.* § 7B-1111(a)(2), Mother "is incapable of providing proper care and supervision of [Imelda], such that . . . [Imelda] is a dependent . . . and that there is a reasonable probability that the incapability will continue for the foreseeable future," *id.* § 7B-1111(a)(6), and the "parental rights of [Mother] with respect to another child of [Mother] have been terminated involuntarily by a court[.]" *Id.* § 7B-1111(a)(9).

The trial court proceeded to disposition and concluded that termination of Mother's parental rights was in Imelda's best interests, and it ordered termination of Mother's parental rights. Mother appealed.

II. Discussion

A termination-of-parental-rights proceeding is a two-step process. *In re D.A.H.-C.*, 227 N.C. App. 489, 493 (2013). In the initial adjudication phase, the petitioner has the burden to "show by clear, cogent[,] and convincing evidence that a statutory ground to terminate exists" under N.C. Gen. Stat. § 7B-1111. *Id.* (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 T.D.P.*, 164 N.C. App. 287, 288 (2004). 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 (2003).

Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of eleven enumerated grounds. We review the trial court's order to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence." *In re Oghenekevebe*, 123 N.C. App. 434, 435-36 (1996) (citation omitted). "Any unchallenged findings of fact are presumed to be supported by competent evidence and are therefore binding on appeal." *In re J.A.K.*, 258 N.C. App. 262, 268 (2018) (citation omitted).

If satisfied that the record contains the requisite evidence supporting the findings of fact, this Court must then determine whether the findings of fact support the trial court's conclusions of law. *In re S.N.*, 194 N.C. App. 142, 146 (2008). This Court reviews the trial court's legal conclusions de novo. *Id.* Finally, with respect to the disposition phase, we review a trial court's decision that termination is in the best interests of the child for abuse of discretion and will reverse only where the trial court's decision is "manifestly unsupported by reason." *Id.* (quotation marks and citation omitted).

A. Grounds for Termination

1. Neglect

Mother contends that clear, cogent, and convincing evidence does not support the trial court's ultimate findings and conclusions that Imelda's neglect would be repeated in the future if she was returned to Mother'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) (2023). 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." *Id.* § 7B-101(15)(a), (e) (2023).

> 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 (2016). "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 (2019) (citation omitted). Here, the trial court made the following relevant findings of fact regarding past neglect and a likelihood of future neglect:

> 11. [Imelda] came to the attention of YFS from a report that Mother was living with [Imelda] in a vehicle at a gas

station without a place to stay. There were also concerns about [Mother's] ability to care for her.

12. [Imelda] was placed in the non-secure custody of YFS on August 4, 2022. She has remained in the custody of YFS since that date.

13. [Imelda] was adjudicated neglected and dependent on or about November 15, 2022. A disposition hearing was also held on November 17, 2022.

14. [Mother's] housing instability and lack of appropriate resources were the main removal conditions in the underlying matter. There were also concerns about mental health and substance abuse due to [M]other's previous involvement with CPS in Kentucky. Further, the [c]ourt found concerns regarding Mother having her five older children removed from her custody and her parental rights terminated in Florida. As part of the disposition order, the [c]ourt adopted an out-of-home family services agreement (OHFSA) for [Mother] that included: attending parenting classes to demonstrate and display active parenting techniques to understand the developmental and emotional needs of [Imelda]; secure safe and appropriate housing suitable for [Imelda][;] obtain and maintain sufficient income; and completing a FIRST assessment to address substance abuse and mental health and follow all recommendations[.]

15. Mother was [o]rdered to participate in FIRST (Families in Recovery Stay Together). She attended the screening and was not recommended for services, but later tested positive for marijuana and alcohol. The [c]ourt [o]rdered for [Mother] to participate in a Parent Focused Parenting Evaluation (PFPE) to determine whether the services previously offered to [Mother] were appropriate and to determine if there were other services that could be offered.

16. [Mother] did participate in the PFPE, and Dr. Hancock determined that [M]other does have a lower functioning IQ and looked at [Mother's] long history of DSS involvement in Florida with her five older children. Those children were removed for concerns surrounding substance abuse and [Mother] not meeting their basic needs.

17. Mother was diagnosed with post traumatic stress disorder (PTSD) and substance abuse disorder. The [c]ourt finds that based on the testimony provided by Dr. Hancock and review of the PFPE, [Mother] lacks insight regarding her circumstances and her past. [Mother] would likely benefit from therapeutic intervention but the reality is that she has not engaged in the recommended and referred services throughout the life of the case.

18. There was testimony and argument surrounding the recommendation in the PFPE that a more in-depth Parental Capacity Evaluation would be beneficial. The [c]ourt made the decision that it was largely unnecessary and that a further evaluation would cause undue delay at a time where Mother was not acting consistent with YFS or her parental rights, was not visiting with [Imelda], had moved to Florida and reunification was unlikely in six months. The [c]ourt finds that further evaluation would only aid prolonging this case and permanence for [Imelda] largely based on the fact that [Mother] has not engaged in the recommended services thus far.

19. Mother has been afforded visitation with [Imelda] throughout the life of this case, but has not been consistent in exercising visitation. Further, since [Imelda] was brought into custody [Mother] has left North Carolina three times to return to Florida for a total of approximately eight months of the eighteen months that [Imelda] has been in YFS custody, and currently resides in Florida although her exact location is unknown. During those absences, [Mother] forfeited her in-person visitations with [Imelda].

20. There was no credible evidence presented that as of today [Mother] has participated in mental health treatment, parenting classes, or has suitable housing. There was no credible evidence that [Mother] has stable or appropriate housing.

21. Mother does receive disability income but refuses to disclose the reason that it is received. Further, [Mother] has consistently claimed to have employment throughout the life of the case but has not provided pay stubs to the department to determine whether she is gainfully employed.

22. YFS has made efforts to move [Mother's] services to North Carolina to aid in reunification, but she made the choice to refuse this help throughout the life of the case.

. . . .

25. At the time of this hearing[,] [Mother] and [Imelda's father] have not made efforts to complete their OHFSA, meaningfully engage in any case planning with the department, or ameliorate the condition that led to the removal of [Imelda].

26. [Mother] was not married to any man at the time of [Imelda's] birth or conception, and no man has come forward claiming to be [Imelda's] father, filed an affidavit of paternity, asked for contact with [Imelda] or provided any support.

27. [Imelda] has not had any contact with John Doe or any other man claiming to be her biological father. Further, there has been no man that has legitimated this child, provided to her cost of care or provided for her since birth.

28. [Imelda] has been placed with Thomas and Emily White since August 23, 2022. The Whites have consistently provided love and support to [Imelda]. They have three older children, and the foster brother closest in age to [Imelda] is her best friend.

29. [Imelda] acknowledges, knows, and loves her mother, but there is no parental relationship. [Mother] is not the person that takes her to the doctor, puts her to bed, feeds her, and has not had in person contact with [Imelda] since November 2023.

30. [Mother] has prior history with DSS in Kentucky and Florida. She has five older children who were removed from her custody in Florida. Her rights were terminated to those five children.

31. Adoption has been part of the primary plan since the second permanency planning hearing on February 14, 2023. The [c]ourt found at all three permanency planning hearings that were held in the underlying matter that neither parent was making progress within a reasonable time

> and both parents were acting in a manner inconsistent with the health and safety of [Imelda].
>
> 32. The probability of neglect is high should [Imelda] be returned to the home of [Mother] or [Imelda's father].

In making these findings of fact, the trial court considered testimony from Dr. Russell Hancock, the psychotherapist who evaluated Mother; Natalie Smith, the YFS worker assigned to the case; Blair Wrangham, the Guardian ad Litem volunteer; and Emily White, Imelda's foster mother. The trial court also considered Dr. Hancock's Parenting Focused Psychological Evaluation of Mother and the Guardian ad Litem's TPR report. Thus, there is clear, cogent, and convincing evidence in the record to support the trial court's findings of fact, including that the neglect experienced by Imelda would repeat or continue if she were returned to Mother's care and custody.

Furthermore, because the trial court properly terminated Mother's parental rights based on neglect, we need not address the three remaining grounds for termination. *See In re C.J.H.*, 240 N.C. App. 489, 497 (2015) ("On appeal, respondent challenges all three of the trial court's grounds for termination of his parental rights. But if we determine that the findings of fact support one ground for termination, we need not review the other challenged grounds.").

III. Conclusion

The trial court did not err by concluding that neglect existed to terminate Mother's parental rights. Mother does not challenge the trial court's dispositional determination that termination was in Imelda's best interest. Accordingly, we affirm the trial court's order terminating Mother's parental rights.

AFFIRMED.

Judges MURRY and FREEMAN concur.

IN RE T.S.

[298 N.C. App. 699 (2025)]

IN THE MATTER OF T.S., III & M.S.

No. COA24-47-2

Filed 7 May 2025

Child Abuse, Dependency, and Neglect—neglect—guardianship—constitutional argument not preserved—appeal dismissed

On remand from the North Carolina Supreme Court for reconsideration in light of *In re K.C.*, 386 N.C. 690 (2024), the Court of Appeals dismissed the appeal of respondent-mother—who purported to challenge an award of guardianship over her two minor children to the children's paternal grandmother by arguing that the district court's findings of fact did not support its conclusions of law that respondent-mother was unfit or had acted in a manner inconsistent with her constitutionally protected parental status. That argument was not preserved for appellate review because, in the district court, respondent-mother contended only that it was "premature" for the court to consider guardianship in light of her progress in rectifying the issues which led to the removal of the children and did not raise any constitutional issue regarding her parental status.

Appeal by Respondent-mother from order entered 5 October 2023 by Judge Wendy S. Hazelton in Pitt County District Court. This case was originally heard in the Court of Appeals 21 November 2024. *See In re T.S. III & M.S.*, 296 N.C. App. 635, 909 S.E.2d 758 (2024). Upon remand from the Supreme Court of North Carolina.

Miller & Audino, LLP, by Jay Anthony Audino, for petitioner-appellee Pitt County Department of Social Services.

GAL Appellate Counsel Matthew D. Wunsche for guardian ad litem.

Anné C. Wright for respondent-appellant mother.

TYSON, Judge.

This case was remanded to this Court by order from the Supreme Court of North Carolina for reconsideration in light of *In re K.C.*, 386 N.C. 690, 909 S.E.2d 170 (2024). We dismiss these appeals.

I. Background

This matter challenges the guardianship disposition of three-year-old T.S., III ("Thomas") and four-year-old M.S. ("Marcus") to their paternal grandmother ("Grandmother"). The background is taken from this Court's prior opinion:

> The Pitt County Department of Social Services (DSS) filed petitions on 26 July 2019 alleging three-year-old Thomas and four-year-old Marcus were neglected juveniles. After noting Respondent-mother's history with DSS dating back to September 2013, DSS alleged it had received two recent reports: a report on 16 April 2019 claiming the children were left alone in the care of their seven-year-old sibling, A.S., while Respondent-mother picked up her boyfriend from jail, and a report on 4 June 2019 alleging improper care and supervision. Although the underlying juvenile neglect proceeding also involved Thomas and Marcus' siblings A.S. and I.S., the order on appeal only addresses the guardianship disposition of Thomas and Marcus.
>
> After investigation of the April report, Respondent-mother was arrested for four counts of misdemeanor child abuse or neglect. Thomas and Marcus were placed with their maternal aunt in a temporary safety placement. DSS also alleged the children had consistently missed routine health appointments and were not being treated for possible developmental delays.
>
> On 30 December 2019, the trial court entered an order adjudicating Thomas and Marcus as neglected juveniles and placed them with their paternal aunt and uncle. The trial court found Respondent-mother had made progress on her case plan by completing a mental health and substance abuse assessment by "taking online classes[,]" but she had not attended her psychological evaluation appointment, had been arrested for failing to appear for the misdemeanor child abuse charges, was unemployed, had only attended one therapy appointment, and she had not maintained visitation with the boys.
>
> The court ordered Respondent-mother to participate in mental health treatment, complete a parenting program, submit to a substance abuse assessment, receive substance abuse treatment, follow the terms of her parole,

and obtain and maintain stable employment. The trial court awarded joint legal custody of Thomas and Marcus to their aunt and uncle and Respondent-mother and further awarded Respondent-mother supervised visitation with her boys for one hour per week.

The trial court entered a three-month review order on 25 March 2020, in which it found Respondent-mother had failed to complete substance abuse treatment, maintain her sobriety, complete a psychological evaluation, and consistently visit with the children. As a result, the court continued Thomas and Marcus' temporary placement with their aunt and uncle.

The trial court entered a permanency planning order on 6 August 2020, maintaining the boys' placement with their aunt and uncle due to Respondent-mother's visitation issues and failure to comply with her case plan. The court set a primary plan of custody with a relative and secondary plan of reunification and again the court ordered respondent-mother to complete her case plan requirements.

The trial court entered another permanency planning order on 30 March 2021, in which it found Respondent-mother had continued to make progress on elements of her case plan, but she had not completed a mental health assessment or taken a recent drug test, and she was not regularly visiting with the children. The court changed the primary permanent plan to guardianship with a relative with a secondary plan of custody with a relative and awarded guardianship of Thomas and Marcus to their aunt and uncle. The court directed no further review hearings would occur unless sought by the motion of a party and relieved DSS, the guardian *ad litem* (GAL), and Respondent-mother's appointed counsel of further duties.

On 22 August 2022, the trial court entered nonsecure custody orders removing the boys from their aunt and uncle's home because "[t]he Juvenile[s were] slapped by the Guardian/Uncle eight times for acting up at the Grandmother's house[,] [and] [t]he Guardian/Aunt does not allow the Juveniles to meet with their (sic) therapist without her present." The court placed the boys with paternal Grandmother. In orders signed on 8 September

2022, but not filed until over four months later on 9 January 2023, the trial court dissolved paternal aunt's and uncle's guardianship.

The trial court conducted a permanency planning hearing on 8 December 2022. In the order from that hearing, the court found Respondent-mother had continued to make progress with her case plan. She had obtained adequate housing and completed a mental health assessment, but she had not secured verified employment, was not consistently attending visitation or family therapy, and had tested positive for cocaine and marijuana. The court set a primary permanent plan of reunification with a secondary plan of guardianship.

The trial court held the next permanency planning hearing on 15 June 2023. In its order from the hearing, the court found Respondent-mother had continued to make progress on her case plan, including obtaining consistent employment, attending college to study business, and completing a comprehensive clinical addendum. However, the court noted Respondent-mother had failed to follow the recommendations of prior assessments and had failed to use additional visitation provided to her. The court changed the primary permanent plan to guardianship with a relative with a secondary plan of reunification.

Another permanency planning hearing was held on 14 September 2023. Prior to the hearing, DSS and the GAL submitted reports requesting that the trial court grant guardianship to Grandmother. During the hearing, Respondent-mother's counsel specifically argued it was premature to consider guardianship in light of her recent progress.

The trial court entered a permanency planning order on 5 October 2023, in which it found "[b]y clear, cogent, and convincing evidence" Respondent-mother was unfit and was acting inconsistently with her constitutionally-protected status as a parent. The court granted guardianship of Thomas and Marcus to Grandmother based on its conclusion that such placement would be in their best interests. Respondent-mother appeals.

Id. at 636-39, 909 S.E.2d at 761-62.

This Court vacated the permanency planning order awarding guardianship to Grandmother and remanded. *Id.* at 647, 909 S.E.2d at 768. The district court's findings of fact failed to support the trial court's conclusion Respondent-mother "is unfit or acted inconsistent with . . . her constitutionally protected status [at that time] is nevertheless required, even when a juvenile has previously been adjudicated neglected and dependent." *Id.* (citation omitted).

The matter was vacated and remanded to the trial court for further findings and proceedings. *Id.* (citation omitted).

Petitioner petitioned for discretionary review pursuant to N.C. Gen. Stat. § 7A-31 (2023), and the guardian *ad litem* joined the petition for review. The Supreme Court allowed the petition without opinion "for the limited purpose of vacating the Court of Appeals decision below, . . . , and remanding the matter to that court for reconsideration in light of *In re K.C.*, No. 142A23 (N.C. Dec. 13, 2024)."

II. *In re K.C.*

Durham County DSS had filed a petition alleging the juvenile to be a neglected juvenile on 25 August 2020. *In re K.C.*, 288 N.C. App. 543, 544, 887 S.E.2d 108, 110 (2023), *rev'd*, 386 N.C. 690, 909 S.E.2d 170 (2024). More than a year later, the trial court entered an order adjudicating the juvenile to be a neglected juvenile. *Id.* at 544, 887 S.E.2d at 111. At the dispositional hearing the trial court "contemplated removal of the child from the non-offending parent" for the first time. *Id.* The trial court entered "a limited order placing [the juvenile] in the temporary custody of her paternal aunt and uncle." *Id.*

The trial court entered a

> formal disposition order on 8 February 2022, wherein it formally placed [the juvenile] in the 'temporary custody' of her paternal aunt and uncle and ordered [the r]espondent to complete a domestic violence program for perpetrators, refrain from physically disciplining [the juvenile], 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.

Id. at 545, 887 S.E.2d at 111. The respondent appealed arguing "the trial court erred in placing the juvenile 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." *Id.*

This Court held this argument was properly preserved for review because the respondent had "opposed DSS's recommendation" to place the juvenile with the paternal aunt and uncle. *Id.* Respondent-mother also challenged findings to support this conclusion. This Court held the finding was unsupported and disregarded them. *Id.* at 550, 887 S.E.2d at 114. This Court noted: "There were no allegations in the petition or findings in the adjudication order that [the 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." *Id.*

This Court reversed the district court holding: "the findings of fact are insufficient to support the trial court's conclusion that [the r]espondent acted inconsistently with his paramount constitutionally protected status as a parent." *Id.*

DSS petitioned the Supreme Court of North Carolina, which allowed discretionary review on an additional issue: "Whether respondent properly preserved this constitutional issue for appellate review." *In re K.C.*, 386 N.C. at 694, 909 S.E.2d at 174 (citation omitted). Two Justices observed, "In a case where, until supplemental briefing requested by this Court, no party argued to this Court that Father [had] waived his constitutional challenge and contrary to our settled practice, the majority steps into the role of advocate and makes a 'better' argument for a party." *Id.* at 699-700, 909 S.E.2d at 177 (Riggs, J., dissenting). The Supreme Court also instructed the parties to submit supplemental briefs on a new additional issue "Whether the Court of Appeals' reliance on its decision in *In re B.R.W.*, 278 N.C. App. 382, 399, 863 S.E.2d 202 (2021), conflicts with this Court's holding in *In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495 (2022)."

The Supreme Court's opinion first recognized and cited the Supreme Court of the United States' holding in *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 519 (1978) reaffirming: "[F]reedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment[,]" and there is "little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."

Our Supreme Court examined and also reaffirmed "a parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child," and recognized the parent is presumed to be fit and to act in his and her child's best interest. Any third party to the parent-child relationship must overcome those presumptions by the requisite and heightened burden of proof to interfere or meddle. *In re K.C.*, 386 N.C. at 695, 909 S.E.2d at 174 (citing *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997)). Mere allegations of a purported statutory ground and even some evidence thereof are insufficient to overcome presumptions of parental fitness and of acting in the best interests of her children and interfere with the paramount and constitutionally-protected parental status. *Id.*

The Supreme Court also acknowledged the General Assembly's stated public policy in asserting the "core purpose of these statutes is to provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents," and implements processes and procedures with the statutory goals for the child to be reunified with their parent(s). *Id.* (citing N.C. Gen. Stat. § 7B-100(1) (2023)).

The Supreme Court further "recognized that there might be rare circumstances in which the provisions of the Juvenile Code are insufficient to protect the constitutional rights of parents. . . . In these rare cases, even if the Juvenile Code authorizes the trial court to remove a child from a parent, the court may not do so because the United States Constitution prohibits it." *Id.* at 696, 909 S.E.2d at 175 (citations omitted).

The Supreme Court reviewed whether preservation of the paramount constitutional rights of parents are or could be implicated by reviewing *In re J.N.*, 381 N.C. at 134, 871 S.E.2d at 498, wherein the appellant had argued the parent expressly opposed DSS' recommendation of guardianship and had further argued "reunification would be the more appropriate plan." *In re K.C.*, 386 N.C. at 697, 909 S.E.2d at 176 (citation omitted).

The Court states that where a parent:

> who merely argues against a child's removal, or against the child's placement with someone else, does not adequately preserve the constitutional issue. To preserve it, the parent must inform the trial court and the opposing parties that the parent is challenging the removal on constitutional grounds and [to] articulate the basis for the constitutional claim.

> This preservation requirement is necessary for a crucial reason. As noted above, the argument is essentially a claim that the Juvenile Code is unconstitutional as applied to that parent. After all, the argument applies only when the Juvenile Code *authorizes* the removal of the child from the parent's care, but the Constitution nevertheless *prohibits* it. Thus, the parties opposing the parent's argument must be given notice of the constitutional challenge so that they can present evidence to rebut it. This evidence, by its nature, may be different from the evidence those parties present to establish grounds for removal under the Juvenile Code —after all, the constitutional claim can prevail only in rare cases where the evidence that is sufficient to satisfy the Juvenile Code nevertheless is insufficient to comply with the constitutional criteria.
>
> Moreover, because of this need to provide notice to the opposing parties, the preservation requirement applies even if the trial court addresses the constitutional claim on its own initiative in its order. A trial court's findings are limited to evidence in the record. Without notice that the parent is asserting a constitutional claim, the opposing parties will not know that they must present evidence that would support the necessary findings to reject the claim.

Id. at 697-98, 909 S.E.2d at 176 (citations omitted).

The Supreme Court reversed Court of Appeal's decision in *In re B.R.W.* and its progeny, as being contrary to *In re J.N. Id.* at 698, 909 S.E.2d at 176 ("In sum, the Court of Appeals' preservation analysis in *In re B.R.W.* did not survive our holding in *In re J.N.* To prevent further confusion, we expressly overrule the preservation holding of the Court of Appeals decision in *In re B.R.W.* and the holdings of the resulting Court of Appeals case law that followed it."); *In re B.R.W.*, 278 N.C. App. 382, 397-99, 863 S.E.2d 202, 214-16 (2021).

III. Analysis

Respondent-mother challenges the guardianship, which awarded Thomas and Marcus to their paternal Grandmother. She argues several of the trial court's findings of fact are unsupported by the evidence and the remaining findings failed to support the court's conclusion either she is unfit as a parent or has acted in a manner inconsistent with her rights to overcome her presumptions of fitness and acting in the best interest of the children to forfeit her constitutionally-protected parental status.

Respondent-mother never argued her as-applied constitutional right to parent was violated, she only asserted it was "premature" to consider guardianship considering her established progress under DSS' supervisions in recent months to rectify the issues, which led to the minors' removal from the home, and to reunify her with Thomas and Marcus.

This argument was also asserted in *In re J.N.*, wherein the respondent had argued "reunification would be a more appropriate plan" to the district court. *In re J.N.*, 384 N.C. at 604-04, 887 S.E.2d at 835-36 ("the respondents waived appellate review because they did not argue to the district court changing the permanent plan would be "improper on constitutional grounds"). As in the case of *In re J.N.*, Respondent-mother cannot argue for the first time on appeal her as-applied constitutionally-protected parental status was violated. *Id.* Respondent-mother has waived appellate review of this issue in this appeal.

IV. Conclusion

Respondent-mother did not argue her constitutionally-protected parental status was violated as applied before the district court. Our Supreme Court's precedent requires Respondent-mother to challenge the interference with and specifically "argue th[e] issue as a violation of a constitutional right." *In re K.C.*, 386 N.C. at 698, 909 S.E.2d at 176; *see In re J.N.*, 384 N.C. at 604-04, 887 S.E.2d at 835-36. Respondent-mother's constitutionally-protected parental rights to Thomas and Marcus are not terminated. Respondent-mother's unpreserved as-applied challenges asserted for the first time in this appeal are dismissed. The trial court's order awarding guardianship remains undisturbed. *It is so ordered.*

DISMISSED.

Judges WOOD and GORE concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
JAY A. YOUNG, INDIVIDUALLY AND DBA YOUNGS CONSTRUCTION COMPANY
AND ELMA FAIRCLOTH, AS ADMINISTRATOR OF THE ESTATE OF
MILDRED GRAY WILLIAMS, DEFENDANT

No. COA24-594

Filed 7 May 2025

1. Appeal and Error—denial of motions for summary judgment—appeal and cross-appeal dismissed—case had proceeded to trial

In a declaratory judgment action filed by an insurance company (plaintiff) seeking a declaration that the employer's liability exclusion in its general liability policy—issued to a general contractor who operated his own construction company—barred any claims asserted by decedent's estate (defendant) arising from the fatal accident that decedent suffered while performing a task on the contractor's worksite, the appellate court dismissed the parties' appeal and cross-appeal, respectively, from the trial court's order denying both parties' motions for summary judgment. Since the trial court subsequently held a bench trial on the merits after denying the motions, its denial of summary judgment was not reviewable on appeal.

2. Insurance—general liability policy—employer liability exclusion—"employee" versus "temporary worker"—no duty to defend or to indemnify

In a declaratory judgment action filed by an insurance company (plaintiff) seeking a declaration that the employer's liability exclusion in its general liability policy—issued to a general contractor who operated his own construction company—barred any claims asserted by decedent's estate (defendant) arising from the fatal accident that decedent suffered while performing a task on the contractor's worksite, the appellate court affirmed the trial court's order determining that, pursuant to the terms of the policy, decedent was the contractor's employee and not a volunteer or a temporary worker and, as a result, that plaintiff had no duty to defend or to indemnify the contractor. Despite conflicting evidence, which was within the province of the trial court to resolve, competent evidence supported the trial court's determination that the contractor intended to pay decedent for her work on the day of the incident and that decedent was not hired to meet a seasonal or short-term workload need.

Appeal by defendant and cross-appeal by plaintiff from order entered 25 January 2023 and judgment entered 24 October 2023 by Judges Vinston M. Rozier, Jr. and Patrick Thomas Nadolski, respectively, in Wake County Superior Court. Heard in the Court of Appeals 20 March 2025.

Young Moore & Henderson, P.A., by Andrew P. Flynt and Angela Farag Craddock, for the plaintiff-appellee/cross-appellant.

DAS Law Group, P.A., by Derek P. Adler, and Shelby L. Gilmer, for the defendant-appellant/cross-appellee.

TYSON, Judge.

Emma Faircloth, as Administrator of the Estate of Mildred Gray Williams ("Defendant") appeals from order denying summary judgment on 25 January 2023 and judgment entered 24 October 2023 following a bench trial. North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Plaintiff") cross-appeals from the 25 January 2023 summary judgment order denying its motion. We affirm.

I. Background

Jay A. Young ("Young") is a general contractor in White Lake, doing business as Youngs Construction Company. Young's main business involved remodel of residential kitchens and bathrooms. Young was introduced to Mildred Gray Williams ("Decedent") through Steven Blount in 2016. Blount owned several vacation rental properties and a car wash. Decedent worked at odd jobs for Blount at his properties and car wash. During the summer rental season Decedent worked for Blount three to four days a week. Outside of the summer rental season, Decedent would work for Blount "from time to time" and whenever he was out of town.

Decedent also worked odd jobs for Young, both at his house and with his construction business. Decedent worked four times for Young between 2016 and 2019. Young paid Decedent at a rate of $10 per hour and always paid her in cash. Young also gave Decedent money "a bunch of times, nothing to do with work."

Young contracted with White Lake Water Rescue to serve as the general contractor to replace the metal roof on the Water Rescue Building at Station 75. Young purchased the materials for the project and subcontracted with Willie Locklear/Locklear Roofing to perform the labor to install the materials on the project.

Decedent's car became inoperable and required repairs. Decedent was working at Blount's car wash to earn the money needed to repair her car. Decedent also performed odd jobs for other people in White Lake to earn money. Blount loaned Decedent an old work truck for transportation to work at his car wash and at other jobs she found. In October 2019, Blount was out of town and Decedent was checking on his car wash to "see if any trash needed to be hauled off."

Decedent went to a meeting at the fire department on 7 October 2019. At the meeting, Decedent learned about the roofing project at the Water Rescue Building. Blount was also aware of the Water Rescue Building project and told Young that Decedent "was available if he needed somebody to do some cleanup." Decedent drove Blount's work truck to the Water Rescue Building and asked Young for work. Young informed Decedent he did not "have anything for [her] to do."

After Decedent's insistence, Young relented and he allowed her to pick up trash around the jobsite. Decedent and Young did not discuss payment. Young specifically told Decedent she was prohibited from getting onto the roof or to help Locklear's crew. Young left the Water Rescue Building site to get materials. Decedent began helping Locklear's crew on the site. Two panels and a skylight were removed leaving an exposed hole approximately fifteen feet above a concrete floor. No fall protections, warnings, or precautions were present to prevent an individual from falling through the opening.

Decedent was walking along the roof carrying a metal panel when a wind gust caused the metal panel to shake. Decedent lost her footing and fell through the hole, travelled fifteen feet and landed on the concrete floor below. Decedent suffered a fatal head injury and internal bleeding.

The North Carolina Occupational Safety and Health Division ("OSH") assigned Safety and Health Officer Howard Laurie to investigate the accident. Laurie first was required to determine whether an employer/employee relationship existed for OSH to obtain jurisdiction over the accident. Laurie interviewed Young on 9 October 2019. Laurie learned Decedent had been a part-time employee of Young. Young told Laurie Decedent had worked for him several days in the past years, had worked for just that day, and he was going to pay her cash for the day.

Young later told Laurie Decedent was a volunteer on the jobsite and he was not going to pay her. Laurie concluded Young and Decedent were in an employer/employee relationship, Decedent was working for monetary compensation, and OSH asserted jurisdiction. Laurie conducted an inspection of the White Lake Water Rescue Project, noted

safety violations, and recommended citations. OSH issued a Citation and Notification of Penalty to Young on 14 February 2020. OSH concluded Young's employees were exposed to fall hazards without fall protection and "the condition resulted in a fatality when an employee of Young's Construction fell through a roof opening to the concrete slab 15-feet below." OSH and Young entered into a Settlement Agreement, which included the same four citations as the Citation and Notification of Penalty but with reduced monetary penalties. In the Settlement Agreement Young had admitted "one or more" or Young's "employees were performing work."

Decedent's family listed Decedent as an employee of Youngs Construction Company in Decedent's obituary. Defendant estate filed a lawsuit against Willie Locklear d/b/a Locklear Roofing in Bladen County Superior Court on 26 March 2021. Defendant's complaint included multiple allegations asserting Decedent was Young's employee at the time of the accident.

Defendant estate also filed a lawsuit against Jay A. Young individually and d/b/a Youngs Construction in Bladen County Superior Court on 5 October 2021. Plaintiff had issued a general liability policy to Jay Young DBA Youngs Construction for the period of 6 April 2019 until 6 April 2020. The general liability policy contained the following exclusion:

> 2. **Exclusions**
>
> This insurance does not apply to:
>
> . . .
>
> **e. Employer's Liability**
>
> "Bodily injury" to
>
> (1) An "employee" of the insured arising out of and in the course of:
>
> (a) Employment by the insured; or
>
> (b) Performing duties related to the conduct of the insured's business; or
>
> (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.
>
> This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> This exclusion does not apply to liability assumed by the insured under an "insured contract."

The general liability policy also contained the following definitions:

> 5. "Employee" includes a "leased worker." "Employee" does not include a "temporary worker."
>
> . . .
>
> 10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker."
>
> . . .
>
> 19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

Plaintiff provided counsel and defended Young in the Decedent's Bladen County action under a reservation of rights. Plaintiff filed a declaratory judgment action seeking a declaration the Employer's Liability exclusion bars coverage for all claims against Young and the Contractual Liability exclusion bars coverage for the breach of contract claim. Plaintiff further sought a declaration holding it had no duty to continue defending Young against the suit and no duty to indemnify Young for any judgment entered against him. Defendant-estate agreed to dismiss its pending breach of contract claim against Young with prejudice.

Defendant-estate moved for summary judgment on 1 November 2022 and filed an amended motion for summary judgment on 20 December 2022. Plaintiff opposed Defendant's motion and requested summary judgment in its favor pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023).

The trial court heard Plaintiff's motion for summary judgment and Defendant's request for summary judgment and denied both motions on 25 January 2023. Following a bench trial, the trial court entered a judgment declaring Plaintiff has no duty to defend Young or to indemnify him against Defendant's claims. Defendant estate appealed from the 25 January 2023 order, which denied its motion for summary judgment and from the 24 October 2023 judgment. Plaintiff cross appeals from the 25 January 2023 order denying its motion for summary judgment. Young did not appeal either the 25 January 2023 order denying his motion for summary judgment or the 24 October 2023 judgment.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Issues

Defendant argues the trial court erred in concluding Decedent was an "employee" because she was a "volunteer;" for concluding Decedent was not a "temporary worker;" and, for making incompetent findings to conclude Decedent was an employee of Young's. Plaintiff argues they were entitled to summary judgment because Young's settlement with OSH was a binding admission he had employed Decedent.

IV. Plaintiff's Cross-Appeal and Defendant's Appeal of the 25 January 2023 Order

[1] Defendant appealed from and Plaintiff cross-appealed from the trial court's 25 January 2023 order which denied Defendant's and Plaintiff's motions for summary judgment. The trial court subsequently held a bench trial on the merits following entry of this order. This Court does not review an order denying summary judgment when the case proceeds to trial:

> a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of facts, either judge or jury.
>
> To grant a review of the denial of the summary judgment motion after a final judgment on the merits would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

WRI/Raleigh, L.P. v. Shaikh, 183 N.C. App. 249, 252, 644 S.E.2d 245, 246-67 (2007). We dismiss Plaintiff's cross appeal. Defendant asserted an appeal of the 25 January 2023 denial of summary judgment order, but only argued issues related to the 24 October 2023 judgment. Defendant's asserted appeal of the 25 January 2023 order is also dismissed.

V. Standard of Review

This Court has held when reviewing a bench trial:

> 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. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Lyons-Hart v. Hart, 205 N.C. App. 232, 235, 695 S.E.2d 818, 821 (2010) (citation omitted).

VI. Defendant's Arguments

A. Rules of Construction of Insurance Policies

[2] Our Supreme Court stated an insurance policy is a contract, "[a]s with all contracts, the object of construing an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 9, 692 S.E.2d 605, 612 (2010) (citation and internal quotation marks omitted); *accord Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978) ("[T]he goal of [insurance policy] construction is to arrive at the intent of the parties when the policy was issued.").

"[T]he most fundamental rule [in interpreting insurance policies] is that the language of the policy controls." *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994). Any ambiguities in the insurance policy are "strictly construed against the insurer and in favor of the insured." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 73 (1986).

Our Supreme Court stated courts are to "construe[] liberally insurance policy revisions that extend coverage so as to provide coverage, whenever possible by reasonable construction," and "strictly construe against an insurance company those provisions excluding coverage under an insurance policy." *Harleysville Mut. Ins. Co.*, 364 N.C. at 9-10, 692 S.E.2d at 612 (citation and internal quotation marks omitted); *see State Capital Ins. Co.*, 318 N.C. at 542-43, 350 S.E.2d at 71 (1986) ("Exclusionary clauses are interpreted narrowly[,] while coverage

clauses are interpreted broadly to provide the greatest possible protection to the insured.").

If the insurance policy specifically defines a word or term, that definition governs its application. *York Indus. Ctr., Inc. v. Mich. Mut. Liab. Co.*, 271 N.C. 158, 162, 155 S.E.2d 501, 505 (1967) ("Since the word . . . is defined in the amended policy, it must be given that meaning, regardless of whether a broader or narrower meaning is customarily given to the term, the parties being free, apart from statutory limitations, to make their contract for themselves and to give words therein the meaning they see fit."). This Court stated, "all parts of an insurance policy are to be construed harmoniously so as to give effect to each of the policy's provisions." *Nationwide Mut. Ins. Co.*, 115 N.C. App. at 198, 444 S.E.2d at 667.

B. Duty to Defend/Duty to Indemnify

A policyholder claiming coverage under an enforceable insurance policy triggers two independent duties the carrier owes to the insured: the duty to defend and the duty to indemnify. *See Harleysville Mut. Ins. Co.*, 364 N.C. at 6-7, 692 S.E.2d at 610-11. Our Court has held: "the insured has the burden of bringing itself within the insuring language of the policy." *Kubit v. MAG Mut. Ins. Co.*, 210 N.C. App. 273, 283, 708 S.E.2d 138, 147 (2011) (citation and alteration omitted).

If the insured party meets this burden, the burden shifts to the insurer to "prove that a policy exclusion excepts the particular injury from coverage." *Id.* (citation omitted). If the insurer meets this burden, the burden shifts back to the insured to "prov[e] that an exception to the exclusion exists and applies to restore coverage." *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 189, 202, 494 S.E.2d 774, 783 (1998) (citation omitted).

Our Supreme Court examined the interplay between a duty to defend and a duty to indemnify in *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986) holding:

> Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial. *When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or*

> *not the insured is ultimately liable*. Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

Id. (emphasis supplied). An insurer is excused from its duty to defend when "the facts are not even arguably covered by the policy." *Id.* at 692, 340 S.E.2d at 378.

Our Supreme Court further explained an insurer's duty to defend in *Waste Management*: "Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside [of] coverage, or within a policy exception to coverage." *Id.* at 691, 340 S.E.2d at 377 (citation omitted).

Later in *Harleysville Mut. Ins. Co.*, the Court articulated a "comparison test" to read the complaint and the policies at issue "side by side" to determine whether an insurer has a duty to defend. *Harleysville Mut. Ins. Co.*, 364 N.C. at 6, 692 S.E.2d at 610. A court takes "the facts as alleged in the complaint . . . as true and compared to the language of the insurance policy. If the insurance policy provides coverage for the facts as alleged, then the insurer has a duty to defend." *Id.* at 7, 692 S.E.2d at 611.

This Court extended the "comparison test" from just allegations in the pleadings and the policy in *Waste Management* and *Harleysville Mut. Ins. Co.* to also include "facts learned from the insured and facts discoverable by reasonable investigation may also be considered." *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 638, 386 S.E.2d 762, 764 (1990).

This Court has held the insurer's duty to defend is

> broader than the duty to indemnify *only* in the sense that an unsubstantiated allegation requires an insurer to defend against it so long as the allegation requires an insurer to defend against it so long as the allegation is of a covered injury; however, even a meritorious allegation cannot obligate an insurer to defend if the alleged injury is not within, or is excluded from, the coverage provided by the insurance policy.

Kubit v. MAG Mut. Ins. Co., 210 N.C. App. 273, 279, 708 S.E.2d 138, 145 (2011) (citation and quotation marks omitted). "Because the duty to defend may be broader than the duty to indemnify we address the duty to defend because if it fails, so too does the duty to indemnify." *N.C.*

Farm Bureau Mut. Ins. v. Phillips, 255 N.C. App. 758, 764, 805 S.E.2d 362, 366 (2017).

C. Decedent's Classification as an Employee

Defendant-estate argues the trial court erred in classifying Decedent as an "employee." Defendant asserts Decedent is properly classified as a volunteer, which falls outside of the Employer's Liability Exclusion, in Young's general liability policy. Defendant further asserts Young's conflicting testimony he was not going to pay Decedent for her work. OSH investigator Laurie testified that during his investigation on 8 and 9 October 2019, Young had told him Decedent had worked for him several days in the past years, he had paid her for the work, and he was going to pay her for the day of the accident. Later on 9 October 2019, after receipt of notice of OSH violations, Young stated for the first time he was not going to pay Decedent for her work that day and asserted Decedent was a volunteer on the jobsite.

The trial court rejected this claim as not credible and found Decedent was working for Young for wages on the day of the accident. Defendant's argument is contrary to longstanding precedent: "Where the trial judge sits as the trier of the facts, his findings of fact are conclusive on appeal when supported by competent evidence. This is true even though there may be evidence in the record to the contrary which could sustain findings to the contrary." *General Specialties Co. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979) (citations omitted).

The trial judge passed upon the credibility of Young and Laurie's testimonies. "The appellate court cannot substitute itself for the trial judge in this task." *Id.* (citation omitted). Competent evidence supports the trial court's finding and conclusion Decedent was an employee and not a volunteer. Defendant's argument is overruled.

D. Temporary Worker Classification

Defendant argues the trial court erred in not classifying Decedent as a "temporary worker" for Young. The policy also excludes a "temporary worker" from in the policy's exclusions from coverage. Under Young's general liability policy, a "temporary worker" is defined as "a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions."

The trial court also concluded Decedent was not and had not been "furnished to" Young by a third party. The trial court found Young had no permanent employees out on leave, nor did Young have any seasonal or short-term workload conditions, requiring additional help from

Decedent or anyone else. Young had hired Locklear Roofing to do the work and to install the materials. The policy does not define "furnish" or "furnished to," nor does any precedent binding upon this Court define either term.

Defendant asserts the language "furnished to" does not require a third party to provide the labor and further asserts, if this Court requires action by a third party, Decedent was "furnished" to Young by Blount. Defendant cites *Canal Ins. Co. v. Nat'l House Movers, LLC*, 777 S.E.2d 418, 419-20 (S.C. Ct. App. 2015), wherein a company with one permanent employee was contacted by a third party, who asked if the individual needed help on a specific project. The company needed help, and the third party contacted another individual and asked them to help on the job. *Id.* That individual contacted by the third party went to the jobsite, worked, and was injured. *Id.* The individual filed a lawsuit against the company. The company sought a declaratory judgment holding the individual was an employee, who was barred from coverage, and not a temporary worker. *Id.*

The South Carolina Court of Appeals laid out a two-part analysis: 1. whether the individual was hired to "meet seasonal or short-term workload conditions;" and, 2. whether the individual the temporary worker was "furnished to" the insured. *Id.* at 421. While the Court held to "furnish" needs third party involvement, the phrase was ambiguous, and the ambiguity was to be construed in favor of coverage. *Id.* at 424.

Plaintiff also cites to other persuasive authorities to support its position "furnished to" specifically requires third-party involvement. We need not decide whether "furnished to" requires third-party involvement. Decedent was not there to meet the seasonal or short-term workload conditions for Young. Decedent was there because she needed to earn money to repair her car. Young testified and the trial court found and concluded Young had no short-term work conditions requiring additional help from Decedent. *General Specialties Co.*, 41 N.C. App. at 275, 254 S.E.2d at 660. Defendant's argument is overruled.

E. Competent Findings

Defendant asserts the trial court erred because no competent findings support its conclusion Decedent was an employee. Young testified he had no intention to pay her and the OSH investigation is inapplicable because OSH uses a different definition of "employee," as compared with its use in the general liability policy. As we held above, the trial court heard conflicting evidence, weighed the credibility, found, and concluded Young intended to pay Decedent for her work that day.

While OSH may use a different definition of "employee" from that used in the policy, the trial court did not declare Decedent was an employee based on Young's admission in the OSH settlement. The trial court instead focused on Young's interactions with Laurie concerning if he was going to pay Decedent, to examine Defendant and Young's claims of whether Decedent was on the job site that day as a volunteer. Defendant's argument is overruled.

VII. Conclusion

Plaintiff's cross-appeal on a denial of summary judgment is not properly before this Court. *WRI/Raleigh, L.P.*, 183 N.C. App. at 252, 644 S.E.2d at 246-67. Decedent was not either a "volunteer" or "temporary employee" for Young. The trial court heard and reconciled the evidence and concluded Decedent was an "employee" of Young.

The trial court made supported and competent findings to support its declaratory judgment concluding the policy's Employer's Liability Exclusion bars coverage for all of Defendant's claims against Young and Plaintiff has no duty to defend or indemnify Young. The judgment of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges WOOD and MURRY concur.

KENNETH W. PREVETTE, JR. AND CAROLL P. PREVETTE, PLAINTIFFS
v.
THOMAS ELSNER AND JOHANNA ELSNER, DEFENDANTS

No. COA24-633

Filed 7 May 2025

1. Real Property—restrictive covenants—action to enforce as real covenants at law—alleged as equitable servitudes—no third-party standing

In a case about two neighboring tracts of land that were once part of a larger property, where the owners of the original property placed certain restrictions on the tract it sold to plaintiffs, leaving the remaining land unrestricted until it sold a portion of that land to defendants subject to the same restrictions placed on plaintiffs' tract, the trial court erred in granting plaintiffs' motions for preliminary injunction and summary judgment—alleging defendants violated the restrictions—because plaintiffs lacked standing to bring an action to enforce the restrictions as real covenants at law. First, plaintiffs' argument that each party's tract was subject to "mutual restrictive servitudes, enforceable by either [party]" alluded to a claim of equitable servitudes, not covenants at law. Second, plaintiffs failed to adequately address the issue of the privity of estate required to enforce a covenant at law.

2. Real Property—restrictive covenants—action to enforce as equitable servitudes—no third-party standing

In a case about two neighboring tracts of land that were once part of a larger property, where the owners of the original property placed certain restrictions on the tract it sold to plaintiffs, leaving the remaining land unrestricted until it sold a portion of that land to defendants subject to the same restrictions placed on plaintiffs' tract, the trial court erred in granting plaintiffs' motions for preliminary injunction and summary judgment—alleging defendants violated the restrictions—because plaintiffs lacked standing to bring an action to enforce the restrictions as equitable servitudes. Specifically, plaintiffs failed to show that the original property owners intended for the restrictions to bind defendants' property for the benefit of plaintiffs' property, especially since the restrictions on the defendants' tract were not mentioned in plaintiffs' deed (since those restrictions came later), and all of the remaining land was left unrestricted when plaintiffs purchased their tract. Further, there

was no evidence of a common scheme of development or a general plan for uniform restrictions across all of the original larger property.

Appeal by Defendants from order entered 29 January 2024 by Judge David L. Hall in Rockingham County Superior Court. Heard in the Court of Appeals 29 January 2025.

Higgins Benjamin, PLLC, by Attorney John F. Bloss, for Plaintiffs–Appellees.

Bell, Davis & Pitt, PA, by Attorneys Bradley C. Friesen & Carson D. Schneider, for Defendants–Appellants.

MURRY, Judge.

Thomas and Johanna Elsner (Defendants) appeal from an order granting Kenneth and Caroll Prevette's (Plaintiffs) motion for summary judgment. Defendants argue that Plaintiffs lack standing to pursue this cause of action, and thus, the trial court lacked subject-matter jurisdiction to grant their motion for summary judgment. For the reasons below, this Court agrees with Defendants and vacates the trial court's judgment.

I. Background

Since the 1990s, Paul and Sharon Knight have owned and resided on land located at 645 Troublesome Road in Reidsville, North Carolina (Knights' Property). The Knights' Property is now 27.48 acres but once totaled approximately 54 acres (Original Property). The Original Property consisted of two larger tracts: a 5-acre tract (Northern Tract) and a 49.085-tract southeast of the Northern Tract (Southern Tract).[1] On 6 April 2021, the Knights recorded a plat combining the Northern Tract with a portion of the Southern Tract (April 2021 Plat), creating a 7.742-acre tract (April 2021 Tract). The April 2021 Plat indicates that the Knights own the property adjacent to the April 2021 Tract but does not depict it. The Knights' Property consists of the April 2021 Tract and the

1. On 13 December 1995, Paul Knight received a deed (1995 Deed) for the Northern Tract. The 1995 Deed does not contain any restrictions on the Northern Tract. On 7 January 1999, the Knights acquired the Southern Tract. The Knights recorded a survey plat of the Southern Tract (January 1999 Plat) and referenced it as the property description in the deed (January 1999 Deed). The January 1999 Plat indicates that Paul Knight owns the Northern Tract adjacent to the Sothern Tract but does not depict the Northern Tract beyond showing its boundary with dashed lines. The January 1999 Deed does not include any restrictions on the Southern Tract.

remainder of the Southern Tract. The April 2021 Plat does not indicate any restrictions on the Knights' Property.

In 2021, Plaintiffs decided to purchase a portion of the Knights' Property to build a home. Before doing so, the Knights provided Plaintiffs with a list of the restrictive covenants they would later include in Plaintiffs' deed. On 28 June 2021, the Knights recorded a survey plat creating a 7.004-acre tract (Plaintiffs' Tract) within the Knights' Property, titled "Survey Plat for Kenneth W. Prevette and wife Caroll P. Prevette" (Plaintiffs' Plat). Plaintiffs' deed would later reference Plaintiffs' Plat as its property description. Plaintiffs' Plat indicates that Plaintiffs' Tract is surrounded on all sides by the Knights' Property, excluding road frontage. Plaintiffs' Plat does not plat the Knight Property together with the Plaintiffs' Tract, depict any other subdivided lots, or indicate any restrictions on the Plaintiffs' Tract. The Knights would later place restrictions on the Plaintiffs' Tract. On 27 August 2021, Plaintiffs purchased Plaintiffs' Tract (Plaintiffs' Property).[2] Plaintiffs' purchasing deed states the following restrictions:

> [N]o mobile homes . . . [may] be placed on the real property[;] no residential structure [may] be l[e]ss than 1500 sq. f[ee]t[;] no unlicensed vehicles . . . [are] allowed . . . on the real property[;] the siding of an[y] additional structure should match the shell of the residential structure[;] no burning of trash [is] . . . permitted[;] the burning of yard waste and fire wood [is] . . . permitted within a suitable fire pit.

Sometime in 2022, Defendants approached the Knights about purchasing the April 2021 Tract (First Tract). At some point, the Knights "removed three mobile homes" from their property. On 12 April 2022, the Knights conveyed First Tract to Defendants. Defendants' deed included the same restrictions as in Plaintiffs' deed. On 28 April 2022, the Knights recorded a new survey plat in the Rockingham County Register of Deeds for a new 3.095-acre tract east of Plaintiffs' Property between First Tract and the remaining portion of the Knights' Property (Second Tract). On 20 May 2022, the Knights conveyed Second Tract to Defendants. Unlike

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2. Prior to conveying to Plaintiffs on 27 August 2021, the Knights had never conveyed any portion of their Original Property. After conveying to Plaintiffs, all of the remaining Original Property remained unrestricted, including the land that the Knights would later restrict upon conveying to Defendants. As of August 2021, there were only three survey plats of record: the 1999 Plat, the April 2021 Plat, and the June 2021 Plat—none of which mentioned any restrictions.

Defendant's first deed, Defendants' second deed did not include any restrictions. On 8 September 2022, Defendants recorded a plat combining First and Second Tracts, resulting in a total lot size of 10.837 acres (Defendants' Property). The record does not indicate that the Knights placed restrictions on any other portion of the Knights' Property.

Sometime thereafter, Defendants opened a recreational vehicle (RV) park on their land called "Little Birds Tiny Farm." On 9 February 2023, Plaintiffs sued to enjoin the park's operation, alleging that it violates the restrictive covenants. Plaintiffs filed motions for a preliminary injunction and summary judgment in their favor, which the trial court granted on 30 August and 2 February 2024, respectively. Defendants timely appealed both on 1 March 2024.

II. Jurisdictional Analysis

Plaintiffs substantively argue that Defendants violate the restrictive covenants by operating their RV park on Defendants' Property. Before reaching these merits, however, we must first determine whether Plaintiffs have standing to bring this action because "substantive issues cannot be addressed unless the[y] . . . ha[ve] the capacity to do so." *Beech Mtn. Prop. Owners' Ass'n v. Current*, 35 N.C. App. 135, 136 (1978). Defendants argue as much. This Court agrees with Defendants and vacates the trial court's orders on that ground.

A. Third-Party Standing

We review *de novo* questions of jurisdictional standing "to make a legal claim or seek judicial enforcement of a duty or right," *Fearrington v. City of Greenville*, 386 N.C. 38, 45 (2024) (quoting *Comm. to Elect Dan Forest v. Emps. PAC*, 376 N.C. 558, 564 (2021)), which may be raised at any time in the litigation process, *McCrann v. Pinehurst, LLC*, 225 N.C. App. 368 (2013). To assert standing, a party must have "a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Woodring v. Swieter*, 180 N.C. App. 362, 366 (2007). Standing is a threshold matter and "necessary prerequisite to the court's proper exercise of subject[-]matter jurisdiction." *Creek Pointe HOA v. Happ*, 146 N.C. App. 159, 164 (2001). "[T]he party invoking jurisdiction . . . ha[s] the burden of proving the elements of standing," *Blinson v. State*, 186 N.C. App. 328, 333 (2007)—here, those of third-party standing.

North Carolina's common law allows a property owner to sell his land subject to any restrictions "that he sees fit," so long as they do not contradict public policy. *Sheets v. Dillon*, 221 N.C. 426, 431 (1942) (citing 7 R.C.L. *Restrictive Covenants* § 30 (1929)). These restrictions are often

included in the conveyance "as either personal . . . or real covenants that . . . run with the land." *Runyon v. Paley*, 331 N.C. 293, 299 (1992). A real covenant "creates a servitude upon the land subject to the covenant (the servient estate) for the benefit of another parcel of land (the dominant estate)." *Cummings v. Dosam, Inc.*, 273 N.C. 28, 32 (1968). The dominant estate may enforce restrictive covenants against the servient estate regardless of "whether [or not] the[ir] owners are the original covenant[ors] . . . or successors in interest." *Runyon*, 331 N.C. at 299.

In keeping with these larger principles, our courts recognize instances where third parties may enforce restrictive covenants if they have standing "in law or equity" to do so. *McCrann*, 225 N.C. App. at 372. As third parties seeking enforcement, Plaintiffs "assume[ ] the burden of showing" they have standing by demonstrating that the restriction is "enforceable by another grantee." *Beech Mtn.*, 35 N.C. App. at 137. Because restrictive covenants hinder "the free and unfettered use of land," however, we have long favored their "strict[ ] constru[ction] so as not to broaden the limitation on the use." *Reed v. Elmore*, 246 N.C. 221, 224 (1957). We similarly apply "[t]his rule of strict construction" to the threshold issue of Plaintiffs' purported standing. *Sleepy Creek Club, Inc. v. Lawrence*, 29 N.C. App. 547, 553 (1976). This canon resolves "all ambiguities" in restrictive covenants in "favor of unrestrained" land use. *Steiner v. Windrow Ests. HOA*, 213 N.C. 454, 457 (2011).

In the case *sub judice*, Plaintiffs do not own the dominant estate; they are instead "strangers to the contract" that contains the restrictions they seek to enforce. *Lawrence*, 29 N.C. App. at 553. To enforce these restrictions as third parties under North Carolina common law, Plaintiffs must establish, in relevant part, either (1) contractual privity to a covenant at law or (2) the covenantors' original intent that Plaintiffs benefit as successors in interest to an equitable servitude. *See Runyon*, 331 N.C. at 299. If the former, Plaintiffs must show that the covenant's mutual burdens and benefits to both Properties "touch and concern [those] land[s]." *Id.* at 310. If the latter, however, Plaintiffs need only show that the restrictive "burden touches and concerns" Defendant's Property. *Id.*

B. Real Covenant

[1] Real covenants at law "rest[ ] squarely upon the terms and conditions of the contract being set out in grantee's chain of title." *Reed*, 246 N.C. at 235. A restrictive covenant is a type of:

> Real covenant that runs with the land of the dominant and servient estates only if (1) the subject of the covenant

> touches and concerns the land, (2) there is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and (3) the original covenanting parties intended the benefits and burdens of the covenant to run with the land.

Runyon, 331 N.C. at 299–300.

1. Touch & Concern Land

A covenant need not have a physical effect on the land to touch and concern it; rather, "[i]t is sufficient that the covenant have some economic impact on the parties' ownership rights." *Id.* at 300. In essence, the covenant must "affect the legal rights of the covenanting parties as landowners." *Id.* We recognize that a restriction "limiting the use of land clearly touches and concerns the estate burdened with the covenant because it restricts the owner's use and enjoyment of the property and thus affects [its] value." *Id.* at 301 ("[T]he nature of the restrictive covenants at issue in this case (building or use restrictions) is strong evidence that the covenants touch and concern the dominant and servient estates.").

2. Privity of Estate

Where the parties lack the contractual privity ordinarily required to enforce a contract, this Court accepts privity of estate "as a substitute for privity of contract." *Runyon*, 331 N.C. at 301–02. To show privity of estate, we "adhere to the rule that a party seeking to enforce a covenant as one running with the land at law must show the presence of both horizontal and vertical privity." *Id.* at 303. Horizonal privity is the "privity of estate between covenantor and covenantee at the time the covenant was created" and can be shown with "some 'connection of interest' between the original covenanting parties, such as, here, the conveyance of an estate in land." *Id.* (citing Restatement (First) of Property § 534 (Am. L. Inst. 1944)). Vertical privity is the "privity of estate between the covenanting parties and their successors in interest" and can be shown by a "succession of interest between the original covenanting parties and the current owners of the dominant and servient estates." *Id.*

3. Intent of Parties

Land-use restrictions "create a personal obligation or impose a servitude upon the land enforceable by" third parties as determined "by the intention of the parties at the time the deed containing the restriction was delivered." *Stegall v. Housing Auth. of Charlotte*, 278 N.C. 95, 100 (1971). The question of the original parties' intent "is one that the court must decide by applying our well-established principles of contract

construction." *Runyon*, 331 N.C. at 305. It "must be ascertained from the deed itself, but when the language used is ambiguous it is proper to consider the situation of the parties and the circumstances surrounding their transaction." *Stegall*, 278 N.C. at 100. An instrument could be intended to benefit a party who is not expressly mentioned in the language of conveyance. *See*, *e.g.*, *Reed*, 246 N.C. at 221 (holding that a covenant was intended to benefit a party not mentioned in the restriction). Intent to benefit "may not be established by parol." *Stegall*, 278 N.C. at 100. Affidavits about the parties' intent are "inadmissible parol evidence to add or vary the terms of the instrument" and "[in]competent evidence" to satisfy the intent requirement. *Runyon*, 331 N.C. at 311.

Plaintiffs cannot enforce the restrictions as a real covenant at law because they fail to adequately specify an argument on those grounds. Plaintiffs argue that "the Knights' conveyances impose mutual restrictive servitudes on Plaintiffs' and Defendants' tracts, enforceable by either of them" and that, "alternatively, Plaintiffs are entitled to enforce the covenants against Defendants as an equitable servitude." This language alludes to a claim of covenants at law; however, Plaintiffs' argument entangles the two pathways for standing. Asserting that a conveyance imposed "mutual restrictive servitudes" to preserve the "uniformity of conditions imposed with respect to a given area" indicates an equitable servitude, not a covenant at law. *See Sedberry v. Parsons*, 232 N.C. 707, 711 (1950). Thus, while Plaintiffs may have intended to allege that they had standing to enforce the deed restrictions as covenants at law, they failed to do so in accordance with established legal precedent.

Plaintiffs also do not adequately address the issue of the required privity to enforce a covenant at law. Contrary to their assertion, they are not "original grantees of the deed[ ] containing the restriction[ ]" applicable to Defendants' Property. They instead focus on whether the Knights intended to impose the restrictions that benefit Plaintiffs and Defendants and are enforceable by both of them. *Runyon*, 331 N.C. at 309. This is further evidence that Plaintiffs base their standing on the theory of equitable servitude alone. Thus, any indication that Plaintiffs intended to argue that the restrictions may be enforced as covenants at law is hereby abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). We limit our review to whether Plaintiffs have standing to enforce the covenants as equitable servitude.

C. Equitable Servitude

[2] A covenant unenforceable by law may "be binding in equity, even to the extent of fastening a servitude." *Runyon*, 331 N.C. at 309. A party

seeking to enforce a real covenant as an equitable servitude must show "(1) that the covenant touches and concerns the land, and (2) that the original covenanting parties intended the covenant to bind the person against whom enforcement is sought and to benefit the person seeking to enforce the covenant." *Id.* at 310.

1. Touch & Concern Land

Under the theory of equitable servitude, we apply the same analysis to whether a covenant "is of such a *character* that it touches and concerns the land" as we do to a covenant at law. *Id.* at 309. Plaintiffs must also show the covenant "affects [both] the dominant estate" and their own land due to its "close proximity." *Id.* Here, the restriction at least runs with the land because Defendants' restrictions clearly limit the use of their land and affect Plaintiffs' land due to their close proximity. *Id.* at 301.

2. Intent of Parties

As nonparties to the original covenant, though, Plaintiffs also "must show that the original covenanting parties intended that the covenant bind" Defendants against them. *Id.* at 311. Our courts generally presume that only the original covenanting parties may enforce covenants, *Stegall*, 278 N.C. at 101, but a plaintiff may rebut this presumption with evidence that "(1) the covenanting parties intended that the covenant personally benefit the party seeking enforcement, or (2) the covenanting parties intended that the covenant benefit property in which the party seeking enforcement holds a present interest." *Runyon*, 331 N.C. 293, 311. Evidentiary intent includes a common scheme of development, *see Higdon v. Jaffa*, 231 N.C. 242, 247 (1949), a succession of interest retained by the covenantee, *see Sheets*, 221 N.C. at 431, or the covenantor's stated intent to *specifically* benefit the property owned by a complainant, *see Lamica v. Gerdes*, 270 N.C. 85, 89–90 (1967). For any of the above, intent "may not be established by parol," *Stegall*, 278 N.C. at 100, which includes affidavits about the parties' intent, *Runyon*, 331 N.C. at 311.

Here, the Plaintiffs are not "successors in interest" because they are not parties to the original covenants that they want to enforce. To meet this element, Plaintiffs would have to "succeed" to the interest created by the Knights' benefitted estate. But that interest did not exist until 12 April 2022, when the Knights conveyed the Defendants' First Tract subject to restrictions creating the dominant and servient estates. *See Sheets*, 221 N.C. at 431 (holding that plaintiff had standing because a "right or interest reserved in a conveyance . . . [is] effective . . .against all who deraign title through the grantee"). The restrictions also lack any

express statement of intent to benefit Plaintiff's property. *See Lamica*, 270 N.C. at 90 (holding that plaintiffs had standing because developer "clearly and distinctly expressed an intention to impose the restrictions on the land[ ] and to allow any[one] . . . owning any real property . . . to enforce the[m] . . . *inter se*").

Because Plaintiffs fail to meet the first two enforcement grounds, we focus on whether the evidence indicates a common scheme of development. In this case, "substantially common restrictions" must "apply to all similarly situated lots." *Dill v. Loiseau*, 263 N.C. App. 468, 471 (2019). A plaintiff must show "proof of a general plan or scheme for the improvement of property," "covenants . . . entered into as part of [that] general plan," and "reference to [that] . . . plan or scheme a[s] the covenant . . . entered into the consideration of his purchase." *Humphrey v. Beall*, 215 N.C. 15, 18 (1939). We assess whether a general plan for the development or improvement of the various lots exists by determining "whether substantially common restrictions apply to all lots of like character or [which are] similarly situated." *Sedberry*, 232 N.C. at 711.

When Plaintiffs purchased the Plaintiffs' Tract from the Knights on 27 August 2021, no other portion of the Knights' property had been conveyed to any other purchaser. The Knights included restrictions in Plaintiffs' deed but retained the surrounding property as unrestricted until later conveying a portion to Defendants. The unsold, unrestricted remainder still belongs to the Knights. Plaintiffs cannot show that the Knights prearranged a general plan of uniform development with intent to improve the land. Additionally, the Plaintiffs' Plat, which served as Plaintiff's property description in their deed, does not include a neighborhood map which could indicate the Knights' intention of establishing a common plan or scheme of development. Plaintiffs did not purchase their property with any notice of multiple lots on a single plat or any plan to subdivide the Knights' property surrounding their tract. *See Rice v. Coholan*, 205 N.C. App. 103, 113–14 (2010) (holding that general plan of development existed where 14 of 18 total lots in a subdivision "contained the same or similar restrictions" despite "deeds to four lots [not being] similarly restricted" because "the properties were sold in accordance with a map"). With respect to Plaintiffs' conveyance, the unrestricted remainder precludes any "mutuality of restrictions." *Sedberry*, 232 N.C. at 711. Plaintiffs' argument that similar restrictive covenants exist on "at least five of the home and/or lots . . . in the immediate vicinity of" the parties' tracts is irrelevant and unavailing, as these properties were never part of the Knights' Property and their restrictions are immaterial to our analysis.

Plaintiffs mistakenly invoke *Reed v. Elmore* to argue that the Knights' imposition of identical covenants on Plaintiffs' and Defendants' deeds shows intent to impose the restrictions on all subsequent properties conveyed. *See Reed*, 246 N.C. at 226 (concluding that plaintiff could enforce a covenant against defendant despite lack of express provision to that effect). In *Reed*, the original grantor produced a map subdividing her 154-acre tract into 7 lots. *Id.* at 222. The original grantor conveyed Lot 3 to plaintiff but retained Lot 4. The single instrument conveying Lot 3 included identical restrictions on Lot 3 and Lot 4. *Id.* at 223. Later, the defendants purchased Lot 4. *Id.* at 223. The *Reed* Court held that the plaintiff could enforce the restrictions against the defendants because the original grantor restricted Lot 4 at the time she conveyed Lot 3. *Id.* at 232. The Court "interpret[ed] the language which the parties chose to express [their] intention" at the time the sale to the plaintiff "was consummated." *Id.* at 224. It reasoned that "[t]he deed from [the original grantor] to plaintiff . . . uniform[ly] limit[ed] . . . the use of these two lots" and that the deed was in defendant's chain of title. *Id.* at 229–30. The Court also noted "the importance of imposing the restrictions on the grantor in the deed under which the grantee claims." *Id.* at 227. The deed's restrictions showed that the owner had purchased the land in reliance on an express restriction on the adjacent tract and "protected himself" by including it in the deed. *Id.* at 230. ("Being an interest in land, registration of the instrument creating the right was necessary if the owner would protect himself against subsequent purchasers for value.").

Here, like the original grantor in *Reed*, the Knights retained all adjacent property after conveying the Plaintiffs' tract, including property they would later convey to Defendants. Unlike the restrictions in *Reed*, however, the restrictions on Defendants' property go unmentioned in Plaintiffs' deed. When conveying the property to Plaintiffs, the Knights did not insert simultaneous restrictions on the property later conveyed to Defendants. Plaintiffs purchased their lot from the Knights on 27 August 2021 without any restrictions on any adjacent Knight property at all, much less any against which Plaintiffs could claim enforcement rights. Unlike the parties in *Reed*, Plaintiffs did not "protect" themselves from future happenings on adjacent property at the time of conveyance. In theory, the Knights could have kept the retained land unrestricted in perpetuity.

Additionally, unlike *Reed*'s original grantor, Plaintiffs show no evidence that the Knights divided the lots as a common scheme of development. The Knights never recorded a survey plat showing any original purpose of development. Plaintiffs instead reference a survey

plat prepared only by Defendants eight months after Plaintiffs' purchase. The evidence does not support Plaintiffs' assertion that the Knights and Defendants intended Plaintiffs to have any right to enforce Defendants' covenants as part of a common scheme of development. Thus, Plaintiffs have failed to show that they may enforce the covenants as equitable servitudes.

Based on these considerations, Plaintiffs lack standing to enforce Defendants' covenants as either covenants at law or equitable servitudes. Therefore, this Court finds no jurisdiction to hear Plaintiffs' claims and holds that the trial court erred by granting their motions for preliminary injunction and summary judgment. Because we find Plaintiffs' lack of standing dispositive, we need not address whether Defendants' conduct violates the restrictive covenant.

III. Conclusion

For the reasons discussed above, this Court dissolves the preliminary injunction and vacates the trial court's judgment for lack of jurisdiction.

VACATED.

Judges ARROWOOD and GORE concur.

RICHARD RIGGAN, JR., PLAINTIFF
v.
CHELSEA ANDREWS, DEFENDANT

No. COA24-649

Filed 7 May 2025

Child Custody and Support—custody—motion for appointment of parenting coordinator—Civil Procedure Rule 11 sanctions—findings of fact insufficient—vacated and remanded

In a child custody action between the parents of a minor child—in which the trial court had previously entered a permanent custody order (by consent of the parties) awarding sole legal and physical custody to the mother (defendant) with the option for the parties to "mutually consent" to a liberal visitation schedule for the father (plaintiff)—where defendant filed a motion for a parenting coordinator, alleging the matter was high conflict, and plaintiff filed a motion for sanctions in response, alleging that the request for a parenting

coordinator was made in retaliation and in bad faith, the court's findings of fact did not support its denial of defendant's motion for a parenting coordinator or its imposition of sanctions on defendant upon a finding of bad faith. Accordingly, the order was vacated and the matter was remanded for entry of a new order with findings of fact sufficient to support the resolution of the parties' motions.

Judge FREEMAN concurring in the result only.

Appeal by Mother from order entered 11 December 2023 by Judge Julie L. Bell in Wake County District Court. Heard in the Court of Appeals 13 February 2025.

No brief filed on behalf of Richard T. Riggan, Jr., pro se plaintiff-appellee.

Law Offices of Stephanie J. Brown, by Stephanie J. Brown, for defendant-appellant.

ARROWOOD, Judge.

Chelsea Andrews ("Mother") appeals from an order entered 11 December 2023 denying her motion to appoint a parenting coordinator and granting Richard Riggan's ("Father") motion for sanctions against Mother. For the following reasons, we vacate and remand to the trial court for actions consistent with this opinion.

I. Background

Father and Mother were never married but have one child ("T.R.") together, born on 27 March 2015. On 21 January 2020, Father filed a complaint for custody in Wake County. He alleged that the parties had previously entered into a parenting agreement, which provided for Father to have visitation rights every other weekend. On 28 February 2020, Mother filed her Answer and Counterclaim for child support. On 1 May 2020, Father filed an emergency custody motion for T.R. That same day, a hearing regarding child custody took place in which the parties resolved their dispute and a temporary order was entered where Father received visitation with T.R. every weekend until a subsequent hearing for permanent custody could take place.[1]

1. The motion for emergency custody and temporary order are not in our record but were referenced in the Consent Order for Temporary Child Custody.

The hearing on a permanent custody order was to take place on 20 July 2020, however, the hearing was continued because Father had not received timely discovery from Mother. Although the hearing was postponed through an order for continuance, there was no extension of the visitation agreement agreed upon on 1 May 2020. On 13 August 2020, the trial court entered a Consent Order for temporary custody order in which both Mother and Father had temporary legal custody of T.R. and Mother had temporary physical custody of T.R. Father received visitation with T.R. every other weekend. The parties were ordered to exchange the child for visitation at Triangle Town Center. On 7 October 2020, a Consent Order Modifying Temporary Custody Order was entered adding more detailed provisions to allow Father to call or video-chat T.R. every Monday, Wednesday, and Friday and modified the pick-up time and location for exchange of the child for Father's visitation weekends with T.R.

On 2 September 2021, the trial court entered a Permanent Order Child Custody and Child Support (Permanent Custody Order) by consent of the parties.[2] The parties waived findings of fact and conclusions of law. The Permanent Custody Order awarded Mother sole legal and physical custody of T.R., but did allow for the parties to "mutually consent" to a liberal visitation schedule for Father. Father and Mother were to only communicate in writing, via email or text-message. This order provided that "neither party is seeking child support from the order" and did not award child support but did require the parties each to pay half of the child's uninsured medical expenses.

On 4 and 5 January 2023, the trial court held a hearing on "Review of Custody from the November 18th hearing" and entered an "Order Regarding Custody" on 17 March 2023.[3] The Order Regarding Custody does not mention a motion to modify a prior order or any change of circumstances but includes findings about events extending back to 2016, before the parties began living separately. In this order, after making

2. The parties signed this Order on 27 July 2021 but the trial court signed it on 1 September 2021 and it was filed the next day.

3. Our record does not include any motion for modification of child custody and there is no document indicating why the trial court was holding a hearing regarding custody on 18 November, apparently in 2022, although the Order does not mention the year. Therefore, we do not know what happened to cause the trial court to "review" custody in 2023, and the findings of fact in the order do not mention any dates of the events noted after 2019.

several findings regarding the initial temporary custody orders, the trial court found as follows:

> 11. Ultimately when Father was pro se and Mother had counsel the parties entered into a Permanent Order for Child Custody and Child Support.[4] Said Order provided that Mother had sole legal custody of the minor child and sole physical custody of the minor child, but the parties may mutually consent to liberal visitation for Father pursuant to a schedule to be determined by the parties.
>
> 12. Currently there is an Order that grants Mother custody of the minor child and Father telephone calls until this hearing on the merits could take place.
>
> 13. Mother testified that Father abused her in 2016, 2017, 2018 and 2019 when they were together.
>
> 14. Mother has allowed Father to have unsupervised visitation with the minor child in the past.
>
> 15. Mother does not believe that [T.R.] should have a relationship with his dad.
>
> 16. Mother testified that she is concerned that her son will grow up to be like his father.
>
> 17. Mother has told Father that she does not want him to be around the minor child, and that she has someone who can fill his shoes.
>
> 18. Mother would like her current boyfriend to be able to adopt [T.R.] and has asked Father to sign over his rights.
>
> 19. Mother initially denied she wanted her current boyfriend to adopt [T.R.] but ultimately admitted she lied under oath.
>
> 20. Mother has told Father he will not see the minor child.
>
> 21. Besides Mother, Father has also engaged in domestic violence with his wife.

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4. This finding refers to the Permanent Custody Order entered in September 2021. Both parties were represented by counsel when the first custody orders were entered, specifically the Consent Order for Temporary Child Custody in August 2020 and the Consent Order Modifying Temporary Child Custody in October 2020.

22. On an occasion when Father was angry with Mrs. Riggan and his stepdaughter he threated to flattened (sic) the step daughter's tires on her car.

23. Later three out of four of the stepdaughter's tires on her car flattened.

24. Father has told his wife that "a restraining order would not stop him".

25. Father threatened to kill his wife and said he would set her parents' trailer on fire.

26. Father has completed the Dose program and says he learned a lot including how to walk away when he is angry.

27. Father has called women the B-word while [T.R.] is present.

28. Father has argued and hit Mother while [T.R.] was present.

29. No evidence was presented about Father ever hitting the minor child.

30. Father has expressed racist views regarding teammates of the minor child.

31. The parties are capable of complying with the Court's Order.

32. The parties are fit and proper persons to have the custodial roles contained herein.

33. The parties do not communicate well and have not shown the ability to co-parent together.

The trial court granted Mother sole legal and primary physical custody of the child and granted Father visitation every other weekend starting on 19 May 2023, from Friday after school until Sunday at 3:00 p.m., with custodial exchanges to occur either at school or at Time Together, a supervised visitation facility. Because "the minor child has not seen Father for a substantial period of time," his visitation was phased in with a series of four visits of three hours each, starting on 25 March 2023. The Order allowed each party telephone contact with the child for at least 10-15 minutes once a week if the child was in the care of the other for at least seven days, with the time to be agreed by use of Our Family Wizard or at 7:30 p.m. on Wednesdays if the parties did not agree. The parties

were to use Our Family Wizard to communicate and inform the other of the child's extracurricular activities.

On 16 June 2023, Mother filed a motion to appoint a parenting coordinator. In her motion, Mother alleged that the parties "are in a high conflict case and continue to have ongoing disputes since the entry of the Permanent Custody Order on this matter. The Father has filed numerous Motion's (sic) for Contempt and Mother wishes to reciprocate with her own Motion's (sic) due to the ongoing conflicts."[5] She also alleged that "without the appointment of a Parenting Coordinator, the parties will remain in conflict and will continue to use the court's limited resources and time to address pending issues. She alleged that "a parenting coordinator would be able to diffuse (sic) issues between the parties and without one, the parties would not be able to move forward in any positive way without involving the court."

In response, on 20 July 2023, Father filed a motion for sanctions and attorney's fees, alleging that Mother made her motion for a parenting coordinator in retaliation against Father and in bad faith. Father also made allegations about Mother's counsel's communications with him to find out if he would consent or object to the appointment of a parenting coordinator before filing the motion. He objected, but Mother then sent in a calendar request for the hearing "without consulting with [Father's] counsel regarding the date requested" but Mother's counsel had failed to note on the request that Plaintiff's counsel objected to the date requested. Father's motion also alleged that

> 10. In Defendant's Motion for a Parenting Coordinator, Defendant indicated that she was only filing her motion as retaliation for Plaintiff's Show Cause Motions against her.
>
> 11. Defendant's Motion was made in bad faith.
>
> 12. Furthermore, the "pending issues" as stated in the Defendant's Motion are solely linked to the Defendant's continual violations of the Court's Permanent Custody Order . . . .

5. We note that our record does not include any motions filed by Father to hold Mother in contempt *before* the Motion for appointment of Parenting Coordinator, but Father's motion for Sanctions alleges that he had "filed 3 Motions for an Order to Show cause since the entry of the parties' March 28, 2023 Order regarding custody" and an Order to show cause had been issued for each one. Father testified that he had filed contempt motions against Mother at least three times before her motion for parenting coordinator was filed, on 25 April 2023, 17 May 2023, and 12 June 2023.

> 13. That upon information and belief, Defendant's motion is nothing more than an attempt to stop Plaintiff from exercising visitation with his son and an excuse for continuing to violate this Court's Custody Order.

He further alleged Mother had failed "to comply with the rules" and that her failure had caused him to incur attorney's fees and other costs. He requested that the court deny Mother's motion for parenting coordinator, sanction Mother "and/or her attorney for intentionally deceiving the Court" and for "willfully falsifying information on the Calendar Request." Father then filed another motion for contempt on 11 August 2023 against Mother, alleging Mother interfered with Father's scheduled visitation, interrupted Father's scheduled phone call with T.R., and deprived Father of his custodial time with T.R.

Between 11 August 2023 and 20 October 2023, Father filed three motions for an order to show cause for why Mother should not be held in contempt for not complying with the custody order. In these motions, Father specifically alleged that Mother was interfering with Father's scheduled visitation with T.R. and interfering with his ability to communicate with T.R. During this same time period, on 28 September 2023, Father also filed a "motion to disqualify" Mother's counsel, alleging that he had "initiated a bar complaint against" Mother's counsel and that Mother's counsel had "offered to represent people who have claims against Father for reduced or discounted prices as retaliation for Father's filing a bar complaint against him."[6]

On 1 December 2023, Father filed a motion to modify the custody order, arguing that there was a substantial change in circumstances between the parties. Father specifically alleged that he had only seen the child two out of the sixteen scheduled visits due to Mother's interference and Mother had also interfered with Father's calls with T.R.

On 11 December 2023, the trial court held a hearing on Mother's motion to appoint a parenting coordinator and Father's motion for sanctions; on the same day the trial court entered an ordered titled "Order for Sanctions/Order Regarding Motion for Appointment of Parenting Coordinator." The trial court specifically made the following findings of fact:

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6. Our record does not show any court ruling on this motion, but Mother's counsel continued to represent her at the hearing in December 2023. Mother is represented by different counsel on appeal.

9. Mother put in her Motion for appointment of a parenting coordinator "The Father has filed numerous Motions for Contempt and Mother wishes to reciprocate with her own Motion due to the ongoing conflict."

10. The Court finds that the Motion for the Parenting Coordinator was made for an improper purpose to retaliate, rather than for the purpose of enabling the parties to parent under the current custody order.

11. Although the Court finds that parenting coordinator's (sic) are able to assist in a lot of cases, the Court does not believe it will assist in this case, due to the primary source of conflict being the allegations of failure to follow the Order.

12. If the Order of a Court is not sufficient to cause parties to follow an Order, the Court fails to see how a directive of a parenting coordinator would cause the parties to follow an Order.

13. Mother has admitted that she picks up the minor child from school, to prevent Father from exercising his custody.

14. Mother testified she did that because she doesn't believe the minor child desires to participate in custody with Father.

15. Father testified that on the rare occasion he has been able to exercise custody, he and the minor child had fun.

16. Mother is aware that she has a duty to follow the Court Order.

17. The Court finds that the Motion for Appointment of a Parenting Coordinator was in fact done for the purpose it stated in retaliation to Father's Motions to Show Cause, and not for a good faith purpose, and therefore the Court believes Father should be sanctioned.

18. Mother incurred attorney's fees defending the Motion for Appointment of a Parenting Coordinator.

The trial court made conclusions of law regarding its jurisdiction and then concluded that:

> 3. The Motion for Appointment of a Parenting Coordinator was filed in retaliation in bad faith.
>
> 4. Any finding of fact that should be included as a Conclusion of Law is incorporated herein as if set forth in full.

The trial court then ordered:

> 1. That the Motion for Appointment of a Parenting Coordinator is denied.
>
> 2. The Motion for Sanctions is granted.
>
> 3. It is Ordered that Mother pay Father $1969.44 within 30 days of entry of this Order as a Sanction for filing the Motion for Parenting Coordinator in bad faith.

Following this order, the trial court also issued an order for civil contempt against Mother on 18 December 2023, finding that Mother willfully violated the custody order. To purge her contempt, Mother was ordered to drop the minor child off at the Raleigh Police Department at noon on 25 December 2023 and 31 December so Father could visit with the child for 2 hours at a "close by location" and then return him to the Raleigh Police Department to return to Mother.

Mother timely filed notice of appeal from the Order for Sanctions/Order Regarding Motion for Appointment of Parenting Coordinator and the Contempt Order on 9 January 2024.

II. Discussion

On appeal, Mother argues the trial court erred in: (1) denying her motion for appointment of a parenting coordinator and (2) granting Father's motion for sanctions against Mother.[7]

A. Motion for Appointment of a Parenting Coordinator

Mother argues the trial court erred in denying her motion for appointment of a parenting coordinator. Mother first argues the trial court failed to make findings of fact required under N.C.G.S. § 50-91(b) in making

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7. Mother did not raise any argument regarding the contempt order on appeal and stated in her brief that "subsequent to the filing of the Notice of Appeal, the trial Court has issued an Order which would render the appeal of that issue moot." We also note that at the conclusion of the hearing on 18 December 2023, the trial court also rendered an order holding Father in contempt of the Custody Order based upon Mother's motion for contempt filed 28 July 2023 for failure to inform her that he had moved to Wilmington.

its determination. Although we reject Mother's contention that N.C.G.S. §50-91(b) requires specific findings of fact in an order *denying* appointment of a parenting coordinator, we note that an order of any type must include sufficient findings of fact to allow appellate review and to support a trial court's conclusions of law and decree. *See* N.C.G.S. § 1A-1, Rule 52. We also note that the trial court did not make separate conclusions of law addressing the denial of the motion for appointment of parenting coordinator and granting the motion for sanctions under Rule 11. The sole conclusion of law addressing the motion for appointment of parenting coordinator is "The Motion for Appointment of a Parenting Coordinator was filed in retaliation in bad faith," but bad faith is the basis for the Rule 11 sanctions. Thus, the trial court both denied the motion for appointment of parenting coordinator *and* granted sanctions based upon Mother's "bad faith" in filing her motion. The Order is therefore a hybrid of an order imposing Rule 11 sanctions and an order denying appointment of a parenting coordinator, but based on the trial court's conclusion of law, it is predominantly an order ruling on Father's motion for sanctions under Rule 11. Since the primary effect of the Order is as an order for sanctions under Rule 11, we must review the trial court's decision to impose sanctions de novo, and if the court properly granted sanction, we review the "appropriateness of the sanction imposed," including the denial of the motion for parenting coordinator, for abuse of discretion. The standards of review for an order granting or denying a motion to impose sanctions under N.C.G.S. § 1A–1, Rule 11(a) has been established by our Supreme Court:

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A–1, Rule 11(a) is reviewable de novo as a legal issue. In the de novo review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A–1, Rule 11(a).
>
> Finally, in reviewing the appropriateness of the particular sanction imposed, an "abuse of discretion" standard is proper because "[t]he rule's provision that the court 'shall impose' sanctions for motions abuses . . . concentrates

> [the court's] discretion on the selection of an appropriate sanction rather than on the decision to impose sanctions."

Turner v. Duke Univ., 325 N.C. 152, 165 (1989) (quoting *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985)).

Although N.C.G.S. § 50-91(b) does not require any specific findings of fact for the trial court's denial of a motion for appointment of a parenting coordinator, under Rule 52 of the Rules of Civil Procedure, in "all actions tried upon the facts without a jury," the trial court is required to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, 52. Therefore, the trial court must make any findings of fact and conclusions of law necessary to address the motions or claims the order addresses. Here, the Order addressed *both* the denial of the parenting coordinator and the imposition of sanctions under Rule 11. Although the titles assigned in the order are not controlling, "Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law." *Woodard v. Mordecai*, 234 N.C. 463, 472 (1951).

In order to appoint a parenting coordinator,

> the court shall make specific findings that the action is a high-conflict case, that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator. The court does not have to find a substantial change of circumstance occurred to appoint a parenting coordinator.

N.C.G.S. § 50-91(b). N.C.G.S. § 50-90(1) defines a "high-conflict case" as:

> [a] child custody action involving minor children brought under Article 1 of this Chapter where the parties demonstrate an ongoing pattern of any of the following:
>
> a. Excessive litigation.
>
> b. Anger and distrust.
>
> c. Verbal abuse.
>
> d. Physical aggression or threats of physical aggression.
>
> e. Difficulty communicating about and cooperating in the care of the minor children.
>
> f. Conditions that in the discretion of the court warrant the appointment of a parenting coordinator.

N.C.G.S. § 50-90(1).

Rule 11(a) sets out the basis for imposition of sanctions for filing a motion or other pleading:

> Appellate review of sanctions under Rule 11 consists of a three-pronged analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. A violation of any one of these prongs requires the imposition of sanctions. For each prong, the trial court must make findings of fact and conclusions of law.

Jonna v. Yaramada, 273 N.C. App. 93, 109 (2020) (citations and internal quotation marks omitted).

To assess the sufficiency of the factual basis of a pleading, this Court must determine "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *In re Thompson*, 232 N.C. App. 224, 230 (2014) (citation omitted).

An appraisal of the legal sufficiency of a pleading requires that we look "first to the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law." *Bryson v. Sullivan*, 330 N.C. 644, 661 (1992) (citation and internal quotation marks omitted).

Lastly, to evaluate the improper purpose prong, we must review the evidence to ascertain whether the pleading was filed for "any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Mack v. Moore*, 107 N.C. App. 87, 93 (1992) (citation and internal quotation marks omitted). "It must be noted, however, that 'just because a plaintiff is eventually unsuccessful in [his] claim, does not mean the claim was inappropriate or unreasonable.' " *Jonna*, 273 N.C. App. at 110 (quoting *Grover v. Norris*, 137 N.C. App. 487, 495 (2000)).

Here, the trial court made several findings of fact and the findings of fact are not challenged as unsupported by the record, so they are binding on appeal. *Scoggin v. Scoggin*, 250 N.C. App. 115, 118 (2016) ("In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence . . . . Unchallenged findings of fact are binding on appeal") (citations omitted). Instead, the findings of fact indicate that Mother did have a factual basis to file a motion for parenting coordinator and there was no dispute at the hearing about the legal sufficiency of the motion under N.C.G.S. § 50-91. The only potential

basis for imposition of Rule 11 sanctions in this case was that Mother filed the motion for an "improper purpose." *Id.*

Mother was represented by counsel when she filed the Motion for appointment of parenting coordinator. We note that the trial court did *not* find, as Father's motion for sanctions alleged, that in filing the Motion for appointment of parenting coordinator Mother or her counsel had failed to "comply with the rules," intentionally deceived the Court, or "willfully falsif[ied] information on the Calendar Request." Instead, the findings address only mother's "bad faith."

In *Jonna v. Yaramada*, this Court addressed a Rule 11 sanctions order imposed in a similarly contentious custody and child support case for "allegedly improper motions interposed in a domestic matter." We noted that

> Absent an improper motive, Rule 11 sanctions should not be assessed against a client who relies in good faith on the advice of counsel:
>
> It is the rare client who understands the strategy and tactics of domestic litigation, as it is practiced in District Court. The defendant asks us to impute the knowledge of the effects of these motions to the attorney's client, the plaintiff. It is more likely the attorney prepared the affidavit for his client and she signed it on advice of counsel . . . . *Without a specific finding from the court which shows the plaintiff had knowledge of the effect of signing the motion would have on court proceedings and took this action to gain some temporary tactical advantage, we are unpersuaded that a signature alone would support Rule 11 sanctions against a client acting on an attorney's advice.*

Jonna, 273 N.C. App. at 112 (emphasis added, cleaned up). This court then addressed the definition of an "improper purpose" as this term has been interpreted for purposes of Rule 11:

> An improper purpose is any purpose other than one to vindicate rights or to put claims of right to a proper test. Our Supreme Court has determined that parties, as well as attorneys, may be subject to sanctions for violations of the improper purpose prong of Rule 11. A represented party . . . will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay.

> The existence of an improper purpose is determined from the totality of the circumstances. The relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. The burden is on the movant to prove, by a preponderance of the evidence, that the pleading has been interposed for an improper purpose.

Id. at 113 (cleaned up).

In *Jonna*, Defendant-Mother asserted that Plaintiff-Father filed the pro se motion, and later the Rule 59 and amended Rule 59 motions, because he was "merely upset with the [trial c]ourt's decision[.]" *Id.* The Court noted that this, standing alone, does not constitute an improper purpose, and that "it is likely that at least one party in any custody trial, if not both, will be unhappy with the trial court's decision[,]" which may lead to a Rule 59 motion. *Id.* (citations omitted). The Court reversed that portion of the order imposing sanctions because the defendant-mother "offered no evidence to the trial court that Plaintiff-Father interposed his motions to gain some temporary tactical advantage, to cause unnecessary expense or delay, or to advance some other improper motive[,]" further noting that the purpose of the motions "was to get more evidence before the trial court and obtain equally shared physical custody of the parties' minor child, rather than to personally or financially injure Defendant-Mother or to delay the proceedings." *Id.* (citations and internal quotation marks omitted).

Here, there are no findings indicating that Mother's Motion for appointment of parenting coordinator was filed "to gain some temporary tactical advantage, to cause unnecessary expense or delay, or to advance some other improper motive." Instead, the findings demonstrate the high conflict which has characterized this case since its inception. The trial court's order relied heavily on the use of the words in Mother's motion that she "wishes to reciprocate" in response to Father's motions for contempt against her. Although this was perhaps a poor choice of words for the motion, otherwise the Motion clearly states the factual and legal basis for appointment of parenting coordinator, and there was no real dispute about either. But the trial court's order did not directly address the motion for parenting coordinator; it focused primarily on the motion for sanctions against Mother for filing the motion.

The order did not include any findings or conclusion of law that the case is or is not a "high conflict" case or about the best interest of the child or how the ongoing conflict between the parties affects (or does not affect) the child. Instead, the trial court focused on the Rule 11 sanction

issue and Mother's motivation, or at least one element of her motivation, for filing the motion for parenting coordinator: that she filed the motion in response, or retaliation, to Father's several pending motions, and the trial court's conclusion of law supporting both sanctions and the denial of the motion for parenting coordinator was Mother's "bad faith."

Overall, the findings of fact, along with the history of "excessive litigation" and the custody order which sets out the custodial arrangement tend to demonstrate that the parties have clearly been engaged in a high-conflict case, regardless of what motivated Mother to file the motion for a parenting coordinator. The findings in the Custody Order and the Order denying the motion for parenting coordinator demonstrate that this case has all the elements of a "high-conflict case": excessive litigation, anger and distrust, verbal abuse, physical aggression or threats of physical aggression, and difficulty communicating about and cooperating in the care of the minor child. N.C.G.S. § 50-90. And at the hearing, counsel for both parties acknowledged that this is a high conflict case.[8]

The trial court noted that there had been excessive litigation in the case, finding that "[t]his is a case where there have been multiple show causes filed[]" and "[t]he largest percentage of the show cause motions stem from the allegations that Mother is not allowing Father to have his court Ordered visitation." However, the trial court did not make a finding or conclusion as to whether this case is a "high-conflict case" as defined by N.C.G.S. § 50-90.

Very few cases have addressed orders *denying* appointment of a parenting coordinator, so it is not clear whether the designation of a "high-conflict case" is a finding of fact or a conclusion of law. N.C.G.S. § 50-91 refers to this as a "finding," but at least one case has addressed it as a conclusion of law. *See Jackson v. Jackson*, 192 N.C. App. 455, 465 (2008) ("On these findings, the trial court *concluded* '[t]his case is a high-conflict case. The parties are able to pay for a Parenting Coordinator and the appointment of a Parenting Coordinator is in [the minor child's] best interest as set forth in G.S. 50–91(b).' ").

Since a conclusion of law is reached "by an application of fixed rules of law," *Woodard*, 234 N.C. at 472, and N.C.G.S. § 50-90 provides the statutory definition of a "high conflict case," the determination that a case is a "high conflict case" requires both findings of fact and "application of

8. Father's counsel told the trial court, "Yes, it's a high-conflict case. I could not stand in front of you with a straight face and say that this is not a high-conflict case."

the fixed rules of law" of the definition N.C.G.S. § 50-90 to those facts. Of course, the trial court would still have discretion not to appoint a parenting coordinator, even if it concludes that a case is a high conflict case, but the trial court's order would need to address why the parenting coordinator would not be in the best interest of the child, assuming the parties also have the ability to pay a parenting coordinator.

Here, the trial court found that although "parenting coordinators are able to assist in a lot of cases, the Court does not believe it will assist in this case, due to the primary source of conflict being the allegations of failure to follow the Order." However, in many cases addressing the appointment of a parenting coordinator, the parties' failures to follow orders or allegations of failures to follow orders create the "excessive litigation" that is part of the definition of a "high conflict" case. Holding a party in contempt may assist in resolving some of the conflict in a high conflict case, but if a mere contempt order were sufficient to quell years of conflict in "high conflict" cases as defined by N.C.G.S. § 50-90, there would rarely be a basis for appointment of a parenting coordinator in any case. And in this case, prior contempt orders had not yet ended the conflict between the parties.

Of more concern for the purposes of § 50-91, the trial court made no findings about the best interests of the child but simply denied the motion to appoint a parenting coordinator and sanctioned Mother for filing the motion, despite making findings about the conflicts between the parties. Finally, the trial court made no findings related to the parties' financial abilities to pay for a parenting coordinator, although Mother stated at the hearing that she was willing and able to pay for the parenting coordinator.

Again, we recognize that N.C.G.S. § 50-91 does not require any particular findings of fact in an order *denying* a motion for a parenting coordinator. This Court previously confronted this question in *Thomas v. Thomas*, 233 N.C. App. 736 (2014). In *Thomas*, this Court stated,

> [o]ur review reveals that N.C. Gen. Stat. § 50-91 governs what findings must be made *only* if the trial court, in its discretion, *appoints* a parenting coordinator. In the case before us, the trial court did not appoint a parenting coordinator and Mother does not cite to any authority, nor can we find any, imposing an affirmative duty on the trial court to require parties to produce evidence of their ability to pay for a parenting coordinator if one is not appointed.

Id. at 747.

However, there are several key distinctions between *Thomas* and the facts of this case, even beyond the fact that the order here is a hybrid with a Rule 11 sanctions. First, in *Thomas*, the trial court did specifically find that it was a high-conflict case and appointing a parenting coordinator would be in the best interest of the child. *Id.* However, the trial court stated that "there was insufficient evidence concerning the parties' present ability to pay a parenting coordinator." *Id.* In making this determination, this Court specifically noted that the unchallenged findings of fact suggested the parties more than likely lacked the ability to pay for a coordinator due to Father owing attorney's fees in excess of $70,000.00 and Mother owing attorney's fees in excess of $90,000.00. *Id.* Thus, this Court affirmed the trial court's dismissal of the motion to appoint a parenting coordinator because evidence tended to suggest the parties would not have been able to afford one. *Id.*

But here, the trial court made findings of fact, and these findings tend to support the appointment of a parenting coordinator, not the denial of the motion, and the trial court seemingly denied the motion as a part of the sanction under Rule 11. First, the trial court did not make any specific finding or conclusion that this is or is not a high-conflict case, but it did make findings that would lead directly to a conclusion of law that the case is a high conflict case as defined in N.C.G.S. § 50-90. Also, counsel for both parties agreed this is a high conflict case. Furthermore, the trial court did not make any findings regarding the best interest of the child. Where the findings of fact demonstrate this is a high conflict case, and there is no mention of the best interest of the child in the order, we are unable to discern why the trial court not only denied the motion for parenting coordinator but also imposed sanctions under Rule 11 just for requesting a parenting coordinator. And even if the trial court determined in its discretion that a parenting coordinator should not be appointed, this does not necessarily mean that Father's motion for sanctions must be allowed. "It must be noted, however, that 'just because a plaintiff is eventually unsuccessful in [his] claim, does not mean the claim was inappropriate or unreasonable.' " *Jonna*, 273 N.C. App. at 110 (quoting *Grover v. Norris*, 137 N.C. App. 487, 495 (2000)).

Finally, there was evidence presented by Mother at trial that she would be able to afford a parenting coordinator. During trial, Mother stated she already paid for T.R.'s therapy and she would be able to afford a parenting coordinator between her and her fiancé's incomes. Additionally, the only evidence that Father provided to rebut this point was the Mother had not been able to file motions to show cause of her

own against Father through her attorney.[9] However, there was no other evidence presented that directly or specifically addressed Father or Mother's inability to afford a parenting coordinator, like there was for the parties in *Thomas*. In any event, Mother testified that she would pay for the parenting coordinator's services.

The trial court based its decision both to deny the parenting coordinator and to grant sanctions under Rule 11 primarily on the fact that the motion was made in retaliation for Father's contempt filings. In addition, it states that one of the causes of the conflict was Mother's failure to follow the previous order. That the motion was filed in response to motions for contempt also seems to support rather than detract from the need for a parenting coordinator.

In all custody cases, the best interest of the child should serve as the lodestar for the court's decisions. *See Respess v. Respess*, 232 N.C. App. 611, 615 (2014) ("It is long-established that a trial court's determination of child custody . . . must be guided by the best interests of the child[.]"). In the present case, based upon the findings that were made even more than those that were missing, it appears the trial court was viewing a need to punish Mother for her actions regarding the previous order rather than a reasoned decision of whether a parenting coordinator would serve as a means of reducing the conflict between the parents thereby benefiting the child at issue, whose wellbeing should be the primary focus. As an aside, the appointment of a parenting coordinator does not lessen the trial court's ability to punish the Mother for previous contemptuous acts, as it surely did by requiring her to take T.R., age 8, to the Raleigh Police Department on both Christmas day and New Year's Eve to visit with Father for two hours.[10] We also note that the trial court could tax the entire cost of the parenting coordinator to the Mother if the court finds that she is the primary cause for the need for the coordinator.

Accordingly, the trial court's findings of fact do not support its conclusion of law to deny the parenting coordinator and granting Rule 11 sanctions based on Mother's filing the motion to appoint a parenting coordinator. In addition, the findings of fact would support a conclusion

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9. But Mother was represented by counsel this hearing and was represented by counsel throughout most of this case, including the filing of the motion for appointment of a parenting coordinator.

10. But we caution that punishment is the purpose of a show cause order for criminal contempt. For civil contempt, the purpose of the order is not to punish but to enforce compliance with the court's order.

that this is a "high conflict" case in which the trial court has the discretion to appoint a parenting coordinator, but the trial court did not make any findings or conclusions regarding the child's best interests. We therefore vacate the order denying the appointment of a parenting coordinator and awarding sanctions under Rule 11 and remand for entry of a new order. Although the trial court is not required on remand to allow the motion for parenting coordinator and the trial court may decide again to impose Rule 11 sanctions, whatever the decisions on remand are, the trial court must make findings of fact and conclusions of law to support both the ruling on the motion for parenting coordinator and the ruling on the motion for sanctions under Rule 11, since these two motions present different legal issues.

II. Conclusion

For the foregoing reasons, we vacate the order and remand to the trial court for actions consistent with this opinion.

VACATED AND REMANDED.

Judge STROUD concurs.

Judge FREEMAN concurs in the result only.

STATE OF NORTH CAROLINA
v.
SHARI NICOLE BROWN, DEFENDANT

No. COA24-500

Filed 7 May 2025

1. Criminal Law—prosecutor closing argument—personal opinion—lack of prejudice

In a trial for felony breaking and entering, communicating threats, and related charges, the trial court properly overruled defendant's objections to the State's closing argument where, even if the prosecutor's statements—that defendant "still would" threaten the victim "today, probably" and calling into question what the evidence did or did not establish—constituted impermissible personal opinions, defendant was not prejudiced in light of the overwhelming evidence of his guilt. The State presented more than fifty evidentiary

exhibits, including defendant's fingerprints that were found along the victim's broken apartment window on the night in question as well as recordings of defendant threatening the victim.

2. Criminal Law—prosecutor closing argument—gross impropriety analysis—overwhelming evidence of guilt

In a trial for felony breaking and entering, communicating threats, and related charges, none of the prosecutor's statements during closing argument—including calling into question defendant's credibility and self-control and referring to the defense as being nothing but "smoke and mirrors"—were so grossly improper as to require the trial court to intervene ex mero motu. Where the State presented over fifty evidentiary exhibits tending to show defendant's guilt—including a video of defendant admitting to being at the victim's apartment on the night in question, expert testimony identifying defendant's fingerprints along a broken window at the victim's apartment, and recordings of defendant harassing the victim—defendant could not establish that the statements so prejudiced her defense as to render the trial fundamentally unfair.

3. Constitutional Law—right against self-incrimination—prosecutor closing argument—no prejudicial error

In a trial for felony breaking and entering, communicating threats, and related charges, the trial court did not prejudicially err by overruling defendant's objection to the portion of the State's closing argument in which the prosecutor noted that defendant had not countered the voluminous amount of evidence presented by the State with evidence of her own. The prosecutor's statement did not impermissibly infringe on defendant's constitutional right not to testify.

Appeal by Defendant from judgment entered 5 December 2022 by Judge Susan E. Bray in New Hanover County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Stacey A. Phipps, for the State.

Manning Law Firm, PLLC, by Attorney Clarke S. Martin for the Defendant–Appellant.

MURRY, Judge.

Shari N. Brown (Defendant) appeals the trial court's treatment of the State's closing argument to her trial. She argues the trial court erred by (1) overruling certain objections to the State's closing argument, (2) permitting an alleged comment on Defendant's decision to not testify, and (3) "failing to intervene *ex mero motu* in response to" "flagrantly impermissible" remarks by the State. For the following reasons, we disagree with Defendant and find no error in the trial, the jury verdicts, or judgments entered thereon and thus affirm the trial court.

I. Background

In 2021, Hannah Parker was in a brief relationship with her co-worker, Hykeem Gaymon (nicknamed "Quick"). While seeing Parker, Gaymon was also romantically involved with Defendant, with whom he shares children. By the end of 2021, Parker and Gaymon had ended their relationship.

Around 11:30 PM on 1 April 2022, Deputy Sean Flynn conducted a traffic stop on Defendant for a missing headlight. Gaymon was a front-seat passenger in Defendant's vehicle. Upon running their information, Deputy Flynn learned that Defendant had filed a domestic violence protective order against Gaymon and arrested him for violating it. Deputy Flynn testified that Gaymon was in the custody of the New Hanover County Sheriff's Department (the Department) from about 11:50 PM on 1 April 2022 until "at least Monday" on 4 April 2022.

As of April 2022, Parker resided at 808 Nature Park, Wilmington, North Carolina. Prior to April 2022, Defendant had already trespassed on Parker's Wilmington residence at several points to slash her tires and dump out her flowerpots, all of which Parker recorded with security video later played at trial. On 2 April 2022, after spending the night away from her apartment, Parker woke up to nine missed calls from an unknown number. She then started to receive threatening text messages from another unknown number, purported to be Gaymon's phone, but later identified as Defendant on Gaymon's phone while he was in police custody from his arrest the night before. After Defendant sent Parker a picture of Parker's diary from this unknown number, Parker called the police upon realizing that someone had been inside her apartment without her knowledge.

Arriving at the scene, Deputy Luke Garmon observed an unlocked exterior door and an unlocked window with a damaged windowpane covered in unidentified fingerprints. The State proffered at trial the Department's in-house Latent Fingerprint Examiner, Lukas Feldbusch, as an expert witness to testify that the prints matched those of

Defendant. CSI Detective Jonathan Vickers testified that Parker's residence was "very much destroyed" as "[a]nything that had a place at one time was moved" and "thrown on the floor." Detective Vickers observed the message, "Call Quick," scribbled on Parker's walls in large, black letters. Parker identified several personal items as missing, including her diary, two televisions, a MacBook Pro laptop, a 9-mm handgun, a vacuum cleaner, a microwave, and a camera. Using a pre-installed geolocator, Parker located her laptop approximately one mile from her apartment at 708 North 30th Street, Wilmington, North Carolina, the same neighborhood where Parker had once dropped off Gaymon when they were seeing each other in 2021.

While law enforcement monitored, Parker solicited additional messages from one of Defendant's unknown numbers. Detective Bailey Fex-Overton instructed Parker to call the number, which Defendant answered to harass her. After Detective Fex-Overton instructed Parker to end the call, Defendant called back and continued communicating threats. The detective recorded both calls, which the State played as evidence at trial.

One week later, Deputy Sergeant Nicholas Lee questioned Defendant about the incident at Parker's apartment; she revealed multiple confrontations with women whom Gaymon had allegedly cheated on her with—including Parker. Defendant admitted to "banging on windows[,] . . . knocking . . . on doors," and "m[ay]be" having a photo of Parker's diary on her phone. She also admitted to visiting Parker's apartment on 1 April 2022 to confront Parker about her relationship with Gaymon. The State also played a recording of this interview as evidence at trial.

On 5 December 2022, a grand jury indicted Defendant for felony breaking and entering, felony larceny, misdemeanor harassing phone call, misdemeanor communicating threats, and possessing a firearm after a previous felony conviction. This case came on for hearing in Superior Court, New Hanover County on 15 November 2023. Defendant did not testify or offer any evidence in her own defense. The State introduced extensive photographic, audio, and video evidence via 54 exhibits. On appeal, Defendant argues that the State's closing argument contains multiple reversible errors. Two statements Defendant challenges were objected to at trial. Defendant argues that the trial court abused its discretion in overruling these objections. In those statements, the State argued that:

> (1) [Defendant] does call back. She's not done. She's not done talking. She's not done talking. She's going to

still say what she would; and she still would today, probably.

(2) You are going to be advised as to you can find [Defendant] guilty of misdemeanor larceny. . . . And that means she stole property not after-but not after a breaking and entering and the property she stole was not over $1,000. I don't think the evidence supports that whatsoever. She either went—it's either she did it or didn't. . . . She did it there or she didn't.

(Challenges #1 & #2.) Of the eight statements that Defendant now challenges for the first time on appeal, the State argued that:

(3) [E]very single person has the right to plead not guilty and ask for a jury trial, no matter what the evidence is against them. I say this, because I don't want you to read into anything, like, "Well, you know, it's a trial; maybe that means something."

(4) "We just fight, like usual that night," may be the strongest evidence because you know who [Defendant] is now.

(5) That shows you who [Defendant] is. That shows you can't believe a single thing she says. Her rage and her fury undermine her. She's unable to control it. And she will do anything and make up anything to get away with anything. Crazy.

(6) Remember in opening . . . [that] Mr. Hosford . . . nam[ed] numerous facts that actually never were presented into evidence because they're not true and they're not here.

(7) [S]moke and mirrors is what this defense is. . . . They don't have a defense.

(8) [T]his right here . . . shows that [Parker]'s telling the truth.

(9) I feel the evidence is obvious. I think it's so strong; but, you know, she's not there. Nothing she said was true, other than the most true thing in the world, the one thing she said that was true: 'I'm angry and I'm getting angry.' We all agree. We – we believe her, don't

> we? In that interview when she says, 'I'm angry, I'm getting angry,' I think we all believed you're angry.
>
> (10) Smoke and mirrors. That's all this is. That's all they have is smoke and mirrors because the evidence is just that strong. It is what it is. She did what she did, and there's no question as to it.

(Challenges #3–#10.) The State also pointed out that it "has the burden to prove that . . . [D]efendant is guilty of every charge beyond a reasonable doubt," that she "has the right to not testify," that the jury is "not to consider that" choice, and that she "has just as much [of a] right to put on evidence." (Challenge #11.) On 15 November 2023, the jury found Defendant guilty of felony breaking and entering, making a harassing phone call, and communicating threats but not guilty of felony larceny or firearm possession. The trial court found mitigating factors[1] and sentenced Defendant to 12 – 24 months in custody of the North Carolina Department of Adult Corrections and 24 months of supervised probation to begin at the expiration of the active sentence. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

Defendant appeals as a matter of right under N.C.G.S. §§ 7A-27(b) and 15A-1444(a) from final judgments entered in Superior Court, New Hanover County.

III. Analysis

Among her preserved arguments regarding the State's closing argument, Defendant contends that the trial court erred by (1) overruling her counsel's objection to one portion of the argument, (2) not intervening *ex mero motu* to correct another portion, and (3) overruling another objection to that prosecutor's alleged invocation of her constitutional right to not testify. Determining the proper standard of review for each issue depends on whether opposing counsel contemporaneously objected to the statement at trial. *See State v. Hembree*, 368 N.C. 2, 18–19 (2005). If so, our appellate courts review only for a trial court's abuse of discretion; otherwise, they look for "gross impropriety." *Id.* We review *de novo* allegations of constitutional error, *State v. Thorne*, 173 N.C. App. 393, 396 (2005), which the State must show as harmless "beyond a reasonable doubt," N.C.G.S. § 15A-1443(b) (2023). For the reasons discussed

1. The trial court found Defendant to be a Prior Record Level IV with 19 prior-sentencing points.

below, this Court holds that the trial court did not reversibly err under any of Defendant's three arguments.

North Carolina has long recognized the privilege against self-incrimination for its criminal defendants at trial. *See* An Act to Permit Defendants in Criminal Cases to Testify in Their Own Behalf, ch. 110, sec. 2, 1881 N.C. Sess. Laws 51, 167 (codified as amended at N.C.G.S. § 8-54 (2023)); *see also State v. Randolph*, 312 N.C. 198, 205–06 (1984) (acknowledging statutory privilege "[w]ell before *Griffin" v. California*, 380 U.S. 609 (1965) decision that constitutionally incorporated it to States). Reinforcing this privilege, § 15A-1230 forbids the State from giving a closing argument to a jury that "abus[es]" a defendant or touches on "matters outside the record." N.C.G.S. § 15A-1230(a). But our appellate courts do not "impose a perfection requirement on the attorneys and trial courts of this State, ever mindful that parties are entitled to a fair trial but not a perfect one." *State v. Parker*, 377 N.C. 466, 472 (2021) (quotation omitted). Despite this small allowance, the prosecutor "owe honesty and fervor to the State and fairness to the defendant in the performance of their duties." *State v. Locklear*, 294 N.C. 210, 217 (1978); *see Berger v. United States*, 295 U.S. 78 (1935) (While a prosecutor "may strike hard blows, [she] is not at liberty to strike foul ones. It is as much [her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

Because a "lawyer's function during closing argument is to provide the jury with a summation of the evidence," she must limit her colloquy to the "relevant legal issues," *State v. Jones*, 355 N.C. 117, 127 (2002), which exclude "incompetent and prejudicial matters," *State v. Rogers*, 355 N.C. 420, 462 (2002). At closing, a prosecutor "may not become abusive, interject . . . personal experiences, [or] express . . . personal belief[s] as to . . . [either] the evidence or . . . guilt of . . . the defendant." N.C.G.S. § 15A-1230. We grant attorneys "wide latitude in their closing arguments to the jury, with the State being entitled to argue to the jury the law, the facts in evidence[,] and all reasonable inferences drawn therefrom." *State v. Fletcher*, 370 N.C. 313, 319 (2017). But we confer to the trial court "the duty . . . to interfere" when an attorney's remarks "are calculated to mislead or prejudice the jury." *State v. Miller*, 271 N.C. 646, 659 (1967).

A. Abuse of Discretion

[1] First, Defendant claims that the trial court erred in overruling her counsel's objections to portions of the State's closing argument, *i.e.*,

Challenges #1 and #2. We disagree. As noted above, this Court reviews an alleged "failure to sustain a defendant's objection . . . made during the State's closing argument" only "for abuse of discretion" by the trial court. *Fletcher*, 370 N.C. at 320. That determination requires a "two-part analysis," *State v. Copley*, 374 N.C. 224, 228 (2022), of whether "the remarks were improper" and "of such a magnitude that their inclusion" prejudiced the defendant, *Jones*, 355 N.C. at 131.

A statement is improper if "calculated to lead the jury astray." *Id.*; *see State v. Taylor*, 289 N.C. 223, 227 (1976). Impropriety may "include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence." *Parker*, 377 N.C. at 473 (quoting *Jones*, 355 N.C. at 131). The improper statement must also prejudice the defendant, *see Jones*, 355 N.C. at 134, which requires her to show a "reasonable possibility" that "the jury would have acquitted" her absent the challenged argument, *State v. Ratliff*, 341 N.C. 610, 617 (1995) (citing N.C.G.S. § 15A-1443(a)).

This Court "assess[es] the likely impact of any improper argument in the context of the entire closing," *State v. Thompson*, 359 N.C. 77, 110 (2004), which includes the factual weight of "the evidence presented at trial" and the legal soundness of "the instructions to the jury," *State v. Goins*, 377 N.C. 474, 479 (2021); *see Jones*, 355 N.C. at 134 ("Improper argument at the guilt–innocence phase . . . may not be prejudicial where the evidence of defendant's guilt is virtually uncontested."); *State v. Murillo*, 349 N.C. 573, 606 (1998) ("[E]ven assuming *arguendo* that this portion of the argument was improper, it was not prejudicial to defendant in light of the substantial evidence of his guilt.").

Presuming any prosecutorial impropriety here, we apply the dispositive prejudice standard to the portions of the State's closing argument where the trial court overruled defense counsel's objections. Specifically, Defendant objected to the prosecutor's closing assertion that she "still would" "threaten[ ]" Parker "today, probably." She also objected to an alleged invocation of "what the prosecutor thinks" and "feels about the evidence." Taking these statements "in context and in light of the overall factual circumstances to which they refer," *Goins*, 377 N.C. at 479, we find no "reasonable possibility" that "the jury would have acquitted defendant [had] the prosecutor's remarks . . . been excluded," *Copley*, 374 N.C. at 231.

The State presented over 50 evidentiary exhibits at trial tending to show the guilt of Defendant, such as her fingerprints along Parker's broken window, a video of her admitting to being at Parker's apartment on

the night of the incident, and recordings of her threatening Parker from the unknown number. The State adduced evidence so "substantial" that, even "[pre]suming . . . the argument was improper," the State's remarks would not have "prejudic[ed] . . . [D]efendant." *Murillo*, 349 N.C. at 606. Thus, this Court holds that the trial court did not abuse its discretion in overruling Defendant's counsel's objections to Challenges #1 and #2 of the State's closing argument.

B. Gross Impropriety

[2] Next, Defendant argues that the trial court erred by "failing to intervene *ex mero motu* in response" to the State's "flagrantly impermissible" remarks in closing, *i.e.*, Challenges #3 through #10. We disagree. A defendant's failure to object to an alleged error at trial ordinarily prevents her from raising that same issue on appeal. *See State v. Jones*, 317 N.C. 487, 499 (1986) ("Ordinarily, objection to the prosecutor's jury argument must be made prior to the verdict . . . for the alleged impropriety to be reversible on appeal."). Our appellate courts nonetheless recognize a "narrow exception . . . for statements during closing argument so grossly improper" that the trial court abuses its discretion per se by not "interven[ing] on its own initiative." *State v. Tart*, 372 N.C. 73, 81 (2019). Our Supreme Court cautions against reviewing the trial court's "exercise of discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328 (1976). "Absent extreme or gross impropriety in an argument, a judge should not be thrust into the role of an advocate . . . when counsel is silent." *Parker*, 377 N.C. at 474.

Gross impropriety is an "exceedingly high bar" surmountable "only when the prosecutor's statements went so far beyond the parameters of propriety that the trial court" *must* "intervene to protect the rights of the parties and the sanctity of the proceedings." *State v. Reber*, 386 N.C. 153, 163 (2024). A defendant must demonstrate "comments so infected . . . with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23 (1998); *see State v. Hipps*, 348 N.C. 377, 411 (1998) ("The impropriety of the argument must be gross indeed . . . for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.").

Here, Defendant did not object to Challenges #3–#10 at trial, thus limiting us to an assessment of gross impropriety. Defendant argues these statements fell "so far beyond the parameters of propriety" that the trial court should have intervened *ex mero motu*. *Reber*, 386 N.C. at

163. We disagree and hold that these comments did not "so overreach[ ] as to shift the focus of the jury from its fact-finding function to . . . its own personal prejudices." *State v. Duke*, 360 N.C. 110, 130 (2005). *Contra*, *e.g.*, *State v. Smith*, 279 N.C. 163, 165–67 (1971) (reversing defendant's conviction because the State "inflammator[il]y and prejudicial[ly]" described him as "lower than the bone belly of a cur dog").

Our appellate courts have upheld multiple closing arguments with similar language to that challenged on appeal here. *E.g.*, *Duke*, 360 N.C. at 128 (holding as not "grossly improper" prosecutor's labeling of defendant as "vicious and selfish"); *Miller*, 271 N.C. at 659 (permitting attorney to "argue to the jury that [it] should not believe a witness" but forbidding him from "call[ing] [witness] a liar"); *State v. Figueroa*, 291 N.C. App. 610, 616 (a prosecutorial assertion of "who [defendant] is" was not prejudicial because it "comprised only a few lines of the prosecutor's eighteen-page closing argument, as transcribed, and was not so grossly improper that it warranted judicial intervention"); *State v. Earley*, No. COA24-386, slip op. at 18–19 (N.C. Ct. App. Mar. 19, 2025) (holding as not "grossly improper" prosecutor's description of self-defense claim as "smoke and mirror[s]").

As discussed above, the State's evidence against Defendant consisted of dozens of evidentiary exhibits, a video of her admitting to being at Parker's apartment on the night of the incident, multiple eyewitnesses to Defendant's harassing phone calls, and expert testimony identifying her fingerprints at the crime scene. In light of the "exceedingly high bar" set by this extensive evidence and the "copious objections made" to it throughout the trial, *Reber*, 386 N.C. at 166, Defendant cannot show how these statements so prejudiced her defense as to have "rendered the conviction fundamentally unfair," *Davis*, 349 N.C. at 23. Thus, this Court holds that the trial court did not prejudicially err by declining to intervene *ex mero motu* in response to Challenges #3 through #10.

C. *De Novo*

[3] Lastly, Defendant argues that the trial court violated her constitutional privilege against self-incrimination by overruling defense counsel's objection to the State's "improper[ ] comment on [her] decision not to testify," *i.e.*, Challenge #11. After reviewing *de novo* this claim of constitutional error, we disagree here as well. *Thorne*, 173 N.C. App. at 396. The State violates a defendant's constitutional right to remain silent and to avoid self-incrimination when directly commenting on either decision to do so. *See* N.C. Const. art. I, § 23; *State v. Randolph*, 312 N.C. 198, 205–06 (1984) (citing *Griffin v. California*, 380 U.S. 609 (1965); then citing

N.C.G.S. § 8-54 (1983)). Likewise, the North Carolina Constitution states that a criminal defendant cannot "be compelled to give self-incriminating evidence." N.C. Gen. Stat. § 8-54 (2023) (No person "charged with the commission of a criminal offense" shall be "compel[led] to answer any question tending to criminate himself."). Accordingly, making "[a]ny direct reference to a defendant's failure to testify is error . . . [that] requires curative measures . . . by the trial court," *State v. Reid*, 334 N.C. 551, 554 (1993), because "extended reference" to them "would nullify the policy that failure to testify should not create a presumption against the defendant," *Randolph*, 312 N.C. at 205–06. But this policy choice does not prevent the prosecutor from "comment[ing] on a defendant's failure to produce witnesses or exculpatory evidence." *Reid*, 334 N.C. at 555. Although the State cannot make the defendant's failure to testify "the subject of comment or consideration," the jury "may consider the fact that" its larger case against her "is uncontradicted . . . or unrebutted." *State v. Bryant*, 236 N.C. 745, 747 (1953).

Here, while the State adduced extensive evidence tending to show Defendant's guilt, Defendant presented none in response and was not required to do so. The State did not comment on Defendant's failure to testify but did "comment on . . . [D]efendant's failure to produce" Gaymon as a witness who could have "contradict[ed] or refute[d] evidence presented by the State." *Reid*, 334 N.C. at 555. The jury could not have considered Defendant's silence but could have considered that Defendant did not contradict the sheer weight of evidence with favorable evidence or testimony, *e.g.*, that of Gaymon. *Cf. State v. Barden*, 356 N.C. 316, 355 (2022) (holding that prosecutor merely sought "to demonstrate to the jury that defense counsel's argument . . . could not explain" State's evidence). Because the State here did not improperly comment on Defendant's privilege against self-incrimination, this Court holds that the trial court did not prejudicially err by overruling defense counsel's objection to Challenge #11.

IV. Conclusion

For the reasons above, this Court holds the trial court did not err in overruling defense counsel's objections to Challenges #1 and #2. Similarly, this Court holds that the trial court did not prejudicially err by failing to intervene *ex mero motu* to Challenges #3 through #10 or by overruling defense counsel's objection to Challenge #11.

NO ERROR.

Judges TYSON and WOOD concur.

STATE v. DUCKER

[298 N.C. App. 759 (2025)]

STATE OF NORTH CAROLINA
v.
ERIC JAMES DUCKER

No. COA24-373

Filed 7 May 2025

1. Constitutional Law—Second Amendment—possession of firearm by felon statute—facial challenge

In a prosecution for possession of a firearm by a felon (N.C.G.S. § 14-415.1)—brought after defendant was reported to be openly carrying a handgun at work despite his felony conviction and then was discovered with the gun in a hip holster during a traffic stop initiated after defendant drove away from his workplace—defendant's facial challenge to the statute's constitutionality in light of recent United States Supreme Court decisions was rejected. The Court of Appeals was bound by its decision in *State v. Nanes*, 297 N.C. App. 863 (2025), which held that the statute's provisions fell into the historical tradition of "disarming individuals who pose a threat to the safety of others" and, accordingly, was facially constitutional under both the federal and state constitutions.

2. Constitutional Law—federal—possession of firearm by felon statute—as-applied challenge—nonviolent predicate felony

In a prosecution for possession of a firearm by a felon (N.C.G.S. § 14-415.1)—brought after defendant was reported to be openly carrying a handgun at work despite his felony conviction and then was discovered with the gun in a hip holster during a traffic stop initiated after defendant drove away from his workplace—the statute did not violate the federal constitution as applied to defendant, even though his predicate felony (attempted fleeing to avoid arrest) was nonviolent in nature, because the Second Amendment affords the right to bear arms to "law-abiding citizens" and is not offended by regulations on the possession of firearms by convicted felons.

3. Constitutional Law—North Carolina—possession of firearm by felon statute—as-applied challenge—Britt factors

In a prosecution for possession of a firearm by a felon (N.C.G.S. § 14-415.1)—brought after defendant was reported to be openly carrying a handgun at work despite his felony conviction and then was discovered with the gun in a hip holster during a traffic stop initiated after defendant drove away from his workplace—the trial court did not err in rejecting defendant's as-applied challenge to the statute

under the state constitution because the State action of charging defendant was reasonable and bore "a fair relation to the preservation of the public peace and safety" as demonstrated by the court's consideration of the five factors set forth in *State v. Britt*, 363 N.C. 546 (2009).

Appeal by Defendant from Judgment entered 1 August 2023 by Judge David Hugh Strickland in Buncombe County Superior Court. Heard in the Court of Appeals 17 February 2025.

Attorney General Jeff Jackson, by General Counsel Fellow Marc D. Brunton, and Solicitor General Ryan Y. Park for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Eric James Ducker (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of Possession of a Firearm by a Felon. On appeal, Defendant challenges the constitutionality of N.C. Gen. Stat. § 14-415.1, which criminalizes Possession of a Firearm by a Felon, under both the Second Amendment of the United States Constitution and Article I, § 30 of the North Carolina Constitution. He challenges the statute both on its face as well as its specific application to him in this case. The Record before us tends to reflect the following:

In 2009, Defendant pleaded guilty to Attempted Fleeing to Elude Arrest with aggravating factors, a Class I felony. N.C. Gen. Stat. § 20-141.5 (2023). In 2018, Defendant was convicted of Misdemeanor Violation of a Domestic Violence Protective Order.

In October 2022, the Buncombe County Sheriff's Department received an anonymous tip stating Defendant was openly carrying a handgun in spite of his felony conviction. Officers arrived at Defendant's work and were told he had left in his truck. An officer located Defendant and began following him, and Defendant pulled over before the officer activated his blue lights. During the stop, Defendant informed the officer he was carrying a handgun in a holster on his right hip. The officer placed Defendant under arrest.

On 6 March 2023 a Buncombe County grand jury charged Defendant with one count of Possession of a Firearm by a Felon under N.C. Gen.

Stat. § 14-415.1. Defendant moved pretrial to dismiss the indictment, arguing Section 14-415.1 violated the Second Amendment of the United States Constitution and Article I, Section 30 of the North Carolina Constitution, both facially and as applied to his case. The trial court denied the motion pretrial and after Defendant renewed it following the presentation of evidence.

After trial, the jury found Defendant guilty of Possession of a Firearm by a Felon. The trial court sentenced Defendant to 13-25 months imprisonment, suspended for a 60-day split sentence and 24 months of supervised probation. Defendant gave oral notice of appeal.

Defendant filed a Petition for Discretionary Review seeking immediate review by our Supreme Court. On 26 June 2024, that Court declined to certify the case prior to this Court's decision. *State v. Ducker*, 386 N.C. 343, 901 S.E.2d 793, No. 115P24, 2024 WL 3249785.

Issues

The issues on appeal are whether N.C. Gen. Stat. § 14-415.1: (I) is facially unconstitutional under the Second Amendment to the United States Constitution; (II) is unconstitutional as applied to Defendant under the Second Amendment to the United States Constitution; and (III) is unconstitutional as applied to Defendant under the North Carolina Constitution.

Analysis

I. Facial Constitutional Challenge

[1] Section 14-415.1 makes it a Class G felony for "any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm." N.C. Gen. Stat. § 14-415.1(a). Defendant argues recent decisions of the Supreme Court of the United States render this statute facially unconstitutional under the Second Amendment.

The Second Amendment protects individuals' rights to keep and bear arms for the purposes of self-defense or for any legal purpose. *District of Columbia v. Heller*, 554 U.S. 570, 599, 171 L. Ed. 2d 637 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750, 177 L. Ed. 2d 894. Its protections are incorporated by the Fourteenth Amendment's Due Process Clause and apply to state action. *McDonald* at 791. Our State Constitution similarly provides: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed[.]" N.C. Const. art. I, § 30.

Under the North Carolina Constitution, it is within the Legislature's power to regulate the right to bear arms so long as the regulation is "at least reasonable and not prohibitive, and [bears] a fair relation to the preservation of the public peace and safety." *Britt v. State*, 363 N.C. 546, 549, 681 S.E.2d 320, 322 (2009) (citations omitted). A constitutional challenge to a statute is a question of law that we review *de novo*. *State v. Grady*, 372 N.C. 509, 521-22, 831 S.E.2d 542, 553 (2019). Under *de novo* review "we consider the matter anew and substitute our judgment for that of the trial court." *Parks v. Johnson*, 282 N.C. App. 124, 127-28, 970 S.E.2d 290, 283 (2022). However, "we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Grady* at 521-22, 831 S.E.2d at 553. "The fact that a statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.' " *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697 (1987)). To succeed on a facial challenge, a defendant "must establish that no set of circumstances exists under which the act would be valid." *Id.*

We have in the past upheld Section 14-415.1 and rejected the argument it violates either State or Federal Constitutional guarantees of the right to bear arms. *See State v. Fernandez*, 256 N.C. App. 539, 545-47, 808 S.E.2d 362, 367-68 (2017); *State v. Whitaker*, 201 N.C. App. 190, 193-95, 689 S.E.2d 395, 397-98 (2009). Defendant argues recent United States Supreme Court decisions require we revisit this analysis.

Specifically, the Supreme Court's decision in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen* modifies the standard for determining if legislation violates the Second Amendment's protections. 597 U.S. 1, 213 L. Ed. 2d 387 (2022). In *Heller* and *McDonald*, the Supreme Court held the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. 554 U.S. at 570; 561 U.S. at 749. Applying those decisions prior to *Bruen*, courts evaluating the constitutionality of statutes implicating that right employed a two-part analysis similar to that used in the context of other individual constitutional rights. The first step was to determine if the challenged law regulated activity within the scope of the protected right as was originally understood. *Bruen*, 597 U.S. at 18-20. Then, if the activity was protected, they would employ means-end scrutiny and determine if the government's interest justified the burden the regulation placed on the right to bear arms. *Id.* Depending upon how "core" of a right was burdened, this could mean applying either strict or intermediate scrutiny. *Id.* at 17-19.

In *Bruen*, the Supreme Court rejected the second part of this test, holding courts should not apply means-end scrutiny in the Second Amendment context:

> Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

Id.

Thus, under *Bruen*, courts apply a new two-part test to determine the constitutionality of firearms regulations. As before, the government may justify the regulation by "establishing that the challenged law regulates activity falling outside of the scope of the right as originally understood." *Id.* at 18 (citations omitted). In making this determination, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. If the law regulates protected conduct, we then "must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'applying faithfully the balance struck by the founding generation to modern circumstances.' " *United States v. Rahimi*, 602 U.S. 680, 692, 219 L. Ed. 2d 351 (2024) (citing *Bruen*, 597 U.S. at 29). Even if a law burdens the right to bear arms for a historically permissible reason, it may be unconstitutional if the scope of the regulation extends "beyond what was done at the founding." *Id.* "If laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Id.* The government is not required to identify a "historical twin" to the statute in question, but must identify a "well-established and representative historical analogue." *Bruen*, 597 U.S. at 30. "[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.*

This Court has examined and upheld the constitutionality of Section 14-415.1 against facial challenge following *Bruen* and determined its provisions fall within this historical tradition of "disarming individuals who pose a threat to the safety of others." *State v. Nanes*, 297 N.C.

App. 863, 870, 912 S.E.2d 202, 209 (2025). We noted the United States Supreme Court in *United States v. Rahimi* had recognized "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." *Id.* at 868, 912 S.E.2d at 207-08 (citing 602 U.S. at 690 (holding as constitutional state law disarming individuals subject to a domestic violence restraining order)). We found historical analogues in surety laws, as well as "going armed" and "affray" laws which punished the use of firearms to terrorize people with imprisonment and the forfeiture of arms. *Id.* at 868, 912 S.E.2d at 208 Accordingly, we held Section 14-415.1 fell within the historical tradition of disarming individuals who pose a clear threat of physical violence to another, in particular because the statute includes a provision by which certain nonviolent felons may petition to have their rights restored. *Id.* at 869-70, 912 S.E.2d at 208-09; N.C. Gen. Stat. § 14-415.4(b).

We are bound by a decision made by a prior panel of this Court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We note as well that our decision in *Nanes* is consistent with the emerging post-*Bruen* consensus among federal courts that felon-in-possession statutes do not facially violate the Second Amendment. *See United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024) ("Congress acted within the historical tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons."); *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024) (holding *Bruen* does not abrogate prior decision holding "felons are categorically 'disqualified' from exercising their Second Amendment right under *Heller*."), *cert. granted, judgment vacated for further consideration in light of Rahimi sub nom. Dubois v. United States*, 220 L. Ed. 2d 375 (2025); *United States v. Canada*, 123 F.4th 159, 161 (4th Cir. 2024) ("No federal appellate court has held that Section 922(g)(1) is facially unconstitutional and we will not be the first.").

We additionally held in *Nanes* Section 14-415.1 does not facially violate Article I, Section 30 of the North Carolina Constitution. 912 S.E.2d at 211. As we are bound by prior decisions of this Court, we continue to hold Section 14-415.1 is facially constitutional under both the United States and the North Carolina Constitutions. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

II. Federal As-Applied Challenge

[2] Defendant contends Section 14-415.1 is unconstitutional as applied to him because his predicate felony, Attempted Fleeing to Elude Arrest, was nonviolent in nature. He argues we should follow certain federal appellate decisions holding specific applications of the federal

felon-in-possession statue unconstitutional. *See, e.g.*, *Range v. Attorney General*, 69 F.4th 96 (3rd Cir. 2023) (holding federal felon-in-possession statute unconstitutional as applied to petitioner convicted of making a false statement to obtain food stamps), *cert. granted, judgment vacated for consideration in light of Rahimi sub nom. Garland v. Range*, 219 L. Ed. 2d 1313 (2024).

Defendant's as-applied challenge is not controlled by our decision in *Nanes* because our as-applied analysis was limited to the specific defendant and predicate felony at issue in that case. The defendant in *Nanes* was convicted of felony animal cruelty for violently killing his parents' pet dog and had a history of violent criminal convictions including assault and battery. 297 N.C. App. at 870-71, 912 S.E.2d at 209-10. We held the defendant "has a demonstrated history of violence towards others" and therefore revoking his right to possess a firearm was within our nation's tradition and history of disarming individuals who pose a threat of violence towards others. *Id.*

However, we need not perform this felony-by-felony analysis to determine the constitutionality of Section 14-415.1 as applied to each individual defendant who challenges it. Prior to the Supreme Court's decision in *Bruen*, we held as-applied challenges to Section 14-415.1 to be universally unavailing because convicted felons fall outside of the protections of the Second Amendment. *See State v. Fernandez*, 256 N.C. App. at 546-47, 808 S.E.2d at 367-68.[1]

In *Fernandez* we adopted the reasoning of the Fourth Circuit in *Hamilton v. Pallozzi*, 848 F.3d 614 (2017), and *United States v. Moore*, 666 F.3d 313 (2012). In those cases, the Fourth Circuit applied the traditional two-part analysis, beginning with the question of whether the regulated conduct "is within the protected Second Amendment right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.' "[2] *Hamilton*, 848 F.3d at 624 (citing *Heller*, 554 U.S. at 635). It held any challenge to a felon-in-possession statute fails because "conviction of a felony necessarily removes one from the class of 'law-abiding,

1. We acknowledge our opinion in *Nanes* states section 14-415.1 "undoubtedly regulates conduct that the Second Amendment's plain text covers as it revokes an individual's right to keep and bear arms following a felony conviction." 297 N.C. App. at 867-68, 912 S.E.2d at 207. However, *Nanes* does not rely on that conclusion, which is at odds with our earlier decision in *Fernandez*.

2. In *Bruen* the Supreme Court clarifies the right to bear arms extends outside of the home. 597 U.S. at 4.

responsible citizens' for the purposes of the Second Amendment."[3] *Id.* at 626.

Revisiting this question following *Bruen*, the Fourth Circuit reached the same conclusion as before. In *United States v. Hunt*, that court addressed facial and as-applied challenges to 18 U.S.C. § 922(g)(1), the federal felon-in-possession statute. 123 F.4th 697 (2024). It held its "previous decisions rejecting as-applied challenges to Section 922(g)(1) remain binding because they can be read 'harmoniously' with *Bruen* and *Rahimi* and have not been rendered 'untenable' by them." *Id.* at 703 (citations omitted). This is because those decisions relied on the determination that those convicted of felonies are not law-abiding citizens and therefore fall outside of the Second Amendment's protections entirely. This first part of the traditional analysis, determining whether the regulated conduct falls within the Second Amendment's protections, was left undisturbed by *Bruen*:

> To be sure, *Bruen* later disavowed the second step of this Court's former two-part test for considering Second Amendment challenges as "one step too many." 597 U.S. at 19, 142 S.Ct. 2111 (rejecting "means-end scrutiny"). But *Bruen* also described the first step of our former test as 'broadly consistent with *Heller*." *Id.* And our en banc Court has concluded that *Bruen* "did not disturb" the analysis this Court conducted under that "first step," including holdings about whether a given situation is "outside the ambit of the individual right to keep and bear arms." *Bianchi*, 111 F.4th at 448.

Id. at 704.

Accordingly, the Fourth Circuit held *Bruen* provides "no basis for a panel to depart from this Court's previous rejection of the need for any case-by-case inquiry about whether a felon may be barred from possessing firearms." *Id.* It continued to apply the holdings of *Moore* and *Hamilton*: that those with felony convictions fall outside of the Second Amendment's protections for law-abiding citizens. *Id.*

We agree with the Fourth Circuit's reasoning. We note the United States Supreme Court in its recent jurisprudence on the matter has made it clear that prohibitions on firearm possession by felons are

3. The only exceptions to this arise if the defendant receives a pardon or if the law forming the basis of the predicate felony conviction has been declared unconstitutional or otherwise unlawful. *Hamilton*, 848 F.3d at 626.

presumptively lawful. *See Heller*, 554 U.S. at 626 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons[.]"). In *Heller*, the Court described the right guaranteed by the Second Amendment as that enjoyed by "*law-abiding*, responsible citizens[.]" *Id.* at 635 (emphasis added). In *Bruen* the Supreme Court repeated this language. 597 U.S. at 5 ("[N]one of these limitations on the right to bear arms operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose."). Following *Bruen* in *United Staes v. Rahimi* the Court remarked it "does not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse[.]" 602 U.S. 680, 682 (citing *Heller*, 554 U.S. at 626). It reaffirmed "that many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.' " *Id.*

Although *Bruen* rejects means-end scrutiny to determine what regulations on protected conduct are acceptable, it does not affect our understanding of the types of conduct the Second Amendment protects. As the Supreme Court has repeatedly, in *Bruen* and other decisions, defined the right to bear arms as one afforded to "law-abiding citizens," nothing in *Bruen* upsets prior determinations that the possession of firearms by felons falls outside of its protections. Because we agree with the Fourth Circuit that *Bruen* does not abrogate decisions like *Hamilton* that hold as such, we are bound by our decision in *Fernandez* and continue to hold Section 14-415.1 regulates conduct outside of the Second Amendment's protections. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. Defendant's as-applied challenge fails and we need not reach the question of whether there is a historical tradition of similar regulations. *Id.*

III. State As-Applied Challenge

[3] Finally, Defendant challenges Section 14-415.1's application to him under our state constitution.

For challenges under Article I, Section 30 of the North Carolina Constitution, we must determine whether the challenged state action is "reasonable and not prohibitive" and "bear[s] a fair relation to the preservation of the public peace and safety." *Britt v. State*, 363 N.C. 546, 549, 681 S.E.2d 320, 322. To perform this analysis and determine if a convicted felon can be constitutionally disarmed under Section 14-415.1 our Supreme Court has focused on five factors:

(1) The type of felony convictions, particularly whether they involved violence or the threat of violence

(2) The remoteness in time of the felony convictions

(3) The felon's history of law-abiding conduct since the crime

(4) The felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited

(5) The felon's assiduous and proactive compliance with Section 14-415.1(a)

State v. Whitaker, 201 N.C. App. 190, 205, 689 S.E.2d 395, 404 (2009) (citing *Britt* at 550, 681 S.E.2d at 323). The individual making the as-applied challenge "must present evidence which would allow the trial court to make findings of fact" as to each factor. *State v. Buddington*, 210 N.C. App. 252, 255, 707 S.E.2d 655 (2011). An appellate court does not engage in factfinding, and we base our analysis upon uncontroverted evidence presented to the trial court regardless of the trial court's factual findings. *Whitaker* at 205, 689 S.E.2d at 404.

In *Britt*, the plaintiff had pleaded guilty to the nonviolent offense of felony possession with intent to sell and deliver a controlled substance in 1979. 363 N.C. at 547, 681 S.E.2d at 321. In 2004, the Legislature amended Section 14-415.1. Previously, the statute had only prohibited felons from possessing certain types of firearms, but the amendment extended the prohibition to all firearms. *Id.* at 547, 681 S.E.2d at 321. The plaintiff, upon discussion with the Sheriff of Wake County, divested himself of all firearms, including rifles and shotguns he used for hunting *Id.* at 548, 681 S.E.2d at 322. Our Supreme Court concluded the amended statute was unconstitutional as applied to the plaintiff because of "his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation." *Id.* at 550, 681 S.E.2d at 323.

The circumstances in Defendant's case are not analogous to those present in *Britt*. We note at outset Defendant has not "assiduously and proactively complied" with Section 14-415.1(a), as this case stems from his violation of that statute. Defendant has not identified—and we are not aware—of any cases in which a defendant has successfully challenged Section 14-415.1 as applied to him after being convicted under it.[4]

4. In fact, successful challenges under the *Britt* factors are exceedingly rare, at least at the appellate level. The only examples of which we are aware are *Britt* itself and *Baysden*, which was affirmed 3-3 by our Supreme Court and has no precedential value.

In *Britt*, the claimant brought an affirmative action against the State and through proactive compliance with the statute, along with the other enumerated factors, showed he was "not among the class of citizens who pose a threat to public peace and safety." *Id.* at 550, 681 S.E.2d at 323. Likewise, in *Baysden v. State* the plaintiff filed a complaint seeking a declaration holding Section 14-415.1 was unconstitutional as applied to him. 217 N.C. App. 20, 718 S.E.2d 699, *aff'd without precedential value* 366 N.C. 370, 736 S.E.2d 173 (memorandum) (2013). As we were "unable to see any material distinction between the facts at issue in the Supreme Court's decision in *Britt* and the facts at issue here," we held the plaintiff in that case had also shown Section 14-415.1 was unconstitutional as applied to him. *Id.* at 25, 718 S.E.2d at 704.

In cases in which a defendant charged with a violation of Section 14-415.1 has asserted an as-applied challenge in defense, we have consistently held those challenges fail. *See, e.g.*, *State v. Bonetsky*, 246 N.C. App. 640, 784 S.E.2d 637 (2016); *State v. Price*, 233 N.C. App. 386, 757 S.E.2d 309 (2014).

This does not end our inquiry, as the Supreme Court has not indicated any of the five factors is determinative. However, Defendant has not presented evidence towards these five factors showing Section 14-415.1, as applied to him, is "an unreasonable regulation, not fairly related to the preservation of public peace and safety." *Britt* at 550, 681 S.E.2d at 323.

Although Attempted Fleeing to Elude Arrest may not directly involve violence or a threat of violence, fleeing from police officers in a vehicle shows a disregard for the safety of others, particularly as Defendant pled guilty to the charge along with three aggravating factors: speeding in excess of fifteen miles per hour, driving recklessly, and while his driver's license was revoked. *See Bonetsky* at 645, 784 S.E.2d at 641 (recognizing our inquiry should focus "on the litigant's actual conduct rather than upon the manner in which the General Assembly has categorized or defined certain offenses").

Defendant argues his felony conviction, 13 years prior to being charged under Section 14-415.1, is remote enough to weigh in his favor. The plaintiff's conviction in *Britt*, however, was 30 years old. 363 N.C. at 549, 681 S.E.2d at 322. We have rejected at least one challenge involving a conviction older than Defendant's. *See Bonetsky*, 246 N.C. App.

We note the plaintiff in *Baysden* affirmatively brought his claim in an action for declaratory judgment.

at 645-46, 784 S.E.2d at 641-42 (eighteen years). *See also Johnston v. State*, 224 N.C. App. 282, 303, 735 S.E.2d 859, 874 (2012) (noting 31-year-old predicate felony "appears to weigh in favor of plaintiff's claim" but reversing and remanding based on the trial court making insufficient findings to resolve constitutional claim).

Defendant argues he has a history of law-abiding conduct following his conviction, but he does so by minimizing his 2017 conviction for violating a Domestic Violence Protective Order. This conduct is in stark contrast to *Britt*, where "no evidence [was] presented which would indicate that plaintiff is dangerous." 363 N.C. at 550, 681 S.E.2d at 322-23.

No evidence in the record shows Defendant's history during the time he was allowed to possess a firearm.[5] Presuming Defendant's firearm possession prior to his conviction was entirely responsible and lawful, this does not outweigh each of the other four factors, particularly given Defendant's violation of the restriction placed on him as a result of his conviction.

Applying each of the *Britt* factors to this case, Section 14-415.1 is a reasonable regulation which is "fairly related to the preservation of public peace and safety" as applied to Defendant. 363 N.C. at 550, 681 S.E.2d at 323. It is not unreasonable to disarm an individual who was convicted of a felony, subsequently violated a domestic violence protective order, and chose to continue to carry a firearm in violation of the law. N.C. Gen. Stat. § 14-415.1 is constitutional as applied to Defendant. The trial court did not err in rejecting Defendant's as-applied challenge under Article I, Section 30 of the North Carolina Constitution.

Thus, the trial court did not err in holding Section 14-415.1 does not violate the United States or North Carolina Constitutions, either facially or as applied to Defendant. Therefore, it did not err by denying

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5. We note this factor has primarily been applied with regards to compliance with Section 14-415.1 by individuals convicted prior to the statute's amendment in 2004 expanding its prohibitions. *See Britt*, 363 N.C. at 550, 681 S.E.2d at 323 (noting the plaintiff's responsible use of firearms "in the seventeen years between restoration of his rights and adoption of N.C.G.S. § 14-415.1's complete ban on any possession of a firearm by him" in 2004); *Johnston*, 224 N.C. App. at 304, 735 S.E.2d at 874 (noting evidence of lawful post-conviction firearm possession between 1988 and 2004). Under the plain language of this factor, however, it appears evidence of lawful, responsible possession prior to a challenger's felony conviction should weigh in their favor. *See Johnston*, 224 N.C. App. at 304, 735 S.E.2d at 873 (remanding for the trial court to take additional evidence and make findings on "whether plaintiff used a firearm in a responsible, lawful manner during the events giving rise to this conviction").

Defendant's Motion to Dismiss. Consequently, the trial court properly entered its Judgment upon the jury's verdict.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the Judgment.

NO ERROR.

Judges STROUD and TYSON concur.

STATE OF NORTH CAROLINA
v.
DAVIDSON NEVILLE HENDERSON, DEFENDANT

No. COA24-223

Filed 7 May 2025

1. Criminal Law—evidence—audio of body-worn-camera footage—no absolute impasse between defendant and counsel

In a prosecution which resulted in defendant being found guilty of carrying a concealed firearm, possession of a firearm by a felon, and having attained habitual felon status—arising from the discovery of a gun in defendant's pocket following a traffic stop—the trial court did not err in failing to instruct defense counsel to comply with defendant's request not to mute a portion of the audio of an officer's body-worn-camera recording of the traffic stop played for the jury where, after defense counsel alerted the court to a conflict with defendant on this tactical decision and the court then directed defendant to discuss the matter with his counsel, no further discussion of, or objection to, the evidence—let alone an absolute impasse—appeared in the record.

2. Appeal and Error—abandonment of issue—mistrial—ex mero motu—plain error not specifically and distinctly argued

In a prosecution which resulted in defendant being found guilty of carrying a concealed firearm, possession of a firearm by a felon, and having attained habitual felon status—arising from the discovery of a gun in defendant's pocket following a traffic stop—defendant abandoned his appellate argument that the trial court erred in failing to declare a mistrial ex mero motu following the admission of allegedly inadmissible and prejudicial evidence (regarding

defendant's possession of suspected marijuana and a stack of temporary license plate tags) where defendant did not object to the admission of the evidence at trial and did not specifically and distinctly argue plain error in his appeal.

3. Constitutional Law—effective assistance of counsel—failure to object to improper evidence or move for a mistrial—cold record insufficient—dismissed without prejudice

In a prosecution which resulted in defendant being found guilty of carrying a concealed firearm, possession of a firearm by a felon, and having attained habitual felon status—arising from the discovery of a gun in defendant's pocket following a traffic stop—where defendant contended on appeal that his trial counsel provided ineffective assistance by failing to object to (or request a mistrial following) the admission of evidence regarding defendant's possession of suspected marijuana and a stack of temporary license plate tags, the Court of Appeals dismissed the issue without prejudice to defendant's right to raise his argument via a motion for appropriate relief in the superior court because the appellate court could not resolve defendant's claim on the cold record.

Appeal by defendant from judgment entered 29 June 2023 by Judge Reggie E. McKnight in Superior Court, Mecklenburg County. Heard in the Court of Appeals 24 September 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General M. Lynne Weaver, for the State.

Assistant Public Defender Julie Ramseur Lewis for defendant-appellant.

STROUD, Judge.

Defendant Davidson Neville Henderson appeals from a judgment entered upon a jury's verdict finding him guilty of carrying a concealed gun, possession of a firearm by a felon, and having attained habitual felon status. On appeal, Defendant argues that: (1) the trial court erred in failing to instruct defense counsel when an absolute impasse occurred; (2) the trial court erred in failing to declare a mistrial *ex mero motu*; and (3) he received ineffective assistance of counsel. After careful review, we conclude there was no error in part and dismiss Defendant's ineffective assistance of counsel claim without prejudice to his right to assert the claim in a motion for appropriate relief.

I. Factual Background and Procedural History

On 21 October 2021, Officer Kevin Jackson and Officer Robert Preston of the Charlotte-Mecklenburg County Police Department were conducting surveillance at a gas station that was known for drug-related activity. According to testimony offered at trial by the officers, their vehicle was between the gas pumps and the store when they saw Defendant walk in front of their vehicle, "wearing a ski mask" "just above his head" but his "eyes, mouth, and nose" were visible. Defendant pulled the black ski mask "down to where his eyes [we]re only exposed." Officer Jackson believed that "[i]n 79-degree weather, pulling a mask over your face once you see police . . . is an attempt to conceal your identity." Defendant "then does a 180 and walks back to [his] vehicle." The officers ran the license plate on the vehicle and determined that Defendant had an outstanding warrant for his arrest. Defendant exited the parking lot of the gas station in his vehicle; the officers followed Defendant's vehicle and conducted a traffic stop within "less than a mile."

Defendant also testified at trial. He testified that he was wearing the ski mask that day for "COVID protection reasons because [Ms. Eden] was pregnant." Defendant said he had pulled his vehicle into the gas station, went inside, paid, and *after* he was "finished pumping the gas and closed the pump and was walking back to the driver's side," he saw the officers. Defendant testified that he "got in the car[,] [he] sat there for probably like, I don't know, 30 seconds, 20, 30 seconds, and pulled off, and then went back to like, up [Interstate] 77 way" before being pulled over.

The officers further testified at trial that after pulling Defendant over, Officer Jackson asked for his driver's license to confirm whether he was the individual with an outstanding warrant. After he confirmed that Defendant was the individual with the outstanding warrant, Officer Jackson asked Defendant to exit his vehicle and informed him that he was being detained. After placing Defendant in handcuffs, Officer Jackson frisked Defendant and felt what he "immediately knew to be a revolver in [Defendant's] right front pocket." He announced "94", a law enforcement code to "let everybody know on scene that there is a firearm in play." Officer Preston then "reached into [Defendant's] right front pocket and retrieved the revolver." The body-worn camera ("BWC") video from Officer Preston's camera clearly shows Officer Preston removing the silver .38 caliber revolver from Defendant's front pocket. Defendant was then placed under arrest for carrying a concealed handgun.

Officer Jackson then returned to Defendant's vehicle and asked the passenger, Ms. Eden, to get out. He frisked her also to make sure "she didn't have any weapons on her." He then checked "to see if there w[ere] any firearms in the vehicle." He found in the center console a green-leafy substance he believed to be marijuana and a "long black tube sock" containing "more .38-caliber rounds," which was "the same caliber of ammunition for the revolver that had been recovered."

Officer Preston testified that while he was in the police vehicle checking information on the computer, Defendant was in the back seat. While they were in the vehicle, Defendant made a "spontaneous utterance." He said, "I keep it for protection." This statement was not captured on his BWC audio. He testified this should have been on the video, but with the "road noise, the radio noise" and "the layer of plastic and metal between" the front and back seats, this statement was not captured.

Officer Jackson transported Defendant to the police station after his arrest. After Defendant waived his *Miranda* rights, Officer Jackson asked him about the gun. Defendant

> said that he knew that he wasn't supposed to have a firearm because he is a convicted felon, but he kept it on him because of the rise in crime trends in Charlotte. He blamed the crime trends on some of the local rappers. So he said he would rather have it on him for protection.

On 1 November 2021, Defendant was indicted upon a true bill of indictment for two counts of carrying a concealed weapon and possession of a firearm by a felon. The matter came on for trial 26 June 2023.

At the start of the second day of trial, the State requested that the trial court read into the record "at some point today before the State rests" the stipulation Defendant had agreed to, that on 14 May 2018, he had been convicted in Mecklenburg County of a felony "committed on June 10, 2016, in violation of the law of the state of North Carolina" that "made it unlawful for . . . [D]efendant [ ] to possess a weapon." The State also informed the trial court that it would be presenting two videos from the BWCs during the testimony of Officer Preston. The State noted some concerns regarding a portion of the audio on the video identified as State's Exhibit No. 5:

> [THE STATE]: [Defense counsel] and I discussed that when I introduce that exhibit, at about four minutes and 19 seconds into that video, I will be muting it because after that point in time, there is a substantial discussion

> between Officer Preston and the female passenger. [Defense counsel] advised me that he had concerns about the relevance of that, of those portions of the video, and so the State is agreeing not to play the audio of the rest of Officer Preston's BWC.

The State also noted that:

> I know that the [S]tate has elicited testimony regarding the reason for the stop and the search in this case was that . . . Defendant had an active warrant for his arrest. The [S]tate has been taking steps to make sure that it has not been elicited that the warrant for his arrest was for his parole violation, and up to this point, I don't believe that that evidence has been elicited.

The State asked that since the basis for the stop of Defendant's vehicle was the warrant for arrest for a parole violation, "at the appropriate time, the State would ask that you give the jury a limiting instruction that they are not to consider the fact that he had a warrant for his arrest as propensity evidence." The trial court agreed to instruct the jury, stated the proposed instruction, and Defendant had no objection to this instruction.

At this point, Defendant's attorney informed the trial court of his client's concerns regarding the muted audio:

> [DEFENSE COUNSEL]: For the record, because my client and I have some disagreements as to strategy, I made an agreement with the district attorney regarding not playing the audio of the portion with Ms. Eden[ ].
>
> THE COURT: The passenger, yes.
>
> [DEFENSE COUNSEL]: The passenger.
>
> THE COURT: Yes, sir.
>
> [DEFENSE COUNSEL]: [Defendant] tells me *he wants it all heard. I don't think that's a good idea*. I don't think it adds anything to his case, and it is my belief that it should not be played. I wanted to at least put on the record *that he disagreed with that decision. He wanted to say that.*
>
> THE COURT: All right. So we'll note for the record that there is evidence as relates to the [BWC] footage from a witness who hasn't testified yet, Officer Preston. *It is anticipated that that testimony or that footage will*

contain hearsay evidence, and so the exhibit of that is what you may want to have a conversation with your client about. Well, I guess that's for y'all to discuss strategy. That you don't have to answer for him on the record.

[DEFENSE COUNSEL]: *I'm not wanting it in there*, anyway, *but he is - -*

THE COURT: Understood.

[DEFENSE COUNSEL]: *I'm informing the court.*

THE COURT: Understood. *But that's your client's wish*, potentially, *that that hearsay evidence be admitted.* Court would note that, for purposes of the record, *that is a discussion that defense counsel has had with [Defendant] in this matter, and that it is [Defendant]'s wish that that information, if not objected to, be admitted into evidence. So we'll note that for the record in terms of what [Defendant] wishes.*

[THE STATE]: And I'll also let the court know that that video clip [that] we had contemplated muting, which does contain what the [S]tate would contend is inadmissible hearsay, also contains several references to the reason for the arrest warrant, which is [Defendant]'s parole violation. So should [Defendant] introduce that, I'm just putting that on the record.

THE COURT: Okay. So with regard to that type of information, once again, we'll note that for the record. [Defense counsel], I mean, the two items that the court has heard about thus far are two items that may or may not be admissible under the rules of evidence as it relates to that type of information, be it in any format, the testimony, video, et cetera. *But that is completely contingent upon strategically what happens as relates to the defense in this matter, which obviously we do not need to put that on the record, but those two items, the court would note just peremptorily, sounds as though they are matters that may have admissibility issues, depending on what the defense decides to do if they are elicited at that time.* I believe that's all we can do as far as the record is concerned.

(Emphases added.)

Immediately after the discussion above, the State requested that "[t]o the extent that we do move forward with the contemplated plan of muting the video, I ask also that at this point you give an instruction to the jury not to speculate as to what's being said."

> [DEFENSE COUNSEL]: And I guess I would just say because they would - - just not for their consideration without giving them any further, whether it's admissible or not.
>
> THE COURT: All right. As to the request for a limiting instruction regarding the potential admissibility of a second portion of [BWC] footage, the court would provide the following instruction. The court will hear from the parties if they have any other recommendations. Members of the jury, you will now hear portions of the audio/video footage. Certain portions of this footage will be muted or not heard by you. You should not speculate or concern yourself with those portions [that] are not played. You're only to consider the portions that have been played for you as evidence in this case.
>
> [THE STATE]: That's acceptable to the [S]tate, your honor. Thank you.
>
> [DEFENSE COUNSEL]: *We already put your concerns on the record.*[1] I'm fine with the instruction, your honor. We put on the record your disagreement with not playing it.
>
> [DEFENDANT]: I have a question, [j]udge. Can I speak to the judge? *Is that fine with you?*[2]
>
> [DEFENSE COUNSEL]: It's up to the judge whether he wants to hear from you.
>
> THE COURT: All right. Well, [Defendant], I just have to let you know, [Defendant], everything that we're saying here obviously is being transcribed. You are on trial here.
>
> [DEFENDANT]: Yes, sir.

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1. It appears defense counsel was speaking to Defendant, as he noted "your concerns."

2. It is not clear whether Defendant was speaking to defense counsel or to the trial court.

> THE COURT: And so you have the right to remain silent. You also have the constitutional right to testify, but what we're talking about now is not testimony. We're talking about you kind of having a conversation with me, and that typically just doesn't happen. *So I would just caution you, have the conversation with your defense counsel.* What we have been discussing are legal items, evidence, issues that are really in the field and spectrum of your lawyer. They are not anticipated for you to understand or know, and so the best way I can really describe this to you is strategically and legally, *you need to have those conversations with your lawyer about this evidence that we're talking about and its admissibility, what admissibility means, that type of thing. That's kind of the best place for that to happen because I can't give you legal advice. That's what an attorney is for. But that's what we[']re talking about. And I'm not saying y'all didn't have that conversation already. I'm simply saying that's the best place to have it because I can't give you legal advice. That's not my role. I can't do that.*
>
> [DEFENDANT]: Okay. Thank you.
>
> THE COURT: But that's what we're talking about as far as the audio and that kind of thing. *My understanding is you have seen it, you have heard it, but obviously during breaks, lunch, et cetera, or now, please feel free to take a moment if you[ ] all need to talk about that in some more depth.*

(Emphases added.)

On 29 June 2023, Defendant was found guilty upon a jury's verdict of carrying a concealed gun, possession of a firearm by a felon, and having attained habitual felon status. From this judgment, Defendant entered oral notice of appeal in open court.

II. Discussion

A. Purported Impasse

[1] In the first of three issues Defendant presents on appeal, Defendant contends that "the trial court erred in failing to comply with the mandates of *State v. Ali* and in failing to instruct trial counsel to comply with [Defendant]'s wishes as to the playing of the audio portion of State's Exhibit No. 5, a videotape, where an impasse on trial tactics was apparent and absolute."

> It is well established in our courts that tactical decisions, such as which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer. However, when counsel and a fully informed criminal defendant reach an absolute impasse as to such tactical decisions during trial, the client's wishes must control. However, no actual impasse exists where there is no conflict between a defendant and counsel. Moreover, when a defendant fails to complain about trial counsel's tactics and actions, there is no actual impasse.

State v. Curry, 256 N.C. App. 86, 97, 805 S.E.2d 552, 559 (2017) (citations, quotation marks, brackets, and ellipses omitted).

This Court recently summarized the law regarding disagreement between a defendant and counsel regarding strategic decisions at trial in *State v. Jackson*:

> Our Courts have previously recognized certain decisions, relating to the conduct of a case, are to be made by the accused, while other strategic and tactical decisions, such as what and how evidence should be introduced, are to be made by defense counsel after consultation with the defendant. However, where the defendant and his defense counsel reach an absolute impasse and are unable come to an agreement on such tactical decisions, the defendant's wishes must control. Notably, upon reaching an absolute impasse, defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached.
>
> In *State v. Floyd*, the defendant argued, on appeal, the trial court failed to adequately address an impasse between the defendant and his counsel regarding certain unidentified questions the defendant wanted to be asked of a witness. Further, the defendant argued the trial court's failure to instruct his counsel to comply with his wishes amounted to a denial of his constitutional right to control his defense and confront a witness. Our Supreme Court stated, while the defendant did tell the court his attorney was not asking the questions the defendant told him to ask, the record did not shed any light on the nature or the substance of those questions. Further, the Court also recognized the

> defendant was generally disruptive throughout trial and was forced to leave the courtroom, which led him to have a consultation with his attorney, while the witness, to whom he wished to ask the desired questions, was on the witness stand. Accordingly, our Supreme Court held it was unable, without engaging in conjecture, to determine whether the defendant had a serious disagreement with his attorney regarding trial strategy and therefore could not determine, from the cold record, whether an absolute impasse existed.

State v. Jackson, 292 N.C. App. 616, 619-20, 899 S.E.2d 34, 38-39 (2024) (citation and quotation marks omitted).

As discussed above, in *State v. Floyd*, the Supreme Court of North Carolina was unable to determine "from the cold record whether an absolute impasse" as described in *Ali* existed. 369 N.C. 329, 337, 794 S.E.2d 460, 466 (2016). In *Floyd*, the defendant "did not believe defense counsel was asking the right questions" of a certain witness:

> [The] defendant told the trial court that his attorney was not asking the questions [the] defendant told him to ask Detective Braswell; however, *the record does not shed any light on the nature or the substance of those desired questions*. We note that [the] defendant was generally disruptive throughout trial, was forced to leave the courtroom when this behavior escalated while Detective Braswell was on the witness stand, and had to consult with his attorney outside of court thereafter. In light of [the] defendant's disruptive behavior, we cannot ascertain, without engaging in conjecture, whether [the] defendant had a serious disagreement with his attorney regarding trial strategy or whether he simply sought to hinder the proceedings. *As a result, it cannot be determined from the cold record whether an absolute impasse existed as described in Ali.*

Id. at 340-41, 794 S.E.2d at 467-68 (emphasis added).

Here, unlike *Floyd*, the record does show "the nature and substance" of the evidence Defendant and defense counsel disagreed on. Defense counsel wanted the audio portion of the State's Exhibit No. 5 to be muted during the portion of the video where Officer Preston was speaking to Ms. Eden. In this portion of the video, Officer Preston takes the gun he removed from Defendant's pocket, gets an evidence envelope for the gun, and secures the gun in the back of the police vehicle. Ms.

Eden is standing at the front of the car, drinking from a cup with a straw. Officer Preston then asks Ms. Eden, did "[y]ou know he had that gun on him the whole time?" She slowly shakes her head to indicate "no" and then says "no." Officer Preston tells her that they ran Defendant's tag and it showed Defendant had a warrant for arrest, so they put Defendant in handcuffs.

During the entire video, there is substantial road noise from the passing vehicles on Interstate 77. Ms. Eden asks "why" and the rest of the question is indecipherable. Officer Preston answers "parole violation"; Ms. Eden indicates she could not hear, so he repeats "parole violation." Officer Preston then asks Ms. Eden for her name, date of birth, and contact information; she provides the information requested as Officer Preston writes it on a notepad.

Based upon the colloquy with the trial court, defense counsel wanted to mute this portion of the audio because Officer Preston told Ms. Eden that Defendant was being arrested for a parole violation. The State wanted this portion of the video muted because of hearsay from Ms. Eden, since she did not testify at trial. Defendant wanted the audio to be heard because Ms. Eden said "no" when she was asked if she knew Defendant "had that gun on him the whole time." Defendant testified in his own defense, and he testified that he did not have a firearm that day at all. He testified that Officer Preston had planted the gun on him and he had never seen the gun before. Defendant believed Ms. Eden's answer of "no" to Officer Preston's question would support his contention that he did not have a gun that day.

The record also shows that defense counsel advised the trial court of the disagreement before the presentation of Officer Preston's testimony and State's Exhibit No. 5, and the trial court addressed this issue with Defendant. The substance of the strategic disagreement was clear on the record, but the record does not show an absolute impasse. Instead, the trial court advised Defendant that he would need to "have those conversations with [his] lawyer about this evidence that we're talking about and it's admissibility, what admissibility means, that type of thing." The trial court noted that, "[m]y understanding is you have seen it, you have heard it, but obviously during breaks, lunch, et cetera, or now, please feel free to take a moment if you[ ]all need to talk about that in some more depth." Defendant did not indicate any further "need to talk about that in some more depth."

After this discussion regarding the conflict at the start of the second day of trial, Officer Jackson testified first, and then Officer Preston

testified. Officer Preston testified about his participation in the traffic stop including his interaction with Ms. Eden. During Officer Preston's testimony, the State offered State's Exhibit No. 5, which was ultimately played for the jury, but the audio was muted at the 4:19 mark as previously discussed. Our record reveals no further discussion, objection, or question regarding Defendant's request for the audio recording to be played in its entirety before the presentation of the video.

Immediately after the video was shown, the trial court excused the jury for a break, and inquired of defense counsel as to any "housekeeping matters" they may need to address "outside the presence of the jury." The State noted that defense counsel had mentioned Defendant's "parole" in front of the jury so it would be appropriate to give a limiting instruction as previously discussed, since the arrest warrant arose from a parole violation.[3] The State also noted its previous request for the stipulation regarding Defendant's felony conviction to be read to the jury. Defense counsel had no requests or objections. After the break, defense counsel proceeded with his cross-examination of Officer Preston.

Based upon the record, Defendant and his defense counsel did not come to an "absolute impasse." They initially had a disagreement regarding a strategic or tactical decision as to presentation of evidence. Defense counsel advised the trial court of this disagreement, and the trial court adequately addressed the disagreement. Defendant had the opportunity to "talk about that in some more depth" with defense counsel *after* the colloquy with the trial court. When the evidence in question was introduced, neither Defendant nor his defense counsel raised any further concerns. Immediately after State's Exhibit No. 5 was played, with the muted audio, the trial court asked if there were any "housekeeping" matters to address, and again, Defendant did not raise any further concerns. This record shows an initial disagreement between Defendant and his defense counsel, but not an "absolute impasse." Therefore, Defendant has failed to demonstrate any error based upon the exclusion of the audio portion of State's Exhibit No. 5.

B. Mistrial

[2] In his second issue on appeal, Defendant argues that the trial court "erred in failing to declare a mistrial *ex mero motu* where inadmissible and highly prejudicial evidence regarding [Defendant]'s possession of

3. During cross-examination of Officer Jackson, defense counsel asked, "Was it you or Officer Preston that informed [Defendant] of the parole issue?" He also asked, "Was [Defendant] under arrest for the parole hit at that point?"

suspected marijuana and a stack of temporary license plate tags was introduced by the State."

"Whether to grant a motion for mistrial is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. Jaaber*, 176 N.C. App. 752, 756, 627 S.E.2d 312, 314 (2006) (citation omitted). However, at the outset, we note that Defendant did not object to this evidence at trial, therefore, this argument is unpreserved. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

"[A]n issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4). Here, Defendant does not "specifically and distinctly" allege that this unpreserved issue is subject to plain error review, consequently, we deem this argument abandoned.

C. Ineffective Assistance of Counsel

[3] Finally, Defendant argues that he "was denied the effective assistance of counsel where his trial counsel failed to object and move for a mistrial after improper evidence was admitted."

Generally, "[t]he accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal." *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985). A motion for appropriate relief is preferable to a direct appeal because to

> defend against ineffective assistance of counsel allegations, the State must rely on information provided by [the] defendant to trial counsel, as well as [the] defendant's thoughts, concerns, and demeanor. Only when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance. Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of representation.

State v. Buckner, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citation, quotation marks, and brackets omitted).

Ineffective assistance of counsel "claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). However, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to assert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

For a criminal defendant to prevail on an ineffective assistance of counsel claim, the defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 80 L. Ed. 2d 674, 693, 698 (1984); *see also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting the *Strickland* test for ineffective assistance of counsel in North Carolina).

After careful consideration, we conclude that we are unable to decide Defendant's ineffective assistance of counsel claim based on the cold record before us. Consequently, we dismiss any ineffective assistance of counsel claims, without prejudice, to permit Defendant to pursue a MAR in the trial court.

III. Conclusion

We conclude that Defendant failed to demonstrate that he and defense counsel reached an impasse regarding the exclusion of a small portion of the audio of State's Exhibit No. 5. Defendant did not argue plain error as to the admission of evidence of the suspected marijuana and temporary license plates, so this issue was abandoned on appeal. Because we conclude that the cold record before us on appeal does not allow us to review Defendant's IAC claim, we dismiss that claim without prejudice to Defendant's right to bring that action in a subsequent MAR proceeding before the trial court.

NO ERROR IN PART; DISMISSED IN PART.

Judges ZACHARY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
DEONTE D. MEADOWS

No. COA24-149

Filed 7 May 2025

Constitutional Law—effective assistance of counsel—murder trial—implied concession of guilt—per se error—new trial granted

In a prosecution for first-degree murder and related charges arising from a home invasion by members of a gang, defendant did not receive effective assistance of counsel under the Sixth and Fourteenth Amendments where his counsel committed a per se *Harbison* violation by admitting during closing argument, without first obtaining defendant's consent, that defendant went to the victim's home on the night of the fatal incident. In a case with a limited amount of physical evidence linking defendant to the scene of the crime and in which the State disregarded an earlier ruling of the trial court and expounded a theory of acting in concert in its closing statement (to which defense counsel did not object), counsel's statement amounted to an implied concession of guilt by seeming to confirm the State's (erroneous) legal theory. Therefore, defendant's convictions were vacated and the matter was remanded for a new trial.

Judge STADING dissenting.

Appeal by defendant from judgment entered 28 March 2023 by Judge Douglas B. Sasser in Duplin County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Robert C. Ennis, for the State.

Ryan Legal Services, PLLC, by John E. Ryan, III, for defendant.

ARROWOOD, Judge.

Deonte D. Meadows ("defendant") appeals from judgment entered 28 March 2023 upon his convictions of possession of a firearm by a felon and first-degree murder. On appeal, defendant argues: (1) defendant's

counsel was per se ineffective by conceding guilt without permission and (2) the trial court erred by failing to intervene *ex mero motu* when the State made improper closing arguments. For the following reasons, we vacate defendant's convictions and remand for a new trial.

I. Background

The evidence at trial tended to show the following:

At around 12:41 am on 8 July 2016, Duplin County Sheriff's Deputy Evan Brock ("Deputy Brock"),[1] along with Sergeant Kennedy and Corporal Turner, responded to a call from Dondi Hutcherson Sr. ("Mr. Hutcherson Sr."), reporting a break-in and a gunshot injury to his son. Upon arriving to the scene, Deputy Brock noticed that there was forced entry at the front door of the home. Inside the home, Deputy Brock found different sized bullet casings on the floor in the living room. When the officers proceeded further into the home, they found Dondi Hutcherson, Jr. ("the victim") lying face down on the floor, and determined that he was deceased.

Mr. Hutcherson Sr. informed Deputy Brock that when he arrived home that evening, he saw a pair of shoes in the road and noticed the front door to his home was open. Upon walking to the front door, he noticed it had been kicked in and saw bullets on the floor. When he walked into the home, he saw his son lying face down on the floor with blood around him.

Defendant was indicted on charges of murder and possession of a firearm by a felon on 28 May 2019. Neither indictment mentioned any other actors or suspects and only discussed the actions of defendant.

Prior to trial, defendant filed a motion to dismiss the charge of first-degree murder, arguing that law enforcement officers "failed to properly secure and process the crime scene." Furthermore, defendant argued that law enforcement officers failed to preserve evidence that could have tested and may have exonerated defendant. After a hearing on the motion to dismiss, the trial court ultimately ruled that there was no indication that evidence had been disturbed or tampered with and denied the motion to dismiss.

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1. At the time of trial, Brock was an officer with the North Carolina State Highway Patrol as a highway patrolman in Duplin County, and the transcript reflects his status as an Officer. However, because he was a deputy with the Duplin County Sheriff's Office at the time of the incident, we refer to him accordingly in the opinion.

The trial commenced on 13 March 2023. During trial, the trial court heard a motion in limine related to potential gang involvement by the defendant. The trial court ultimately held that evidence of the defendant's gang involvement was admissible to establish motive, intent, planning, preparation, and the identity of the perpetrator.

Leslie Daugherty, a forensic scientist at the North Carolina State Crime Laboratory, testified as to the physical evidence that was found at the scene of the crime. She testified that she could not match the imprints of shoes that were found on the front door, which had been forcibly entered, to the shoes found outside the home.

Thus, much of the State's case rested on testimony given by defendant's former partner, Nalja Burton ("Ms. Burton"). During trial, Ms. Burton, who had previously dated and lived with defendant at the time of the incident, testified that the shoes found at the crime scene were loaned to defendant by his former roommate. Ms. Burton further testified that defendant had been in a gang known as Eight Trey Crips along with two men who were known to Ms. Burton as "Ducc" and "Chapo."

Ms. Burton testified that on the night of the incident, defendant had received a call from his gang brothers "to handle some business." She had given defendant the shoes that were found at the scene of the crime prior to defendant leaving their home with Ducc and Chapo. When defendant, Ducc, and Chapo returned to Ms. Burton's apartment, she observed them pacing and sweating. She testified that they came back with "a whole bunch of money and a lot of weed" and they proceeded to divide both the money and the weed between the three of them. She indicated that another member of the gang, nicknamed "Dehigh," was responsible for ordering Chapo, Ducc, and defendant to pursue the victim, and "was the one that paid them." According to Ms. Burton, Dehigh and Ducc had a higher position in the gang than defendant and Chapo. Ms. Burton also noted that defendant was not wearing shoes when he returned to their home. According to Ms. Burton, when defendant arrived back to their home on the evening of 7 July 2016, he admitted to her that he had killed the victim and that he "moved up in the gang."

The State only brought charges against defendant and did not bring charges against Ducc and Chapo, who Ms. Burton had testified had been present at the scene of the incident that night. In addition to Ms. Burton's testimony, the State also played for the jury several phone calls between Ms. Burton and defendant, which the State argued corroborated Ms. Burton's testimony that defendant was the shooter.

During trial, the court conducted a *Harbison* inquiry with defendant. The trial court specifically questioned defendant about the State eliciting testimony from witnesses regarding a prior felony conviction. The prior felony in question was a conviction of felony flee to elude arrest committed on 18 February 2014. The trial court confirmed that the defendant consented to a stipulation that he had previously been convicted of a felony. Beyond asking about this prior felony conviction, the trial court did not inquire about, and the defendant did not provide, consent to discuss any other stipulations or admissions of guilt.

Notably, prior to and during trial, defendant sought new counsel on three different occasions. First, pursuant to defendant's request, his trial counsel filed a motion to withdraw on 22 December 2022, which the trial court denied. Subsequently, on 9 January 2023, during pre-trial motions, defendant's counsel motioned for withdrawal stating that defendant had lost confidence in his ability to represent him. The trial court ultimately denied this motion. Finally, on 20 March 2023, defendant's counsel made an oral motion for withdrawal as defendant's counsel during the trial. Defendant's counsel stated that defendant was "not happy with [his] representation[,]" felt that counsel was "not representing vigorously enough or zealously enough," and that his "continued representation [was] not in his best interest." However, defendant's counsel stated that he had no ethical reasons why he could not continue to represent defendant. Accordingly, the trial court, after acknowledging that they had not observed any actions or lack thereof to indicate that defendant's counsel was not fulfilling his ethical obligations in providing effective and zealous representation, denied the motion.

Following the close of evidence, the trial court conducted a charge conference to determine the appropriate jury instructions to provide. The parties specifically discussed whether to include an instruction about acting in concert. The trial court stated it would not provide an instruction to the jury about acting in concert and denied the State's request to include such instruction in the jury charge.

After the charge conference, the trial proceeded to closing arguments. The State presented its closing argument first, stating as follows:

> First, we told you during jury selection that you will hear evidence that the defendant was not the only person responsible for the murder of the victim, but he is the only person on trial in front of all of you. For you to fulfill your duty, you have to decide this defendant's guilt. You've all promised that you would not consider or be distracted by

> the fact that others were involved, because it is your duty to determine this defendant's guilt. And as we discussed during jury selection, as His Honor will instruct you with regard to the law on proximate cause, His Honor will tell you that the defendant's act may not have been the only cause nor the nearest cause. It is sufficient if it occurred with some other cause happening at the same time, which in combination would have caused the victim's death. Either acting by himself or with others, the defendant is absolutely guilty of murder.

The State later stated,

> Now, when you consider the evidence, the State doesn't have to prove that the defendant actually fired the shot that actually killed the victim. If he committed one act that contributed to the victim's death, he is just as guilty as everybody else. But we know that he did more than one act, ladies and gentlemen. We know that he actually went in there with a loaded firearm with the intent to commit murder and fired multiple shots at the victim, which resulted in his death.

The State proceeded to make arguments regarding acting in concert, ignoring the trial court's denial of the request for an instruction and without any objection by the defendant's counsel:

> [T]he State must prove the defendant's acts were the proximate cause of the victim's death. We talked about this earlier. A proximate cause is a real cause, a cause without which the victim's death would not have occurred. Of course, shooting at a human being is a proximate cause. But he doesn't have to actually cause the fatal shot. If he did something, acting himself or help with others, to cause the proximate death of the victim, he is guilty of first-degree murder.

Following the State's closing arguments and a brief recess, counsel for defendant presented his closing arguments. Defendant's counsel made several comments throughout his closing arguments related to defendant and the possibility of his guilt. Specifically, defendant's counsel stated,

> We have discovered other things about Deonte. Deonte is a soldier. He's at the bottom of the totem pole. When I say

> a soldier, Ducc is the top guy. He's the guy with authority over a lot of people. Chapo is below Ducc, and Deonte is the guy at the bottom, under Chapo. Of course, under Ducc. He's like a soldier. Higher-ups, sergeants, officers tell a soldier to go and do this and that. That's a soldier's job, not to question orders. Go do it. Deonte is the guy at the bottom, like a soldier.
>
> What else have we discovered about Deonte and how it happened, about Deonte? The call came the night of the incident, and the call is like, "Hey, dude, we've got a job. Do you want to -- do you want to come join us on the venture?" He was not given an option. The bossman and the sub-bossman show up in a, probably, muscle truck, pick him up. Deonte could not say, "Well, I'm interested," "I'm not interested." When the bossman shows up, hey, got to go. You have no choice in the matter. Deonte had no choice in the matter. They came, they picked him up. We have no idea whether he went voluntarily, whether he went grudgingly. What we do know is he had no choice.

Defendant's counsel went on to state:

> We have no idea what went on, because -- I told you -- I promised you at the beginning, the fact that there was no eyewitness, there is no video, there is no photo, will cause problems for the State. We circle back. We are right here. We have no idea what happened. We don't know what -- is it Ducc who kicked the door down? Is it Deonte? We have no clue. We don't know who was holding up a .45 caliber weapon. I don't know who was holding a 9-millimeter weapon. We don't even know how -- in fact, how many people went inside the residence. . . . Maybe all three of them were there. Maybe you might -- you might reasonably conclude that all three of them were there, but, again, we have no idea -- we really don't have any idea what happened. Again, we don't -- we don't know whether all three of them were there. We don't know which one was holding which firearm. We don't know who fired that fatal shot. We have no clue. That's the State's burden they did not --they failed to meet.

However, later in his oral arguments, defendant's counsel admitted defendant was at the scene of the crime:

> What is the point? It shows at least one of the shooters, terrified, don't know what he's doing, necessary or unnecessary, just firing, because he was in a state of panic, under high stress. Doesn't want to be there. Evidence doesn't show anything about Deonte's state of mind, but what we do know is he went there under the orders of these higher-ups. I submit to you that it is reasonable to suppose he was only concerned about himself, only concerned about carrying out orders of his higher-ups. He had no intent whatsoever. He was supposed to act the way -- he was trying to act the way he was supposed to under these circumstances.
>
> But we know a little bit more about -- if you are to believe the State's evidence -- if you were to draw the State's evidence, it he was, indeed, Deonte; it was indeed Deonte who left one shoe or two shoes on the roadway; we also know a little bit more. He's terrified. Ms. Morton took pains to explain to you there was only one person in the house, unarmed. They know he was there. But how does, allegedly, Deonte act? Terrified. It's like Jurassic Park. Dinos are coming. He's running, shoe falls off. He's in such a hurry, he doesn't even have the time to put the shoe back on, if you were to believe that's what happened, based on the State's evidence.

After closing arguments, the trial court gave jury instructions which did not include any acting in concert instruction. The jury deliberated and returned a guilty verdict on the charge of first-degree murder. Defendant filed oral notice of appeal on 28 March 2023 in open court.

II. Discussion

On appeal, defendant argues: (1) counsel for defendant was per se ineffective by conceding guilt without permission and (2) the trial court erred by failing to intervene *ex mero motu* in the State's improper closing arguments. Because we find a *Harbison* violation, we need not address the second argument.

A. *Harbison* violation

Defendant contends that his counsel was per se ineffective by conceding guilt without first receiving permission from defendant. Specifically, defendant argues that his counsel impliedly admitted defendant's guilt when he stated during closing arguments that defendant

went to the home of the victim with Ducc and Chapo on the night of the incident. Based upon the facts in this case, we agree.

Under the Sixth and Fourteenth Amendments of the United States Constitution, a "defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Generally, in order to establish a claim for ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In some cases, there exist "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *State v. Harbison*, 315 N.C. 175, 179 (1985). One such circumstance is:

> When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent.

Id. at 180. Thus, a "per se in violation of the Sixth Amendment[] has been established in every criminal case[] in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.*

In *State v. McAllister*, our Supreme Court held that "[a]lthough an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a per se violation of the defendant's right to effective assistance of counsel can occur." 375 N.C. 455, 475 (2020). Rather, "[i]n cases where . . . defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy." *Id.*

Regarding consent, "an on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument," but our Courts have also "declined to define such a colloquy as the sole measurement of consent." *Id.* at 477 (citations and quotation marks omitted). Additionally, "the absence of any indication in the record of defendant's consent to his counsel's admissions will not—by itself—lead us to 'presume defendant's lack of

consent.' " *Id.* (citations omitted). Following a conclusion that a defendant's trial counsel violated *Harbison* by making an admission of guilt without defendant's consent, the proper course is to reverse and remand for a new trial. *Id.* at 464.

In this case, defendant maintained his innocence throughout trial and during the only *Harbison* inquiry at trial, gave his counsel consent to discuss *only* his previous conviction of felony fleeing to evade arrest. There is no evidence in the record to suggest that at any other point before or during trial defendant's counsel sought or obtained informed consent from defendant to discuss his presence at the crime scene or his involvement with the gang the evening of the incident. Accordingly, the record reflects that defendant gave consent to discuss his previous conviction, but not his presence at the crime scene, which coupled with the fact that defendant maintained his innocence throughout trial leads us to the conclusion that defendant did not knowingly or voluntarily consent to an admission that he was present at the crime scene during closing argument.

However, there were several instances where both the State and defendant's counsel erred in presenting their closing arguments. During the State's closing argument, the prosecutor stated:

> And as we discussed during jury selection, as His Honor will instruct you with regard to the law on proximate cause, His Honor will tell you that the defendant's act may not have been the only cause nor the nearest cause. It is sufficient if it occurred with some other cause happening at the same time, which in combination would have caused the victim's death. *Either acting by himself or with others, the defendant is absolutely guilty of murder.* (emphasis added)
>
> . . . .
>
> A proximate cause is a real cause, a cause without which the victim's death would not have occurred. Of course, shooting at a human being is a proximate cause. But he doesn't have to actually cause the fatal shot. *If he did something, acting himself or help with others, to cause the proximate death of the victim, he is guilty of first-degree murder.* (emphasis added)

However, at the charge conference, the trial judge had *specifically decided not to provide a jury instruction on acting in concert* because

only defendant was named in the indictment and there was no other mention of anyone else acting with him or even being present at the scene of the crime. The trial judge expressed concern with the instruction opening up a situation that was not in accordance with the indictment. The State did not bring charges against Ducc or Chapo and defendant was the only person being charged with first-degree murder out of all the individuals allegedly present at the scene of the incident.

Essentially, the State disregarded the trial court's ruling at the charge conference that acting in concert was not an appropriate method to prove defendant's guilt, and on two separate occasions argued a portion of the rejected acting in concert instruction alongside the trial court's proposed proximate cause instruction. In direct contravention of the court's ruling the State argued that because defendant was present at the scene of the crime with Ducc and Chapo, he could be found guilty of first-degree murder, based upon a theory of acting in concert.

Defendant's trial counsel, in addition to failing to object to this improper argument, made several statements during his closing argument that amounted to an implied admission of guilt on this theory. First, defendant's counsel admitted that defendant went with Ducc and Chapo to defendant's home when he stated,

> We have discovered other things about Deonte. Deonte is a soldier. He's at the bottom of the totem pole. When I say a soldier, Ducc is the top guy. He's the guy with authority over a lot of people. Chapo is below Ducc, and Deonte is the guy at the bottom, under Chapo. Of course, under Ducc. He's like a soldier. Higher-ups, sergeants, officers tell a soldier to go and do this and that. That's a soldier's job, not to question orders. Go do it. Deonte is the guy at the bottom, like a soldier.
>
> What else have we discovered about Deonte and how it happened, about Deonte? The call came the night of the incident, and the call is like, "Hey, dude, we've got a job. Do you want to -- do you want to come join us on the venture?" He was not given an option. The bossman and the sub-bossman show up in a, probably, muscle truck, pick him up. Deonte could not say, "Well, I'm interested," "I'm not interested." When the bossman shows up, hey, got to go. You have no choice in the matter. Deonte had no choice in the matter. They came, they picked him up. We have no idea whether he went voluntarily, whether he went grudgingly. What we do know is he had no choice.

Defendant's counsel clearly stated to the jury that defendant did indeed go with Ducc and Chapo to the victim's house, albeit apparently under duress. His counsel further stated, "[e]vidence doesn't show anything about Deonte's state of mind, but what we do know is he went there under the orders of these higher-ups. I submit to you that it is reasonable to suppose he was only concerned about himself, only concerned about carrying out orders of his higher-ups."

These statements, coupled with the State's closing arguments that directed the jury to find guilt if defendant was acting with the other two perpetrators, imply guilt. Defense counsel's statements could not be interpreted as anything other than an implied admission of guilt when the State specifically told the jury that defendant is guilty if he was present at the scene of the incident. This is particularly problematic where there was limited physical evidence tying defendant to the scene.

In *State v. McAllister*, defense counsel conceded that defendant, who had been charged with the crime of assault against a female, had gotten physical with the victim. *See id.* at 472. Specifically, defense counsel stated, "[y]ou heard him admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives." *Id.* at 460. Although defense counsel later asked the jury to find defendant not guilty for the other three crimes defendant had been charged with, he never mentioned anything about finding defendant not guilty for assault against a female. Because defense counsel admitted that the defendant had gotten physical with the victim, our Supreme Court noted this statement reminded the jury that defendant admitted that defendant had "did wrong" to the victim.

The statements made by defendant's counsel in this case are analogous. Here, defendant's counsel admitted that defendant, although he had no choice, followed orders from other gang members who were in a higher position than defendant and conceded that defendant went along with them to the victim's house. Defendant's counsel effectively confirmed Ms. Burton's testimony when she discussed the call defendant had received from Ducc and Chapo on the night of the incident. This amounts to an implied admission that although defendant was following orders, he was also a participant in the crime in question.

While recognizing the *McAllister* Court's admonition "that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence[,]" *McAllister*, 375 N.C. at 376, we believe defendant's counsel's statements in this case present such a rare occurrence. Accordingly, defendant's counsel committed a per se *Harbison* violation

in violation of defendant's Sixth and Fourteenth Amendment right to effective counsel by making an implied admission of guilt without defendant's consent. We arrest judgment and remand for a new trial.

B. Intervention *Ex Mero Motu*

The remaining issue on appeal is whether the trial court erred in not intervening *ex mero motu* during the State's closing arguments when the State instructed the jury that they may find guilt from defendant's mere presence at the scene of the incident. However, arresting the judgment from the trial court and ordering a new trial moots the need for us to address that contention.

III. Conclusion

For the foregoing reasons, we vacate judgment and remand this matter to the trial court for a new trial.

JUDGMENT VACATED; REMANDED FOR NEW TRIAL.

Judge COLLINS concurs.

Judge STADING dissents by separate opinion.

STADING, Judge, dissenting, writing separately.

I would hold that Defendant's trial counsel did not render ineffective assistance of counsel because he did not impliedly admit Defendant's guilt. However, even if trial counsel had made such admission, since the cold record is silent as to whether Defendant knowingly and voluntarily consented to any implied admission of guilt, Defendant's appeal should be dismissed without prejudice. *See State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995); *see also State v. McAllister*, 375 N.C. 455, 477, 847 S.E.2d 711, 725 (2020). Additionally, I would hold that the trial court did not err by declining to intervene *ex mero motu* during the State's closing argument.

I. Implied Admission of Guilt

A. *Harbison* Error

If trial counsel "admits the defendant's guilt to the jury without the defendant's consent[,]" such act amounts to a "per se" violation of the defendant's Sixth Amendment right to counsel. *State v. Harbison*,

315 N.C. 175, 180, 337 S.E.2d 504, 507–08 (1985). "Although an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a per se violation of the defendant's right to effective assistance of counsel can occur." *McAllister*, 375 N.C. at 475, 847 S.E.2d at 723. A *Harbison* error could also occur if "defense counsel's statements cannot be logically interpreted as anything other than an implied concession of guilt to a charged offense . . . unless the defendant has previously consented to such a trial strategy." *Id.* The circumstances under which our Court determines the existence of "a *Harbison* error based on an implied concession of guilt should be a rare occurrence." *Id.* at 476, 847 S.E.2d at 724.

Our Supreme Court has stated "that an on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument"; yet, it has "declined to define such a colloquy as the sole measurement of consent." *Id.* at 477, 847 S.E.2d at 724 (citation omitted). Moreover, "the absence of any indication in the record of defendant's consent to his counsel's admissions will not—by itself—lead us to 'presume defendant's lack of consent.' " *Id.* at 477, 847 S.E.2d at 725 (citation omitted).

Here, Defendant contends that his trial counsel's closing argument impliedly admitted Defendant's guilt by conceding Defendant was present at the victim's house with two others implicated in the crimes. Even so, this admission does not qualify as an admission of guilt. *See State v. Wiley*, 355 N.C. 592, 620, 565 S.E.2d 22, 42 (2002) ("Admitting a fact is not equivalent to an admission of guilt."). With respect to the offenses Defendant faced at trial, his trial counsel recalled the State's factual points for the jury before discounting them. In doing so, trial counsel consistently made qualifying statements such as "I'm not admitting to anything," "I'm not saying anything they said happened," and "If you were to believe the State's evidence . . . ."

After recalling these factual points, Defendant's trial counsel then discussed the elements required to sustain a conviction as well as the requisite burden of proof:

> I told you from the beginning, what the State is asking you to do is send the young man over there to prison to spend the rest of his natural life, and the State's burden, by law, is strict and high. This is one of those they have done nothing to satisfy. We have no idea what went on, because -- I told you -- I promised you at the beginning, the fact that there

> was no eyewitness, there is no video, there is no photo, will cause problems for the State. We circle back. We are right here. We have no idea what happened. We don't know what -- is it Ducc who kicked the door down? Is it [Defendant]? We have no clue. We don't know who was holding up a .45 caliber weapon. I don't know who was holding a 9-millimeter weapon. We don't even know how -- in fact, how many people went inside the residence. . . . How did Chapo's bandanna end up inside the residence? What . . . did Najla Burton really know about what happened? Based on that -- I'm asking you, because nobody knows -- is it reasonable to conclude that -- there are twice as many 9-millimeter shell casings as .45 caliber and Chapo's bandanna was inside the residence. Maybe all three of them were there. Maybe you might -- you might reasonably conclude that all three of them were there, but, again, we have no idea -- we really don't have any idea what happened. Again, we don't -- we don't know whether all three of them were there. We don't know which one was holding which firearm. We don't know who fired that fatal shot. We have no clue. That's the State's burden they did not -- they failed to meet. . . . It's the State's burden to prove who fired that shot, or to prove that shot caused -- in conjunction with some other shot, caused the death. Nothing of that sort has been brought forth.

A holistic view of trial counsel's closing shows that he raised the State's factual contentions to argue it failed to prove Defendant's guilt beyond a reasonable doubt. *See State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citation omitted) ("Statements or remarks in closing argument 'must be viewed in context and in light of the overall factual circumstances to which they refer.' "); *see also State v. Jackson*, 292 N.C. App. 616, 626, 899 S.E.2d 34, 42 (2024) ("[I]n viewing the entirety of defense counsel's statements in context, we hold those statements cannot logically be interpreted as an implied concession of Defendant's guilt."). Defense counsel's statements thus do not amount to an implied admission of guilt. Furthermore, coupling the State's closing argument with Defendant's trial counsel's argument to reach a determination of ineffective assistance stretches beyond the four corners of *Harbison*, 315 N.C. 175, 337 S.E.2d 504, and *McAllister*, 375 N.C. 455, 477, 847 S.E.2d 711. I lament that the majority's result expands the current boundaries of precedent.

B. Defendant's Consent

Even assuming trial counsel's statements violated *Harbison*, the cold record does not reveal whether Defendant knowingly and voluntarily consented to these admissions. As in *State v. House*, we "will not presume from a silent record that defense counsel argued defendant's guilt without defendant's consent." 340 N.C. at 196, 456 S.E.2d at 297. Rather, "[i]n this situation the appropriate remedy, if any, is for a defendant to file, either before or after direct appeal, a motion for appropriate relief in the superior court based upon ineffective assistance of counsel." *Id.* at 196–97, 456 S.E.2d at 297.

Such result is consistent with the ruling in *State v. McAllister*. 375 N.C. 455, 847 S.E.2d 711. In *McAllister*, our Supreme Court determined that "defense counsel's statements . . . amounted to an implied admission of defendant's guilt of the crime of assault on a female." *Id.* at 473, 847 S.E.2d at 722. Since the cold record was silent, the Court remanded the matter "for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether defendant knowingly consented in advance to his attorney's admission of guilt to the assault on a female charge." *Id.* at 477, 847 S.E.2d at 725. Accordingly, even if defense counsel's concession could be construed as an implied admission of guilt, the appropriate remedy in this scenario is to dismiss Defendant's appeal without prejudice so that he may file a motion for appropriate relief with the Superior Court.

II. The State's Closing Argument

Trial courts have a duty, "upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu*." *State v. Sanderson*, 336 N.C. 1, 15, 442 S.E.2d 33, 42 (1994) (citations and quotation marks omitted). "To establish such an abuse, [the] defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Ward*, 354 N.C. 231, 250, 555 S.E.2d 251, 264 (2001) (citation and quotation marks omitted). "[T]he comments must be viewed in the context in which they were made and in light of the overall factual circumstances to which they referred." *State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 519 (1998).

Defendant maintains his trial was fundamentally unfair and the trial court should have intervened, without prompting, as the State "injected

its own acting-in-concert instructions and stamped [the trial court's] imprimatur upon it":

> The question you-all have to ask yourselves during deliberations is how do you know that the defendant was the one that committed murder. First, we told you during jury selection that you will hear evidence that the defendant was not the only person responsible for the murder of the victim, but he is the only person on trial in front of all of you. For you to fulfill your duty, you have to decide this defendant's guilt. You've all promised that you would not consider or be distracted by the fact that others were involved, because it is your duty to determine this defendant's guilt. And as we discussed during jury selection, as His Honor will instruct you with regard to the law on proximate cause, His honor will tell you that the defendant's act may not have been the only cause nor the nearest cause. It is sufficient if it occurred with some other cause happening at the same time, which in combination would have caused the victim's death. Either acting by himself or with others, the defendant is absolutely guilty of murder.
>
> . . . .
>
> Now when you consider the evidence, the State doesn't have to prove that the defendant actually fired the shot that actually killed the victim. If he committed one act that contributed to the victim's death, he is just as guilty as everybody else.
>
> . . . .
>
> But he doesn't have to actually cause the fatal shot. If he did something, acting himself or help with others, to cause the proximate death of the victim, he is guilty of first-degree murder.

This argument did not amount to gross impropriety. *See State v. Frye*, 341 N.C. 470, 491, 461 S.E.2d 664, 674 (1995) (The prosecutor's arguments summarizing aggravating and mitigating circumstances "were not grossly improper and did not require the trial court to intervene *ex mero motu*" since they "were substantially correct, even if slightly slanted toward the State's perspective."). Moreover, this claimed error of law, "whispered into the ear of the jury" by the prosecution, was cured by the trial court's correct jury instructions following closing arguments.

See State v. Barden, 356 N.C. 316, 366, 572 S.E.2d 108, 140 (2002) ("The statements made by the prosecutor, while not technically correct, were not so misleading that the trial court erred by failing to intervene *ex mero motu*. Most important, any misstatements of law by the prosecutor were cured by proper instructions given by the trial court when it charged the jury."). When discussing proximate cause, the State referenced "others were involved," but the trial court correctly instructed the jury, thus curing any alleged defect within the State's closing argument. *See State v. Messick*, 159 N.C. App. 232, 237, 585 S.E.2d 392, 395 (2003) (holding the trial court did not err by giving the following proximate cause instruction to the jury: "The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it occurred with some other cause acting at the same time, which in combination with it, proximately caused the death of (name victim)."). The trial court did not abuse its discretion by failing to intervene *ex mero motu*.

EMERSON THOMPSON, EMPLOYEE, PLAINTIFF
v.
CRANFILL, SUMNER & HARTZOG, LLP EMPLOYER, DEFENDANT, AND THE PHOENIX INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA24-596

Filed 7 May 2025

1. Workers' Compensation—disability award—retroactive attendant care—sufficiency of factual findings

In a workers' compensation case involving a former lawyer and equity partner (plaintiff) at a law firm, where the parties disputed several issues related to plaintiff's disability benefits after the firm and its insurance carrier (together, defendants) admitted liability for his work-related back injury, the Industrial Commission did not err in awarding retroactive attendant care as part of plaintiff's disability award. The Commission's findings of fact—supported by competent evidence, including testimony from plaintiff, multiple healthcare providers, and a life care planner—were sufficient to support the award as being reasonably necessary, including findings detailing the nerve damage to plaintiff's spine along with the progressive extremity weakness, all of which put him at an increased risk for falls.

2. Workers' Compensation—disability award—ten percent late payment penalty on indemnity—statutorily required—no prejudice to employer and insurance carrier

In a workers' compensation case involving a former lawyer and equity partner (plaintiff) at a law firm, where the parties disputed several issues related to plaintiff's disability benefits after the firm and its insurance carrier (together, defendants) admitted liability for his work-related back injury, the Industrial Commission did not err by imposing a ten percent late penalty on indemnity payments to plaintiff as statutorily required under the Workers' Compensation Act (specifically, N.C.G.S. § 97-18(b)), which mandates that ten percent of an untimely-paid benefit installment "shall" be added to that installment. Defendants, as a law firm engaged in the practice of worker's compensation law and an insurance carrier in the business of providing workers' compensation coverage, were not only aware of the indemnity issue in the case but also familiar with the applicable law on this issue; thus, their argument that they should be excused from paying the penalty—because plaintiff had previously denied needing the indemnity payments—was unpersuasive.

3. Workers' Compensation—disability award—employee's refusal of medically necessary home modification—reasonable

In a workers' compensation case involving a former lawyer and equity partner (plaintiff) at a law firm, where the parties disputed several issues related to plaintiff's disability benefits after the firm and its insurance carrier (together, defendants) admitted liability for his work-related back injury, the Industrial Commission did not err in declining to suspend plaintiff's benefits pursuant to N.C.G.S. § 97-25 due to his noncompliance with a previous opinion and award, in which a deputy commissioner ruled that a downstairs bedroom in plaintiff's house was medically necessary. Competent evidence showed that plaintiff's refusal to set up the bedroom in the downstairs living area—per defendants' request, not the commissioner's—was reasonable, including his doctor's concern that the proposed home modification would not allow plaintiff enough space to use a walker or wheelchair, as well as an architect's opinion that the plan "did not work" from an architectural standpoint.

4. Workers' Compensation—disability award—employer's request for attorney fees denied—no evidence of unreasonable litigation by plaintiff

In a workers' compensation case involving a former lawyer and equity partner (plaintiff) at a law firm, where the parties disputed

several issues related to plaintiff's disability benefits after the firm and its insurance carrier (together, defendants) admitted liability for his work-related back injury, the Industrial Commission did not err in declining to award attorney fees to defendants pursuant to N.C.G.S. § 97-88.1, under which the Commission had discretion to assess attorney fees for bringing, prosecuting, or defending a hearing without reasonable grounds. Where the Commission determined that plaintiff's refusal to implement defendants' home modification plan—proposing a bedroom in plaintiff's downstairs living area—was reasonable, defendants failed to show that plaintiff's pursuit of litigation challenging the home modification plan was unreasonable or "grounded in unfounded litigiousness," and, therefore, they were not entitled to attorney fees with respect to that litigation.

5. Workers' Compensation—disability award—offset crediting employer-law firm—for prior equity distributions to former law firm partner—improper

In a workers' compensation case involving a former lawyer and equity partner (plaintiff) at a law firm, where the parties disputed several issues related to plaintiff's disability benefits after the firm and its insurance carrier (together, defendants) admitted liability for his work-related back injury, the Industrial Commission erred in mandating an offset for plaintiff's disability award, which gave defendants a credit for equity distributions they had previously paid plaintiff from his half-percent ownership of the firm. Despite the Commission's authority to grant employers a credit offset toward its workers' compensation payments (N.C.G.S. § 97-42), the partial equity payments made to plaintiff had nothing to do with workers' compensation, neither served as wage replacements nor were analogous to disability payments, and would have been due to plaintiff irrespective of his disability; therefore, these payments were not creditable against plaintiffs' disability award under section 97-42.

Appeal by Defendants and cross-appeal by Plaintiff from the Decision and Award entered 15 November 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals on 11 February 2025.

The Sumwalt Group, by Vernon Sumwalt and Fink & Hayes, PLLC, by Steven B. Hayes for Plaintiff-Appellee / Cross-Appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Neil P. Andrews, for Defendants-Appellants / Cross-Appellees.

WOOD, Judge.

Emerson Thompson ("Plaintiff") and Cranfill, Sumner, & Hartzog, LLP and The Phoenix Insurance Company ("Defendants") appeal from the Decision and Award entered 15 November 2023 by the North Carolina Industrial Commission ("the Commission"). Defendants contend that the Commission erred in: (1) awarding retroactive attendant care; (2) awarding a ten percent (10%) late penalty on indemnity; (3) failing to suspend benefits for failure to comply with the medical treatment requested; and (4) failing to award attorney fees against Plaintiff. In contrast, Plaintiff asserts the Commission erred in mandating an offset for his disability award and contends that even if Defendants are entitled to an offset the Commission miscalculated the offset amount.

I. Factual and Procedural Background

Plaintiff is a former civil trial lawyer and former equity partner in the law firm of Cranfill, Sumner & Hartzog. Plaintiff had preexisting back issues prior to his injury at work. On 29 March 2006, Plaintiff re-injured his back at Charlotte Douglas International Airport while on a work trip. The initial Form 18, Notice of Accident and Claim of Employee, was filed on 17 April 2007. On 27 March 2008, Defendants admitted liability for this compensable injury in an Industrial Commission Form 60 Employer's Admission of Employee's Right to Compensation (G.S. 97-18(b)).

Since the onset of the injury in 2007 Plaintiff and Defendants have disputed numerous related issues. On 22 July 2019, a deputy commissioner for the Commission ruled that a downstairs bedroom in Plaintiff's home was medically necessary for Plaintiff as well as a chair lift and grab bars to aid immediately while construction in his home was ongoing. However, Plaintiff and Defendants have been unable to agree on how to modify the home for a downstairs bedroom.

On 26 January 2020, Plaintiff advised Defendants that his doctor had prescribed three months of temporary attendant care beginning 18 February 2020 because Plaintiff's wife, who is his regular caregiver, was set to undergo surgery. Defendants authorized attendant care but a conflict arose between the parties because Plaintiff wanted any caregiver to sign a confidentiality agreement to prevent the disclosure of information to Defendants against Defendant's policy.

In March to April of 2020, Plaintiff filed a Motion to Compel Reimbursement of Medical Expenses and Defendants filed an Administrative Medical Motion to Compel Compliance with Attendant

Care. On 20 April 2020, a deputy commissioner denied both motions. On 28 April 2020, Plaintiff appealed the deputy commissioner's order by filing a Request that Claim be Assigned for Hearing. On 10 November 2020, Plaintiff filed an amended Request for Hearing adding the issue of payment of permanent and total disability benefits and attorney fees. On 19 January 2021, Defendants filed a Response to Request That Claim Be Assigned for Hearing, and on 1 September 2021, Defendants amended their response.

On 17 March 2022, a deputy commissioner conducted a hearing on the issues and entered a Decision and Award on 25 October 2022. The deputy commissioner determined that Defendants were entitled to attorney fees and sanctions for costs based on unnecessary litigiousness; Plaintiff was barred from further medical compensation or indemnity due to his refusal to select a home modification; and Plaintiff's claims for retroactive indemnity and attendant care as well as all other claims were denied. Both parties appealed to the Full Commission.

On 15 March 2023, the case was heard before the Full Commission. The evidence presented to the Commission tended to show: Plaintiff's work-related injury necessitated several more back surgeries and other treatments. The parties had stipulated to "permanent and total disability." Plaintiff's long-term medical providers including Dr. Alden Milam, MD ("Dr. Milam"), an orthopedic surgeon, and Dr. T. Kern Carlton, MD ("Dr. Carlton"), a physiatrist all declared him permanently and totally disabled.

Before his injury, Mr. Thompson's "average weekly wage," as defined by N.C. Gen. Stat. § 97-2(5), was $2,500.00. This entitled him to the maximum compensation rate for 2006, the year of his injury, in the amount of $730.00 per week. Plaintiff contends that Defendants have not paid any weekly workers' compensation to Plaintiff since he first became totally disabled on 9 February 2009. Plaintiff did receive $10,000.00 from a long-term disability plan for which he had paid the premiums through his employment at Defendant-Employer. In addition, between February 2009 and 31 December 2015, Plaintiff also received $32,000.00 per year in equity distributions under an equity partnership agreement with Defendant-Employer. During testimony Plaintiff explained that these equity distributions were used to cover his ongoing employment benefits, including insurance coverage and retirement. However, Defendants contend the payments were compensation for Plaintiff's work as a client liaison.

On 15 November 2023, the Full Commission issued an Opinion finding Plaintiff to have been totally disabled since 9 February 2009

and determining that Defendants are responsible for total disability compensation under N.C. Gen. Stat. § 97-29 since that date and continuing. However, the Commission gave Defendants an offset against the $730.00 weekly amount in compensation payable to Plaintiff from 9 February 2009 until 31 December 2015 based on the equity distributions of $32,000.00 per year that had previously been paid by Defendants. The Commission did so by deducting the weekly equivalent of the equity distributions ($615.38 = $32,000.00 / 52 weeks) from Plaintiff's weekly compensation checks. The Full Commission ordered Defendants pay Plaintiff's full compensation rate—that is, without an "offset"— beginning on 1 January 2016. In explaining why it reduced Plaintiff's compensation, the Full Commission stated "Defendants are entitled to an offset or reduction under *Moretz v. Richards & Associates, Inc.*, 316 N.C. 539, 342 S.E.2d 844 (1986) for the $615.38 per week paid to Plaintiff in an attempt to pay some amount of salary continuation and receive some compensation to continue Plaintiff's access to benefits and to offset the cost of them." In addition, a ten percent (10%) late penalty was awarded to Plaintiff as well as attorney fees of twenty-five percent (25%) of the temporary total disability compensation and penalty fees. Finally, Defendants were required to pay for all reasonably necessary medical treatment, including attendant care for four hours a day beginning in January 2022. Defendants' request for attorney fees was denied.

On 22 November 2023, Plaintiff filed a Notice of Appeal in Superior Court on the issue of the Commission's failure to award Plaintiff's counsel a twenty-five percent (25%) contingency fee from the compensation awarded in the original award for the payment of attendant care services provided by the wife. On 18 December 2023, the Full Commission *sua sponte* issued an order requesting information from Plaintiff in order for the Commission to make findings and a determination on the additional attorney fees issue. On 8 January 2024, the Full Commission issued an order denying the attorney fees because Plaintiff's counsel failed to submit the requested documents and there was no information in the record from which a decision could be made. On 10 January 2024, Plaintiff's counsel filed a Motion for Reconsideration based on the Commissions' failure to accurately serve the prior orders on the parties. On 11 January 2024, the Commission granted Plaintiff's Motion for Reconsideration and awarded Plaintiff's attorney an attorney fee of twenty-five percent (25%) of the attendant care services payments paid to Plaintiff's wife. On 11 January 2024, Plaintiff dismissed his appeal to Superior Court.

On 30 November 2023, Defendants filed a Motion to Reconsider the 15 November 2023 decision. On 25 January 2024, Defendants filed

another Motion to Reconsider adding a request to reconsider the 11 January 2024 decision. On 28 February 2024, the Commission denied both motions. Both parties filed Notices of Appeal to this Court.

II. Analysis

"Appellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence; and (2) whether the conclusions of law are justified by the findings of fact. *Gore v. Myrtle/Mueller*, 362 N.C. 27, 40, 653 S.E.2d 400, 409 (2007) (cleaned up). "A finding of fact is conclusive on appeal if supported by any competent evidence, even where there is evidence to contradict the finding." *Scarboro v. Emery Worldwide Freight Corp.*, 192 N.C. App. 488, 491, 665 S.E.2d 781, 784 (2008) (cleaned up). "Thus, this 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Chandler v. Atl. Scrap & Processing*, 217 N.C. App. 417, 423, 720 S.E.2d 745, 750 (2011) (cleaned up). The Industrial Commission's conclusions of law are reviewable de novo by this Court. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997).

A. Arguments by Defendants

On appeal, Defendants contend that the Commission erred in: (1) awarding retroactive attendant care; (2) awarding a ten percent (10%) late penalty on indemnity; (3) failing to suspend Plaintiff's benefits for failure to comply with the medical treatment requested; and (4) failing to award attorney fees against Plaintiff.

1. Awarding retroactive attendant care

[1] Defendants appeal the award of retroactive attendant care. They challenge findings of fact 22, 51, and 52, asserting that the findings are insufficient to support the award of retroactive attendant care. Therefore, Defendant's believe the Commission's order awarding medical care including attendant care for four hours per day beginning January 2022 and its supporting conclusion of law number 6 are also in error. Defendants do not contest the accuracy of the enumerated findings only that they are insufficient to support the legal conclusion that attendant care is medically necessary. We disagree.

"[T]he [Workers' Compensation] Act places upon an employer the responsibility to furnish 'medical compensation' to an injured employee." *Mehaffey v. Burger King*, 367 N.C. 120, 124, 749 S.E.2d 252, 255 (2013). At the time of Plaintiff's injury medical compensation was defined as:

> medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and *other treatment*, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability. . . .

Id. at 124-25, 749 S.E.2d at 255 (emphasis added). The Act's provision for "other treatment" was interpreted by our Supreme Court to include attendant care services. *Id.* at 125, 749 S.E.2d at 255. Attendant care services were added directly to the definition of medical compensation when the statute was amended in 2011, and this Court has stated "the term 'medical expenses' encompasses attendant care services rendered by an injured worker's family members." *Chandler v. Atl. Scrap & Processing*, 217 N.C. App. 417, 424, 720 S.E.2d 745, 750 (2011); *see also Mehaffey v. Burger King*, 367 N.C. 120, 125, 749 S.E.2d 252, 255 (2013).

Additionally, the Workers' Compensation Act states:

> [I]n case of a controversy arising between the employer and the employee, the Industrial Commission may order necessary treatment. In order for the Commission to grant an employee's request to change treatment or health care provider, the employee must show by a preponderance of the evidence that the change is reasonably necessary to effect a cure, provide relief, or lessen the period of disability.

N.C. Gen. Stat. § 97-25(c) (2024). Therefore, the Commission was required to determine if the attendant care services were "reasonably necessary." This Court has explicitly adopted

> a flexible case-by-case approach in which the Commission may determine the reasonableness and medical necessity of particular attendant care services by reviewing a variety of evidence, including but not limited to the following: a prescription or report of a healthcare provider; the testimony or a statement of a physician, nurse, or life care planner; the testimony of the claimant or the claimant's family member; or the very nature of the injury.

Shackleton v. Southern Flooring & Acoustical Co., 211 N.C. App. 233, 250-51, 712 S.E.2d 289, 301 (2011).

In the case *sub judice* the Commission made the following findings which Defendants contend are insufficient to support the award of attendant care, specifically:

> 22. Dr. Milam was of the opinion that Plaintiff needs attendant care to manage the risk from falling and his attention deficit and the accompanying risks. Dr. Milam was of the opinion that Plaintiff is going to need assistance for four hours a day, including helping with chores. Plaintiff's wife could participate in those four hours per day.
>
> 51. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff requires four hours of attendant care daily as a result of his compensable injury by accident arising out of and in the course of his employment with Defendant-Employer on March 29, 2006.
>
> 52. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiffs need for medical treatment, including but not limited to his need for attendant care, is caused by his compensable injury by accident arising out of and in the course of his employment with Defendant-Employer on March 29, 2006 and has been and is reasonably necessary to effect a cure, lessen disability, and provide relief.

However, in addition to the challenged findings, the Commission also found:

> 10. Plaintiff testified that he could fall putting on his pants and had fallen three times the week of the hearing. He explained that he is in constant pain and that lifting causes him to fall off balance because he depends on his knees being locked.
>
> 15. Dr. Alice Cole practices with Tryon Medical Group as an internist. Dr. Cole is board certified and has practiced as an internist for 21 years. In the 2019 home modification litigation, Dr. Cole was tendered without objection and was admitted as an expert in the field of internal medicine by the July 22, 2019 Opinion and Award. Dr. Cole treated Plaintiff from approximately 2004 until his last visit on June 14, 2018. Dr. Cole testified that Plaintiff became weaker over the time that she knew him due to his back surgeries and nerve injury. She also noted that Plaintiff's weakness was progressive and that it had become "more and more of a problem" as Plaintiff aged. She was of the opinion that Plaintiff was a 9/10 as to risk of falling.

16. Dr. Milam testified that a February 16, 2017 MRI revealed Plaintiff had increased atrophy of the paraspinal muscles greater on the right than left when compared with the November 13, 2012 MRI. In February 2017 Dr. Milam indicated that Plaintiff was at an increased risk for falls and that Plaintiff would require a first-floor bedroom as he will be unable to ambulate up steps. By September 19, 2018, Dr. Milam recommended a chair lift (as a temporary fix) and referenced his February 2017 recommendation for a first-floor bedroom as it was unsafe for Plaintiff to go up and down stairs due to recurrent falls caused by motor weakness which had increased. On September 19, 2018, Dr. Milam indicated that Plaintiff had permanent nerve damage which was the cause of falls and that Plaintiff had objective muscle atrophy and clear progression of his symptoms. On January 7, 2020, Dr. Milam noted that Plaintiff's extremity weakness was progressive and prescribed three months of one-hour per day attendant care as Plaintiff's wife was going to be incapacitated due to her own surgery.

23. Dr. T. Kern Carlton, M.D. of the Rehab Center is a stipulated expert in physical medicine and rehabilitation, as well as pain medicine, and is one of Plaintiff's authorized treating physicians. Plaintiff first presented to Dr. Carlton on October 30, 2020. Dr. Carlton stated that Plaintiff has known nerve damage in his legs which causes weakness, numbness, and pain, and this predisposes him to falls. Dr. Carlton explained Plaintiff's typical fall occurs when his leg gives way due to weakness or due to a sharp pain or when he trips and stumbles due to numbness and lack of normal feeling in the leg. Plaintiff reported 55 falls in 2019 to Dr. Carlton. In Dr. Carlton's opinion, Plaintiff was not a good candidate for the multidiscipline program at the Rehab Center as getting him totally off opiates or getting him back to work was unrealistic, nerve damage is not fixed by work hardening, and Plaintiff is a fall risk.

26. Jessica Conard, MRC, CRC, CLCP, a certified life care planner and certified rehabilitation counselor was hired by Plaintiff to assess his need for home healthcare. Ms. Conard has produced expert reports in dozens of cases in workers' compensation proceedings before the Industrial

> Commission and has performed approximately 25 life care plans in her career. The Full Commission accepts Ms. Conard as an expert in vocational rehabilitation and life care planning. Ms. Conard, as is her usual practice, reviewed all medical records pertinent to the claim, held a remote interview (due to COVID concerns) with Plaintiff and his wife, and then contacted his physician, Dr. Milam, to obtain recommendations about Plaintiff's future medical needs. From the medical record review, Ms. Conard gleaned that Plaintiff has a history of limited compromised mobility and falls, recommendations that he use assistive devices while ambulating, and at least at one point, a recommendation that Plaintiff be limited to sleeping on the first floor of his home. . .

These findings were based on the record evidence as well as testimony from Plaintiff's doctors and the certified life care planner, all of which the Commission found to be persuasive. Dr. Milan testified that Plaintiff needs support from his wife while dressing and completing other life tasks. Similarly, the certified life care planner testified that Plaintiff reported limited ability to cook or fix meals, do laundry, change sheets, and other self-care tasks that require standing and mobility. Dr. Carlton testified that he supports Dr. Milan's recommendation for four hours of attendant care per day and recognizes the balance that Plaintiff must maintain each day, judging the amount of physical exertion he can manage to keep his independence and mental health while still mitigating his high fall risk which could cause serious injury. There was clearly an abundance of competent evidence, including everything this Court in *Shackleton* delineated that trial courts should consider when making a determination of "reasonable necessity" including: the report of a healthcare provider; the testimony of a life care planner; the testimony of the claimant; and the nature of the injury. Therefore, we affirm the Commission's determination that attendant care is reasonably medically necessary.

2. Awarding a late payment penalty on indemnity

[2] Defendants contend the Full Commission made no findings regarding Plaintiff's continued delaying of the indemnity payment and whether that fact should or should not have any bearing on the timeliness of the payments. Therefore, Defendants argue Plaintiff should not be entitled to a ten percent (10%) late payment penalty due to his own denial of the need for these payments and his multiple statements that disability payments were not in issue. We disagree.

Under the North Carolina Workers' Compensation Act,

> When the employer or insurer admits the employee's right to compensation, the first installment of compensation payable by the employer shall become due on the fourteenth day after the employer has written or actual notice of the injury or death, on which date all compensation then due shall be paid.

N.C. Gen. Stat. § 97-18(b) (2024). Additionally,

> If any installment of compensation is not paid within 14 days after it becomes due, *there shall be added* to such unpaid installment an amount equal to ten per centum (10%) thereof, which *shall be* paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

N.C. Gen. Stat. § 97-18(g) (2024) (emphasis added). Finally,

> [T]he employer's filing of a Form 60 is an admission of compensability. Thereafter, the employer's payment of compensation pursuant to the Form 60 is an award of the Commission on the issue of compensability of the injury. . . . Thus, an employer who files a Form 60 waives the right to contest a claim that it is liable for a claimant's injury. . . .
>
> . . . .
>
> . . . North Carolina law clearly places the burden on the employer or carrier to determine whether a particular claim is compensable and whether the employer or carrier is liable before filing a Form 60.

Spivey v. Wright's Roofing, 225 N.C. App. 106, 111-13, 737 S.E.2d 745, 749-50 (2013) (cleaned up).

In the case *sub judice* the Commission made multiple findings of fact related to compensability:

> 28. . . . a hearing was held by Deputy Commissioner Amanda Witzke Bruce on May 30, 2019. A Pre-Trial Agreement entered by the parties at that hearing contained the following [s]tipulations:

. . .

4. Plaintiff suffered an admittedly compensable injury by accident to his lumbar spine on March 29, 2006 when he lost his balance and twisted his back while overloaded with luggage and case materials.

. . .

6. As a result of these injuries, Plaintiff is permanently and totally disabled.

37. Although workers' compensation payments were not made to Plaintiff by Defendants and although the issue had not been litigated, the record reveals that the issue of periodic indemnity payments was present and that both parties were aware of that issue. Documents from Stipulated Exhibit 2 confirm that the issue of periodic disability compensation was present throughout. Allegations of prejudice by Defendants are unpersuasive given that Defendant-Employer is a law firm engaged in the practice of workers' compensation law; that Defendant-Carrier is in the business of providing workers' compensation coverage and has familiarity with not only North Carolina workers' compensation law but also that there are interactions between benefits for long-term disability, social security disability, and workers' compensation benefits; that Defendants had counsel; that the parties were all aware of Plaintiff's medical treatment; and that the parties knew Plaintiff was pursuing and receiving social security benefits and long-term disability benefits.

46. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that the parties stipulated that Plaintiff is permanently and totally disabled and did so with full knowledge of the circumstances and law without misrepresentation.

The Commission clearly made findings that Defendants admitted Plaintiff's right to compensation and were aware of the compensation laws in place. Pursuant to N.C. Gen. Stat. § 97-18(g) a ten percent (10%) late penalty is statutorily required when compensation is past due. Thus, we affirm the Commission's order.

3. Failing to suspend benefits for failure to comply

[3] Defendants contend that because of Plaintiff's ongoing non-compliance with the home modification order, Plaintiff must be barred from receiving any additional compensation, including attendant care, or from receiving any past, present, or future indemnity until his unreasonable and unjustifiable refusal ceases.

At the time of Plaintiff's injury in 2006, N.C. Gen. Stat. § 97-25 stated, in pertinent part,

> The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal. . . .

N.C. Gen. Stat. § 97-25 (2005). Our Court has applied the standard of "a similarly situated reasonable man" when determining whether an employee's refusal is justified. *Watkins v. City of Asheville*, 99 N.C. App. 302, 305, 392 S.E.2d 754, 757 (1990). The Commission is the "sole judge of the credibility of the witnesses and the weight given to their testimony." *Id.* at 303, 392 S.E.2d at 756. "As long as there is some competent evidence to support the Commission's determination, it is binding on appeal even though the evidence might also support contrary findings." *Bolick v. ABF Freight Sys., Inc.*, 188 N.C. App. 294, 298, 654 S.E.2d 793, 796 (2008).

In the case *sub judice* the Commission found,

> 53. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiffs past refusal of some medical care was not unreasonable. The Full Commission further finds that Plaintiff should not be subject to a penalty for the past refusal and that his current need for attendant care should not be precluded by that reasonable refusal.

In addition, in finding 56 the Commission assigned greater weight to the testimony and opinions of Dr. Milam, Dr. Carlton and Ms. Conard than to Defendants' witnesses.

According to Plaintiff's testimony, Dr. Milam informed him he had concerns about the modification of the downstairs living area being

turned into a bedroom, in part due to space constraints related to his present need for a walker and his future need for a wheelchair. In addition, Plaintiff engaged the services of a licensed architect to review the plans, and the architect opined that "this does not work." Additionally, while there is a 22 July 2019 Opinion and Award stating that a downstairs bedroom is required, the Commissioner did not require a specific plan, and the current proposals were not submitted to the Commission. The Commission's determination that a reasonable man would be justified in refusing a home modification that does not align with his doctor's assessments of his needs and whose architect has told him, "this does not work" is supported by competent evidence. We affirm the Commission's determination that Plaintiff's refusal was reasonable.

4. Failing to award attorney's fees against Plaintiff

[4] Defendants contend that attorney's fees should be assessed against Plaintiff under N.C. Gen. Stat. § 97-88.1, which provides the Commission with discretionary authority to assess costs and attorney fees for bringing, prosecuting, or defending a hearing without reasonable grounds. N.C. Gen. Stat. § 97-88.1 (2024). Defendants argue that they should be awarded attorney fees for the 30 May 2019 litigation because Plaintiff brought the litigation "knowing" that his wife would not agree to the modification of their home. As discussed *supra*, the record contains competent evidence from which the Commission could find, as illustrated in finding of fact 53, that Plaintiff's refusal of the home modification offered by Defendants was reasonable. Therefore, pursuant to N.C. Gen. Stat. § 97-88.1, Defendants are not entitled to an award of attorney fees from Plaintiff as the Commission correctly stated in its conclusion of law, specifically:

> 13. Defendants have requested an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1, which provides that reasonable fees may be awarded if the Industrial Commission "shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground...." The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness. *Sparks v. Mountain Breeze Rest. & Fish House, Inc.*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 577 (1982). Because Defendants have failed to show that Plaintiff's prosecution or defense of this matter was unreasonable or grounded in unfounded litigiousness, Defendants' request for attorney's fees pursuant to N.C. Gen. Stat. § 97- 88.1 must be denied.

We agree and affirm the Commission's Order and Award denying Defendant's attorney fees for the 30 May 2019 litigation.

B. Arguments by Plaintiff

[5] Plaintiff asserts that the Full Commission erred in mandating an offset for his disability award. Plaintiff further contends that the offset amount, if allowed, was miscalculated. We agree.

This Court has consistently held that N.C. Gen. Stat. § 97-42 is the sole statutory authority that allows an employer a credit offset toward its obligation for workers' compensation payments. *Effingham v. Kroger Co.*, 149 N.C. App. 105, 119, 561 S.E.2d 287, 296 (2002); *Johnson v. IBM*, 97 N.C. App. 493, 494, 389 S.E.2d 121, 122 (1990). Pursuant to N.C. Gen. Stat. § 97-42:

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. . . .

N.C. Gen. Stat. § 97-42 (2024). However, "because the Industrial Commission may credit an employer only for payments not due or payable under the terms of the workers' compensation statute, an employer is not automatically entitled to a credit for any and every payment to a claimant[.]" *Meares v. Dana Corp./Wix Div.*, 172 N.C. App. 291, 295, 615 S.E.2d 912, 916 (2005) (cleaned up). For example, "N.C. [Gen. Stat.] § 97-42 does not authorize a credit for payment of benefits that have nothing to do with the Workers' Compensation Act and are not analogous to payments under a disability and sickness plan." *Id.* at 296, 615 S.E.2d at 917 (cleaned up). This Court has held that vacation and sick leave are "due and payable" because they have been earned and therefore are not creditable. In addition, severance payments pursuant to a severance agreement have been determined to be "due and payable" and not creditable because they had nothing to do with workers' compensation, would have been received regardless of the disability, and were of a contractual nature. *Id.* at 296-99, 615 S.E.2d at 917-18.

Defendants urge us to consider *Clayton* in which this Court clarified that "even where an employer's payments were due and payable, and thus, no credit is allowed, an employee may not receive more in wage supplements than he is entitled to receive under the Workers' Compensation Act." *Clayton v. Mini Data Forms, Inc.*, 199 N.C. App. 410, 419, 681 S.E.2d 544, 550 (2009) (cleaned up). Defendants' assertions

are inapposite, however, because this Court's holding in *Clayton* only applies where the payment made by the employer is "a wage-replacement benefit equivalent to workers' compensation [benefits]" and not to instances of payments unrelated to an employee's workers' compensation which the individual was entitled to receive even if not disabled. *Id.* at 420, 681 S.E.2d 551.

In the case *sub judice*, the Commission made the following findings of fact:

> 18. From 2009 until December 31, 2015, Plaintiff performed some client development, business development, client liaison duties, etc. for less than 30 hours per week. The nature of Plaintiff's work was limited and was more of a way for him to receive benefits and for Defendant-Employer to retain clients, continue to market to new clients, and maintain client goodwill. He received continued *partial equity payments* monthly during this time which amounted to approximately $32,000.00 per year. From this payment, Plaintiff's expenses including costs for benefits like health insurance and life insurance were deducted. Notwithstanding that Defendant-Employer's health insurance policy required that an employee regularly work 30 hours per week in order to qualify for coverage, the greater weight of the evidence is that Plaintiff had phone conversations and occasional lunches or meetings. The evidence does not support that Plaintiff regularly worked 30 hours per week or that Plaintiff was performing a job generally filled at Defendant-Employer's firm or other law firms. Since March 9, 2009, Plaintiff has also received $10,000.00 per month in long term disability through an Unum policy.
>
> 32. . . . At hearing, Plaintiff testified regarding the long-term disability Unum policy:
>
> . . . there was a three-month deductible. So from February 9, 2009 until May 8th, 2009, I got my salary, and then after that *it dropped down to my equity portion which was the one half of one percent.* And that's what I used to pay for my benefits for health insurance, for life insurance, for retirement. And I actually had to supplement, I had to write a check to the firm. I mean it was really just my benefits package was being covered because I was a partner and partners have to pay for their own benefits.

(emphasis added). These findings clearly state that the payments made to Plaintiff were made as "partial equity payments" from his half-percent ownership as a partner in the firm. This finding is supported by the testimony of Barry Pennell ("Pennell") the chief operating officer at Cranfill Sumner, LLP., formerly Cranfill, Sumner & Hartzog, LLP.

> Q. Okay. Was he an owner in the company?
>
> A. He had a very small amount of equity percentage in the firm. Yes.
>
> Q. Okay. And from what time period was he an owner in the company?
>
> A. I believe he became a partial equity partner before I got there, and I don't know when exactly.
>
> Q. Okay. And for how long after you were there was he an equity partner?
>
> A. He had some equity until I believe it was around 2013.
>
> Q. Okay. And when did he last work for Cranfill?
>
> A. 2015.
>
> . . .
>
> Q. Okay. If the – from 2009 to that termination date in 2015, was he working for the firm doing work?
>
> A. There were some things that he had said he would continue to do which were related to client development, business development, other things that may have come up.
>
> Q. Okay. Was he receiving compensation?
>
> A. That partial equity payment, yes.
>
> . . .
>
> Q. Was he getting a draw check or a dividend check each quarter or month, however you get paid?
>
> A. It was paid monthly and – and there – the first part of that would've been that partial equity payment. We estimate that, what that would be over the course of a year, and then give – divide it by twelve and at the end of every month he would get one-twelfth. And we would true that up after we did the tax return, then around that 2013 timeframe we converted that equity into just being a guarantee. And I think it was a $32,000 flat guarantee, and that's what he was paid for the last two years if I'm remembering correctly.

In addition, the determination that the payments were partial equity payments is supported by records supplied by Defendants which report that in January 2011 they were looking into options as to how to de-equitize Plaintiff because requirements in the partnership agreement would not allow a partner to remain on disability long-term. The firm sought advice on how to convert Plaintiff's partnership into some type of guaranteed payment. This information in the records is consistent with Pennell's testimony that "around that 2013 timeframe we converted that equity into just being a guarantee. And I think it was a $32,000 flat guarantee, and that's what he was paid for the last two years if I'm remembering correctly."

These payments had nothing to do with workers' compensation or wage replacement and would have been due to Plaintiff irrespective of his disability. Initially, Plaintiff received equity payments pursuant to a contractual partnership agreement. The payments were then converted into a contractual guarantee when Plaintiff was phased out of the partnership agreement. These payments are directly analogous to the severance payments in *Meares* which this Court determined were not creditable against an employee's workers' compensation award in contrast to the wage replacement payments considered in *Clayton*. *Meares v. Dana Corp./Wix Div.*, 172 N.C. App. 291, 299-300, 615 S.E.2d 912, 916 (2005); *Clayton v. Mini Data Forms, Inc.*, 199 N.C. App. 410, 420, 681 S.E.2d 544, 550 (2009). Because the equity payments made by Defendants to Plaintiff were not wage replacements, the Commission erred as a matter of law in determining that a credit should be applied to offset Defendants' workers' compensation obligations. We reverse the Commission's offset credit mandate based on equity payments and remand for correction of Plaintiff's disability award not inconsistent with this opinion.

Because we have determined that Defendants are not entitled to offset credit based on equity payments to Plaintiff, it is unnecessary to address Plaintiff's remaining argument concerning credit miscalculations.

III. Conclusion

For the foregoing reasons, we conclude the Commission's fifty-eight findings of fact were clearly supported by competent evidence. Defendant's contentions concerning the award of retroactive attendant care, a ten percent (10%) late penalty on indemnity, Plaintiff's compliance with the medical treatment requested, and the refusal to award attorney fees against Plaintiff were addressed by the Commission in its clearly

supported findings of fact, which in turn support the Commission's conclusions of law. However, the Commission erred as a matter of law in mandating an offset to Plaintiff's disability award because the payments at issue were contractual in nature. Therefore, we affirm the Commission's Opinion and Award in part, reverse the portion which awards an offset credit to Defendant, and remand for recalculation of the amount of Plaintiff's workers' compensation award. It is so ordered.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges STROUD and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 MAY 2025)

CRANDALL v. MANORFIELD PROP. OWNERS ASS'N, INC. No. 24-781	Alamance (23CVS001177)	Dismissed
DERKITS v. PITT CNTY. MEM'L HOSP., INC. No. 24-158	Pitt (22CVS680)	Affirmed in Part, Reversed in Part, and Remanded
ERIE INS. EXCH. v. STRICKLAND No. 24-111	Wake (22CVS14984)	Affirmed
EXEC. OFF. PARK OF DURHAM ASS'N, INC. v. ROCK No. 24-579	Durham (18SP001035)	Vacated and Remanded
HILTON v. HILTON No. 24-689	Brunswick (15CVD001026)	Vacated and Remanded
IN RE A.R. No. 24-895	Forsyth (22JT000232) (22JT000233)	Affirmed
IN RE B.O.R. No. 24-1019	Wilkes (20JA000126)	Affirmed
IN RE E.H.Y. No. 24-944	Cabarrus (23JT000055)	Affirmed
IN RE M.J.B.M. No. 24-847	Wake (21JA000074)	Affirmed
IN RE P.L.E. No. 24-676	Wilkes (20JA000127)	Dismissed
IN RE R.S.T. No. 24-526	Stanly (23JT000013)	Affirmed
IN RE S.R. No. 24-591	Forsyth (24JA000010)	Affirmed
IN RE T.P.A. No. 24-1054	Catawba (23JT000180)	Affirmed
ISAAK v. N.C. DEP'T OF ENV'T QUALITY No. 24-510	Wake (21CVS010831)	Affirmed

ORTIZ v. RIVERA No. 24-856	Rockingham (22CVD001235)	Reversed and Remanded
PALMER v. HARTE No. 24-932	Rowan (20CVD001698)	Affirmed in Part, Vacated in Part, and Remanded
STATE v. ARENAS No. 24-222	Wake (20CR212534-541)	No error in part; remanded in part
STATE v. ATKINSON No. 24-684	Mecklenburg (17CRS212358) (17CRS212359) (17CRS212360) (23CRS007934)	No Error
STATE v. BASS No. 24-751	Stokes (21CRS051294) (21CRS051295) (21CRS051296) (22CRS000153)	No Error
STATE v. BETHEA No. 24-742	Guilford (21CRS070221) (21CRS070222)	No Error
STATE v. BLACKMON No. 24-975	Pitt (22CRS052987) (23CRS001155)	AFFIRMED In Part, and DISMISSED In Part
STATE v. COLLINS No. 23-817	Watauga (21CRS51189-90)	No Error
STATE v. DANIELS No. 24-429	Davidson (22CRS52679) (22CRS52714)	No Error in Part, Vacated and Remanded in Part.
STATE v. DAVIS No. 24-595	Union (20CRS052187) (20CRS052188)	No Error
STATE v. DIAZ-RODRIGUEZ No. 23-979	Mecklenburg (18CRS232848-49) (18CRS232855-56)	No Error
STATE v. DRAUGHN No. 24-1070	Johnston (19CR050023-500)	NO ERROR In Part, and DISMISSED In Part

STATE v. FORTE No. 24-950	Mecklenburg (19CR246898-590) (19CR246899-590) (19CR246934-590) (23CR002255-590)	No Error in Part, Remanded for Correction of Clerical Error in Part.
STATE v. GRIFFIN No. 24-287	Pitt (21CRS54459)	No Error
STATE v. GRIZZEL No. 24-132	Wilkes (21CRS50970)	No Prejudicial Error
STATE v. HARWELL No. 24-492	Durham (20CRS054994) (20CRS054995)	NO ERROR In Part, and DISMISSED In Part
STATE v. HAYNES No. 24-720	Buncombe (21CRS080374)	Dismissed
STATE v. HINSON No. 24-841	Stanly (22CRS050806) (22CRS050807)	Affirmed
STATE v. LAMPKINS No. 24-1025	Forsyth (23CRS439640)	Affirmed
STATE v. LAWRENCE No. 24-535	Mecklenburg (19CRS247842-45) (19CRS248147)	No Error
STATE v. LEWIS No. 24-773	Johnston (14CRS055560-500)	No Error
STATE v. LINDSEY No. 24-163	Stanly (20CRS291) (20CRS51722-23) (21CRS396)	No Error
STATE v. MARTINEZWELFEL No. 24-351	Wake (21CRS214587-88-910)	No Error.
STATE v. McKNIGHT No. 24-238	Guilford (22CRS28638)	Affirmed
STATE v. NEWTON No. 24-586	New Hanover (23CRS210491)	No Error
STATE v. REGO No. 24-883	Stokes (22CRS050381)	Dismissed

STATE v. SHORE No. 24-113	New Hanover (22CRS345439)	Affirmed
STATE v. THOMPSON No. 24-821	Wayne (21CRS051878)	Dismissed without prejudice in part; no error in part.
STATE v. WATSON No. 24-201	Vance (19CRS51925)	No Error
STATE v. WILLIAMS No. 24-378	Alamance (14CRS56577)	No Error.
VAUGHAN v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 24-733	N.C. Industrial Commission (TA-029615) (TA-029616) (TA-029617)	Affirmed
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Accessory after the fact—felony murder—assault with deadly weapon—hit and run—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the State presented substantial evidence to defeat defendant's motion to dismiss the charges. Defendant's behavior after witnessing her co-defendant run over multiple victims more than once with the car gave rise to a reasonable inference that she aided her co-defendant in escaping arrest, detection, or punishment, including by: getting in the car, leaving the scene, abandoning the car some distance from the scene, and taking the car key from the co-defendant so as to conceal the co-defendant's identity as the driver. **State v. Watlington, 584.**

Accessory after the fact—hit and run—more than merely leaving the scene—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court did not err by denying defendant's motion to dismiss the charges of accessory after the fact to her co-defendant's convictions for hit and run. Contrary to defendant's argument, the convictions were not merely for "leaving the scene," but for defendant's actions in assisting her co-defendant escape detection, arrest, and punishment by taking the car keys, abandoning the car after driving away from the scene, and concealing her co-defendant's identity as the driver. **State v. Watlington, 584.**

Accessory after the fact—multiple counts—unit of prosecution—rule of lenity inapplicable—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the appellate court determined that, because the charging statute—N.C.G.S. § 14-7—unambiguously set forth the allowable unit of prosecution to be each felony that was committed by the principal and assisted by the accessory after the fact, the rule of lenity did not apply. Therefore, the trial court did not err by denying defendant's motion to dismiss for insufficient evidence that she committed more than one count of accessory after the fact. **State v. Watlington, 584.**

Accessory after the fact—some of principal's judgments arrested—corresponding accessory convictions unsupported—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, where the appellate court had arrested judgment on three of the co-defendant's convictions of hit and run, leaving two undisturbed, the appellate court similarly arrested judgment on three of defendant's convictions of accessory after the fact and remanded for resentencing. **State v. Watlington, 584.**

AIDING AND ABETTING

Claim against school—enrollment of daughter—aiding breach of separation agreement—no merit—The trial court properly dismissed plaintiff's claim against her daughter's school (defendant) for allegedly aiding and abetting her daughter's father in breaching the parents' separation agreement by declining to unenroll the daughter at plaintiff's request. First, North Carolina does not recognize as a valid cause of action aiding and abetting a breach of contract. Second, plaintiff's complaint lacked sufficient facts to support a colorable claim for tortious interference with a contract. **Zhang v. Cary Acad., 305.**

APPEAL AND ERROR

Abandonment of issue—mistrial—ex mero motu—plain error not specifically and distinctly argued—In a prosecution which resulted in defendant being found guilty of carrying a concealed firearm, possession of a firearm by a felon, and having attained habitual felon status—arising from the discovery of a gun in defendant's pocket following a traffic stop—defendant abandoned his appellate argument that the trial court erred in failing to declare a mistrial ex mero motu following the admission of allegedly inadmissible and prejudicial evidence (regarding defendant's possession of suspected marijuana and a stack of temporary license plate tags) where defendant did not object to the admission of the evidence at trial and did not specifically and distinctly argue plain error in his appeal. **State v. Henderson, 771.**

Denial of motions for summary judgment—appeal and cross-appeal dismissed—case had proceeded to trial—In a declaratory judgment action filed by an insurance company (plaintiff) seeking a declaration that the employer's liability exclusion in its general liability policy—issued to a general contractor who operated his own construction company—barred any claims asserted by decedent's estate (defendant) arising from the fatal accident that decedent suffered while performing a task on the contractor's worksite, the appellate court dismissed the parties' appeal and cross-appeal, respectively, from the trial court's order denying both parties' motions for summary judgment. Since the trial court subsequently held a bench trial on the merits after denying the motions, its denial of summary judgment was not reviewable on appeal. **N.C. Farm Bureau Mut. Ins. Co. v. Young, 708.**

Interlocutory order—awarding considerable amount of attorney fees—validity dependent upon pending claims—no substantial right shown—In a lawsuit between family relatives about real property that was part of plaintiffs' inheritance but which defendants allegedly obtained through fraudulent means, where the trial court granted summary judgment to plaintiffs on only three of their eleven claims, defendants' appeal of an interlocutory order requiring them to pay over $25,000 in attorney fees to plaintiffs—pursuant to N.C.G.S. § 47B-6—was dismissed for lack of jurisdiction because defendants failed to show a substantial right that would be impaired absent immediate review. First, the fact that they were ordered to pay a "significant amount of money" in attorney fees did not, by itself, establish a deprivation of a substantial right. Second, because the validity of the award was tied to the eight substantive claims that were still pending in the trial court, defendants' rights could be fully and adequately protected in a single appeal after final judgment, and appellate review of the fee award before then would have created the risk of a fragmentary appeal. **Arrington v. Arrington, 622.**

Interlocutory orders—denial of motion to abate action—immediately appealable—related issues reviewed by writ of certiorari—In a termination of parental rights action, although the trial court's orders denying a guardian ad litem's

APPEAL AND ERROR—Continued

(GAL's) motions to dismiss, transfer venue, and hold the matter in abeyance and denying respondent-mother's motion to dismiss were interlocutory (because they were made during the pendency of the case and did not dispose of the case), the appellate court determined that it would reach the merits of the arguments raised against the trial court's orders. First, a refusal to abate an action was immediately appealable; second, where the GAL challenged the trial court's jurisdiction by raising the prior pending action doctrine, which was interrelated to the GAL's other arguments on appeal, the appellate court elected to treat the GAL's brief and record on appeal as a petition for writ of certiorari and to grant the writ in order to address the merits of all claims raised. **In re S.W., 39.**

Preservation of issues—criminal case—due process violation—substitute judge's authority to sign written order—In a criminal case where defendant moved to dismiss a charge for embezzlement, arguing that the State's more than ten-year delay in prosecuting her violated her Fifth Amendment due process rights, and where the order denying her motion was signed by a substitute judge after the judge who originally presided over the case had retired, defendant preserved for appellate review: (1) the Fifth Amendment issue, by filing her motion to dismiss, presenting evidence in support of her motion at a hearing, and receiving an oral ruling on the motion (from the original judge); and (2) her argument challenging the substitute judge's authority to sign the order, by filing a "Notice of Exception" to the order, renewing her motion to dismiss at trial, and timely filing her notice of appeal from the order after a final judgment was entered in the case. The State's argument that defendant should have done more to preserve the second issue was meritless, since the original judge had directed the State at the hearing to prepare the written order, which defendant could not have anticipated would later be signed by a different judge without a new hearing. **State v. Fearns, 75.**

Preservation of issues—failure to object to testimony at trial—untimely objection during State's closing—limited review—In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, defendant failed to preserve for appellate review any of her challenges to testimony that was elicited by the State regarding defendant's failure to provide a statement to law enforcement during its investigation of the incident. First, any arguments regarding testimony to which no objections were lodged were waived. Second, defense counsel objected to only portions of the testimony and the same evidence was later introduced without objection. Finally, some of defense counsel's objections did not provide a specific basis for the objection. Thus, review of the challenged statements was limited to plain error analysis. With regard to defendant's failure to preserve for appellate review statements by the prosecutor during closing argument regarding defendant's silence—because defense counsel's objection was not timely—the appellate court undertook to determine whether the challenged statements were grossly improper. **State v. Earley, 172.**

Preservation of issues—hearsay excluded—no offer of proof made—In a trial for possession of stolen goods arising from the discovery of a stolen pop-up camper on defendant's property, defendant failed to preserve for appellate review the trial court's exclusion of a detective's answer on hearsay grounds—after defense counsel asked whether the person who stole the camper lied to defendant about it—because defendant did not make the required offer of proof as to the content of the excluded testimony. Further, the substance of any answer that might have been given was not apparent from the leading question. **State v. Capps, 412.**

APPEAL AND ERROR—Continued

Statement of grounds of appellate review—appeal from interlocutory order—burden of demonstrating substantial right—not met—In a class action lawsuit filed against a county and a certified nurse assistant (defendants) who worked at two county-owned prenatal care clinics, in which plaintiffs—female patients and their spouses—raised multiple tort claims after the nurse assistant was caught secretly filming patients in various states of undress, plaintiffs' appeal from an order dismissing their claims against the county only (based on lack of personal jurisdiction and the defense of governmental immunity) was dismissed because plaintiffs failed to demonstrate in their statement of the grounds for appellate review that the order affected a substantial right. Specifically, plaintiffs mischaracterized the order as a final judgment and failed to cite precedent to support immediate appellate review based on a substantial right theory. **Ayala v. Perry, 134.**

ARBITRATION AND MEDIATION

Arbitration clause—in project-specific contract—preemption by dispute resolution terms in broader contract—motion to compel arbitration denied—appeal dismissed —In a dispute between a construction company (plaintiff) and a facility owner (defendant), where the parties executed a Master Services Agreement (MSA)—providing the general contract framework for all projects they entered into—and agreed to supplement the MSA with project-specific contracts, after which they entered into one such contract ("Construction Contract") for mechanical piping services at defendant's Charlotte facility, the trial court in plaintiff's breach of contract lawsuit properly denied defendant's motion to compel arbitration, which relied upon the Construction Contract's arbitration clause. The MSA's plain language explicitly provided that to the extent a project-specific contract addressed a topic also addressed in the MSA, the MSA's terms would control and render any corresponding terms in the project-specific contract null and void. Both the MSA and the Construction Contract addressed the topic of dispute resolution, and therefore the MSA's terms—which allowed the parties to pursue court action—nullified the Construction Contract's arbitration clause. Further, because there was no valid arbitration agreement between the parties, defendant's appeal of the interlocutory order denying his motion to compel arbitration was dismissed as not affecting a substantial right. **Bilfinger Inc. v. Cargill, Inc., 322.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse and neglect—adjudicatory findings of fact—ambiguity resolved—In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical exams), the district court's adjudicatory findings of fact did not lack clarity about respondent-mother's role in causing the child to undergo three vaginal exams where, although the evidence was unclear about whether respondent-mother or the maternal grandmother took the child to the hospital, the court specifically found that respondent-mother gave permission for each of the exams to be undertaken. **In re K.E.P., 527.**

Abuse and neglect—adjudicatory findings of fact—evidentiary support—In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical exams), the district court's findings of fact challenged by respondent-mother were supported by clear, cogent,

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

and convincing evidence, including: (1) child welfare reports that were properly admitted pursuant to the business records exception to the general bar on hearsay; (2) testimony from doctors whose opinions were properly based on out-of-court statements made for the purpose of medical treatment and a written child medical examination (which itself had been admitted); and (3) testimony from a child protective services worker, about which the court made credibility determinations. **In re K.E.P., 527.**

Abuse and neglect—adjudicatory findings of fact—no finding of bad faith required—In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical examinations), the district court did not err in failing to determine whether respondent-mother acted in bad faith in making the sexual abuse reports because the Juvenile Code does not require bad faith by a parent for a juvenile adjudication; rather, in determining whether a child is abused or neglected, the circumstances and conditions surrounding the child—not the fault or culpability of a parent—are the determinative factors. **In re K.E.P., 527.**

Abuse and neglect—allegations of child sexual abuse by father—emotional harm to children caused by mother's response—dependency—alternative child care arrangement—The adjudication of respondent-mother's minor daughters as abused and neglected juveniles was affirmed where, after reporting to police that the children's father had sexually abused them, respondent-mother's subsequent conduct—regardless of whether the abuse allegations were true—caused significant emotional harm to the children, especially where she: systematically alienated the children from their father, even holding a "ceremony" where they burned photographs of him; coached the children regarding the sex abuse allegations, which the children did not corroborate during forensic interviews; recorded them discussing sensitive topics, including embarrassing private behavior; subjected them to repeated medical and forensic evaluations despite professionals advising against it due to the potential trauma caused by the process; and hindered efforts by the department of social services to investigate the abuse allegations. On the other hand, the adjudication of the children as dependent was vacated because there was no evidence showing that respondent-mother lacked appropriate alternative child care options. **In re B.C., 153.**

Abuse and neglect—child with life-threatening medical condition—parent's ongoing failure to provide proper care—causing injury and risk of serious physical harm—An order adjudicating a father's ten-year-old son as an abused and neglected juvenile was affirmed where the trial court's uncontested factual findings showed that the father was aware of his child's serious medical condition but consistently failed to provide the necessary medical care, which caused injury to the boy and placed him at risk of serious physical harm and even death. Specifically, the court found: the father knew his son had type 1 diabetes, received extensive training on how to medicate his son, and was repeatedly informed of the risks associated with his son's diabetes not being monitored by an adult; the father refused to take responsibility over his son's medical care, instead leaving the child in charge of managing his own diet, blood sugar, and medication schedule; and, as a result, the child was hospitalized several times for diabetic ketoacidosis, which in turn resulted in end organ damage and multiple near-death injuries. **In re A.D.W., 515.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Adjudication hearing—mother's testimony regarding sexual abuse allegations against father—father's stipulation denying the allegations—no due process violation—Respondent-mother's due process rights were not violated during an abuse and neglect proceeding, which arose from petitions by the department of social services alleging that respondent-mother's conduct toward her children—stemming from a belief that their father had sexually abused them—caused significant emotional harm to the children. First, respondent-mother's contention that she was prevented from testifying about the allegations against the father—and therefore was unable to present a full defense by showing that her subsequent reaction was justified—was not supported by the record, which showed that the abuse allegations were discussed extensively at the adjudication hearing and that any objections to testimony referencing those allegations were made for reasons other than to prohibit the topic. Second, the court did not err in relying on the father's stipulation that allegations of sexual abuse existed but that he denied them, where the stipulation was legally sufficient under N.C.G.S. § 7B-807(a) and clarified the focus of the adjudication hearing, which was on respondent-mother's actions rather than the father's alleged abuse. **In re B.C., 153.**

Adjudication—findings of fact—incorporating language from petitions and evidentiary materials—all but one challenged finding upheld—In respondent-mother's appeal from an order adjudicating her children as abused, neglected, and dependent juveniles, respondent-mother's arguments challenging specific findings of fact were largely rejected. First, the court's incorporation of language from the juvenile petitions and verbatim portions of certain evidentiary materials did not constitute an improper delegation of its fact-finding duty, since the court ultimately made its own independent findings resolving any material disputes in the case. Second, most of respondent-mother's arguments alleging that the court failed to resolve inconsistencies in the evidence appeared to be masked requests to reweigh the evidence or second-guess the trial court's credibility determinations, which could not be done on appellate review. However, a portion of one finding—addressing the parents' inability to offer appropriate alternative child care options—was not supported by the evidence and was therefore not upheld on appeal. **In re B.C., 153.**

Neglect—guardianship—constitutional argument not preserved—appeal dismissed—On remand from the North Carolina Supreme Court for reconsideration in light of *In re K.C.*, 386 N.C. 690 (2024), the Court of Appeals dismissed the appeal of respondent-mother—who purported to challenge an award of guardianship over her two minor children to the children's paternal grandmother by arguing that the district court's findings of fact did not support its conclusions of law that respondent-mother was unfit or had acted in a manner inconsistent with her constitutionally protected parental status. That argument was not preserved for appellate review because, in the district court, respondent-mother contended only that it was "premature" for the court to consider guardianship in light of her progress in rectifying the issues which led to the removal of the children and did not raise any constitutional issue regarding her parental status. **In re T.S., 699.**

Permanency planning—specific visitation not in juvenile's best interest—supervised visitation left to foster parents' discretion—order affirmed—In a neglect proceeding involving a child who tested positive for methamphetamine at birth and whose parents had a long history of domestic violence, the district court did not err by giving the juvenile's foster parents discretion over whether the juvenile's father could exercise supervised visitation with the child where the court made findings of fact—including that the father had not participated in substance abuse or

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

mental health treatment; had multiple positive drug screens and missed others; was terminated from a domestic violence education program for failure to comply with drug screening; continued to engage in domestic violence against the child's mother, leading to a charge of assault on a female; did not take advantage of visitation opportunities for approximately 10 months before the permanency planning hearing; and blocked the foster parents from texting him—that supported its conclusion of law that it was not in the child's best interest to order specific visitation with the father, determinations that were sufficient to permit the denial of visitation for the father entirely. **In re D.E., 7.**

CHILD CUSTODY AND SUPPORT

Custody—motion for appointment of parenting coordinator—Civil Procedure Rule 11 sanctions—findings of fact insufficient—vacated and remanded— In a child custody action between the parents of a minor child—in which the trial court had previously entered a permanent custody order (by consent of the parties) awarding sole legal and physical custody to the mother (defendant) with the option for the parties to "mutually consent" to a liberal visitation schedule for the father (plaintiff)—where defendant filed a motion for a parenting coordinator, alleging the matter was high conflict, and plaintiff filed a motion for sanctions in response, alleging that the request for a parenting coordinator was made in retaliation and in bad faith, the court's findings of fact did not support its denial of defendant's motion for a parenting coordinator or its imposition of sanctions on defendant upon a finding of bad faith. Accordingly, the order was vacated and the matter was remanded for entry of a new order with findings of fact sufficient to support the resolution of the parties' motions. **Riggan v. Andrews, 730.**

CIVIL PROCEDURE

Trial court's discretion—consideration of untimely affidavit—in opposition to motion to compel arbitration—In a contract dispute between two companies over the validity of an arbitration clause, where defendant moved to compel arbitration and plaintiff—on the same day as the hearing on defendant's motion—moved to supplement the record with an additional affidavit in support of its own cross-motion to stay arbitration, the trial court did not abuse its discretion in admitting the affidavit where, even though it was not timely served pursuant to Civil Procedure Rule 6(d), the affidavit was clearly supplemental and was used to rebut a new argument raised by defendant in its memorandum opposing plaintiff's cross-motion to stay arbitration. **Bilfinger Inc. v. Cargill, Inc., 322.**

CONSTITUTIONAL LAW

Effective assistance of counsel—failure to object to improper evidence or move for a mistrial—cold record insufficient—dismissed without prejudice— In a prosecution which resulted in defendant being found guilty of carrying a concealed firearm, possession of a firearm by a felon, and having attained habitual felon status—arising from the discovery of a gun in defendant's pocket following a traffic stop—where defendant contended on appeal that his trial counsel provided ineffective assistance by failing to object to (or request a mistrial following) the admission of evidence regarding defendant's possession of suspected marijuana and a stack of temporary license plate tags, the Court of Appeals dismissed the issue without prejudice to defendant's right to raise his argument via a motion for appropriate

CONSTITUTIONAL LAW—Continued

relief in the superior court because the appellate court could not resolve defendant's claim on the cold record. **State v. Henderson, 771.**

Effective assistance of counsel—murder trial—implied concession of guilt—per se error—new trial granted—In a prosecution for first-degree murder and related charges arising from a home invasion by members of a gang, defendant did not receive effective assistance of counsel under the Sixth and Fourteenth Amendments where his counsel committed a per se *Harbison* violation by admitting during closing argument, without first obtaining defendant's consent, that defendant went to the victim's home on the night of the fatal incident. In a case with a limited amount of physical evidence linking defendant to the scene of the crime and in which the State disregarded an earlier ruling of the trial court and expounded a theory of acting in concert in its closing statement (to which defense counsel did not object), counsel's statement amounted to an implied concession of guilt by seeming to confirm the State's (erroneous) legal theory. Therefore, defendant's convictions were vacated and the matter was remanded for a new trial. **State v. Meadows, 785.**

Effective assistance of counsel—timely objection to line of witness questioning—no other action taken—no prejudice shown—In a trial for murder and possession of a firearm by a felon after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, defendant did not receive ineffective assistance of counsel where his attorney objected on Fifth Amendment grounds after the prosecutor questioned a police detective about defendant's silence when surrendering himself to law enforcement. Although defendant's attorney raised the objection fairly late into the line of questioning, it was still a timely objection, which the court sustained. Further, although the attorney neither moved to strike the line of questioning from the record nor requested a curative instruction regarding the detective's testimony—a choice that may have been part of a reasonable trial strategy—these omissions did not prejudice defendant where the State presented overwhelming evidence that he committed the charged crimes. **State v. Parker, 262.**

Federal—possession of firearm by felon statute—as-applied challenge—nonviolent predicate felony—In a prosecution for possession of a firearm by a felon (N.C.G.S. § 14-415.1)—brought after defendant was reported to be openly carrying a handgun at work despite his felony conviction and then was discovered with the gun in a hip holster during a traffic stop initiated after defendant drove away from his workplace—the statute did not violate the federal constitution as applied to defendant, even though his predicate felony (attempted fleeing to avoid arrest) was nonviolent in nature, because the Second Amendment affords the right to bear arms to "law-abiding citizens" and is not offended by regulations on the possession of firearms by convicted felons. **State v. Ducker, 759.**

North Carolina—possession of firearm by felon statute—as-applied challenge—Britt factors—In a prosecution for possession of a firearm by a felon (N.C.G.S. § 14-415.1)—brought after defendant was reported to be openly carrying a handgun at work despite his felony conviction and then was discovered with the gun in a hip holster during a traffic stop initiated after defendant drove away from his workplace—the trial court did not err in rejecting defendant's as-applied challenge to the statute under the state constitution because the State action of charging defendant was reasonable and bore "a fair relation to the preservation of the public peace and safety" as demonstrated by the court's consideration of the five factors set forth in *State v. Britt*, 363 N.C. 546 (2009). **State v. Ducker, 759.**

CONSTITUTIONAL LAW—Continued

North Carolina—Sunday hunting statute—facial challenge—rational basis— In considering a facial challenge to the constitutionality of an amended version of N.C.G.S. § 103-2 (restricting hunting on Sundays to permitted times, locations, methods, and prey) enacted in the same legislative session during which an amendment to the North Carolina constitution (that was ultimately ratified) protecting the right to hunt and fish was introduced, the Court of Appeals affirmed the decision of the three-judge panel that allowed summary judgment in favor of defendants (government entities connected to the passage or enforcement of the statute) after applying rational basis review and noting that the restrictions ensured that, on Sunday mornings: non-hunters could safely enjoy game lands; residents—including churchgoers—could enjoy respite; and migratory bird populations could be preserved. Additionally, by applying the statutory restrictions, North Carolina received compensatory hunting days from the U.S. Fish and Wildlife Service. **Oates v. Berger, 550.**

Right against self-incrimination—prosecutor closing argument—no prejudicial error—In a trial for felony breaking and entering, communicating threats, and related charges, the trial court did not prejudicially err by overruling defendant's objection to the portion of the State's closing argument in which the prosecutor noted that defendant had not countered the voluminous amount of evidence presented by the State with evidence of her own. The prosecutor's statement did not impermissibly infringe on defendant's constitutional right not to testify. **State v. Brown, 748.**

Right to a public trial—courtroom closure during two witnesses' testimonies—Waller four-part test—At a trial for attempted first-degree murder and related charges arising from an incident where defendant fired a gun at a group of individuals from inside a moving car, the trial court's partial courtroom closure during the testimony of two men from the group—including one who was shot in the back—did not violate defendant's constitutional right to a public trial. Specifically, the court properly determined—at a remand hearing on the issue—that the closure was justified under the four-part test in *Waller v. Georgia*, 467 U.S. 39 (1984), in that: (1) the closure advanced an overriding interest in witness safety supported by competent evidence, including social media posts in which defendant directed threatening messages at the witnesses, along with other intimidating conduct by defendant and members of the gallery; (2) the closure was narrowly tailored to address witness safety concerns, since it was limited to the testimony of just two witnesses and defendant's direct relatives were allowed to remain in the courtroom; (3) the court properly considered and ruled out reasonable alternatives, such as banning cell phones in the courtroom; and (4) the court made sufficient findings of fact based on competent evidence to support the closure. **State v. Miller, 250.**

Right to be present in courtroom—forfeiture by conduct—disruptive behavior—In a prosecution for obstruction of justice, attempted access of a government computer to defraud, and filing false liens, the trial court did not err by concluding that defendant had forfeited his right to be present in the courtroom and having defendant removed from the courtroom, where defendant's actions, including in front of the jury pool, were disruptive, abusive, and disrespectful, such as: repeatedly accusing the State and the trial court of lying, claiming the State had beat him, interrupting, and challenging the trial court's authority. The trial court complied with the procedures in N.C.G.S. § 15A-1032, provided defendant with regular updates on the trial proceedings by written communications, repeatedly gave defendant the opportunity to return to the courtroom and participate in the trial upon improved

CONSTITUTIONAL LAW—Continued

behavior, and instructed the jury that defendant's removal was not to be considered in their deliberations. **State v. Fuller, 199.**

Right to counsel—decision not to appoint standby counsel—no abuse of discretion—In a prosecution for obstruction of justice, attempted access of a government computer to defraud, and filing false liens, the trial court did not abuse its discretion by declining to appoint defendant standby counsel after determining that defendant had forfeited his right to counsel and his right to be present in the courtroom, where the trial court took into account defendant's disruptive and disrespectful behavior and previous refusal to cooperate with his appointed counsel. **State v. Fuller, 199.**

Right to counsel—forfeiture by conduct—disruptive and combative behavior—In a prosecution for obstruction of justice, attempted access of a government computer to defraud, and filing false liens, the trial court did not err by concluding that defendant had forfeited his right to counsel where defendant's actions were sufficiently combative and interruptive so as to frustrate the purpose of the right to counsel, including: repeatedly disrupting the trial proceedings, refusing to sign the waiver of counsel form, giving conflicting answers regarding whether he desired assistance of counsel, refusing to acknowledge or work with appointed counsel, refusing to stop speaking over all parties in the courtroom, arguing with the trial court, and accusing the trial court of lying. **State v. Fuller, 199.**

Right to counsel—forfeiture—defendant firing multiple attorneys—no evidence of delay tactics—Defendant was entitled to a new trial on multiple counts of sexual offenses against a child where he did not forfeit his right to counsel by committing egregious misconduct. Firstly, at no point did defendant threaten counsel, disrupt court proceedings, deny the trial court's jurisdiction, or refuse to participate in the judicial process. Secondly, although defendant did fire multiple attorneys throughout the proceedings, the trial court made no findings to support the State's claim that defendant was trying to delay the trial by doing so. Rather, the record showed that defendant's first two attorneys withdrew for reasons unrelated to defendant's conduct, his third attorney withdrew for unexplained "personal reasons," and defendant's dissatisfaction with subsequent attorneys stemmed from disagreements over the preparation of his defense. **State v. McGirt, 223.**

Right to counsel—voluntary waiver—insufficient colloquy by trial court—continued requests by defendant for new counsel—Defendant was entitled to a new trial on multiple counts of sexual offenses against a child where, after conducting a colloquy at a hearing on defense counsel's motion to withdraw, the trial court erred in concluding that defendant voluntarily waived his right to counsel. During the colloquy, the court failed to: inform defendant that he would be waiving his right to counsel if he fired his current attorney; ask defendant whether he wished to represent himself; ensure that defendant understood and appreciated the consequences of waiving his right to counsel; or inform defendant of the full range of permissible punishments for the charges, explaining only the minimum punishment. Further, although defendant had previously fired multiple attorneys and even filed a handwritten motion indicating that he wished to proceed pro se with standby counsel, he repeatedly requested new counsel throughout the proceedings and stated in the handwritten motion that he felt it was "time to move on with a new attorney who is willing to help," thereby contradicting any implication of a knowing waiver of counsel. **State v. McGirt, 223.**

CONSTITUTIONAL LAW—Continued

Right to counsel—waiver by conduct—warning from trial court required— Defendant was entitled to a new trial on multiple counts of sexual offenses against a child because, although he did fire multiple attorneys throughout the case, he received no warning from the trial court that he was engaging in dilatory conduct and therefore he did not waive his right to counsel through waiver by conduct. **State v. McGirt, 223.**

Right to remain silent—prosecutor's questions—defendant's post-arrest silence—no probable impact on outcome—In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, the trial court did not commit plain error by allowing the State to question defendant regarding her failure to make a statement to law enforcement after her arrest, where, in light of the substantial unchallenged evidence that supported the State's version of events and contradicted defendant's, the jury would not have reached a different verdict absent the alleged error. **State v. Earley, 172.**

Second Amendment—possession of firearm by felon statute—facial challenge—In a prosecution for possession of a firearm by a felon (N.C.G.S. § 14-415.1)—brought after defendant was reported to be openly carrying a handgun at work despite his felony conviction and then was discovered with the gun in a hip holster during a traffic stop initiated after defendant drove away from his workplace—defendant's facial challenge to the statute's constitutionality in light of recent United States Supreme Court decisions was rejected. The Court of Appeals was bound by its decision in *State v. Nanes*, 297 N.C. App. 863 (2025), which held that the statute's provisions fell into the historical tradition of "disarming individuals who pose a threat to the safety of others" and, accordingly, was facially constitutional under both the federal and state constitutions. **State v. Ducker, 759.**

CONTEMPT

Civil—noncompliance with alimony order—finding of ability to pay sufficient—remand for clerical correction—In holding defendant in civil contempt for his failure to meet his support obligations under an existing alimony order, the trial court's findings of fact—that defendant's income at the time of the contempt hearing exceeded his income at the time the alimony order was entered and that defendant had acted in deliberate disregard of his support obligations—fully supported the court's determination that he had the ability to pay the alimony award for which he was in arrears; however, the matter was remanded for correction of a clerical error in regard to the exact amount of the arrearage. **Icenhour v. Icenhour, 502.**

CONTRACTS

Breach—school enrollment—mootness—student graduated—Plaintiff's breach of contract claim against her daughter's school (defendant) for failing to modify a re-enrollment agreement, which was dismissed by the trial court, was moot because plaintiff's daughter graduated from the school and was no longer attending and, therefore, the relief requested (the daughter's unenrollment) had been achieved. Further, there was no basis for granting plaintiff's ancillary requests for relief where plaintiff did not allege any damages, financial or otherwise, caused by her daughter's enrollment. **Zhang v. Cary Acad., 305.**

CONTRACTS—Continued

Commercial lease dispute—breach of contract—nonpayment of rent—implied waiver by conduct—In a breach of contract action brought by a commercial landlord (plaintiff) against a business tenant (defendant) for nonpayment of rent, the trial court erred by granting summary judgment to plaintiff where genuine issues of material fact existed regarding whether plaintiff waived its right to collect rent from defendant. Where evidence was presented that plaintiff accepted other payments defendant made on its behalf—including nearly fifty mortgage payments and maintenance and operational expenses—in lieu of formal rental payments for approximately four years, plaintiff's acceptance of the arrangement constituted an intentional, albeit implied, waiver which led defendant to believe that its payments were a satisfactory substitute for monthly rent. Therefore, the trial court erred by granting summary judgment in favor of plaintiff on its breach of contract claim. **Paradigm Park Holdings, LLC v. Global Growth Holdings, Inc., 64.**

CRIMINAL LAW

Evidence—audio of body-worn-camera footage—no absolute impasse between defendant and counsel—In a prosecution which resulted in defendant being found guilty of carrying a concealed firearm, possession of a firearm by a felon, and having attained habitual felon status—arising from the discovery of a gun in defendant's pocket following a traffic stop—the trial court did not err in failing to instruct defense counsel to comply with defendant's request not to mute a portion of the audio of an officer's body-worn-camera recording of the traffic stop played for the jury where, after defense counsel alerted the court to a conflict with defendant on this tactical decision and the court then directed defendant to discuss the matter with his counsel, no further discussion of, or objection to, the evidence—let alone an absolute impasse—appeared in the record. **State v. Henderson, 771.**

Jury instructions—accessory after the fact—evidence showing assistance— In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court did not plainly err by allowing the jury to consider defendant's possession of the car keys as circumstantial evidence that defendant knowingly assisted her co-defendant in escaping detection, arrest, and punishment. Although the indictments did not allege that defendant possessed the car keys, this evidence provided the means by which defendant assisted her co-defendant after the events that gave rise to the charges. **State v. Watlington, 584.**

Jury instructions—felony murder trial—voluntary manslaughter not supported by evidence—In defendant's trial for felony murder and related offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not err by failing to instruct the jury on the lesser included offense of voluntary manslaughter because the evidence did not support a reasonable inference that defendant's actions were a result of a passion or heat of blood produced by adequate provocation. Defendant had walked away from an initial altercation in the parking lot, gotten into the car, and paused, then backed over the victim before changing gears and running over the victim a second time. Even if the instruction had been warranted, any error would have been harmless given that the jury convicted defendant of felony murder. **State v. Watlington, 584.**

CRIMINAL LAW—Continued

Jury instructions—felony murder—level of intent required—plain error analysis—In defendant's trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not plainly err in its jury instruction on felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury, where the court properly told the jury that it could convict defendant if it found that defendant intentionally struck the victims with her vehicle. Contrary to defendant's argument, the trial court's instruction did not allow the jury to convict defendant upon mere culpable or criminal negligence. **State v. Watlington, 584.**

Multiple convictions—Anders review—no issues of arguable merit—In an appeal after defendant was convicted by a jury of possession of cocaine, felony fleeing to elude arrest, and speeding, in which defendant's appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), the appellate court conducted a full examination of the record and concluded that there were no issues of arguable merit, including the potential issues raised by appellate counsel (regarding the trial court's denial of defendant's motion for substitute counsel, failure to inform defendant of his right to self-representation, admission of testimony that drugs were thrown from defendant's car, and defendant's lack of opportunity to be heard regarding attorney fees that the trial court subsequently remitted). **State v. Johnson, 219.**

Prosecutor closing argument—defendant's post-arrest silence—not grossly improper—In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, the prosecutor's statements regarding defendant's post-arrest silence and failure to provide a statement to law enforcement were not so grossly improper as to require the trial court to intervene ex mero motu, and the trial court's failure to do so did not constitute an abuse of discretion. The prosecutor's statements were de minimis and, considering the record as a whole, not prejudicial in light of the substantial evidence presented of defendant's guilt. **State v. Earley, 172.**

Prosecutor closing argument—gross impropriety analysis—overwhelming evidence of guilt—In a trial for felony breaking and entering, communicating threats, and related charges, none of the prosecutor's statements during closing argument—including calling into question defendant's credibility and self-control and referring to the defense as being nothing but "smoke and mirrors"—were so grossly improper as to require the trial court to intervene ex mero motu. Where the State presented over fifty evidentiary exhibits tending to show defendant's guilt—including a video of defendant admitting to being at the victim's apartment on the night in question, expert testimony identifying defendant's fingerprints along a broken window at the victim's apartment, and recordings of defendant harassing the victim—defendant could not establish that the statements so prejudiced her defense as to render the trial fundamentally unfair. **State v. Brown, 748.**

Prosecutor closing argument—personal opinion—lack of prejudice—In a trial for felony breaking and entering, communicating threats, and related charges, the trial court properly overruled defendant's objections to the State's closing argument where, even if the prosecutor's statements—that defendant "still would" threaten the victim "today, probably" and calling into question what the evidence did or did not establish—constituted impermissible personal opinions, defendant was not prejudiced in light of the overwhelming evidence of his guilt. The State presented more than

CRIMINAL LAW—Continued

fifty evidentiary exhibits, including defendant's fingerprints that were found along the victim's broken apartment window on the night in question as well as recordings of defendant threatening the victim. **State v. Brown, 748.**

Prosecutor's arguments—confusing or erroneous statement of law—cured by jury instruction—In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), any error in the prosecutor's confusing-at-best, legally-incorrect-at-worst, statement during closing arguments—"Even if it is reasonable, the defendant never has a right to use excessive force"—was cured by the trial court's proper instruction to the jury regarding the law of self-defense. **State v. Ervin, 420.**

Prosecutor's closing argument—post-crime evasion—reasonable inferences from evidence—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court was not required to intervene ex mero motu during the State's closing argument, in which the prosecutor stated that defendant and her co-defendant were "walking away together." The statement was a reasonable inference from the evidence—provided by officer testimony and body camera footage—that the two defendants were walking near each other when they were apprehended. **State v. Watlington, 584.**

Prosecutor's closing argument—reference to co-defendant's plea deal—possible misstatement of law—no prejudice shown—In a trial for murder and possession of a firearm by a felon, brought after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, where a co-defendant (a member of the group that accompanied defendant to the home) testified for the State after entering a plea deal that reduced his initial charge of first-degree murder to involuntary manslaughter, the trial court did not err in declining to intervene ex mero motu during closing arguments when the prosecutor—in referring to the co-defendant's plea deal—described manslaughter as a lesser-included offense of second-degree murder. Even presuming that the prosecutor misstated the law, the trial court provided curative instructions to the jury distinguishing between first-degree and second-degree murder, as well as instructions regarding how to evaluate the testimony of a witness who had secured a plea deal from the State. **State v. Parker, 262.**

Prosecutor's closing argument—references to not guilty plea and cross-examination of victim's mother—not grossly improper—In a trial for murder and possession of a firearm by a felon, brought after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, where the victim's mother gave eyewitness testimony identifying defendant as her son's shooter, the trial court did not err in declining to intervene ex mero motu during closing arguments when the prosecutor stated that defendant "not only refuse[d] to take responsibility" but also "attacked," "harassed," and "yelled at" the victim's mother when cross-examining her. Taken together, these references to defendant's plea of not guilty and cross-examination of the mother were not grossly improper, since they came after defendant attacked the validity of the mother's testimony during his closing argument, and therefore they could be considered part of a strategy to restore the mother's credibility. **State v. Parker, 262.**

DIVORCE

Alimony overpayments—unjust enrichment—court's discretion to order reimbursement—equitable remedy—In a divorce case, where plaintiff ex-husband claimed to have overpaid defendant ex-wife $36,010 in alimony payments and $3,600 in attorney fees, the trial court had discretionary authority at equity to order that plaintiff be reimbursed for the overpayments. Additionally, plaintiff's claim met all of the elements of unjust enrichment (since he conferred a benefit to defendant, which she continually accepted, in the form of alimony payments for specific dollar amounts pursuant to a court order), for which restitution was the proper remedy. Therefore, because the trial court mistakenly concluded that it lacked authority to order the reimbursement, the court's order denying plaintiff's motion for reimbursement was vacated and the matter was remanded for a new hearing to determine whether the purported overpayments should be reimbursed. **Du Plessis v. Du Plessis, 664.**

Alimony—modification—change in circumstances—findings of fact supported by evidence—In denying defendant's motion to modify his alimony payments to plaintiff, the trial court's findings of fact necessary to support its conclusions of law were supported by competent evidence, including findings: (1) that defendant ceased paying full alimony to plaintiff during the relevant time period, as demonstrated by both an exhibit and testimony from plaintiff's counsel's paralegal; (2) regarding the amount of defendant's income in 2020, as shown by defendant's December 2020 paycheck and in light of his testimony that he was furloughed thereafter; (3) that defendant was not worried about making job transitions in the relevant time period, as determined by the court in considering the credibility of defendant's testimony and lack of other evidence; and (4) about defendant's income, which was supported by testimony and exhibits (despite a nonprejudicial clerical error). **Icenhour v. Icenhour, 502.**

Alimony—modification—consideration of debt payments and other expenses—no substantial change of circumstances shown—In denying defendant's motion to modify his alimony payments to plaintiff, the trial court did not fail to consider defendant's debt payments and the impact of his live-in girlfriend on his expenses in light of the specific factors set forth in N.C.G.S. § 50-16.3A to determine whether defendant had demonstrated a substantial change of circumstances, as required for modification. Rather, defendant failed to produce any evidence to support the allegations in his motion—including those concerning his purported increased expenses—leaving the court unable to determine whether there had been a substantial change in defendant's expenses. **Icenhour v. Icenhour, 502.**

Alimony—modification—imputed income—credibility and weight of evidence left to the trial court's discretion—In denying defendant's motion to modify his alimony payments to plaintiff, the trial court did not err in imputing income to defendant after considering defendant's evidence and testimony about his choice to change jobs to accept a lower-paying position because the court was the sole of judge of credibility and was free to weigh the testimony and evidence in its discretion. **Icenhour v. Icenhour, 502.**

Equitable distribution—unequal distribution—no abuse of discretion—In plaintiff wife's action for equitable distribution (in which she specifically sought an unequal distribution), although the trial court entered default against defendant husband for failure to respond in the early stage of the proceedings, the trial court did not abuse its discretion by granting an unequal distribution and awarding a greater share of marital assets to defendant (in particular, the marital home and the value of

DIVORCE—Continued

defendant's 401(k) account). The entry of default did not affect plaintiff's burden or the court's analysis regarding distribution; the court appropriately considered and weighed each distributional factor set forth in N.C.G.S. § 50-20(c); and the court's findings—none of which were challenged by plaintiff—were binding and supported by competent evidence. **Arrington v. Arrington, 313.**

DOMESTIC VIOLENCE

Protective order—complaint improperly incorporated—error not prejudicial—The trial court erred by incorporating plaintiff's complaint as additional findings of fact into its order granting plaintiff a one-year domestic violence protective order (DVPO) because, unlike in an ex parte DVPO, the trial court was required to comply with Civil Procedure Rule 52 by specially making its own findings and, here, the court did not demonstrate any processes of logical reasoning before incorporating the complaint's allegations, not all of which were supported by the evidence. However, the error was not prejudicial because the court's remaining findings—including that defendant bumped into plaintiff with her car, causing injury to plaintiff's finger—supported the conclusion that defendant had committed acts of domestic violence. **Williams v. Cabrera, 611.**

Protective order—conflicting evidence resolved—denial proper—In a domestic violence protective order (DVPO) action, brought by a wife (plaintiff) against her husband (defendant) on behalf of herself and the parties' minor child, alleging that the child was the product of defendant raping plaintiff and that defendant had sexually assaulted and raped plaintiff "50-100" times during their marriage, the trial court did not err in denying plaintiff's complaint and motion where the only finding of fact challenged by plaintiff (as a mere recitation of evidence) both recounted the conflicting evidence regarding the parties' sexual encounters and explained the court's weight and credibility determinations, explicitly stating that it could not find that defendant "committed an act of domestic violence." Further, the trial court did not err in concluding that plaintiff failed to prove grounds for issuance of a DVPO because the findings of fact did not support a conclusion that an act of domestic violence occurred—a requirement for issuance of a DVPO. **Shomette v. Needham, 400.**

Protective order—discretionary relief—animal custody and treatment—social media ban—The trial court's order granting plaintiff a one-year domestic violence protective order based on an incident in which defendant backed her car into plaintiff was modified and affirmed. First, the trial court did not abuse its discretion by granting plaintiff custody of one of the parties' two emotional support animals and by ordering defendant to refrain from cruelly treating or abusing any animal possessed by the parties, where the facts of the case warranted this discretionary relief under N.C.G.S. § 50B-3(a). However, the trial court's directive banning defendant from posting or commenting about plaintiff on social media was overbroad and arbitrary because it was not reasonably tailored to the facts, and the appellate court ordered this portion stricken from the DVPO. **Williams v. Cabrera, 611.**

Protective order—findings of fact—competency of evidence—trial court's fact-finding duty—The issuance of a one-year domestic violence protective order (DVPO) against defendant on behalf of his ex-wife (plaintiff) was affirmed where competent evidence supported the trial court's findings of fact—which supported its conclusion that defendant committed acts of domestic violence against plaintiff—including that defendant committed second-degree rape when, on at least one occasion, he forced plaintiff to engage in rough sexual intercourse with him that

DOMESTIC VIOLENCE—Continued

caused her physical injury. When making its findings, the court did not delegate its fact-finding duty to plaintiff by relying on her typewritten statement (describing a violent sexual encounter with defendant) attached to her complaint and an exhibit (showing a text message exchange between the parties) that she introduced at the hearing on her DVPO motion, since the court also heard and considered testimony from both parties at the hearing. Even though plaintiff's exhibit was later determined to have been altered, the court specifically found that it was not done to willfully mislead the court and, even if the exhibit were stricken from the record, there was still ample evidence supporting the entry of a DVPO. **Jay v. Jay, 50.**

Protective order—personal jurisdiction—sufficient minimum contacts—In a proceeding for a domestic violence protection order—sought by a mother on behalf of her minor children—the trial court had personal jurisdiction over the children's father, a resident of Tennessee, where he had sufficient minimum contacts with North Carolina to satisfy our state's Long Arm Statute (N.C.G.S. § 1-75.4) and his right to due process in that he: (1) participated in a child custody modification action in North Carolina; (2) was alleged to have committed domestic violence against his minor children, who were residents of North Carolina; and (3) contracted with a North Carolina attorney to represent him in the child custody and domestic violence actions. **Ziegler v. Ziegler, 122.**

DRUGS

Expert testimony—scientific identification of plant material—marijuana versus hemp—plain error not shown—In a prosecution on numerous drug-related charges, the trial court did not commit plain error in allowing expert testimony from a forensic scientist that certain plant material defendant sold to a confidential informant was marijuana rather than legal hemp. Longstanding precedent held that chemical analysis is not required for the identification of marijuana, and the principles and methods applied by the expert—including weighing, macroscopic testing, microscopic examination, and confirmatory testing—demonstrated sufficient reliability for admission pursuant to Evidence Rule 702(a) (governing expert testimony). **State v. Ruffin, 104.**

Jury instructions—legal definitions of marijuana and hemp—plain error not shown—In a prosecution on numerous drug-related charges, the trial court did not commit plain error in giving the pattern jury instructions for the charges of sale and delivery of marijuana, with the addition of the phrase "the term [marijuana] does not include hemp or hemp products" (as requested by defendant during the charge conference), but without explaining that marijuana has a Delta-9 tetrahydrocannabinoid (THC) content in excess of 0.3%, while hemp has a Delta-9 THC content of 0.03% or less. Appellate courts routinely approve jury instructions that are consistent with the North Carolina Pattern Jury Instructions, and the additional language requested by defendant and given by the court tracked language from the statute defining marijuana (N.C.G.S. § 90-87(16)). **State v. Ruffin, 104.**

Lay witness testimony—visual identification by law enforcement officer—marijuana versus hemp—plain error not shown—In a prosecution on numerous drug-related charges, the trial court did not err, let alone commit plain error, in allowing lay opinion testimony from a law enforcement officer that, based on his training and experience, certain plant material defendant sold to a confidential informant was marijuana rather than legal hemp. The case cited by defendant in support of his position—*State v. Ward*, 364 N.C. 133 (2010)—concerned expert testimony

DRUGS—Continued

admitted pursuant to Evidence Rule 702 rather than lay opinion testimony admitted pursuant to Evidence Rule 701 (such as the officer's marijuana identification). **State v. Ruffin, 104.**

Maintaining a dwelling to keep controlled substances—evidence of residency—The trial court properly denied defendant's motion to dismiss a charge of keeping or maintaining a dwelling for the purpose of keeping or selling controlled substances where the State presented substantial evidence from which a jury could find the element of the offense that defendant kept or maintained a dwelling, including: defendant's admission that he had "been" at his parents' home for more than fifteen years, defendant's identification of an upstairs bedroom in his parents' house as his bedroom, a piece of mail with defendant's name and his parents' address on the dresser of his bedroom, defendant's admission to having used heroin "on and off" for more than twenty years, and defendant's acknowledgment that he used heroin after being asked about the heroin (approximately sixty-nine grams) and drug paraphernalia that had been found in his bedroom. **State v. Rowland, 274.**

Motion to dismiss—sale and delivery of marijuana—marijuana versus hemp—evidence sufficient—In a prosecution on numerous drug-related charges, the trial court did not err in denying defendant's motion to dismiss the marijuana-related charges for insufficiency of evidence that the plant material defendant sold to a confidential informant was marijuana rather than legal hemp where: (1) a law enforcement officer testified that the material appeared to be marijuana upon visual inspection, he heard defendant use the term "an eighth"—referring to marijuana—and he observed defendant rolling a "blunt"—a marijuana cigarette—via surveillance equipment; and (2) a forensic scientist testified that she performed multiple tests on the material and determined that it belonged "to the genus cannabis containing tetrahydrocannabinol, concentration of cannabinoid not determined." That evidence was sufficient to send the marijuana-related charges to the jury. **State v. Ruffin, 104.**

ELECTIONS

Post-election protest filing—statutory requirements—adequate notice—dismissals reversed—In post-election protest proceedings brought by plaintiff (a candidate for a seat on the North Carolina Supreme Court who lost the election by 734 votes) in regard to three groups of challenged voters—voters with incomplete voter registration, overseas voters who failed to include a copy of photo identification or an exception form with their ballots, and voters who never domiciled or resided in North Carolina but whose parents or guardians were eligible North Carolina voters—the dismissals of plaintiff's protests by the State Board of Elections on the basis of his failure to satisfy statutory notice requirements set forth in the Board's Election Protest Form (plaintiff had mailed postcards with a quick response (QR) code to potentially affected voters) were reversed where the relevant statutes (N.C.G.S. §§ 163-182.9 and 163-182.10) required county boards of elections—rather than a protester such as plaintiff—to provide notice of hearings, and then only once the need for an evidentiary hearing had been established following a preliminary hearing—for which no notice to affected voters was required. **Griffin v. N.C. State Bd. of Elections, 436.**

Post-election protest filing—statutory requirements—probable cause of election violations shown—In post-election protest proceedings brought by plaintiff (a candidate for a seat on the North Carolina Supreme Court who lost the election by 734 votes) in regard to three groups of challenged voters—voters with incomplete

ELECTIONS—Continued

voter registration, overseas voters who failed to include a copy of photo identification or an exception form with their ballots, and voters who never domiciled or resided in North Carolina but whose parents or guardians were eligible North Carolina voters—after reversing the State Board of Elections' dismissals of plaintiff's protests on notice grounds, the Court of Appeals further determined that probable cause existed to believe that election violations had occurred and, accordingly, reached the merits of plaintiff's challenges to each of the three voter groups. The matters were remanded as to the voters with incomplete registrations and the overseas voters, with instructions for the Board to notify affected voters and provide them 15 days to cure the deficiencies in their registrations. Voters in the final group, who never domiciled or resided in North Carolina, were ruled ineligible to vote in North Carolina, non-federal elections, and the Board was instructed to remove their votes from the Supreme Court election count. **Griffin v. N.C. State Bd. of Elections, 436.**

EVIDENCE

Authentication—still frames from ATM videos—business record—subset of data collected—no plain error—There was no plain error in defendant's trial for felony obtaining property by false pretenses and felony identity fraud by the admission of still photos extracted from ATM videos showing defendant withdrawing funds from his mother's account. The still photos were properly admitted as a business record where the State laid a proper foundation for the videos—to which defendant did not object—by declaring them as business records that had not been edited and that were true and correct copies of records maintained by the bank that operated the ATM, and where the proper admission of the videos impliedly included their constituent frames, which were a subset of data from the overall videos. **State v. Windseth, 285.**

Possession of drug paraphernalia—motion to dismiss—evidence sufficient—In a prosecution on several drug charges—brought after defendant, upon being stopped for suspected shoplifting, was discovered to possess heroin and a glass pipe—the trial court properly denied defendant's motion to dismiss the charge of possession of drug paraphernalia where, in the light most favorable to the State, the evidence that defendant intended to use the glass pipe to ingest a controlled substance "other than marijuana" (as required by N.C.G.S. § 90-113.22)—or, more specifically, that defendant had heroin in the same pocket as the pipe (which was visibly charred, indicating prior use), but did not possess marijuana or any other substance for which the pipe could be used—was sufficient to send the issue to the jury. **State v. Bryant, 566.**

Testimony regarding defendant's prior violent behavior—properly admitted under Evidence Rules—In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err or abuse its discretion in admitting testimony from defendant's girlfriend regarding three incidents in which defendant was violent toward her, where two of the incidents involved defendant brandishing a gun and all three incidents occurred during the time period when defendant, his girlfriend, and the victim were residing together. The evidence was properly admitted under Evidence Rules 401, 402, 403, and 404 because it: was relevant to the context of the parties' relationships and conflicts; demonstrated defendant's motive, intent, opportunity, and preparation to use the gun involved in the shooting; and had probative value that was not substantially outweighed by its prejudice to defendant. **State v. Ervin, 420.**

EVIDENCE—Continued

Victim's alleged gang involvement—exclusion—no error or abuse of discretion shown—In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err or abuse its discretion in excluding evidence of the victim's alleged gang involvement where, even if it was relevant, the trial court determined that the probative value of the evidence to defendant's self-defense theory of the case was substantially outweighed by the danger of unfair prejudice. **State v. Ervin, 420.**

HOMICIDE

First-degree felony murder—predicate felony—assault with deadly weapon inflicting serious injury—In defendant's trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not err by submitting to the jury the first-degree felony murder charge based on the underlying felony of assault with a deadly weapon inflicting serious injury. Although defendant did not preserve the issue for appellate review, the appellate court considered the issue in its discretion and determined that the assault could serve as a predicate felony for the felony murder charge as a matter of law. Sufficient evidence was presented that defendant had actual intent to commit the assault by first backing the vehicle directly over multiple people, completely running them over; coming to a full stop; pausing; and then shifting the car's gears and driving forward at full speed over the victims a second time. **State v. Watlington, 584.**

First-degree murder—motion to dismiss—sufficient evidence of premeditation and deliberation—In a prosecution for first-degree murder arising from defendant shooting and killing his girlfriend's brother following a physical conflict between defendant and the victim (over whether defendant had treated the victim and his family with disrespect), the trial court did not err in denying defendant's motion to dismiss where the evidence of premeditation and deliberation, viewed in the light most favorable to the state—including that defendant had walked away from a physical confrontation with the victim (which took place on the first floor of the townhome where defendant, his girlfriend, his sister, the victim, and others resided), went to the third floor to retrieve his gun, descended to the second floor where he spoke with his sister for some period of time, then returned to the first floor and shot the victim three times—was sufficient to send the charge to the jury. **State v. Ervin, 420.**

IDENTIFICATION OF DEFENDANTS

Lay opinion testimony of officer—person depicted in ATM videos—prior interactions with defendant—no abuse of discretion—The trial court did not abuse its discretion in defendant's trial for felony obtaining property by false pretenses and felony identity theft by allowing the lay opinion testimony of a law enforcement officer that defendant was the person depicted in still frames from ATM videos who withdrew funds from defendant's mother's account. The officer had previously interacted with defendant multiple times as part of an investigation into the disappearance of defendant's mother, and those interactions gave the officer a sufficient level of familiarity with defendant's appearance to be helpful to the jury. **State v. Windseth, 285.**

IMMUNITY

Governmental—city firefighter—collision while driving firetruck back to fire station—governmental function—waiver not shown—In a negligence case brought against a city firefighter and the city itself (together, defendants), where the firefighter was driving a firetruck back to the fire station when she collided with a motorcyclist (plaintiff) who sustained serious injuries as a result, including one leg amputation, the trial court erred in partially denying defendants' motion to dismiss—filed pursuant to Rule 12(b)(2)—based on governmental immunity. To begin with, governmental immunity—which applies to actions taken by municipalities in the course of a governmental function—applied to the firefighter's conduct because the operation of a firetruck is a governmental function, even when the firetruck is not responding to an emergency. Furthermore, plaintiff failed to show that defendants waived governmental immunity where: (1) the city's excess liability insurance policies contained language excluding coverage for claims in which immunity applied; (2) the city did not participate in a local government risk pool; and (3) although the city did pass a resolution establishing requirements that, if met, would result in a limited waiver of immunity, plaintiff failed to meet those requirements. **Smith v. Lane, 560.**

INDICTMENT AND INFORMATION

Indictment—accessory after the fact—no fatal variance from evidence at trial—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, there was no fatal variance between the indictments and the evidence presented at trial. Evidence that defendant possessed the car keys after the incident—an allegation that was not included in the indictments—demonstrated the means by which defendant aided her co-defendant in escaping detection, arrest, and punishment. **State v. Watlington, 584.**

INSURANCE

General liability policy—employer liability exclusion—"employee" versus "temporary worker"—no duty to defend or to indemnify—In a declaratory judgment action filed by an insurance company (plaintiff) seeking a declaration that the employer's liability exclusion in its general liability policy—issued to a general contractor who operated his own construction company—barred any claims asserted by decedent's estate (defendant) arising from the fatal accident that decedent suffered while performing a task on the contractor's worksite, the appellate court affirmed the trial court's order determining that, pursuant to the terms of the policy, decedent was the contractor's employee and not a volunteer or a temporary worker and, as a result, that plaintiff had no duty to defend or to indemnify the contractor. Despite conflicting evidence, which was within the province of the trial court to resolve, competent evidence supported the trial court's determination that the contractor intended to pay decedent for her work on the day of the incident and that decedent was not hired to meet a seasonal or short-term workload need. **N.C. Farm Bureau Mut. Ins. Co. v. Young, 708.**

JUDGES

Motion to dismiss criminal charge—orally denied—written order signed by substitute judge—without new hearing—order deemed a nullity—In a criminal case where the presiding trial judge retired nine months after orally denying defendant's motion to dismiss a charge for embezzlement, and where the written order memorializing the oral ruling was signed by a substitute judge, the written order was vacated and the matter was remanded because the substitute judge lacked authority to sign the order without holding a new hearing. Although the substitute judge cited Civil Procedure Rule 63 as authority for signing in place of the now-retired judge, the Rules of Civil Procedure do not apply to criminal cases. Since there was no other legal basis for allowing the substitute judge to sign the order without holding a new hearing, the order was a nullity. **State v. Fearns, 75.**

Recusal—authority to enter substantive order in same case—order vacated—remanded for new hearing—Where a trial judge in a domestic case concluded a hearing on permanent child custody in March 2019, but no written order was issued that year, and the judge subsequently recused himself from the matter in 2021 after granting plaintiff's motion to recuse, the judge thereafter lacked authority to enter any substantive order in the case. Despite the judge's remarks at the recusal hearing that he was recusing based on having a heavy caseload, nothing in the written order of recusal indicated that the recusal was temporary or limited in any way; not only did the written order state that the basis for the recusal was the granting of plaintiff's motion to recuse but, in addition, the judge specifically assigned the case to another judge. Therefore, the judge's issuance of an order in 2023 nunc pro tunc to 27 May 2019, ruling on matters he had heard at the March 2019 hearing, was vacated and the matter was remanded for a new hearing and entry of a new order. **Green v. Branch, 677.**

JUDGMENTS

Renewal—against State Treasurer—enforceability not a bar to claim—In plaintiff county board of education's action to renew a judgment against the State Treasurer (involving fines collected for improper equipment violations), the trial court properly denied the motion to dismiss filed by defendants (the Treasurer and other State officials in their official capacity), in which defendants asserted sovereign immunity, because, while plaintiff may never be able to collect the judgment absent an appropriation from the General Assembly to satisfy the judgment, plaintiff was nevertheless entitled to seek renewal and have a new judgment entered. Plaintiff obtained a valid judgment in a prior action and properly brought the renewal action within ten years of the original judgment pursuant to N.C.G.S. § 1-47(1). **Richmond Cnty. Bd. of Educ. v. Folwell, 390.**

JURISDICTION

Personal—no minimum contacts shown—due process rights violated—denial of motion to dismiss reversed—In an action for wrongful eviction, breach of contract, and illegal sales tax—brought by an individual against a Charlotte hotel where she had stayed and a Delaware company (the parent holding company of the Hilton hotel and hospitality business) ("Hilton")—the trial court erred in denying Hilton's motion to dismiss for lack of personal jurisdiction where the court's unchallenged findings of fact were that Hilton: was not incorporated or headquartered in North Carolina, was not registered or licensed to do business in the state, did not lease or own any real property in the state, and was not a party to any franchise agreement with the Charlotte hotel. Accordingly, even though two other findings of fact challenged

JURISDICTION—Continued

by plaintiff were not supported by the evidence, the order denying Hilton's motion to dismiss was reversed because Hilton did not have minimum contacts with North Carolina sufficient to permit maintenance of a suit that did not offend due process concerns. **Carter v. Home2 Suites by Hilton Charlotte I-77 S., 655.**

JURY

Juror replacement—before jury was empaneled—jury veniremember selected over alternate juror—no prejudice shown—constitutional argument not preserved—In a prosecution on charges including first-degree murder, where a juror was excused before the jury was empaneled because his wife had unexpectedly gone into labor, the trial court did not err by selecting his replacement from the jury venire instead of using a prospective alternate juror. The court did not violate N.C.G.S. § 15A-1215(a)—which requires an alternate juror to replace a juror who is discharged for any reason before a verdict is rendered—since that statute only applies after a jury is officially empaneled. Rather, the court followed the correct procedure under N.C.G.S. § 15A-1214(g), which governed the jury selection process before empanelment. Further, defendant failed to argue that the juror replacement prejudiced his case, and he could not bypass the requirement to show prejudice by arguing that the court committed error per se or structural error. Finally, defendant failed to preserve his constitutional argument that he was deprived of a fair and impartial jury where he did not raise that argument at trial; moreover, his case did not involve the "manifest injustice" that would justify invoking Appellate Rule 2 to suspend the Rules of Appellate Procedure and decide the constitutional issue on the merits. **State v. Griffin, 85.**

LIENS

Pleading—N.C.G.S. § 44A-12—strict compliance required—date of last furnishing of labor or materials—dismissal proper—In an action arising from plaintiff construction company's contract with defendant for the construction of a single-family residence, the trial court properly dismissed plaintiff's lien enforcement claim after requiring strict compliance with the enumerated elements of N.C.G.S. §§ 44A-12 and 44A-13 (providing content and timing requirements for filing a claim of lien on real property), including the date of the last furnishing of labor or materials—an element which plaintiff failed to plead. Accordingly, the Court of Appeals affirmed the trial court's dismissal of plaintiff's lien enforcement claim and declined to reach the merits of plaintiff's additional appellate argument regarding the purported lien. **Fine Line Homes, LP v. Luthra, 670.**

MANDAMUS

Transfer of inmate from a men's prison to a women's prison—statutory discretion vested in Department of Adult Correction—The trial court erred in issuing a writ of mandamus ordering respondent—the Commissioner of Prisons—to transfer petitioner—an inmate assigned male at birth, but who claimed to be a woman (or an "intersex woman") and received an amended birth certificate designating her sex as female—from the men's prison where she was incarcerated to a women's prison because the relevant statutes (N.C.G.S. §§ 148-36 and 148-44), taken together, provide the Department of Adult Correction with discretion to assign an inmate to any prison facility so long as male and female inmates are quartered separately (which further comports with federal legislation enacted to prevent prison

MANDAMUS—Continued

rape and sexual abuse). The trial court's erroneous conclusion that the department lacked discretion to assign petitioner to a male prison facility arose from its incorrect belief that petitioner's birth certificate created an irrebuttable presumption that she must be classified as female, while N.C.G.S. § 130A-93 provides that a birth certificate is only prima facie evidence of a person's sex. The evidence regarding petitioner's sex was conflicting, with the court's unchallenged findings of fact indicating that petitioner was intersex. **Inscoe v. Ishee, 358.**

MORTGAGES AND DEEDS OF TRUST

Non-judicial foreclosure—home equity line of credit—valid debt and right to foreclose—forged signatures on loan documents—ratification of debt and deed of trust—In a non-judicial foreclosure proceeding following the default on a home equity line of credit (HELOC), which was secured by a deed of trust encumbering a property owned by a married couple until they divorced, at which point the wife (respondent) was awarded sole title to both the property and the HELOC, the trial court erred in finding that the HELOC was not a valid debt and that the holder of the HELOC note (petitioner) had no right to foreclose on the property based on respondent's testimony that her signatures on the HELOC loan documents were forged. Despite respondent's claims of forgery, petitioner still met its burden of showing that the HELOC and the deed of trust were valid by introducing evidence that respondent ratified both by: acknowledging the HELOC as a valid marital debt in her verified complaint for divorce and equitable distribution, making several monthly payments on the HELOC loan, entering into (and benefitting from) subordination agreements related to the HELOC, and using the HELOC debt to satisfy a prior loan. **In re Foreclosure of Godfrey, 29.**

MOTOR VEHICLES

Murder trial—multiple counts of hit and run—unit of prosecution—rule of lenity—In defendant's trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, although defendant was convicted of four counts of felonious hit and run resulting in serious bodily injury or death and one count of misdemeanor hit and run based on the number of victims, since the charging statute—N.C.G.S. § 20-166—was ambiguous regarding the allowable unit of prosecution, the appellate court applied the rule of lenity and held that the unit of prosecution under the statute was the number of crashes from which the defendant fled and not the number of victims. Since defendant had fled from two crashes, she could only be convicted of two violations of the statute; therefore, the appellate court arrested judgment on three of the hit-and-run convictions and remanded to the trial court for resentencing. **State v. Watlington, 584.**

PARENT AND CHILD

Claim against school—alleged violation of Parental Bill of Rights—no private cause of action—The trial court properly dismissed plaintiff's claim against her daughter's school (defendant) for allegedly violating the Parental Bill of Rights (N.C.G.S. § 114A-10) where the statute did not create a private cause of action, either express or implied, against non-parent third parties such as defendant in this case. **Zhang v. Cary Acad., 305.**

PARTIES

Plaintiff—not a real party in interest—lack of standing—motion to amend complaint—denied—In an action filed by the broker of an insurance policy covering a restaurant, which was damaged in a fire allegedly caused by a failure in the fire-suppression system provided and serviced by defendants, where the broker moved to amend its complaint to correct the plaintiff's name from the broker to the insurance company that issued the policy, the trial court properly granted defendants' motions to dismiss for lack of subject matter jurisdiction without allowing the motion to amend. The insurance company—having paid the restaurant owner's claims for damages under the policy—was the true necessary-party plaintiff in this case and was required to sue in its own name to enforce its subrogation rights against defendants. Therefore, the broker was not a real party in interest and lacked standing to sue defendants; accordingly, the trial court lacked jurisdiction to consider the broker's motion to amend and thus properly dismissed the case without ruling on the motion. **Intrepid Direct Ins. Agency v. Amerex Corp., 384.**

POSSESSION OF STOLEN PROPERTY

Constructive possession—incriminating circumstances—stolen camper located on defendant's property—The State presented substantial evidence, in the form of incriminating circumstances, from which a jury could find that defendant constructively possessed a stolen pop-up camper, which was discovered on defendant's property a couple of weeks after it was stolen, to meet the possession element of felonious possession of stolen goods. When law enforcement questioned defendant about the camper, he stated that he had been aware of the camper on his property; that although he didn't know where it came from, he "didn't choose to ask"; and he acknowledged that by the time of the interview he knew the camper was stolen. **State v. Capps, 412.**

PRODUCTS LIABILITY

Defective aircraft maintenance and overhaul manual—sufficiency of pleadings—barred by statute of repose—In a suit initiated on behalf of the estates of a husband and wife (plaintiffs), after the couple's private plane fatally crashed due to engine failure, the trial court properly granted summary judgment in favor of the manufacturer of the plane's engine and of the maintenance and overhaul manual (defendant) where plaintiffs' complaint did not sufficiently plead a product liability claim based on an alleged defect in the maintenance and overhaul manual—which, unlike claims about the aircraft and engine, would not have been barred by the applicable statute of repose. The complaint asserted liability based on defective engine components and alleged that defendant failed to provide proper maintenance instructions, but did not allege that the maintenance and overhaul manual was a separately defective product and, thus, did not put defendant on notice that it was required to defend a product liability claim based on the defective manual as a product separate from the aircraft. Based on the purchase date of the engine, the statute of repose had expired before plaintiffs brought suit. **Weiss v. Cont'l Aerospace Techs., Inc., 293.**

PUBLIC OFFICERS AND EMPLOYEES

Foresters—fire fighting—overtime compensation—calculation of payments—genuine issue of material fact—In an action filed by a group of current and former foresters for the North Carolina Forest Service seeking overtime compensation

PUBLIC OFFICERS AND EMPLOYEES—Continued

for time spent fighting forest fires, the trial court properly dismissed the State's recoupment defense—in which the State asserted that any payments owed to the foresters should be set off or reduced by the amount of any purported overpayments to the foresters—since there was no statute of limitations for when the State could seek repayment. Thus, the State could still seek recoupment of any overpayments through established administrative procedures. Further, where there remained a genuine issue of material fact regarding the percentage of the Evans Road fire that occurred on state versus private lands, and, thus, whether funds earmarked by the State from the federal government covered 100% or 60% of the foresters' overtime worked to contain that fire, the matter was remanded to the trial court to hold an evidentiary hearing. **Brown v. N.C. Dep't of Env't Quality, 634.**

Foresters—fire fighting—overtime compensation—calculation—straight time versus time-and-a-half—In an action filed by a group of current and former foresters for the North Carolina Forest Service seeking overtime compensation for time spent fighting forest fires, the trial court did not err by strictly construing N.C.G.S. § 106-903 and determining that the foresters had been fully compensated for their overtime hours by the State's payments to them on a straight time basis, in contrast to the foresters' claim in their cross appeal that they should have been compensated for overtime on a time-and-a-half basis. **Brown v. N.C. Dep't of Env't Quality, 634.**

Foresters—fire fighting—overtime compensation—recalculation of retirement and federal benefits—In an action filed by a group of current and former foresters for the North Carolina Forest Service seeking overtime compensation for time spent fighting forest fires, the trial court properly ordered the State retirement system and other federal benefits programs to recalculate the foresters' retirement benefits in order to make retroactive adjustments, based on an under-reporting of compensation with regard to overtime hours, where the trial court's calculations were not speculative and where the parties had stipulated to the number of overtime hours and the value of those hours with regard to each class of foresters. **Brown v. N.C. Dep't of Env't Quality, 634.**

Foresters—fire fighting—overtime compensation—statutory mandate—In an action filed by a group of current and former foresters for the North Carolina Forest Service seeking overtime compensation for time spent fighting forest fires, the trial court correctly interpreted N.C.G.S. § 106-903—based on clear legislative intent, as evidenced by legislative history and the plain language of the statute, which mandates that the agency "shall" provide overtime compensation—as requiring the State to pay foresters monetary compensation for any overtime hours accrued that were not otherwise compensated for with compensatory time (either because the time was not taken or had been erroneously forfeited). Further, once the benefits had been earned, they could not be rescinded by the State. **Brown v. N.C. Dep't of Env't Quality, 634.**

Foresters—fire fighting—overtime compensation—third-party beneficiaries to federal reimbursement contracts—In an action filed by a group of current and former foresters for the North Carolina Forest Service (NCFS) seeking overtime compensation from the N.C. Department of Environmental Quality (defendant) for time spent fighting forest fires, the trial court properly held that the foresters were intended third-party beneficiaries to certain federal reimbursement contracts for fighting fires on federal land (the "Master Agreements," entered into between the NCFS and federal agencies periodically, each effective for a term of five years) and

PUBLIC OFFICERS AND EMPLOYEES—Continued

that, as a result, the foresters were entitled to reimbursement on a time-and-a-half basis for overtime hours worked fighting fires on federal land. Further, the trial court properly denied defendant's ultra vires defense, since, by statute, the Department was required to provide overtime compensation to the foresters. **Brown v. N.C. Dep't of Env't Quality, 634.**

REAL PROPERTY

Restrictive covenants—action to enforce as equitable servitudes—no third-party standing—In a case about two neighboring tracts of land that were once part of a larger property, where the owners of the original property placed certain restrictions on the tract it sold to plaintiffs, leaving the remaining land unrestricted until it sold a portion of that land to defendants subject to the same restrictions placed on plaintiffs' tract, the trial court erred in granting plaintiffs' motions for preliminary injunction and summary judgment—alleging defendants violated the restrictions—because plaintiffs lacked standing to bring an action to enforce the restrictions as equitable servitudes. Specifically, plaintiffs failed to show that the original property owners intended for the restrictions to bind defendants' property for the benefit of plaintiffs' property, especially since the restrictions on the defendants' tract were not mentioned in plaintiffs' deed (since those restrictions came later), and all of the remaining land was left unrestricted when plaintiffs purchased their tract. Further, there was no evidence of a common scheme of development or a general plan for uniform restrictions across all of the original larger property. **Prevette v. Elsner, 720.**

Restrictive covenants—action to enforce as real covenants at law—alleged as equitable servitudes—no third-party standing—In a case about two neighboring tracts of land that were once part of a larger property, where the owners of the original property placed certain restrictions on the tract it sold to plaintiffs, leaving the remaining land unrestricted until it sold a portion of that land to defendants subject to the same restrictions placed on plaintiffs' tract, the trial court erred in granting plaintiffs' motions for preliminary injunction and summary judgment—alleging defendants violated the restrictions—because plaintiffs lacked standing to bring an action to enforce the restrictions as real covenants at law. First, plaintiffs' argument that each party's tract was subject to "mutual restrictive servitudes, enforceable by either [party]" alluded to a claim of equitable servitudes, not covenants at law. Second, plaintiffs failed to adequately address the issue of the privity of estate required to enforce a covenant at law. **Prevette v. Elsner, 720.**

SEARCH AND SEIZURE

Warrantless search of vehicle—implied consent—wallet on top of car excluded—In a prosecution for possession of methamphetamine, which was based on drugs found inside defendant's wallet during a warrantless search of defendant's vehicle while in a national forest, the trial court erroneously denied defendant's motion to suppress the drugs. Although wildlife officers had defendant's implied consent to search the vehicle (because defendant did not object after her companion, who had been driving the car and thus had control over it, gave explicit consent for the search in her presence and hearing and because defendant tried to assist the officers as they began their search), that consent did not extend, absent clear and unequivocal evidence, to search the wallet, which the trial court found had been placed on top of the car by defendant at some point during the encounter and which was not attached or tethered to the car in any way. Since the only evidence supporting

SEARCH AND SEIZURE—Continued

the offense was found inside the wallet, and the trial court did not make any findings regarding whether defendant consented to the wallet being searched, defendant's conviction was vacated and the matter was remanded for further proceedings. **State v. Peters, 572.**

SENTENCING

Extraneous information from prosecutor—not considered by trial court—permissible considerations—Defendant failed to show that, in sentencing him on convictions for trafficking in heroin by transportation, the trial court considered extraneous information presented by the prosecutor—that someone had died as a result of the drug transaction underlying the trafficking charges—in deciding to impose consecutive, as opposed to concurrent, sentences. During sentencing, the trial court expressly stated that it was not considering the death (or a potential death by distribution charge) in imposing sentences on the trafficking convictions. Further, challenged remarks made by the trial court during sentencing—such as discussing "peddling dope that kills people"—referenced permissible considerations within the court's discretion, such as the societal impact and severity of the crimes. **State v. Ruffin, 104.**

Life imprisonment without parole—judicial review after 25 years served—statutory requirements met—After defendant had served 25 years of his life without parole sentence for first-degree murder, thereby becoming eligible for review of his sentence pursuant to N.C.G.S. § 15A-1380.5, the trial court's recommendation not to alter or commute defendant's sentence was affirmed, where the court's review process followed all of the statutory requirements and where its recommendation was reasonably supported by the record. The trial court did not abuse its discretion by declining to hold a hearing on the matter or to enter written factual findings supporting its recommendation, as neither step was required under section 15A-1380.5. Further, the court made it clear that it had considered the trial record, defendant's record from the Department of Corrections, the risk he posed to society, and other relevant information when reviewing defendant's sentence. **State v. Walker, 579.**

Marijuana—convictions for both selling and delivering—consolidation and concurrent sentencing—any error harmless—Following defendant's convictions on numerous drug-related charges, arising from defendant selling controlled substances—including marijuana—to a confidential informant, any error in defendant being sentenced for both selling and delivering marijuana as part of the same transaction (a matter the appellate court assumed without deciding) was harmless because the court consolidated those convictions and set their sentences to run concurrently with the longer sentence defendant received on his conviction on a trafficking charge; accordingly, defendant's term of imprisonment was not affected by the sale and delivery sentences. **State v. Ruffin, 104.**

Prior record level—calculation—point erroneously assigned to exempt traffic violation—prejudicial error—Where the trial court miscalculated defendant as a prior record level (PRL) III based on 6 points by erroneously assigning one point to defendant's prior conviction of driving while license revoked for impaired driving, a traffic offense that is exempt from inclusion in a prior record level calculation pursuant to N.C.G.S. § 15A-1340.14(b)(5), the error was prejudicial—even though his sentence was within the presumptive range of either a PRL II or PRL III—because the minimum sentence for a PRL II is lower than that for a PRL III and, thus, defendant could have received a lesser sentence if the correct PRL had been calculated.

SENTENCING—Continued

Defendant's judgment was vacated and the matter was remanded for the trial court to sentence defendant as a PRL II based on 5 points. **State v. Wilson, 278.**

Prior record level—out-of-state conviction—identity theft—lack of substantial similarity—resentencing required—For purposes of sentencing, the trial court erred by concluding that defendant's prior conviction for identity theft in Virginia was substantially similar to a North Carolina offense, where, unlike in North Carolina, Virginia's statute could be violated by using identifying information for a "false or fictitious person." The court therefore erred by treating the Virginia conviction as a Glass G felony and assigning four points to defendant's prior record level as a result, which made defendant a prior record level III rather than II. Therefore, the matter was remanded for resentencing. **State v. Fuller, 199.**

Second-degree murder—aggravated sentence—mitigating factors—no finding of mental illness—In sentencing defendant in the aggravated range after he was convicted of the second-degree murder of his girlfriend (who he stabbed and cut over 160 times), the trial court did not err by declining to find defendant's proposed mitigating factor, pursuant to N.C.G.S. § 15A-1340.16(e)(3), that defendant suffered from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability. Although a forensic psychiatrist testified that he had diagnosed defendant with schizophrenia while evaluating defendant for the sole purpose of determining his competency to stand trial, that evidence did not constitute substantial, uncontradicted, and manifestly credible evidence that, at the time of the murder: (1) defendant suffered from schizophrenia, and (2) that his illness significantly contributed to the murder; therefore, defendant failed to meet his burden. **State v. Rojas, 95.**

Second-degree murder—sentenced as Class B1 felony—supported by jury verdict—After defendant was convicted of second-degree murder for going to a young man's home and shooting him in front of the man's mother and five-year-old brother, the trial court properly imposed a Class B1 sentence where the evidence at trial only supported one of the two theories of malice identified in N.C.G.S. § 14-17(b)—in this case, the malice attributed to Class B1 felonies (requiring intent to harm) and not the malice attributed to Class B2 felonies (involving reckless behavior or inherently dangerous acts)—thereby removing any question as to whether the jury rendered an ambiguous verdict. Additionally, a Class B1 sentence was appropriate where the jury found as an aggravating factor that defendant committed the crime in the presence of a minor. **State v. Parker, 262.**

STATUTES OF LIMITATION AND REPOSE

Statute of repose—product liability—defective aircraft maintenance and overhaul manual—separate product—independent claim allowed—In a suit initiated on behalf of the estates of a husband and wife (plaintiffs), after the couple's private plane fatally crashed due to engine failure, the appellate court rejected an argument by the manufacturer of the plane's engine and of the maintenance and overhaul manual (defendant) that plaintiffs' product liability and negligence claims were barred by the six-year statute of repose (pursuant to now-repealed N.C.G.S. § 1-50(a)(6)). While acknowledging contrary holdings from federal courts that distinguish between flight manuals and maintenance or overhaul manuals, the Court of Appeals followed the reasoning in *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519 (1993) (which involved a flight manual), and held that a maintenance and overhaul manual is a separate product that may support an independent claim for

STATUTES OF LIMITATION AND REPOSE—Continued

product liability if the manual was obtained separately from the aircraft and the claim stemmed from an alleged defect in the manual. **Weiss v. Cont'l Aerospace Techs., Inc., 293.**

TERMINATION OF PARENTAL RIGHTS

Denial of motion to change venue—trial court's discretion—statutory findings not required—In a termination of parental rights (TPR) matter, the trial court did not abuse its discretion by denying the guardian ad litem's (GAL's) motion to change venue from the county in which the TPR petition was filed (Brunswick) to the county where an underlying juvenile case was pending (Cumberland). Regardless of which transfer of venue provision applied—N.C.G.S. § 7B-900.1(a) in the Juvenile Code for post-adjudication transfers, or N.C.G.S. § 1-83(2) in the Civil Procedure statutes—there was no showing that the ends of justice demanded a change of venue or that failure to transfer venue would deny the GAL a fair trial. The GAL's concerns about having to travel to Brunswick County for the TPR proceedings did not rise to the level of requiring a change of venue and, further, the minor child, the child's guardian, and other witnesses all resided in Brunswick County. Finally, the trial court was not required to make statutory findings when denying a motion to transfer venue. **In re S.W., 39.**

Grounds for termination—failure to make reasonable progress—failure to obtain suitable housing—undocumented status not considered—An order terminating a father's parental rights in his son was affirmed where the findings of fact challenged on appeal were supported by competent evidence and where those and other findings supported the conclusion that the father failed to make reasonable progress in correcting the conditions that lead to the child's removal (N.C.G.S. § 7B-1111(a)(2)). Importantly, the trial court's decision was based not on the father's status as an undocumented immigrant, but rather on his failure to secure safe and appropriate housing for himself and his child. Although the father's undocumented status did affect his ability to obtain housing, the court also found that: his primary obstacle was his criminal record; social services gave him resources for finding housing options that would be available to him even with his criminal record and undocumented status, but he failed to follow up on them; and, despite having over two years to find suitable housing and enough finances to afford it, he continuously lived under unsuitable conditions for raising a child (sleeping on a living room couch in a house with a group of unidentified adults). **In re R.A.X., 341.**

Grounds for termination—willful abandonment—complete lack of contact—The trial court properly terminated a mother's parental rights to her son based on willful abandonment where there was clear, cogent, and convincing evidence that, during the relevant six-month period, the mother: had no contact or communication of any sort with her son; did not request visitation; did not send any cards, gifts, or letters to her son; did not provide any financial support for her son; and failed to respond to a letter written to her by her son. The court's findings were supported by the evidence and, despite the mother's argument to the contrary, showed the court's consideration of the mother's history and circumstances; together, the evidence and findings demonstrated the mother's lack of any parental concern for her son and, in turn, supported the court's conclusion that termination based on willful abandonment was warranted. **In re D.R.W., 18.**

Indian Child Welfare Act—inquiry into child's heritage—"at the commencement of the proceeding"—hearing held after twelve continuances—An order

TERMINATION OF PARENTAL RIGHTS—Continued

terminating a father's parental rights in his son—and finding that the child was not an "Indian child" for purposes of the Indian Child Welfare Act (ICWA)—was affirmed because, although the case was continued twelve times after the termination petition was filed, the trial court had complied with ICWA's requirement to inquire into the child's possible Indian heritage "at the commencement of the proceeding," where it conducted the inquiry during a pre-trial hearing, which—because it was the first hearing held after the filing of the petition and after all twelve continuances—provided the first opportunity for the court to conduct the inquiry. **In re L.Q., 540.**

Initial hearing on petition—continued for more than 90 days—father's failure to petition for writ of mandamus—In a termination of parental rights (TPR) case, where the initial hearing on the petition to terminate a father's rights did not occur until seventeen months after the petition was filed, since the trial court had continued the case twelve times (including for reasons related to the COVID-19 pandemic), the father failed to file a petition for a writ of mandamus while the TPR petition was pending and therefore missed his opportunity to seek a remedy for what he argued was a violation of N.C.G.S. § 7B-1109(d) (providing that courts may continue an initial hearing on a TPR petition "for up to 90 days" after the petition's filing). **In re L.Q., 540.**

Jurisdiction—underlying juvenile case in different county—statutory requirements met—prior pending action doctrine inapplicable—The Brunswick County district court had jurisdiction over a termination of parental rights action even though an underlying juvenile proceeding remained pending in Cumberland County (where a guardian had been appointed for the minor child). A trial court's jurisdiction over an abuse, neglect, or dependency action is distinct from jurisdiction over a termination of parental rights action and, here, the jurisdictional requirements in N.C.G.S. § 7B-1101 for a termination petition had been met; therefore, Cumberland County did not have exclusive, original jurisdiction over the termination action, which had been filed in Brunswick County where the minor child, the child's guardian, and other witnesses resided. Further, the prior pending action doctrine was inapplicable because the subject matter, issues, and relief sought were different between the underlying juvenile proceeding and the termination proceeding. Therefore, the Brunswick County court did not err by denying the guardian ad litem's motions to dismiss the petition for lack of jurisdiction and to hold the matter in abeyance. **In re S.W., 39.**

Motion to continue—extraordinary circumstances and necessity for the proper administration of justice not shown—no abuse of discretion—In a termination of parental rights proceeding, the district court did not abuse its discretion in denying respondent-mother's counsel's motion to continue the hearing—filed when respondent did not appear—because the juvenile petition had been pending for 90 days and respondent's counsel did not make any argument regarding extraordinary circumstances or the necessity of a continuance in order to secure the proper administration of justice. Under those circumstances, no balancing of respondent's need for the continuance with the potential harm that might arise was required. Further, respondent's counsel did not raise any notice or due process arguments in the district court, and, thus, respondent waived appellate review of any alleged constitutional violations. **In re C.A.D., 1.**

Neglect—likelihood of future neglect—unstable housing—failure to engage in recommended services—forfeiture of visitation—An order terminating a mother's parental rights in her minor daughter based on neglect was affirmed where

TERMINATION OF PARENTAL RIGHTS—Continued

clear, cogent, and convincing evidence supported the trial court's findings of fact, including that the probability of future neglect would be high if the child were returned to her mother's care. Notably, the court found that: the mother had a history of housing instability—which included living with her daughter inside of a van parked at a gas station—and lacked appropriate resources to care for the child; the mother did not engage in most of the services recommended to her by the department of social services (DSS), including parenting classes and treatment for substance abuse and post-traumatic stress disorder; throughout the case, the mother did not provide evidence of having stable housing or income; and, since the child was brought into DSS's custody, the mother repeatedly left the state for months at a time, during which she forfeited in-person visitation with the child. **In re I.M.S., 689.**

Subject matter jurisdiction—failure to provide birth certificate or child's full name—remanded for prejudice determination—The trial court erred by dismissing a mother's petition to terminate the parental rights of her child's father for lack of subject matter jurisdiction where, although the mother failed to comply with the requirements of N.C.G.S. § 7B-1104(1)—because she did not list the child's full name on the petition (instead using the child's first and last name but only an initial for the middle name), did not allege that the child's name was as it appeared on the birth certificate, and did not provide a birth certificate or other supporting documentation to verify the child's legal identity—the mother's technical noncompliance did not automatically deprive the trial court of subject matter jurisdiction absent a finding of prejudice. Therefore, the court's order was vacated and the matter was remanded for the trial court to conduct an inquiry into whether the child's father was prejudiced by the statutory violation. **In re A.J.B., 143.**

UNJUST ENRICHMENT

Counterclaim—commercial lease dispute—nonpayment of rent—extra-contractual payments and services—dismissal inappropriate—In a breach of contract action brought by a commercial landlord (plaintiff) for nonpayment of rent against its tenant (defendant), where the trial court had erroneously granted summary judgment in favor of plaintiff on the breach of contract claim, the trial court also erred by dismissing defendant's counterclaim for unjust enrichment. Although there was a valid contract between the parties, under which defendant was obligated to make monthly rental payments, where defendant alleged that it had conferred benefits on plaintiff—mortgage payments, payment of maintenance and other expenses, and additional services accepted by plaintiff in lieu of rent for nearly four years—beyond what was required by the lease and which, thus, were extra-contractual, in the event defendant was found to be in breach of the lease, it was entitled to present evidence of the benefits accepted by plaintiff in support of the equitable remedy of unjust enrichment. **Paradigm Park Holdings, LLC v. Global Growth Holdings, Inc., 64.**

WORKERS' COMPENSATION

Disability award—employee's refusal of medically necessary home modification—reasonable—In a workers' compensation case involving a former lawyer and equity partner (plaintiff) at a law firm, where the parties disputed several issues related to plaintiff's disability benefits after the firm and its insurance carrier (together, defendants) admitted liability for his work-related back injury, the Industrial Commission did not err in declining to suspend plaintiff's benefits pursuant

WORKERS' COMPENSATION—Continued

to N.C.G.S. § 97-25 due to his noncompliance with a previous opinion and award, in which a deputy commissioner ruled that a downstairs bedroom in plaintiff's house was medically necessary. Competent evidence showed that plaintiff's refusal to set up the bedroom in the downstairs living area—per defendants' request, not the commissioner's—was reasonable, including his doctor's concern that the proposed home modification would not allow plaintiff enough space to use a walker or wheelchair, as well as an architect's opinion that the plan "did not work" from an architectural standpoint. **Thompson v. Cranfill, Sumner & Hartzog, LLP, 801.**

Disability award—employer's request for attorney fees denied—no evidence of unreasonable litigation by plaintiff—In a workers' compensation case involving a former lawyer and equity partner (plaintiff) at a law firm, where the parties disputed several issues related to plaintiff's disability benefits after the firm and its insurance carrier (together, defendants) admitted liability for his work-related back injury, the Industrial Commission did not err in declining to award attorney fees to defendants pursuant to N.C.G.S. § 97-88.1, under which the Commission had discretion to assess attorney fees for bringing, prosecuting, or defending a hearing without reasonable grounds. Where the Commission determined that plaintiff's refusal to implement defendants' home modification plan—proposing a bedroom in plaintiff's downstairs living area—was reasonable, defendants failed to show that plaintiff's pursuit of litigation challenging the home modification plan was unreasonable or "grounded in unfounded litigiousness," and, therefore, they were not entitled to attorney fees with respect to that litigation. **Thompson v. Cranfill, Sumner & Hartzog, LLP, 801.**

Disability award—offset crediting employer-law firm—for prior equity distributions to former law firm partner—improper—In a workers' compensation case involving a former lawyer and equity partner (plaintiff) at a law firm, where the parties disputed several issues related to plaintiff's disability benefits after the firm and its insurance carrier (together, defendants) admitted liability for his work-related back injury, the Industrial Commission erred in mandating an offset for plaintiff's disability award, which gave defendants a credit for equity distributions they had previously paid plaintiff from his half-percent ownership of the firm. Despite the Commission's authority to grant employers a credit offset toward its workers' compensation payments (N.C.G.S. § 97-42), the partial equity payments made to plaintiff had nothing to do with workers' compensation, neither served as wage replacements nor were analogous to disability payments, and would have been due to plaintiff irrespective of his disability; therefore, these payments were not creditable against plaintiffs' disability award under section 97-42. **Thompson v. Cranfill, Sumner & Hartzog, LLP, 801.**

Disability award—retroactive attendant care—sufficiency of factual findings—In a workers' compensation case involving a former lawyer and equity partner (plaintiff) at a law firm, where the parties disputed several issues related to plaintiff's disability benefits after the firm and its insurance carrier (together, defendants) admitted liability for his work-related back injury, the Industrial Commission did not err in awarding retroactive attendant care as part of plaintiff's disability award. The Commission's findings of fact—supported by competent evidence, including testimony from plaintiff, multiple healthcare providers, and a life care planner—were sufficient to support the award as being reasonably necessary, including findings detailing the nerve damage to plaintiff's spine along with the progressive extremity weakness, all of which put him at an increased risk for falls. **Thompson v. Cranfill, Sumner & Hartzog, LLP, 801.**

WORKERS' COMPENSATION—Continued

Disability award—ten percent late payment penalty on indemnity—statutorily required—no prejudice to employer and insurance carrier—In a workers' compensation case involving a former lawyer and equity partner (plaintiff) at a law firm, where the parties disputed several issues related to plaintiff's disability benefits after the firm and its insurance carrier (together, defendants) admitted liability for his work-related back injury, the Industrial Commission did not err by imposing a ten percent late penalty on indemnity payments to plaintiff as statutorily required under the Workers' Compensation Act (specifically, N.C.G.S. § 97-18(b)), which mandates that ten percent of an untimely-paid benefit installment "shall" be added to that installment. Defendants, as a law firm engaged in the practice of worker's compensation law and an insurance carrier in the business of providing workers' compensation coverage, were not only aware of the indemnity issue in the case but also familiar with the applicable law on this issue; thus, their argument that they should be excused from paying the penalty—because plaintiff had previously denied needing the indemnity payments—was unpersuasive. **Thompson v. Cranfill, Sumner & Hartzog, LLP, 801.**